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ON THE LEGALITY OF DEFRAUDING THE PUBLIC

WES HENRICKSEN

Speech used to intentionally mislead others to gain a tangible benefit while causing harm to the one deceived or to others is generally labeled “fraud.” This term is used in both legal and nonlegal contexts. Where speech used to defraud satisfies the elements of a tort or a crime, it becomes “actionable fraud.” Categories of actionable fraud include common law deceit, securities fraud, and wire fraud. But taken together, these laws address harmful dishonesty in an inconsistent manner. While they broadly prohibit deceiving individual victims, they often allow deceiving the public at large. As a result, it is often lawful to intentionally spread harmful, false, or misleading messages to the public. Moreover, because such publicly disseminated false speech is often not actionable fraud, it is protected speech under the First Amendment. This gap in the law, whereby one is prohibited from defrauding one person but permitted to defraud millions, gives a green light to those who stand to benefit from the largest and most harmful schemes to deceive. These include, for instance, the fossil fuel industry’s campaign of climate change denial and former President Donald Trump’s stolen election lie. This Article builds on prior scholarship by exploring why current law largely fails to address schemes to defraud the public. It further explores the myriad ways fraud on the public causes economic harm, harm to human health and life, and environmental damage. The Article then argues that this gap in the law should be closed and posits possible ways to do so consistent with the First Amendment. The Article answers critics who claim that imposing such speech restrictions will allow those in power to determine the “truth” and impose it on the public by noting that those in power are already doing this precisely because the law allows it. Those with the public megaphone frequently disseminate self-serving falsehoods and manipulate the public into buying into falsehoods as “truth.” Accordingly, the Article concludes it is urgent we find solutions to this problem.

* Associate Professor of Law, Barry University School of Law. Thank you to the participants and discussants at the Stanford-Penn-Northwestern Junior Faculty Forum for Law and STEM at Northwestern University School of Law. Thanks to Dean Leticia Diaz and Barry University School of Law for their support for this Article. Thanks to James Knox Anderson and Martina Sapia for excellent research assistance. Portions of this Article have been adapted, in substantially altered form, from my forthcoming book, IN FRAUD WE TRUST: HOW LEADERS IN POLITICS, BUSINESS, AND MEDIA PROFIT FROM LIES—AND HOW TO STOP THEM (Univ. Press of Kansas, forthcoming).
that carefully balance free speech rights against the harm from intentional falsehoods spread to the public.

I. THREE MISUNDERSTANDINGS ABOUT THE CONCEPT OF, AND TERMINOLOGY USED TO DESCRIBE, HARMFUL DISHONESTY ..........1045
   A. Harmful Dishonesty is More Widespread and Deeply Ingrained into Society than is Often Acknowledged..........................1047
   B. Although Fraud is Wrongful, Deceitful, and Harmful, it is Often Legal...........................................................................1054
   C. The Misunderstood “Evasion” Component of Fraud..............1058

II. THE LAW’S EXCESSIVE FOCUS ON PERSONAL FRAUD, AND RESULTING FAILURE TO ADDRESS FRAUD ON THE PUBLIC............................1062

III. WHY FRAUD ON THE PUBLIC, WHICH THE LAW GENERALLY ALLOWS, IS ARGUABLY AS HARMFUL AS ONE-ON-ONE FRAUD, WHICH THE LAW GENERALLY PROHIBITS ..................................................1071
   A. Brief Overview of the Prevalence and Purpose of Fraud on the Public ...........................................................................1071
      i. For Financial Gain..................................................................1077
      ii. For Political Gain ..................................................................1078
      iii. To Inhibit Justice ..................................................................1081
      iv. To Falsify History ..................................................................1083
   B. Harms Caused by Fraud on the Public.................................1085

IV. CONCLUSION ............................................................................1093
I. THREE MISUNDERSTANDINGS ABOUT THE CONCEPT OF, AND TERMINOLOGY USED TO DESCRIBE, HARMFUL DISHONESTY

Lying is generally legal. This makes sense. To begin with, most lies are harmless, and some are even socially beneficial. Perhaps more importantly, however, lies are ubiquitous; they are uttered by virtually everyone every day. Indeed, people are frequently untruthful in ordinary interactions with friends, family, colleagues, and strangers. Lies are part of the normal way individuals communicate with one another. Accordingly, courts are understandably skeptical of suggestions that falsehoods are, or should be, unprotected under the First Amendment. This hostility toward regulating falsehoods arises, as well, from the high likelihood that a state empowered to arbitrate truth will use that power to silence opponents and disfavored views. Accordingly, suggestions that the state ban falsehoods, or any broad category of falsehoods, should be,


5. See Alvarez, 567 U.S. at 722 (noting that false statements do not comprise a “general” category of unprotected speech); United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010) (“While we agree with the dissent that most knowingly false factual speech is unworthy of constitutional protection and that, accordingly, many lies may be made the subject of a criminal law without creating a constitutional problem, we cannot adopt a rule as broad as the government and dissent advocate without trampling on the fundamental right to freedom of speech.”), aff’d, 567 U.S. 709 (2012); Jonathan D. Varat, Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship, 53 UCLA L. REV. 1107, 1109 (2006) (“[A]ccepting unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including most notably—and however counterintuitively—our rights to personal and political self-rule.”).

6. See Alvarez, 567 U.S. at 751–52 (Alito, J., dissenting) (“The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.”).
and most often are, met with suspicion, if not contempt.\footnote{See sources cited supra note 5.} Such sweeping censorship would be as unfeasible as it would be undesirable.\footnote{See \textit{Alvarez}, 567 U.S. at 722 (noting false statements are not a category of unprotected speech); Holloway v. Am. Media, Inc., 947 F. Supp. 2d 1252, 1263 n.15 (N.D. Ala. 2013) ("[F]alsity must be coupled with some other element of culpability, such as an intent to injure or defraud another person.").}

However, the same can be said for going to the other extreme. That is, on the spectrum of the legality of lies, if the state were to go all the way in the other direction, allowing individuals the freedom to utter any and every falsehood, this would be likewise unfeasible and undesirable. Some lies are clearly too harmful to allow. These include, for instance, speech that qualifies as perjury or defamation, or that incites a crowd to engage in imminent violence.\footnote{Alvarez, 567 U.S. at 717–18.} Moreover, as Justice Oliver Wendell Holmes put it so aptly more than a century ago, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

This brings us to the necessary starting point for any discussion of falsehoods under the First Amendment: the acknowledgement that some lies simply must be allowed, and some simply must not. This is precisely how the First Amendment’s free speech protections operate. Courts and legislatures have drawn lines that delineate, under the First Amendment, which falsehoods are protected, on one hand, and which may be proscribed, on the other.\footnote{Schenck v. United States, 249 U.S. 47, 52 (1919).} Many such lines have been drawn.\footnote{Alvarez, 567 U.S. at 722.} This Article focuses on one of those lines: the line between permitted and proscribed fraudulent speech.

That such a line even exists is a matter of contention and confusion. Indeed, the way we think about fraud as a concept is problematic in at least two ways. First, people often assume that conduct described as fraudulent must be necessarily either tortious or criminal. They conflate the word fraud with unlawful activity. This, as discussed further below in Section I.B, is inaccurate.\footnote{Id. at 748–49 (Alito, J., dissenting) (explaining that falsehoods held to be unprotected, and therefore which can be restricted by law, include false statements under oath, false threats of violence, false claims that incite a mob, false claims that cause severe emotional distress, and falsely impersonating a Federal Bureau of Investigation’s officer).} And second, the term "fraud" is very often misused in bad faith
acccusations against persons or groups with whom the speaker disagrees or whom the speaker dislikes. In this way, the term shows up in the news, in social media, and in other contexts where it is used, not to describe actual wrongful conduct or speech, but rather to invent fictional wrongdoing that never occurred, which the speaker intends to make people believe occurred. In this context, the “fraud” label is applied, ironically, in a fraudulent manner. I hope here to dispel some of the misconceptions people have about fraud, and to clarify under what circumstances it indeed actually is tortious or criminal, and under what circumstances it is legal and constitutionally protected.

A. Harmful Dishonesty is More Widespread and Deeply Ingrained into Society than is Often Acknowledged

The term “fraud” has two commonly used, though somewhat inconsistent, meanings. On one hand, it is a legal term of art used to refer to a broad category of civil and criminal wrongs, each of which has similar, though not identical, elements. It could refer, for instance, to securities fraud, wire fraud, or common law deceit. On the other hand, the term “fraud” is used in nonlegal terminology to refer to harmful dishonesty more generally. Some of the conduct that falls under this second definition would be actionable, and some would not. This broader definition of the term would include, for instance, many of the allegations of “fraud” frequently lobbed at public figures, news channels, and political opponents alleging wrongdoing of one kind or another, which, even if engaged in, may or may not actually run afoul of the law.

14. See, e.g., Trip Gabriel, Driven by Election Deniers, This County Recounted 2020 Votes Last Week, N.Y. TIMES (Jan. 15, 2023), https://www.nytimes.com/2023/01/15/us/politics/2020-recount-lycoming-county.html [https://perma.cc/8NUN-DKKK] (discussing that a Pennsylvania county conducted a hand recount of ballots based on allegations of “fraud,” but no fraud or irregularities were detected).

15. See, e.g., id.


19. See Jon Cohen, Almost Everything Tucker Carlson Said About Anthony Fauci This Week Was Misleading or False, SC., (Aug. 25, 2022, 6:10 PM), https://www.science.org/content/article/almost-everything-tucker-carlson-said-about-anthony-fauci-this-week-was-misleading-or-false?et_rid=17778419&et_cid=4371647& [https://perma.cc/56DV-PVEQ] (discussing media figure calling Dr. Anthony Fauci a “dangerous fraud” for alleged wrongdoing,
In this Article, I will use the words “fraud” and “fraudulent” in this latter sense: to denote harmful dishonesty in general. Therefore, fraud, as used herein, is where A lies to B with the intent of making B believe the lie and, as a result, A benefits and B suffers harm. To be fraud, the dishonesty must cause an unacceptable level or distribution of harm. It would not, therefore, cover white lies or other deceits that cause harm society generally finds acceptable. The unacceptability of the harm is the touchstone distinction between mere falsehood, on one hand, and fraud, on the other.

In each fraud, the one who attempts to deceive or mislead another is the “liar.” The one deceived is the “dupe.” Any time a liar deceives a dupe and, in the process, causes an unacceptable level or distribution of harm, then it is fraud.

While some may object to my use of the word “fraud” in this more general sense, it is preferable for at least two reasons. First, it reflects the most widely accepted definition of the term fraud, rather than artificially imposing on the term one of a number of possible legal definitions. In fact, “fraud” is the word most often used in English to refer to the harmful deceit, whether or not it runs afoul of criminal or tort law. And second, using the term “fraud” in this broader sense helps bring clarity to the discussion and analysis in parts of the Article where it is necessary to distinguish between fraudulent conduct that is criminal or tortious, on one hand, and fraudulent conduct that is not, on the other. For clarity, then, when I make reference to fraudulent conduct that is

20. See Mark Tushnet, The Kids Are All Right: The Law of Free Expression and New Information Technologies, 71 CATH. U. L. REV. 471, 479 (2022) (discussing, in the context of free expression, how the law permits conduct up to the point where the harm, or the distribution of harm, reaches a level of unacceptability in society, and conduct causing harm above this threshold can be, and often is, prohibited and punished).

21. For instance, “fraud” is used to describe harmful dishonesty more than twice as frequently as “deception,” three times as frequently as “scam,” and five times more frequently than “deceit.” See Frequency Lists, WORD & PHRASE, https://www.wordandphrase.info/frequencyList.asp [https://perma.cc/ML22-AKEK] (search in search bar “fraud”; then search in search bar “deception”; then search in search bar “scam”; then search in search bar “deceit”) (receiving 8,949 total results for “fraud”; 2,256 total results for “deception”; 2,397 total results for “scam”; 669 total results for “deceit”).
ON THE LEGALITY OF DEFRAUDING THE PUBLIC

2024]

either tortious or criminal, I will refer to it as actionable fraud. This will distinguish it from fraud more generally, which may be tortious or criminal, but on the other hand may be perfectly legal, notwithstanding the fact it is wrongful or objectionable.

Given the broad scope of the term fraud, encompassing all unacceptably harmful deceits, it is clear that fraudulent conduct is prevalent in society. Indeed, even actionable fraud is clearly widespread, as evidenced by the over ten thousand actionable fraud cases published on Westlaw in 2022 alone.22 These do not include more than perhaps a tiny fraction of many of the most common frauds carried out today, via phishing email and text scams, robocalls, and other digital deceit the public is regularly bombarded with, but rarely results in a tort or criminal court case.23 Indeed, there are over fifteen billion spam emails every day, making phishing emails difficult to detect or block.24 And in 2021, “roughly 214,345 unique phishing websites were identified, and the number of recent phishing attacks has doubled since early 2020.”25 Phishing is just one subset of the many ways liars defraud using digital platforms and communications.26 And digital platforms and communications represent just one kind of forum where harmful deceit takes place.27 Many frauds are accomplished or attempted in person, by mail, and over the phone.28

Of course, fraud is not a new phenomenon. Historian Robert Leflar remarked that “fraud and misrepresentation are as old as human communication.”29 While this is certainly true, it may be something of a gross understatement. Tying fraud to “human communication” masks just how long

22. A Westlaw search of federal and state cases, in 2022, for “(fraud! Deceit! “fraudulent misrepresentation” “intentional misrepresentation”) & DA(aft 12-31-2021)” yielded over 10,000 results for actionable fraud cases in 2022, the maximum number visible in Westlaw searches.
24. Id.
25. Id.
28. See id.
we and our ancestors have engaged in, and fallen for, fraud, and just how deeply ingrained fraud is into our society, if not our genetic endowment.

To begin with, other primates deceive one another, and people, to get things they want the very same way people deceive. They use vocal sounds, body language, hand gestures, facial expressions, and eye diversion to deceive for gain. This has been observed, and scientifically documented, for decades, and not only with regard to gorillas, chimpanzees, and other great apes in captivity. In other words, it is not just primates.

Dogs have long been observed deceiving each other, as well as their owners. But until recently, such anecdotal observations had not been studied under controlled conditions. Dr. Marianne Heberlein, of the University of Zürich, tested canine deception in a controlled experiment to determine if dogs actually do consciously deceive to get what they want, or if humans simply project their own traits onto dogs. The study, which is discussed more fully in the footnote to this sentence, demonstrated conclusively that a significant proportion of the twenty-seven dogs in that study clearly did deceive to obtain something they wanted—a sausage.


31. Id. at 32.


35. In the experiment, Heberlein and her researchers tested twenty-seven dogs to see whether they would deceive to obtain a sausage. Id. at 513. She and her researchers put two boxes on one side of a room. Id. at 514. One contained a sausage. Id. The other was empty. Id. All dogs were trained to follow a simple verbal command. Id. When any trainer said, “Show me the food,” the dog was to lead the trainer to the box with the sausage in it. Id. The dogs all learned this simple task. Id. Each dog was paired with two human partners. Id. at 516. One was generous and one was selfish. Id. at 511. When the generous partner told the dog, “Show me the food,” and the dog showed her the box with the sausage in it, as the dog was trained to do, the generous partner took out the sausage and gave it to the
Given what has been discovered and studied about conscious deceit among other mammals, such as primates like chimpanzees and apes, as well as dogs, it is almost certain that conscious deception predates human communication. It appears, instead, to be a trait, or more likely, a collection of traits that we have inherited from our ancestors dating back millions of years.

Scientists have observed attributes we share with other species and drawn conclusions about those attributes based on how long ago we shared a common ancestor with those species. The last common ancestor (LCA) we share with these other species informs us how long we have possessed traits we share with them. This includes, for example, gender identity and gender differences in bonobos (LCA 8 million years ago), personality traits in mammalian farm dogs. Id. at 514. But when the selfish partner said, “Show me the food,” and the dog led the selfish partner to the box with sausage in it, the selfish partner took the sausage out and put it in her pocket, withholding it from the dog. Id. If, however, the dog led either partner, generous or selfish, to the empty box—that is, the wrong box—the partner would show the dog that the box was empty and leave the sausage-containing box untouched. Id. at 515. Then, in the final step of the experiment, the dog would be returned to their owner, and the owner would go and look in both boxes. Id. If the sausage was still in its box, the owner would take it out and give it to the dog. Id. Heberlein put each dog through the whole scenario with the generous partner and the selfish partner numerous times. Id. It always began with the command, “Show me the food.” Id. at 514. At first, the dogs led both partners, generous and selfish, to the correct sausage-containing box. Id. at 515. The generous partner each time gave the dog the sausage. Id. The selfish partner always withheld it. Id. Then, the dogs began changing their behavior. Id. During the two days, one dog after another began deceiving the selfish partner by leading her to the empty box, knowing they would later get the sausage from their owner. Id. at 518. These same dogs, however, continued being truthful with the generous partner. Id. Every dog knew what the command, “Show me the food,” meant. Id. They knew what they were supposed to do: that they were supposed to always lead the human to the box with the sausage. Id. at 518. Throughout the experiment, more and more dogs misled the selfish partner because the selfish partner was never going to give them the sausage. Id. at 516.

36. Kirkpatrick, supra note 30, at 33; Terrace, Pettito, Sanders & Bever, supra note 32, at 981–902; PROJECT NIM, supra note 32; DECEPTION: PERSPECTIVES ON HUMAN AND NONHUMAN DECEIT, supra note 32, at 249; Byrne & Whiten, supra note 33, at 669.


animals (LCA varies), personality traits in squirrels (LCA 88 million years ago), and even hierarchical societal structures in lobsters (LCA 350 million years ago). We have learned much about our own cognitive abilities, biological traits, and societal structures from studying these traits in other animals, and most particularly other mammals. Accordingly, evidence strongly suggests we and our ancestors have lived with, and fallen for, consciously deceptive behavior for at least 92 million years, which is when the LCA we share with dogs lived. If, however, we discard canines and accept only great ape deception similarities, this would still put the age of our conscious deception trait at between 8 and 20 years. In any case, the problem is millions of years old. In all that time, we and our ancestors have been manipulating one another by actions and words to wrongfully get things we want in ways that deprive others of things rightfully theirs. Given what is now known about deception in our mammalian relatives, including canines, we must reckon with the likely fact we have lived with conscious deceit since long before we developed language (200,000 years ago), or first stood upright and walked on two legs (6 million years ago), or lost our tail (25 million years ago).

ago). It is a problem millions of years old. This should inform us how seriously we should take it, and what measures we should implement to protect ourselves against it.

Moreover, given how long fraud has been part of our society and the way people interact with, and manipulate, one another, one might expect that humans might have developed some sort of defense mechanism to protect themselves from it. But the opposite is actually true. One of the principal reasons fraud is such an incredibly difficult problem to address is that, as recent studies show, people are hardwired to fall for it. In the words of Timothy Levine, one of the leading experts on deception detection, “[gullibility] is a near-universal human tendency. We all are perceptually blind to deception. We are hardwired to be duped.” People have no reliable way to know if they are being lied to, whether the lie is spoken, written, or shown. Indeed, in decades of deception detection research, it has been well established that people, at best, have a 54% success rate at telling when someone is lying. This, of course, is barely better than flipping a coin. There are a number of competing theories on why we are such poor lie detectors. But regardless of why it is the case, the fact remains we are poor at detecting deception. This does not stop people from believing they can detect lies, which only makes us even more vulnerable to them. The combination of our inability and overconfidence in the area of deception detection makes fraudulent conduct extremely effective, and therefore profitable, wherever people are able to get away with it. The results are as you might predict, given the foregoing to be true. Where people are to deceive to gain a thing they desire—be it money, a job, political office, or an intimate partner—many will use deceit to get it, even if they cause harm in the process.


52. Id. at ix.

53. Id. at 10.

54. Id. at 10–11.

55. See id. at 5.

56. See id. at 17–26 (discussing the unreliable deception cues people commonly rely on to tell if someone is lying).

57. See discussion infra Section III.A.
B. Although Fraud is Wrongful, Deceitful, and Harmful, it is Often Legal

In recent years, many political campaigns have used manipulative tactics in their online donation platforms to extract more money from donors. One such scheme was detailed in a *New York Times* report by Shane Goldmacher.\(^\text{58}\) According to the report, the Trump presidential campaign added checkboxes to a screen on its donation site where donors had to click through to complete their donation.\(^\text{59}\) The checkboxes were auto-checked.\(^\text{60}\) One auto-checked box made the donation recurring, meaning the donor “opted,” often without knowing they had done so, to donate monthly or weekly, or in some cases multiple times per week.\(^\text{61}\) Another auto-checked box doubled the donation amount for recurring donations.\(^\text{62}\) Each checkbox had lengthy instructions next to it.\(^\text{63}\) It required extensive careful reading to understand what the checkboxes were for, and whether unchecking them meant “opt in” or “opt out” for each item.\(^\text{64}\) On the checkbox page, the website warned, “If you UNCHECK this box, we will have to tell Trump you’re a DEFECTOR.”\(^\text{65}\) Using deceptive tactics like this, Trump’s campaign specifically targeted retirees, veterans, and chronically ill individuals who are more vulnerable to such tactics.\(^\text{66}\) The result? Trump’s campaign collected millions of dollars that donors never intended to donate.\(^\text{67}\)

In one case, a sixty-three-year-old man named Stacy Blatt, who was battling cancer and living in hospice care in Kansas City on less than $1,000 per month, made his first ever donation to the Trump campaign.\(^\text{68}\) He had heard on the Rush Limbaugh radio show that Trump badly needed campaign cash.\(^\text{69}\) So, Blatt made a one-time donation of $500—or so he thought.\(^\text{70}\) Unbeknownst to Blatt, “another $500 was withdrawn the next day, then $500 the next week and every week through mid-October, without his knowledge—until Mr. Blatt’s bank account had been depleted and frozen. When his utility and rent payments


\(^{59}\) *Id.*

\(^{60}\) *Id.*

\(^{61}\) *Id.*

\(^{62}\) *Id.*

\(^{63}\) *Id.*

\(^{64}\) *Id.*


\(^{67}\) *Id.*

\(^{68}\) *Id.*

\(^{69}\) *Id.*

\(^{70}\) *Id.*
bounced, he called his brother, Russell, for help."\textsuperscript{71} "What the Blatts soon discovered was $3,000 in withdrawals by the Trump campaign in less than 30 days. They called their bank and said they thought they were victims of fraud."\textsuperscript{72}

Blatt was one of thousands duped by the scam.\textsuperscript{73} In fact, it was estimated that about 3\% of all credit card fraud claims in the U.S. in 2020 came from automatic donations made to Trump.\textsuperscript{74}

Victor Amelino, a seventy-eight-year-old in California, made a one-time $990 online donation to Trump.\textsuperscript{75} But because he failed to uncheck a box, the payment recurred seven more times, adding up to almost $8,000.\textsuperscript{76} "I’m retired," Amelino said.\textsuperscript{77} "I can’t afford to pay all that damn money."\textsuperscript{78} Like Blatts, Amelino felt betrayed. The ones running the website, he said, were "bandits."\textsuperscript{79} Ron Wilson, another Trump donor, called the donation website "predatory."\textsuperscript{80} Wilson, an eighty-seven-year-old retiree in Illinois, made a series of small contributions totaling about $200.\textsuperscript{81} Within a couple months, however, the Trump donor platform "had withdrawn more than seventy separate donations from Mr. Wilson worth roughly $2,300."\textsuperscript{82}

Goldmacher, who authored the \textit{New York Times} report, was interviewed on MSNBC.\textsuperscript{83} At one point in the interview, after he listed some of the tactics still being used on Trump’s political contribution website, the interviewer, Stephanie Ruhle, shook her head and remarked, "It may be immoral, but it appears to be legal."\textsuperscript{84}

This phrase captures the essence of the problem. Fraud is always unacceptably harmful, or in the words of Ruhle, "immoral," but it is nevertheless often legal.\textsuperscript{85}

\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{84} Id.
\textsuperscript{85} See id.
The Trump campaign’s deceptive tactics amounted to fraud by the dictionary definition of the term, but not in the legal sense of the term.\textsuperscript{86} That is, it was likely not actionable fraud. This happens often.\textsuperscript{87} One reason for it is obvious: the ways people defraud one another are far too numerous and varied to fit into any particular prohibited category. Fraudulent conduct, unlike the law, can be crafted in every imaginable way, on the spur of the moment, as the need or desire arises. The law, on the other hand, can only prohibit specific categories of conduct, none of which can be overbroad or vague.\textsuperscript{88} The law, unlike the schemes themselves, develops slowly and must comply with certain standards. A new scheme to manipulate or deceive can be thought up instantly. A new law to address it, on the other hand, can be enacted only after going through a lengthy political or judicial process.\textsuperscript{89}

Accordingly, the frauds that run afoul of the law will always comprise only a subset of the full spectrum of possible (and actual) fraudulent schemes devised and carried out. The following diagram, though not necessarily to precise scale, roughly illustrates this principle.\textsuperscript{90}

\begin{footnotes}
\footnotetext[86]{Compare Goldmacher, supra note 26, with Fraud, supra note 18.}
\footnotetext[89]{WES HENRICKSEN, IN FRAUD WE TRUST (forthcoming 2024) (manuscript at 88) (on file with author) ("Whereas a new fraud scheme can be thought up in the moment, and can be molded and shaped as it is carried out, putting a law in place to prohibit that scheme is a slow and cumbersome reaction, which can be accomplished only through a lengthy political process.").}
\footnotetext[90]{Id. (manuscript at 89).}
\end{footnotes}
Every deceptive scheme whereby one seeks to deceive another for their own advantage, and in so doing causes harm—that is, every fraud—fits within the larger circle in this Venn diagram. These include all frauds, then, whether or not they might satisfy the elements of any particular tort or crime. Fraud schemes that do satisfy the elements of a tort or crime, actionable fraud, are represented by the smaller circle at the bottom. Actionable fraud is only a small subcategory of the far larger category of fraud. It is almost certainly the case, although empirical data on this would be difficult to establish, that most frauds are not actionable. That is, most instances where one deceives people with falsehoods for their own advantage, and cause some harm in so doing, are neither a tort nor a crime.

The line delineating what constitutes actionable fraud is drawn by those who make and interpret the law. This is done largely by legislators and courts. It is, therefore, an artificial line that can, and has, moved over time. Indeed, it is always in flux to some degree, adjusting with each new fraud case decided by courts. The central problem I seek to highlight in this Article, and which I

91. Id.
92. Id.
93. Id.
will discuss in greater detail below, is that there is a category of fraudulent conduct that should, by any fair measure, fit inside the small circle of actionable fraud but is today treated by the law as outside it. This includes many fraudulent schemes aimed at the public rather than at individual victims. One reason fraud aimed at the public is not, today, adequately addressed by law is that most fail to see it as “fraud” because they do not understand how fraud works and how serious of a problem it really is, particularly when it is carried out on a large scale.

C. The Misunderstood “Evasion” Component of Fraud

Perhaps the single greatest misconception when it comes to understanding and dealing with fraud arises from people’s misplaced belief that fraud is centered on deception, and that therefore the focus when crafting laws to address fraudulent schemes should likewise focus on its deception component.\[95\] It is true, of course, that deceit is key to fraud. Fraud always involves a liar deceiving one or more dupes.\[96\] But seeing fraud through this lens misses a critical point. Every fraud is centered, first and foremost, not on deception but on evasion.

In every scheme to defraud, regardless of the size of the scheme or the aim of those carrying it out, the last thing most consider when analyzing and addressing it—but the first thing considered by the liar who aims to carry it out—is that, to succeed, the liar must profit from it.\[97\] To do so, they must get away with it.\[98\] And “getting away with it” is what is meant by evasion. This element, though never listed in any fraud definition, is in fact required for every successful fraud.\[99\]

A liar can accomplish evasion in either of two ways. The scheme they carry out must either (1) go undetected, or (2) if it is detected, then the liar must avoid punishment. If either (1) or (2) is achieved, then evasion is accomplished.

The first option is always preferable to the second. There is, of course, no need to worry about punishment if you are not caught in the first place. But if a liar is caught defrauding another, then the liar is left only with the second option, avoiding punishment. To achieve this, the liar must establish that their


\[97\] Id.

\[98\] Id.

\[99\] Id.
conduct, although fraud, was not actionable fraud. If the liar’s fraud does not satisfy the elements of a tort, then it is not tortious, and if it does not satisfy the elements of any crime, then it is not criminal. If the conduct runs afoul of no law, then no punishment can be imposed nor damages awarded. This allows the liar to avoid paying any penalty for the fraud, thereby allowing them to achieve the advantage or profit they sought by their fraud in the first place. The liar succeeds in this task by winning in court, or by making clear they would win if taken to court.

Failure to accomplish evasion by either manner—avoiding detection or punishment—renders the fraud unprofitable. If unprofitable, it removes the incentive to carry out the fraud in the first place. Without evasion, fraud is futile.

This point may seem obvious when it comes to actionable one-on-one frauds, which are now largely, though not totally, prohibited by law. But evasion is frequently—indeed, almost universally—overlooked and ignored when it comes to frauds aimed at deceiving millions of people, such as those carried out by politicians, media, and corporations. These kinds of largescale frauds, which I call “fraud on the public,” are most often legal, meaning they do not fit into any existing prohibited fraud category, such as common law fraud, securities fraud, or false advertising, nor do they fit into any other false speech prohibited category, such as defamation or incitement. In short, the conduct involved in most frauds on the public falls outside existing legal

100. Take, for instance, the campaign donation scam, see supra notes 58–85 and accompanying text, where the scheme may have been “immoral,” but “appear[ed] to be legal.” Stephanie Ruhle Reports, supra note 83.

101. See Damages, LEGAL INFO. INST., https://www.law.cornell.edu/wex/damages#:~:text=Damages%20are%20imposed%20if%20the,intended%20to%20punish%20the%20wrongdoer [https://perma.cc/C3CC-S8XS].

102. Henricksen, supra note 96, at 2444–45.

103. Of course, not every instance where one deceives another to gain something in a manner that causes harm is, or even should be, prohibited. For example, if someone wanted to cut into a long line at a coffee shop, and they lied to someone in the line to allow them to cut in, this would be a fraud, albeit a relatively benign one, and it would almost certainly not be actionable. One-on-one frauds are actionable only under very limited circumstances, most often involving a financial profit motive. See Eugene Volokh, When Are Lies Constitutionally Protected?, KNIGHT FIRST AMEND. INST. (Oct. 19, 2022), https://knightcolumbia.org/content/when-are-lies-constitutionally-protected [https://perma.cc/6R2J-4TNA] (listing as one category of falsehoods the First Amendment does not protect as “fraudulent attempts to get money”).


105. See id. at 559.

prohibitions. This gives those who carry them out a free pass to defraud with impunity.

This happens out in the open. It is not hidden. Anyone who observes the news, regardless of which source one consumes it from, will, if looking for them, frequently find falsehoods reported alongside truthful information.\textsuperscript{107} Falsehoods are thus spread far and wide, not just in the news, but on social media, other online platforms, and by word of mouth.\textsuperscript{108} Of course, a falsehood alone never amounts to fraud. To be fraud, it must involve someone purposefully spreading something they know to be false for the purpose of deceiving others for their own benefit.\textsuperscript{109} And while not all falsehoods one finds in the media or online are fraudulent, some are.\textsuperscript{110} Politicians purposefully spread falsehoods to help swing public opinion, and votes, in their favor.\textsuperscript{111} Media outlets purposefully spread falsehoods to gain viewers and, therefore, more revenue.\textsuperscript{112} Corporations purposefully spread falsehoods to increase profits and shareholder value.\textsuperscript{113} Many of the falsehoods that ultimately reach us through our screens or by word of mouth were cooked up by politicians, media, and corporations, and others, who benefit from manipulating people into believing the falsehoods to be true.\textsuperscript{114}

The law treats fraud schemes aimed at millions of people different from a fraud scheme aimed at one person.\textsuperscript{115} As pointed out by Professor Howard Wasserman, “paradoxically, speech is easier to sanction when it is said to a smaller group than a larger one.”\textsuperscript{116} But why is this the case? Certainly, there

\begin{thebibliography}{9}
\bibitem{107} See discussion infra Section III.A.
\bibitem{110} Two recent examples are climate change denial and the stolen election lie. See generally Wentz & Franta, supra note 26; Henricksen & Betz, supra note 109.
\bibitem{114} See sources cited supra notes 111–13.
\bibitem{115} Henricksen, supra note 104, at 556–57.
\end{thebibliography}
must be a number of factors at work, including the simple fact that the nature of policing publicly made statements, which may fall on millions of ears, is more dangerous and more risky than policing statements made one-on-one. But I do not believe that this justification is the full story. For example, it appears likely that one reason fraud on the public is largely allowed is the fact that those who possess the wealth and power to spread profitable falsehoods, unlike those who seek to defraud one-on-one, have massive resources, which allow them not only to devise and carry out sophisticated and carefully-tailored schemes that straddle the line of illegality but also to influence, if not outright dictate, where the line of illegality is, or should be, drawn. The ways this may be accomplished, which are well documented elsewhere, are not the focus of this Article. However, it may involve the same techniques used to influence public opinion and political power in general, such as campaign contributions, lobbying, public relations campaigns, marketing, and advertising, all of which may influence not only elections but also judicial and other political appointments.

Another significant factor that helps explain why the law ignores massive fraud schemes and focuses, instead, almost exclusively on smaller frauds, involves how and when fraud law first emerged, and the way the law developed over the past couple of centuries. Although there have been laws against some harmful deceptions for centuries, going all the way back to the Code of Hammurabi, modern fraud law, as it exists today and is applied in the U.S. and other common law jurisdictions around the world, was invented with the stroke of a judge’s pen in London in 1789 and has, for the most part, evolved as a tool by which tort plaintiffs and prosecutors seek most often to hold liable, or to punish, only those who target particular victims with their schemes rather than aiming the schemes at the public.

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117. See Henricksen, supra note 104, at 555–56.
118. See K. Sabeel Rahman, Producing Democratic Vibrancy, 25 J. L. & Pol’y 273, 274 (2016) ("[E]conomic wealth generates disparities in political power and influence, and that we need a variety of legal protections and structures to secure the political freedoms that make democracy possible.").
120. See id.
121. See, e.g., Code of Hammurabi, WRIGHT ST. UNIV., http://www.wright.edu/~christopher.oldstone-moore/Hamm.htm [https://perma.cc/5JUK-WEVL] (quoting CODE OF HAMMURABI (1700 B.C.E.) ("If a man bears false witness concerning grain or money, he shall himself bear the penalty imposed in the case.").
II. THE LAW’S EXCESSIVE FOCUS ON PERSONAL FRAUD, AND RESULTING FAILURE TO ADDRESS FRAUD ON THE PUBLIC

Actionable fraud is prohibited for the same reason other harmful human impulses are prohibited: from a tort perspective, to protect victims; and from a criminal perspective, to protect society. If left to their own devices, people very often deceive others to get things they want. But while most refrain from deceiving in a way that causes significant harm to others, some will carry out such fraudulent schemes if allowed to do so by law, or if they can get away with it undetected. This, in short, is why there are laws against fraud, and why there have been for as long as laws have been written down. The network of laws aimed at stopping deceit, which can be broadly labeled “fraud law,” succeeds to some extent by curtailing some of the unacceptably harmful ways people deceive one another.

In this way, fraud law is not unique. People possess a number of destructive impulses the law steps in to prohibit. These include, for instance, robbery, trespassing, property destruction, assault, murder, rape, and incest. As societies progress, so do restrictions on these harmful behaviors. The law, of course, rarely lines up perfectly with morality; there are moral actions deemed illegal and immoral actions deemed legal. In some cases, the law overcorrects. For instance, until recently, American law prohibited one from marrying a person of a different race, and until just a couple of years ago, it prohibited marrying a person of the same sex. The law also, for most of U.S. history, made it a

123. Henricksen & Betz, supra note 109, at 124.
125. See generally Levine, supra note 51.
126. See, e.g., Code of Hammurabi, supra note 121.
127. See Robert E. Hoyt, David B. Mustard & Lawrence S. Powell, The Effectiveness of State Legislation in Mitigating Moral Hazard: Evidence from Automobile Insurance, 49 J.L. & ECON. 427, 427 (2006) (carrying out an empirical study on the effectiveness of laws aimed at curtailing insurance fraud and finding that some laws appeared to have an effect while others “had[ ] no statistically significant effect on fraud”).
129. See, e.g., Hal Fliegelman, A Bear of a Problem, NAELA Q., Spring 1999, at 18 (“[A]n act may be legal and immoral, legal and moral, illegal and immoral, or illegal and moral.”); Kang, supra note 128, at 383 (“Of course, there are moral acts that are illegal and immoral acts that are legal.”).
crime to engage in homosexual activity.\textsuperscript{131} Although these laws, too, prohibited certain human impulses, most today agree these restrictions did not help make society safer, happier, or better.\textsuperscript{132} They did not protect victims.\textsuperscript{133} Instead, they were, as is obvious through historical hindsight, oppressive and counterproductive.\textsuperscript{134} One can think of numerous laws, past and present, that overreach like these. Clearly, not all laws put in place to suppress hardwired impulses necessarily help society. But many such laws do. We are certainly better off suppressing the impulses to rob, to assault, or to murder.

Like robbery, assault, and murder, fraud appears to be a human impulse hardwired into some people, whereby one seeking personal advantage, profit, or satisfaction is willing to harm others for their own private gain.\textsuperscript{135} Like robbery, assault, and murder, fraud encompasses a broad spectrum of wrongful activity, which varies from highly harmful to minimally harmful. Take robbery for example. There is a vast difference between stealing someone's car and stealing an air freshener out of their car. Should one who commits either of these acts be put on trial and imprisoned? Perhaps they should for the former, but should they for the latter? As for assault, there is a huge difference between accidentally bumping into someone on the sidewalk and purposefully punching them. Murder, too, has degrees. Is it murder to use a contraceptive while engaging in sexual intercourse? According to some, yes.\textsuperscript{136} But this point is certainly debatable.

Fraud, like other harmful impulses, has degrees. The law distinguishes between lies that are harmful but legal, on one hand (nonactionable fraud), and those too harmful to allow, on the other (actionable fraud).\textsuperscript{137} But how this distinction is made has, to date, not been adequately studied or appreciated. A survey of fraud law over the past two and a half centuries reveals a troubling

\textsuperscript{131} See Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that Texas’s anti-sodomy law, which criminalized homosexual behavior, violated the Due Process Clause of the Fourteenth Amendment).

\textsuperscript{132} See, e.g., Windsor v. United States, 699 F.3d 169, 182 (2d Cir. 2012) (holding that “homosexuality has no relation to aptitude or ability to contribute to society”), aff’d, 570 U.S. 744 (2013).

\textsuperscript{133} Id. at 187–88.

\textsuperscript{134} See supra notes 130–33; see also William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1490 (1993).

\textsuperscript{135} See LEVINE, supra note 51, at ix, 96 (noting people “are hardwired to be duped,” and that while “most people lie infrequently” and “are honest most of [the] time,” “[t]here are a few people . . . who lie often,” and that “[m]ost lies are told by a few prolific liars”).

\textsuperscript{136} See, e.g., Elizabeth Sepper, Gendering Corporate Conscience, 38 HARV. J.L. & GENDER 193, 211 (2015) (“By categorizing emergency contraception and IUDs as abortion and then condemning it as murder, some . . . denounce women who use such forms of contraception as murderers.”).

\textsuperscript{137} Henricksen, supra note 104.
inconsistency. The law generally prohibits one person defrauding another in an unacceptably harmful way. But the more victims one defrauds, the less likely it is for the scheme to be actionable fraud under the law. This presents a paradox. The more victims a fraudster targets, the less likely it is the fraud they carry out will fit into the actionable fraud category. Therefore, the bigger the fraud is, the less likely it will be prohibited. Part of the explanation for why this is the case can be found in the history of how fraud law was established in the first place, and how it has evolved in the years since.

*     *     *

Modern fraud law, which today encompasses all actionable fraud, grew primarily out of a single court decision in 1789. Up to then, in the United Kingdom’s common-law system, which all common-law jurisdictions inherited from the United Kingdom, there was no law against defrauding another person unless you had entered into a contract with that person. No contract, no fraud.

One judge in the 1789 case of Pasley v. Freeman, decided in the King’s Bench Court, changed that. The facts of Pasley are simple. A store owner sold goods to a customer on credit. The customer needed to provide a personal reference to vouch for his creditworthiness. For this purpose, the customer brought in a man named Joseph Freeman, who assured the store owner the customer could, and would, pay.

But the customer did not pay. He disappeared and was never seen again. The store owner, who was owed the equivalent of over $500,000 in today’s U.S. currency, could not sue the customer because the customer

138. Henricksen, supra note 89 (manuscript at 89).
139. Henricksen, supra note 104, at 553 (noting how defrauding another in a harmful way may constitute an actionable crime and tort).
140. Id.; Henricksen, supra note 89 (manuscript at 89).
141. There are other factors, of course. For example, First Amendment analysis gives stronger protections for speech to the public than to one-on-one speech. This makes the bar higher for restricting speech to the public than for one-on-one speech. See Wasserman, supra note 116.
142. See Olson, supra note 122.
143. See Dalley, supra note 94, at 413–14.
145. Id. at 450.
146. Id.
147. Id.
148. Id. at 450–51.
149. Id. at 451.
could not be found.\textsuperscript{151} Instead, the store owner sued Freeman, who had vouched for the nonpaying customer.\textsuperscript{152} Freeman, in fact, had lied.\textsuperscript{153} He had known the customer was untrustworthy, and that he would likely not pay.\textsuperscript{154} Freeman’s lies about the customer’s integrity and creditworthiness caused the store owner to lose thousands of dollars.\textsuperscript{155}

But such deceit was not illegal at the time. Fraud was then only actionable if carried out between parties to a contract.\textsuperscript{156} The store owner and Freeman had no contract.\textsuperscript{157} So, the store owner had no legal basis for a claim against Freeman.\textsuperscript{158}

The case was appealed to the King’s Bench Court.\textsuperscript{159} There, Chief Justice Lord Kenyon conceded the obvious: there being no contract between the men, the law provided no avenue for the store owner to seek damages against Freeman.\textsuperscript{160} However, Justice Grose, whose opinion in the case is appended to Lord Kenyon’s, insisted that although there is no law, there is a “principle” that holds “that wherever deceit or falsehood is practised to the detriment of another, the law will give redress.”\textsuperscript{161} Lord Kenyon agreed.\textsuperscript{162} Using this principle as the basis of his ruling, the Chief Justice invented a new law under which Freeman could be, and was, held liable to pay the store owner’s damages.\textsuperscript{163} The law Lord Kenyon created was:

\begin{quote}
A false affirmation, made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action, it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.\textsuperscript{164}
\end{quote}

This was an astonishing change to the law. From one moment to the next, victims of fraud who had no contractual relationship with the one who deceived

\textsuperscript{151} Pasley, 100 Eng. Rep. at 451.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} See id. at 456–58.
\textsuperscript{161} Id. at 451.
\textsuperscript{162} See id. at 457 (“[A]n action upon the case for a deceit lies when a man does any deceit to the damage of another.”).
\textsuperscript{163} Id. at 450.
\textsuperscript{164} Id.
them went from having no rights to being able to take the fraudster to court and sue for damages.\textsuperscript{165} Under the ruling in \textit{Pasley}, it did not even matter if the one deceiving stood to gain \textit{anything} from the fraud.\textsuperscript{166} Freeman appeared to gain nothing from deceiving the store owner.\textsuperscript{167} It was enough that Freeman defrauded the store owner, and that the store owner suffered damages as a result.\textsuperscript{168} Today, two and a half centuries later, these general parameters of the law still hold true in common-law jurisdictions like the U.S.\textsuperscript{169}

Thousands of actionable fraud cases were decided in American courts during the century following \textit{Pasley}.\textsuperscript{170} Most of these cases arose out of one-on-one transactions involving the sale of goods, such as horses or other livestock, intellectual property, or land. Some, like \textit{Pasley}, involved credit references. When a case was decided in favor of the plaintiff (i.e., the dupe), the defendant (i.e., the liar) was ordered to pay damages. In addition to these tort cases, criminal laws were passed to make actionable fraud a crime.\textsuperscript{171} This meant that one who harms another through fraud can be sent to prison or ordered to pay fines, in addition to being required to pay damages to the one defrauded.\textsuperscript{172}

In the 1700s, it made sense to focus legal remedies for harmful frauds on the kinds of frauds most often carried out in that era, which were one on one. To be clear, it is not as if fraud on the public was totally nonexistent; the idea of spreading a fraudulent claim to masses of people certainly existed at the time.\textsuperscript{173} But the available avenues for disseminating falsehoods to masses of people were extremely limited when compared with the opportunities available

\textsuperscript{165} Dalley, \textit{supra} note 94, at 413–14.
\textsuperscript{166} \textit{Pasley}, 100 Eng. Rep. at 450.
\textsuperscript{167} \textit{Id}. at 451.
\textsuperscript{168} \textit{Id}. at 450.
\textsuperscript{169} Klein v. Receivable Mgmt. Grp., Inc., 595 F. Supp. 3d 1183, 1191 (M.D. Fla. 2022) (quoting \textit{Pasley} for the proposition there must be damage for a fraud claim to be actionable).
\textsuperscript{170} I make this observation, and the ones to follow, drawing from the knowledge I have acquired by conducting, in collaboration with research assistants, numerous reviews, studies, surveys, and analyses concerning fraud cases in the U.S. These reviews, studies, surveys, and analyses are on file with the author.
\textsuperscript{171} See \textit{Steven W. Feldman, Government Contract Guidebook} § 12:14 (4th ed. 2023) ("There are a number of criminal statutes under which the government prosecutes procurement fraud."); Utah v. Kent, 945 P.2d 145, 147 (Utah Ct. App. 1997) (discussing "statutes criminalizing forgery, insurance fraud, and communications fraud").
\textsuperscript{172} See Feldman, \textit{supra} note 171; Kent, 945 P.2d at 147.
\textsuperscript{173} See, e.g., Samantha Barbas, \textit{From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption}, 61 \textit{Buff. L. Rev.} 1119, 1140 (2013) (discussing patent medicines, which were “‘cure-all’ elixirs that were typically fraudulent if not toxic” and “were the most commonly advertised product of the 1800s”).
in later centuries. At the time, to send a message to one person out of earshot took a significant amount of time. With no telephones or electronic communications, except in later decades the telegraph, and without automobiles or airplanes, messages traveled slowly. Thus, one-on-one fraud posed the most immediate and clear threat. Accordingly, it made sense for fraud law to, in its early stages, focus almost entirely on one-on-one fraud schemes.

But a new kind of fraud scheme grew more prevalent during the 1800s. This category of fraud did not quite fit the model for which fraud law had been made. This new fraud scheme involved the marketing, selling, and purchasing of securities, such as stocks and bonds. These frauds were different because they were not carried out the way fraud schemes had previously, where one person made false representations to another so that the other would rely on them and thereby suffered harm. As the Supreme Court has noted, “the typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable.” In a securities fraud scheme, “privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule.” The liar in a securities fraud scheme disseminates a profitable falsehood, not to any particular individual, as is the case in the sale of horses or land, but rather to potential investors, an undefined but substantial portion of “the public at large.” That is, the one hoping to profit from deceiving others disseminates the lie to the public via, for instance, a prospectus or news release, to spread the falsehood to everyone who might have occasion to hear or read it and who might either sell or buy shares themselves, or might communicate the information to someone else who would. The liar’s hope was for someone, though the liar did not know or care who, would believe the falsehood to be...
true and, based on that belief, either buy a particular stock or other security, or that they sell it.\textsuperscript{182} This purchase or sale would ultimately enrich the liar. That is, it worked the very same way as any other fraud scheme, but with one variation. The lie was targeted not at an individual victim but at the public, which was a class of thousands or millions of potential victims.\textsuperscript{183}

This difference in the way securities fraud is carried out posed a novel problem. It was clear that such deceptions, which were aimed at thousands or millions of people, rather than at one individual, posed a threat to people just like one-on-one fraud schemes, but the law, as it had up-to-then developed, was ill-equipped to handle securities fraud claims.\textsuperscript{184} The law had been created in a different era when the fraud threat came almost entirely in the form of one-on-one frauds.\textsuperscript{185}

As a result, fraud law turned out to be a poor check on the harmful impulses to defraud when it came to stopping securities fraud.\textsuperscript{186} The law, in fact, was so deficient on this front and so lopsided in favor of those who carried out securities fraud that, in the early twentieth century, every state in the U.S. passed securities fraud laws to address it.\textsuperscript{187} But “state-by-state regulation proved ineffective.”\textsuperscript{188} Accordingly, in 1934, Congress passed legislation

\textsuperscript{182} See id.; supra note 170.

\textsuperscript{183} See What’s New, supra note 180; James Chen, \textit{What Is Securities Fraud? Definition, Main Elements, and Examples}, INVESTOPEDIA, https://www.investopedia.com/terms/s/securities-fraud.asp [https://perma.cc/4DGF-6H55] (June 9, 2022) (“Securities fraud . . . is a type of serious white-collar crime that can be committed in a variety of forms but primarily involves misrepresenting information investors use to make decisions.”).

\textsuperscript{184} See Paul N. Edwards, \textit{Compelled Termination and Corporate Governance: The Big Picture}, 10 \textit{J. CORP. L.} 373, 427 (1985) (“Section 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions.”).

\textsuperscript{185} See Wes Henricksen, \textit{Fraud Law and Misinfodemics}, 2021 \textit{UTAH L. REV.} 1229, 1249–50 (discussing the growth of securities fraud cases brought under common law doctrine at the end of the 1800s and beginning of the 1900s).

\textsuperscript{186} Edwards, supra note 184, at 427; see also Joseph Goldberg & Walter F. Kelly, Jr., Comment, \textit{Accountants’ Liabilities to Third Parties Under Common Law and Federal Securities Law}, 9 \textit{B.C. INDUS. & COM. L. REV.} 137, 154 (1967) (“It is clear that Congress intended, in passing [the Securities Act of 1933 and the Securities Exchange Act of 1934], to provide the public with more protection and better remedies than were available at common law.”).


\textsuperscript{188} Lazaro & Edwards, supra note 187, at 52–53.
targeting securities fraud and created an entire government agency, the
Securities and Exchange Commission (SEC) to investigate and prosecute
securities fraud cases.\textsuperscript{189}

An independent executive agency was created, in large part, to stop this
kind of fraud on the public, which under the law at the time was falling through
the cracks.\textsuperscript{190} This gave victims a way to sue to recover damages against those
who defrauded them by spreading false and misleading claims to the public.\textsuperscript{191}
It also made securities fraud a crime, which allowed the state to prosecute
securities fraud under criminal fraud law statutes.\textsuperscript{192} This did not entirely stop
securities fraud, but it almost certainly at least made a dent in it.\textsuperscript{193}

The manner in which securities fraud is carried out, however, was not as
anomalous as might appear at first. But the way the law was amended to address
it was anomalous.

Securities fraud is not the only kind of fraud carried out on the public.
Beginning in the 1910s and 1920s, with establishment of mass media through
radio and television, avenues for spreading messages, both true and false, have
expanded the opportunities for those seeking to profit through fraud.\textsuperscript{194} At the
very beginning of this new era, the idea of shaping public opinion through
propaganda was viewed largely as a positive development and integral to
managing a democratic population.\textsuperscript{195} During World War I, President Woodrow
Wilson established the Committee on Public Information for the express
purpose of generating support for the war effort among the American public.\textsuperscript{196}

\begin{footnotesize}
191. See Allegaert v. Perot, 466 F. Supp. 516, 519 (S.D.N.Y. 1978) (“The trustee’s characterization of 10B-5 claims as intentional torts is of course correct.”).
194. Buckley v. Valeo, 424 U.S. 1, 21 (1976) (“The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.”).
\end{footnotesize}
In the wake of the war, the public relations (PR) industry was established, and many large businesses and corporate interest groups engaged PR firms to shape public opinion in their favor. Some of these messages, no doubt, were akin to truthful advertising, perhaps containing puffery, but not containing outright lies. Some, however, used this access to manipulate public opinion, to spread outright falsehoods calculated to hide dangers posed by their products, and to deceive the public about what they were selling. This included, for instance, the leaded gas, tobacco, fossil fuel, asbestos, and sugar industries. There were, and are, many others.

In each of these particular cases, the industry did not merely tinker with language or express a valid, albeit convenient, opinion. Each of these industries knew its products posed enormous threats to human health and life, and nevertheless lied to the public so the public would remain ignorant for as long as possible about the actual threat posed.

Private industry is not alone in taking advantage of this opportunity to defraud millions. Politicians and media organizations, who likewise stand to gain from spreading profitable falsehoods, do so as well. Like securities fraud, in nearly every case where a fraudulent scheme is based on a lie told to the public, rather than a lie told to an individual, fraud law, as first established in Pasley, proves inadequate and ill-suited for the job.

So, while one particular kind of fraud on the public, securities fraud, has been reasonably well addressed, the vast majority of other methods of defrauding the public have, so far, continued to be protected by law, rather than punished by it. Accordingly, the law focuses far too narrowly on one-on-one fraud. It ignores most fraud on the public. By doing so, it gives free rein to those seeking to profit through fraudulent conduct and messages.

198. See, e.g., Henricksen, supra note 96, at 2420.
199. See id. at 2414–23 (discussing disinformation campaigns by the leaded gas, tobacco, and other industries).
200. See id.
201. See id. at 2420, 2424–25.
202. See, e.g., Wentz & Franta, supra note 26, at 10995–98 (discussing fossil fuel industry campaign of climate change doubt and the industry’s knowledge of the falsity of its public campaign); see also generally Naomi Oreskes & Erik M. Conway, Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming (2010) (discussing the fossil fuel and tobacco industries’ disinformation campaigns for profit).
204. See Henricksen & Betz, supra note 109, at 113 (discussing the stolen election lie).
205. See Edwards, supra note 184, at 427; Goldberg & Kelly, Jr., supra note 186, at 154.
III. WHY FRAUD ON THE PUBLIC, WHICH THE LAW GENERALLY ALLOWS, IS ARGUABLY AS HARMFUL AS ONE-ON-ONE FRAUD, WHICH THE LAW GENERALLY PROHIBITS

A. Brief Overview of the Prevalence and Purpose of Fraud on the Public

Most would agree that politicians, the media, and corporations frequently deceive millions by spreading falsehoods, half-truths, and exaggerations for their own benefit and, in the process, cause harm to others. That is where the agreement on this issue ends, however. There is vast disagreement on numerous dimensions of this issue, such as how much harm is caused by the spread of harmful falsehoods, how serious the threat of fraud on the public actually is, and what we should, or even could, do about it.

Perhaps the chief impediment to finding common ground on the issue of fraud on the public lies not in the lack of representative examples but in an overabundance of them. Fraud on the public is so ubiquitous it appears not only completely normal but perhaps inevitable, necessary, or even preferable. We are bombarded with disinformation aimed to mislead so frequently that many, understandably, conclude it must be unavoidable in a free society. It appears, by its sheer omnipresence, to be the natural order of things. People who subscribe to this line of thinking tend to believe the best course of action, when it comes to fraud on the public, is no action. The impulse to take a laissez-faire approach to fraud on the public is understandable, given how

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206. See, e.g., Dillon, supra note 26, at 179 (“It may be considered something of a truism that ‘all politicians lie.’”).

207. Compare, e.g., id. at 179–80 (arguing that the U.S. “must enact laws making the propagation of lies, deliberate untruths of a significant nature, by elected or other officials, immediately disqualifying”), with Nadine Strossen, The Paradox of Free Speech in the Digital World: First Amendment Friendly Proposals for Promoting User Agency, 61 WASHBURN L.J. 1, 10–11 (2021) (noting that “[a]lmost without exception, controversial political speech,” such as “‘hate speech’ or ‘disinformation’ [are] constitutionally protected from government censorship”).

208. See infra notes 211–236.


210. Tim Wu, Disinformation in the Marketplace of Ideas, 51 SETON HALL L. REV. 169, 171 (2020) (explaining the hesitation by some to regulate disinformation as stemming from the belief that “the cure is worse than the disease,” and that because “disinformation and propaganda are inherently subjective categories and forms of speech,” “there is nothing to be done”). However, as noted by Professors Terri Day and Danielle Weatherby, “the marketplace of ideas theory has many critics.” Terri R. Day & Danielle Weatherby, Shackled Speech: How President Trump’s Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment, 23 LEWIS & CLARK L. REV. 311, 322 (2019).
saturated the information environment is with falsehoods aimed at deceiving the public for the benefit of those who invented and spread the lies.

One morning in May 2022, while working on the book In Fraud We Trust, from which portions of this Article were adapted, I opened the Washington Post (online) to look for representative examples of articles addressing or containing harmful falsehoods. That day’s Washington Post offered a diverse range of stories that pertained, directly or indirectly, to purposeful efforts to mislead the public. One of the top stories in the Washington Post that day was by Meryl Kornfield, entitled “U.S. surpasses record 100,000 overdose deaths in 2021.” That article covered the then-current status of the opioid epidemic, considered by some the “worst public health crisis in American history.” The opioid crisis, which is virtually unique to the U.S., was effectively manufactured by the opioid industry through an aggressive, long-term disinformation campaign to downplay and hide the addictiveness and dangers posed by opioid painkillers. This “marketing” push resulted in massive over-prescription. Those responsible, including the Sackler family, made billions.

That was the first relevant headline I noticed in that day’s Washington Post. There were plenty of others:

“Earth given 50-50 chance of hitting key warming mark by 2026,” by Seth


213. Thomas J. Salerno & Clarissa C. Brady, In Defense of Third-Party Releases in Chapter 11 Cases: Part I: Let’s Define the Battlefield!, AM. BANKR. INST. INST. J., Mar. 2022, at 32 n.6 (noting the opioid crisis has been called a “uniquely American problem”).

214. See Keith Ongeri, A New Prescription: The Case for Enterprise Liability Reform in Light of the Opioid Epidemic, 35 NOTRE DAME J. L. ETHICS & PUB. POL’Y ONLINE 865, 889 (2021) (“Purdue Pharma and other opioid pharmaceuticals engaged in an active disinformation campaign that downplayed the adverse side effects of the drug, leading doctors and patients to believe the drug they were taking was not nearly as dangerous or addictive as it was.”).


216. See Brian Mann & Martha Bebinger, Purdue Pharma, Sacklers Reach $6 Billion Deal with State Attorneys General, NPR (Mar. 3, 2022, 1:43 PM), https://www.npr.org/2022/03/03/1084163626/purdue-sacklers-oxycontin-settlement [https://perma.cc/8QJM-TR62] (“Court filings show the family took in $10 billion in profits from OxyContin . . . .”).
Borenstein. This article discussed the ways powerful countries chose, through their leaders’ decision, not to act on climate change. This failure to act resulted in large part, if not as a direct result of, the fossil fuel industry’s campaign to raise climate change doubt.

“Nearly half of Republicans agree with ‘great replacement theory,’” by Philip Bump. This story covered how nearly one in three Americans now buys into a baseless conspiracy theory being spread in rightwing media and, more recently, by Republican leaders, whereby Democrats are allegedly funneling immigrants into the U.S. to “replace” other Americans with “more obedient voters from the Third World.”

“Inside the Republican campaign to take down Madison Cawthorn,” by Isaac Arnsdorf. Cawthorn was, at the time, a freshman congressman who had spread provably false claims about himself, his opponents, and numerous public policy issues. Shortly before that article appeared, he had falsely claimed to have witnessed other members of Congress snorting cocaine and taking other hard drugs, and claimed to have been invited by other members of Congress to an orgy.

“The Supreme Court: Unreachable, inaccessible and frightening,” by Robin Givhan. Givhan’s piece discussed the Court’s politicization and the recently-leaked opinion purporting to overturn Roe v. Wade; the fact both events were ultimately the result of a scheme to mislead the public by Senator Mitch McConnell and other Republicans, whereby that party blocked President

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217. See Seth Borenstein, Earth Given 50-50 Chance of Hitting Key Warming Mark by 2026, AP NEWS (May 9, 2022, 6:01 PM), https://apnews.com/article/climate-science-environment-8be309e8610879ee029bd26dd1fb45e8 [https://perma.cc/2SHE-3HBB].

218. See id.

219. See id.


221. Id.


223. Id.


Barack Obama from filling a vacant seat on the Court by lying about the propriety and precedent of Presidents filling such vacancies during election years, was not mentioned in the piece.\(^{226}\)

Scrolling just a couple inches down on the *Washington Post* homepage, readers that day encountered an entire panel dedicated to COVID-19 vaccination rates and the current status of infections state by state.\(^{227}\) There were numerous articles, charts, and opinion pieces included, as well. Like the *New York Times*, CNN, Fox News, and numerous other leading news media, the *Washington Post* had included a dedicated section for COVID-19 since shortly after the pandemic began in 2020. Although there has been a great deal of disinformation purposefully disseminated to mislead the public with regard to the pandemic, just two examples should suffice. First, there were falsehoods spread by the right. Specifically, rightwing media, former President Donald Trump, and Republican leaders spread false claims about the pandemic being a hoax perpetrated by Democrats, about vaccines being a plot by Bill Gates to install microchips into people’s bodies, and about horse worm medicine and other homeopathic remedies being more effective against the virus than the vaccine.\(^{228}\) Second, there was hypocrisy from some on the left. California Governor Gavin Newsom, like many Democrats, imposed harsh restrictions during the COVID pandemic, including mask mandates, social distancing guidelines, and orders to avoid nonessential social contact.\(^{229}\) During one COVID-19 surge, however, Newsom was photographed eating out at one of the three-Michelin star restaurants, The French Laundry, in Napa Valley, sitting at a table with at least a half dozen other patrons, all unmasked.\(^{230}\)

The last article from that day’s *Washington Post* that I will mention here is an opinion piece by Max Boot entitled, “We’re in danger of losing our

\(^{226}\) Id.
\(^{227}\) See, *e.g.*, Coronavirus, WASH. POST, https://www.washingtonpost.com/coronavirus/?itid=hp_top_nav_coronavirus [https://perma.cc/5EQ7-Q7CE].
democracy, but most Americans are in denial.” In it, Boot outlined the risk posed by Republicans continuing to embrace the falsehood that the 2020 election was “stolen” by Joe Biden through massive fraud perpetrated by the Democrats, a falsehood now commonly referred to by many pejoratives, such as the Stolen Election Myth and the Big Lie. Not only has Trump never conceded the election, but “[f]ealty to the ‘big lie’ has become a litmus test for GOP candidates because it has become gospel for Republican voters.” As a result, “most Republicans have tacitly accepted that inciting an insurrection is no big deal.” This would have been unthinkable a few years ago before the Trump era of politics. But this is what an overabundance of disinformation produces: a view of reality so warped the unthinkable becomes the new normal.

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Although disinformation is not a new phenomenon, there appears to be an emerging consensus among scholars that the speed with which disinformation proliferates today presents a danger of a different magnitude than it did in the past. A great deal of disinformation, of course, is almost certainly protected
speech and, therefore, could not be regulated as fraud or as any other category of unprotected speech.236 However, some of the ways that some political, media, and business leaders purposefully spread profitable falsehoods might qualify as fraud on the public, which I argue should be treated like any other kind of fraud.

Unlike other kinds of fraud, however, fraud on the public is carried out by only those who have access to so vast an audience that they can manipulate public opinion. This exclusive group includes, among others, three major categories of people: (1) those involved in the political process, whether as an officeholder, a candidate, a campaign official, or a political party; (2) those who work in the media, such as TV news pundits, newspaper editors, and journalists; and (3) large corporations, big banks, and those who work on their behalf, such as officers and directors, trade groups, lobbyists, and paid experts.237

The purpose of schemes to defraud the public is, in many ways, indistinguishable from schemes to defraud individuals. Perhaps the most common and obvious goal of those who defraud the public is money. The fraud is aimed at profiting the liar. Other major motivating factors for defrauding the public are political power and elected office. But while these cover perhaps the vast majority of the reasons for fraud on the public, there are others. These include attempts to inhibit or evade justice, and to falsify history.

Naturally, asking why someone says or does something is always tricky, but it is particularly so here. Not only does addressing this question risk taking focus off what is most important—the fact those with power manipulate and mislead regular people constantly, and in the process, reap enormous profit while causing enormous harm—but discussing the motivations held by large groups of people, such as the groups who defraud the public (politicians, corporate officers and directors, etc.), is something that can be done with precision only with extensive study and analysis, which, to the author’s knowledge, has not been undertaken. Nevertheless, courts routinely determine fraudulent intent (motivation) in deciding whether to impose liability for fraudulent conduct on individuals.238 That is to say, the law does not treat

236. Henricksen & Betz, supra note 109, at 118–19.
237. Henrickesen, supra note 89 (manuscript at 110).
238. See Stewart v. Scheinert, 392 N.E.2d 563, 563 (1979) (holding that liability under a statute imposing sanctions for public officials who commit “illegal acts” “arises only if the illegal acts were
fraudulent intent as something unknowable. It can be proven with evidence. Moreover, an understanding of the reasons those in politics, media, and business defraud the public is necessary to gain a clear picture of how and why fraud on the public happens, and the grave dangers it poses.

I will briefly discuss the two primary aims of fraud on the public: financial gain and political gain. I will also discuss two other motivations underlying fraud on the public. Although not as widespread and common, they are nevertheless important. These are the avoidance of justice and the falsification of history.

i. For Financial Gain

Many schemes to defraud the public are aimed at making money, including, for instance, the public deception schemes to conceal product dangers (PDCPD Schemes) like those carried out by the fossil fuel, opioid, and sugar industries, as well as corporate welfare schemes whereby massive government subsidies are paid to giant corporations even though the purported purpose of them is to assist middle-class or working-class families. In short, in the past century, many corporations have taken advantage of their public platform to spread false and misleading messages to defraud the public for profit, and they have done so in diverse ways. Media corporations are no exception. There are plenty of examples of media organizations, as well as individuals in the media, who engage in fraud on the public for financial gain in much the same way as other kinds of corporations. They have done this, for instance, by spreading falsehoods for the purpose of gaining or retaining viewers, or increasing online engagement, both of which ultimately further the media platform’s bottom line. For example, radio host Rush Limbaugh claimed Hurricane Irma was a hoax and told listeners not to heed official warnings just hours before he, himself, fled his Florida home to escape its collusive, fraudulent, or motivated by personal gain”); In re Alpha-Omega Commc’ns, Inc., 52 B.R. 846, 849–50 (Bankr. E.D. Pa. 1985) (holding that liability there rested on whether defendant was “motivated by fraud or selfish considerations” or “motivated by fraud and self-dealing”).

239. Henricksen, supra note 96, at 2401–02.


path. 243 Breitbart News falsely claimed Hillary Clinton’s presidential campaign was funded by Saudi Arabia. 244 CNN falsely reported that Trump aide Anthony Scaramucci was involved in a Russian hedge fund under Senate investigation. 245 Slate falsely reported Trump created a secret internet server to covertly communicate with a Russian bank. 246 Radio host Hal Turner falsely claimed that people with the COVID-19 vaccine are being “tracked in real time via 5G cellular, and all that data can be hacked into to track you.” Examples of provably false claims in the media are so commonplace, in fact, that listing them risks making them appear less common than they actually are. Any scheme whereby one aims to mislead the public to turn a profit would, if all other elements were met, likewise fit into the category of fraud on the public for financial gain.

ii. For Political Gain

Not all frauds on the public are aimed at financial gain. Many are aimed, instead, at political ends. In fact, when one thinks of people lying to large numbers of people for their own benefit, it perhaps most often brings to mind

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the government and politicians. There is good reason for this. Politicians lie frequently. If such a lie causes unacceptable harm, it would be, under my definition of fraud on the public, fraud on the public for political gain. The political gain could be winning an election, generating support for a particular policy or agenda item, or increasing support for a political party, platform, or candidate more broadly. Examples include: the Republican chair for Bexar County, Texas, telling an audience and TV viewers that the COVID-19 pandemic was a Democratic hoax and imploring everyone to take their protective masks off; Senator Marco Rubio claiming President Barack Obama wants to “take away our guns”; President George W. Bush and his administration claiming Iraq possessed

248. See, e.g., Bruce Fraser, The Neutral as Lie Detector, Disp. Resol. Mag., Winter 2001, at 12 (“[M]ost of the time we don’t expect people to lie to us (except in the case of politicians).”).
249. Critics of the idea of regulating political speech raise two major objections. The first is that it would violate the political question doctrine. See Elizabeth Earle Beske, Political Question Disconnects, 67 Am. U. L. Rev. F. 35, 36–39 (2018) (explaining the origin and parameters of the doctrine). Notably, the very existence of the political question doctrine is in question. See, e.g., id. at 39 (“[T]he vacillating fortunes of the political question doctrine have led some commentators to declare the doctrine dead.”); Jesse H. Choper, The Political Question Doctrine: Suggested Criteria, 54 Duke L.J. 1457, 1459 (2005) (observing that numerous scholars have concluded that the political question doctrine is “in serious decline, if not fully expired”). Even if the doctrine exists, however, it does not necessarily limit regulating political speech in any way inconsistent with my definition of fraud on the public. The second objection is the idea that prohibiting false and misleading political speech, where such speech satisfies the elements of fraud on the public, might effectively include a substantial portion of all political speech. See Jack Shafer, In Defense of Political Lying, Reuters (Apr. 28, 2014, 5:15 PM), https://www.reuters.com/article/idUSK193102541220140423 [https://perma.cc/5YRK-C8FN]. But if lies really are the foundation of most political speech, then it would mean truthfulness cannot have any place in political speech. Accordingly, unless the aim is to elevate dishonesty, this objection appears to be an argument for regulating fraud on the public, not against it.

250. Sanford Nowlin, At Rally, Bexar County Republican Chair Cynthia Brehm Claims Coronavirus Is a Democratic Hoax, San Antonio Current (May 23, 2020, 7:55 AM), https://www.sacurrent.com/news/at-rally-bexar-county-republican-chair-cynthia-brehm-claims-coronavirus-is-democratic-hoax-23690141 [https://perma.cc/E6PP-J255]; see also Timothy Burke (@bubbaprog), Twitter (May 22, 2020, 4:00 PM), https://twitter.com/bubbaprog/status/1263937751872868353 [https://perma.cc/M3Q9-WUHU] (“Absolutely bizarre. The Bexar County GOP chair concludes this rally by stating that the coronavirus is a hoax perpetuated by Democrats, tells people to take off their masks, and then everyone hugs each other.”). The video embedded in the tweet shows the chairperson saying, “Why is all this happening? I’ll tell you why. All of this has been propagated by the Democrats to undo all the good that President Trump has done for our country. And they are worried. So, take off your mask. Exercise your constitutional rights. Stand up, speak up, and vote Republican.” Id.

weapons of mass destruction as a pretext for the American invasion of Iraq;\textsuperscript{252} campaign workers for Democrat Doug Jones creating a Facebook group called “Dry Alabama,” which purported to be an alliance between teetotalers and Jones’s Republican opponent, Roy Moore, but which was actually an effort by Jones to get moderate conservatives to vote Democrat;\textsuperscript{253} and Joe Biden claiming in September 2020, “If [President Trump] had done his job, had done his job from the beginning, all the people would still be alive. All the people. I’m not making this up. Just look at the data.”\textsuperscript{254} Fraud on the public for political gain is carried out using a diverse range of techniques, including demonizing marginalized groups, such as immigrants, racial and ethnic minorities, and the LGBTQ+ community; making baseless and bad faith accusations against political opponents and opposition parties; manufacturing outrage with regard to irrelevant or nonexistent issues; and utilizing rhetorical weaponry in bad faith, such as making false equivalencies or whataboutisms.\textsuperscript{255} These politically motivated deceptions have caused myriad horrors, from genocides\textsuperscript{256} to military invasions.\textsuperscript{257} The fact that the end goal is not pecuniary does not make these frauds any less dangerous. Nevertheless, whether any such scheme should be subject to speech restrictions depends on a careful examination of the speech involved, the harm or potential harm it poses, and a First Amendment analysis of any law, rule, or regulation restricting such speech.\textsuperscript{258}

\textsuperscript{252} Dylan Matthews, \textit{No, Really, George W. Bush Lied About WMDs}, \textit{VOX} (July 9, 2016, 10:00 AM), [https://www.vox.com/2016/7/9/12123022/george-w-bush-lies-iraq-war](https://www.vox.com/2016/7/9/12123022/george-w-bush-lies-iraq-war).


\textsuperscript{256} See \textit{TIMOTHY SNYDER}, \textit{BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN 201 (2012)} (discussing the ways that Germany deceived German, Eastern European, and Soviet Jews to make themselves available to be massacred and noting “[d]isinformation was the key to the entire operation”).


\textsuperscript{258} Varat, \textit{supra} note 5, at 1141.
iii. To Inhibit Justice

Another form of fraud on the public consists of spreading disinformation to wrongfully influence the outcome of possible criminal charges or civil claims against an individual or organization the liars hope to protect. This is fraud on the public to inhibit justice. In recent years, there have been a handful of well-publicized cases of police departments carrying out these kinds of frauds on the public. They do this by disseminating false or misleading information about actions by police officers who injured or killed civilians, most often during the act of arresting or transporting suspects. In the case of George Floyd, a man arrested on suspicion of having used a counterfeit $20 bill at a food mart, the Minneapolis Police Department released an official statement claiming Floyd had “physically resisted officers” and that he had died in a “medical emergency.” Several videos of the incident later emerged that clearly showed Floyd had cooperated with police and that he had been murdered by Police Officer Derek Chauvin when Chauvin pressed his knee heavily onto Floyd’s neck for nine minutes and twenty-nine seconds. Had the videos not emerged, the public would almost certainly have had little choice but to buy into the falsehoods in the police department statement.

Incidents like this one occur with frightening frequency. Indeed, while writing this Article, news emerged of yet another incident where police brutality against a citizen was fraudulently covered up by an official police department public statement that blamed the victim and concealed criminal violence by police. This time, the victim was Tyre Nichols, who died from a savage beating he received from a group of police officers. According to the New York Times, “[a] police report written hours after officers beat Tyre Nichols was starkly at odds with what videos have since revealed, making no mention of the powerful kicks and punches unleashed on Mr. Nichols and instead claiming that he was violent.” The police report painted Mr. Nichols,


261. McCarthy, supra note 259.


263. Id.

264. Id.
29, who died three days after the January 7 beating, as an irate suspect who had ‘started to fight’ with Memphis police officers, even reaching for one of their guns. The videos, which were released last week, showed nothing of the sort.\(^{265}\)

Time and again, police department public relations offices have been caught misleading the public about harms caused by police conduct. There are myriad examples.\(^{266}\) I will give just one more here, as another case in point. A few months ago, another man, this one named Manuel Ellis, died while being arrested in Tacoma, Washington.\(^{267}\) The Tacoma Police Department released an official account of how it had happened.\(^{268}\) It said Ellis had attacked police officers and that no officer placed a knee on his head or neck.\(^{269}\) These statements directly contradict three witnesses who saw the encounter.\(^{270}\) In fact, in the case of Mr. Ellis, it later came to light that overwhelming evidence showed a police officer did put a knee on Ellis’s neck, and that as a result of the knee on his neck, Ellis died of asphyxiation.\(^{271}\) In fact, Ellis’s last words were “I can’t breathe, sir!”\(^{272}\)

Political leaders also sometimes make false claims to the public to interfere with justice. Trump, for instance, while running for and serving as President, (1) praised former Navy SEAL, Eddie Gallagher, while Gallagher was on trial for heinous war crimes; (2) pressured military courts to take legal action against Lt. Col. Alexander Vindman, who had criticized Trump; and (3) bullied a U.S. district judge who issued a ruling unfavorable to Trump by claiming the judge was biased, calling him “Mexican,” and suggesting the judge should be

\(^{265}\) Id.


\(^{268}\) Id.

\(^{269}\) Id.

\(^{270}\) Id.

\(^{271}\) Id.

\(^{272}\) Id.
investigated. Although such statements are also clearly “for political gain,” “for profit,” or both, the fact they involve meddling in the justice system means their aim was also “to inhibit justice.”

iv. To Falsify History

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

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


277. Id.
In attempting to deal with defeat, Southerners created an image of the war as a great heroic epic. A major theme of the Cult of the Lost Cause was the clash of two civilizations, one inferior to the other. The North, “invigorated by constant struggle with nature, had become materialistic, grasping for wealth and power.” The South had a “more generous climate” which had led to a finer society based upon “veracity and honor in man, chastity and fidelity in women.” Like tragic heroes, Southerners had waged a noble but doomed struggle to preserve their superior civilization. There was an element of chivalry in the way the South had fought, achieving noteworthy victories against staggering odds. This was the “Lost Cause” as the late nineteenth century saw it, and a whole generation of Southerners set about glorifying and celebrating it.

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

It is difficult to know the extent of the harm caused by spreading this falsified version of history. It is clear, however, that it has had a radical effect on Americans’ failure to adequately understand race and history. In a Pew Research poll taken in 2011, for instance, it was found that 48% of Americans thought the Civil War was mainly about states’ rights—including 60% of those under age thirty—while only 38% thought it was primarily about slavery. These opinions do not square with reality. The Confederate leaders’ own words show slavery was the central issue of contention between the Southern and

279. Huffman, supra note 275.
280. See id.
Northern states, and that it was the motivating cause for secession and war.283 The poll results reflect the fact that students in the South, as well as many outside the South, were fed Lost Cause propaganda for generations.

This was one of many instances where those motivated to erase or rewrite history have purposefully spread lies about the past to benefit themselves by spreading an ideology or solidifying their own place at the top of the societal hierarchy. Falsifying history, of course, overlaps with other kinds of fraud on the public, such as “for profit” and “for political gain.” For instance, if an oil company attempted to mislead the public into believing that scientists were “divided” on the global warming question in the 1990s, which oil companies have actually done,284 this would be both an attempt to defraud the public “for profit” and “to falsify history.” If a politician spread the same climate science doubt as part of a political campaign, which has also been done, then it would be both an attempt to defraud the public “for political gain” and “to falsify history.”

B. Harms Caused by Fraud on the Public

This Article’s principal argument, that fraud on the public should be regulated in a manner similar to fraud on the individual, rests largely on the claim that failing to regulate fraud on the public results in unacceptable harm. Whether a particular harm is unacceptable is, by necessity, a subjective determination. But to make that determination, one must first gather the facts. In this case, that involves a review of the harms caused by fraud on the public.

These include harm to human health and life; environmental destruction; harm to knowledge, autonomy, and the search for truth; undermining of democracy and democratic institutions; the proliferation of gun violence, including injuries and deaths resulting from it; and an increase in intolerance, inequality, and an increased threat of tyranny. These are by no means an exhaustive list. The exercise of cataloguing the harms caused by fraud on the public would fill a book and will be addressed more fully in scholarly work elsewhere.285 This Article will only briefly discuss each major category of harm

283. Ta-Nehisi Coates, What This Cruel War Was Over, THE ATL. (June 22, 2015), https://www.theatlantic.com/politics/archive/2015/06/what-this-cruel-war-was-over/396482/ [https://perma.cc/Y59K-3475] (quoting the words of Confederate leaders and Confederate states’ declaration of secession).

284. See William C. Tucker, Deceitful Tongues: Is Climate Change Denial a Crime?, 39 ECOLOGY L.Q. 831, 844 (2012) (“[B]y the early 1990s a clear consensus was emerging among climate scientists that human-caused global warming was underway and posed a threat to humankind.”).

285. See HENRIKSEN, supra note 89 (manuscript at 149) (discussing laundry list of harms caused by fraud on the public).
to give readers a rough analytical framework for understanding the scope of the threat.

With regard to harms to human health and life, numerous schemes to defraud the public result in this kind of damage. One notable recent example was the falsehoods spread for political purpose regarding the safety, effectiveness, and advisability of taking the COVID-19 vaccine. As a result of massive and widespread disinformation spread through rightwing media networks and channels, a gap between vaccination rates of liberals and conservatives emerged, even though prior to the disinformation no such gap had existed. Studies now show this diminished vaccine rate killed hundreds of thousands of people.

But politically motivated vaccine disinformation is just one of the ways fraud on the public causes harm to human health and life. Another is profit motivated disinformation spread by corporations aimed to mislead the public about dangers posed by the products they make and sell. These PDCPD Schemes have been carried out by numerous industries. The opioid industry misled doctors, the public, lawmakers, and courts about the dangers and addictiveness of opioid painkillers and caused “the worst public health crisis in American history.”

The sugar industry carried out a similar scheme. Beginning in the 1960s, it launched a decades-long campaign to hide the health dangers of high-fructose corn syrup and other harmful sugars by paying

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scientists, academics, and public relations firms to produce messages that downplayed the dangers of sugar and redirected the public’s attention to fat. As a result, diabetes, hypertension, cardiovascular disease, and other sugar-caused health maladies spiked in the U.S. The U.S. leads the world in added sugar consumption.

Another large PDCPD Scheme was carried out by the fossil fuel industry between up about 1990 and up through the 2010s. Like the sugar industry, the fossil fuel industry spent millions of dollars to convince the public that the dangers posed by its product were not scientifically certain and that there was doubt about the cause–effect relationship between fossil fuel and climate change. In addition to the displacement of millions of people and all of the other climactic effects, climate change has also had a catastrophic effect on human health; according to one study, global warming now kills 9 million people per year. Most of these deaths occur as a result of small particle


respiratory infections and related respiratory illnesses.\textsuperscript{296} This has amounted to one in every five deaths worldwide.\textsuperscript{297} “Without fossil fuel emissions, the average life expectancy of the world’s population would increase by more than a year, while global economic and health costs would fall by about $2.9 [trillion].”\textsuperscript{298}

Numerous other industries have carried out PDCPD Schemes to deceive the public about dangers posed by the products they make and sell. These include, for instance, the tobacco,\textsuperscript{299} leaded gas,\textsuperscript{300} lead-based paint,\textsuperscript{301} cosmetic,\textsuperscript{302} and baby powder\textsuperscript{303} industries. Similar schemes to mislead the public have been

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\item See generally Off. of the Surgeon Gen., Health Consequences of Smoking, Surgeon General Fact Sheet, U.S. DEP’T HEALTH & HUM. SERVS. (Jan. 16, 2014), https://www.hhs.gov/surgeongeneral/reports/communications/factsheet/index.html [https://perma.cc/8SRC-E4AL] (noting that more than 20 million Americans have died because of smoking since 1964, including approximately 2.5 million deaths due to exposure to secondhand smoke). As Stanford professor Robert Proctor points out, “[i]t’s still the leading cause of death. It still kills over 400,000 Americans per year. It’s still two jumbo jets crashing every day.” Michael Mechanic, “Golden Holocaust: Is the Book Big Tobacco Doesn’t Want You to Read, MOTHER JONES,” https://www.motherjones.com/politics/2012/05/tobacco-golden-holocaust-robert-proctor [https://perma.cc/698F-QML5]. Worldwide, the number is even more grim; it is estimated 100 million people were killed by tobacco in the twentieth century, and that as many as 1 billion are expected to die from tobacco in this century. See Michael V. Ciresi, Roberta B. Walbum & Tara D. Sutton, Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation, 25 WM. MITCHELL L. REV. 477, 482 (1999) (tracing the beginnings of tobacco litigation back to the 1950s).
\item See Cnty. of Santa Clara v. Atl. Richfield Co., 137 Cal. Rptr. 3d 313, 319 (Ct. App. 2006). There, the appeals court held that the plaintiffs had sufficiently alleged a fraud claim against the defendant lead paint manufacturers based on the allegations that defendants had made false misrepresentations and concealments to the public in an effort to deceive the public as to the dangers of low-level exposure to lead paint. Id.
\item See Maryse Rodriguez, Dying to Be Beautiful: An Assessment of How a Self-Regulating Cosmetic Industry and Biotechnology Are Impacting Public Health, 20 HOUS. J. HEALTH L. & POL’Y 457, 487 (2021) (describing how the failure of the government to adequately regulate the cosmetics industry results in myriad health dangers posed by beauty products).
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carried out by the asbestos, pesticide, soft drink, artificial sweetener, fast food, processed food, and prenatal drug industries. There are others. These, together with politically motivated disinformation on vaccines and other public health matters, represent just some of the ways fraud on the public harms human health and life.

Fraud on the public also harms the environment. This arises from numerous sources, including the fossil fuel industry’s campaign of disinformation, which effectively stopped meaningful government action to restrict, cap, or ban fossil fuels for at least three decades. This fraudulent scheme resulted in trillions in profit for the industry and has resulted in a cornucopia of environmental harms, such as “[e]xtreme weather events, desertification, wild fires, heat waves, sea level rise, ocean temperature increases, and glacial and polar ice melt.” Other


309. See Barbara L. Thompson, Pat Levitt & Gregg D. Stanwood, Prenatal Exposure to Drugs: Effects on Brain Development and Implications for Policy and Education, 10 NATURE REV. NEUROSCIENCE 303, 308 (2009).

310. See Joseph Manning, Climate Torts: It’s a Conspiracy!, 62 B.C. L. REV. 941, 944 (2021) (“[T]he fossil fuel industry knew about the dangers of climate change but nevertheless chose to fund disinformation campaigns designed to spread doubt and confusion regarding the existence, cause, and risks of climate change.”).

effects of global warming include increased food insecurity and more frequent and severe droughts and floods.312

It is not just the fossil fuel industry either. Other schemes to defraud the public result in environmental harm, such as the harms caused by mineral extraction, deforestation, and pesticide use, which often result, at least in part, from false and misleading claims by those who profit from the products causing the harm.313

Apart from harm to health, life, and the environment, fraud on the public also causes harm to knowledge, truth, and autonomy. Although this category of harm may appear less definite and measurable than harms to health, life, and the environment—and it certainly is—it is nevertheless arguably even more immediately relevant and personal. After all, when we, ourselves, are manipulated by falsehoods calculated to get us to think, speak, vote, or consume in a manner favorable to the one spreading the falsehoods, the first harm caused is the harm of us being manipulated in the first place. When we are deceived by those seeking to profit off of our gullibility, it is hurtful, humiliating, and disrupts our life. The intrusion into the autonomy of the dupe might not be measurable, but it is certainly stressful, and this stress can cause trauma, insomnia, or even physical illness.314 That is why lies that deceive us are an assault on the autonomy of those lied to.315 This is even truer when the liar aims


313. See, e.g., Katherine Drabiak, Roundup Litigation: Using Discovery to Dissolve Doubt, 31 GEO. ENV’T. L. REV. 697, 715 (2019) (discussing claim against Monsanto, alleging it knew of Roundup’s “dangerous propensities and carcinogenic characteristics” but “concealed, downplayed, or otherwise suppressed, through aggressive marketing and promotion” information relating to the risks and dangers of product exposure rather than warning consumers); Nadia Ahmad, Blood Biofuels, 27 DUKE ENV’T. L. & POL’Y F. 265, 290 (2017) (discussing claims by Honduran farmers who allege “thousands of hectares of land used for subsistence farming were fraudulently and coercively transferred to agribusinesses that grow African palms, which are lucratively exported to the west for biofuel, and are traded in the carbon credit market”).


to manipulate the dupe to personally profit off of the liar’s naiveté, which is the case in every fraud on the public.

Fraud on the public also undermines faith in democracy and weakens democratic institutions. For example, Professor Helen Norton observed that falsehoods spread by those in government “inflict democratic harm when they deny the public the information necessary to hold the government accountable for its misconduct, undermine citizens’ ability to make informed voting choices, sabotage the policymaking process when participants cannot rely on others’ assertions, and foster public cynicism about (and disengagement from) democratic self-governance.”316 Another leading First Amendment scholar, Professor Caroline Mala Corbin, likewise pointed out that “the government’s deliberate dissemination of false claims on matters of public interest” poses an imminent threat to democratic functions and institutions.317 Self-government depends on a well-informed public able to understand what public officials are doing, what they stand for, and who to vote for at the ballot box. Purposeful manipulation of the electorate disrupts the electoral process, results in a less democratic system, and weakens democratic institutions.

Other harms arguably caused by fraud on the public include the tens of thousands of gun deaths in America each year.318 Conservative former Chief Justice of the Supreme Court, Warren Burger, wrote:

> The very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires. In referring to “a well regulated militia,” the Framers clearly intended to secure the right to bear arms essentially for military purposes.319

In a 1991 interview, he asserted that the gun lobby’s interpretation of the Second Amendment is “one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen


in my lifetime.”320 Admittedly, whether this is a fraud or a legitimate result of good-faith advocacy is debatable. What is not debatable is that, unique in the developed world, America experiences frequent gun violence and mass shootings, and that in 2021 alone more than 45,000 Americans were killed by a gun.321

Other harms caused by fraud on the public, though perhaps less measurable or even identifiable, are nevertheless impactful on people’s lives. These include, for example, intolerance of minority groups and views,322 widening economic inequality,323 and the threat of tyrannical government.324 A fruitful discussion of these three harms—intolerance, inequality, and tyranny—could themselves fill a book on how fraud on the public helps create and maintain


321. Gramlich, supra note 318.

322. See Whittney Barth, Comment, Taking “Great Care”: Defining Victims of Hate Speech Targeting Religious Minorities, 19 CHI. J. INT’L L. 68, 71 (2018) (discussing hate speech targeted at Muslims as a racial minority or as a religious minority, which generate animosity toward the minority group).

323. Patrick Crawford, Occupy Wall Street, Distributive Justice, and Tax Scholarship: An Ideology Critique of the Consumption Tax Debate, 12 U. N.H. L. REV. 137, 140–41, 142 n.7 (2014) (quoting ADAM SMITH, ROY HUTCHESON & ANDREW S. SKINNER, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 267 (Clarendon Press 1976) (1776)) (discussing the theory that the radical recent increase in economic inequality arose at least in part from the fact that those with wealth “have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it”).

324. The connection between manipulation of public opinion through spreading falsehoods, on one hand, and tyrannical rule, on the other, has been noted by many several authors. See, e.g., Max Eastman, Book Review of The Future of Liberty by George H. Soule (New York: Macmillan Company, 1936), 47 YALE L.J. 303, 304 (1937) (noting that, in Russia, “a more unscrupulous and more absolute tyrant has deceived a more ignorant population into believing that tyranny is … the last word in democracy”); SNYDER, supra note 256, at 201 (noting that, with regard to the Nazi’s planning and perpetrating the Holocaust, “[d]isinformation was the key to the entire operation”); Mary L. Gill, North Korea: The Role of Propaganda in the Sustainability of the Kim Regime (Nov. 1, 2012) (M.A. Thesis, Georgetown University), https://repository.library.georgetown.edu/handle/10822/557700 [https://perma.cc/4EJ3-NT8E] (discussing how propaganda spreading falsehoods has propped up the Kim regime for decades in North Korea).
them. But these are simply three of the multitude of harms imposed on society by those spreading profitable falsehoods.

The damage done by fraud on the public is significant and underappreciated. Those who deceive millions of people for their own benefit, whether it be economic, political, ideological, or some other aim, do enormous harm to people, society, and the environment. This seeming paradox, whereby it is unlawful to defraud one person, but it is perfectly legal to defraud millions, causes myriad harms. Indeed, a strong argument could be made that these harms, taken as a whole, pose as great a threat to people, society, and the environment as the sum total of smaller one-on-one frauds. Yet, the law remains largely silent when it comes to fraud on the public. The question is: Should it? It is urgent we now revisit the approach (or lack thereof) the law takes vis-à-vis fraud on the public. The most harmful intentional falsehoods should be prohibited, and those who knowingly spread them should be held accountable.

IV. CONCLUSION

The problem this Article sets out to shine a light on is that harmful dishonesty is handled in an inconsistent manner under the law. Small schemes aimed at defrauding individuals are, in many circumstances, both criminal and tortious. But large schemes aimed at defrauding the public at large are almost universally ignored by law. They are, accordingly, allowed and most often legal. Certainly, there are reasons for treating intentional falsehoods aimed at small groups differently from intentional falsehoods aimed at large groups. The former raises fewer First Amendment concerns than the latter. Yet, the harm now being caused by fraud on the public presents a compelling reason to now revisit this paradox of the law.

Front and center in this debate is the First Amendment’s Free Speech Clause, and that clause’s fraud exception. Speech involved in actionable fraud is unprotected. But fraudulent speech that is not actionable has not, to date, been held to fall within this unprotected category. Because fraud on the public is generally not actionable—with the exception of narrow categories like securities fraud and false advertising—a large number of schemes to


327. See 15 U.S.C. §§ 52–55 (prohibiting the dissemination of any advertising or labeling that is false or misleading “in a material respect”).
defraud the public are categorically protected speech. This gives a free pass to those who stand to profit from defrauding the public to do so without legal risk.

This present state of affairs has resulted from two contributing factors. First, those in charge of making and applying the laws have largely failed to grasp how fraud works, why we fall for it, and how much of a danger it actually poses. And second, the development of new technologies, first at the dawn of the twentieth century (telecommunications, radio, TV) and the dawn of the twenty-first century (internet, email, social media), have provided exponentially more power to those who profit from disinformation, while providing no corollary defensive mechanism, in law or otherwise, for the public against the rising tide of false and misleading claims. A number of solutions to this problem have been proposed. These include prohibiting “deliberately or recklessly disseminating demonstrably false statements in pursuit of fraudulent electoral or commercial gain,” “government propaganda,” health-related misinformation and disinformation, and “false statements made for material gain or advantage in an election.” More broadly, some have called for the First Amendment to be de-weaponized by tailoring it to protect the people against the powerful, rather than allowing it to be used by the powerful as a weapon against the people. However, the search for solutions continues.

Finding a solution to this problem will prove challenging. There are real dangers inherent in speech restrictions applied to those who disseminate messages to the masses. However, one of the gravest dangers of imposing such restrictions is that it will allow those in power to determine what the “truth” is and impose it on the rest of us. However, that is precisely what is happening right now. Those with the public megaphone disseminate falsehoods dressed up as “truth” and manipulate the minds of millions, spreading a self-serving and categorically false “reality” on voters, followers, and consumers. Thus, the danger of those in power imposing self-serving “truth” on the rest of us is precisely why we must restrict fraud on the public. Whatever solution is adopted must carefully balance fundamental free speech rights against the harm from intentional falsehoods spread to the public. Finding such solutions will not

328. See Henricksen & Betz, supra note 109, at 119 (discussing the constitutionality of the stolen election lie).
be easy. But it is urgent we explore the options at our disposal. The stakes are too high to continue allowing unfettered fraud on the public by those who stand to profit from it.