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## Mischief with Government Information Policy

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# MISCHIEF WITH GOVERNMENT INFORMATION POLICY

RENÉE M. LANDERS\*

## INTRODUCTION

Thank you for this opportunity to comment on Nathan Cortez's article, *Information Mischief under the Trump Administration*. Professor Cortez's article provides a useful account of the information policies of the Obama and Trump administrations and assesses the level of professionalism and preparation accompanying the approach of each to generating information and making information available to the public.<sup>1</sup> While the Obama administration information practices had critics, its general approach reflected a philosophy of collecting data relevant to the formation of governmental policies and making this information available even if the material did not always support the administration's preferred policy options.<sup>2</sup> Professor Cortez's paper contrasts Obama's practices with the performance of the Trump administration. The paper observes that certain aspects of the Trump administration approach immediately after taking office appeared to reflect a lack of preparation.<sup>3</sup> The paper cites numerous examples which seemed to indicate that the Trump administration aimed to create a clean canvas<sup>4</sup> so that the new administration could start from scratch in providing its preferred data,<sup>5</sup> eliminating access to data with which it disagreed,<sup>6</sup> reducing the government's capacity to generate useful data,<sup>7</sup> and weaponizing data transparency to serve the administration's policy goals.<sup>8</sup> Finally, the paper assesses the ability of various legal and non-legal constraints on the discretion of the executive in implementing information policies.<sup>9</sup> The

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1. Nathan Cortez, *Information Mischief under the Trump Administration*, 94 CHI.-KENT L. REV. 315 (2019).

2. *Id.* at 322–24.

3. *Id.* at 324.

4. *Id.* at 324–25.

5. *Id.* at 325–26.

6. *Id.* at 326–30.

7. *Id.* at 335.

8. *Id.* at 335–39.

9. *Id.* at 339–47.

paper concludes that even taken together, these formal and informal controls are limited in the ability to constrain all forms of mischief.<sup>10</sup>

Professor Cortez's focus on how presidential administrations approach the management of the government's collection and use of the information examines a vitally important aspect of the public's ability to hold the government accountable for its policies. A corollary set of issues beyond the scope of Professor Cortez's paper are raised by the policies of the federal government relating to protecting the privacy interests of members of the public against abuses by the government and private businesses which collect and share such data. The historic failure of the United States government to enact comprehensive privacy protections for individually identifiable information, exacerbated during the Trump administration, is another area in which current law is inadequate.

This comment will explore some of the reasons why Professor Cortez's focus on government information policies is timely and important to the functioning of the nation's democratic institutions and the integrity of public policy formation. Examples from dystopian literature and the growing body of scholarly work on threats to democratic institutions will illustrate the crucial role information policies play in free societies. The comment will identify certain actions of the Trump administration and predecessors that have undermined or failed to strengthen an already weak set of requirements that private entities collecting information from the public must respect. This comment endorses Professor Cortez's conclusion regarding the importance of engaging in robust efforts to inject competing information into the public debate and to ensure through archiving that longitudinal and other historical information is not eradicated from the public record. Finally, the comment will argue that privacy protections for individually identifiable information should rise to the top of the legislative and administrative policymaking agenda, along with other policies to prevent internet service providers from discriminatory information transmission practices

## I. "MISINFORMATION" AND "DISINFORMATION" IN THE PUBLIC SPHERE

Professor Cortez's article enters the literature as *Dictionary.com* declared the term "misinformation" its word of the year for 2018.<sup>11</sup> Defined as "false information spread, regardless of whether there is intent to mis-

10. *Id.* at 348.

11. *Dictionary.com's 2018 Word Of The Year Is . . .*, DICTIONARY.COM, <https://www.dictionary.com/e/word-of-the-year/> [<https://perma.cc/2ZM9-AYGV>].

lead,”<sup>12</sup> misinformation is not a synonym for “disinformation” which means “deliberately misleading or biased information/ manipulated narrative or facts; propaganda.”<sup>13</sup> The Dictionary.com article announcing “misinformation” as its word of the year uses the political context to illustrate the distinction between the two words.

For example, if a politician strategically spreads information that they know to be false in the form of articles photos, memes, etc., that’s *disinformation*. When an individual sees this disinformation, believes it, and then shares it, that’s *misinformation*.<sup>14</sup>

Thus, the same information can fall into both categories depending on who is disseminating it, and whether the person believes the information to be true. Both “misinformation” and “disinformation” have the capacity to distort the public debate and undermine the integrity of public policymaking when such erroneous or inaccurate information is used to justify policy or forms the basis for public opinion.

The Trump administration’s campaign to distort information began shortly after the inauguration when Kellyanne Conway told Chuck Todd on *Meet the Press* on January 23, 2017, that Sean Spicer was not misrepresenting the truth when he falsely claimed that Trump’s inaugural crowd was larger than the crowd attending Obama’s inauguration. Conway stated that Spicer was providing “alternative facts.”<sup>15</sup> *Dictionary.com* states that “alternative facts” may be “falsehoods, untruths, or delusions,” “[s]o to talk about *alternative facts* is to talk about the opposite of reality (which is delusion), or the opposite of truth (which is untruth).”<sup>16</sup> When people cannot agree on obvious facts, or on which facts are the subject of legitimate debate, or on which information is subject to multiple interpretations or is in the realm of opinion or values, then policymakers have no useful basis on which to develop policy or engage in a meaningful policy debate. The concept of “alternative facts” disputes the notion of the existence of any externally determined reality.<sup>17</sup>

12. *Id.*

13. *Id.*

14. *Id.*

15. Marilyn Wedge, *The Historical Origin of “Alternative Facts”*, PSYCHOL. TODAY (Jan. 23, 2017), <https://www.psychologytoday.com/us/blog/suffer-the-children/201701/the-historical-origin-alternative-facts> [<https://perma.cc/J2G2-NVM3>]. In a Fox News appearance, Sean Hannity helped Conway recharacterize “alternative facts” as statements offering a “different perspective.” *What Does alternative facts Mean?*, DICTIONARY.COM, <https://www.dictionary.com/e/slang/alternative-facts/> [<https://perma.cc/9P5X-CQST>].

16. *What Does alternative facts Mean?*, *supra* note 15.

17. See Samantha Power, *Beyond Elections: Foreign Interference with American Democracy*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 93 (Cass R. Sunstein ed., 2018) (noting

Professor Cortez's article presents several categories of information mischief in which the Trump administration has engaged. Among them are removing information from agency websites such as the Occupational Safety and Health Administration, the U.S. Department of Agriculture and the Environmental Protection Agency (EPA).<sup>18</sup> The agencies justified many of the removals of information about agency enforcement activities under the guise of protecting the privacy of regulated entities.<sup>19</sup> The removal of scientific information on climate science was not explained.<sup>20</sup> Professor Cortez documents the efforts of private organizations—that had anticipated these efforts to hide information—to archive the information the Obama administration made available, rendering fruitless the Trump administration efforts at eradicating data.<sup>21</sup>

Manipulating data by adjusting analytical models, eliminating come questions from the Census, and requesting lower appropriations for data collection activities are other forms of mischief Professor Cortez identifies.<sup>22</sup> Professor Cortez also documents agencies engaged in censoring scientific information and scrubbing terminology, most notably in the realm of climate science.<sup>23</sup> In contrast with the removal of information on enforcement activities for the asserted purpose of protecting the privacy of regulated entities that run afoul of the law, Cortez documents EPA efforts to use transparency to reduce the available research that can be used to inform public policy.<sup>24</sup> Framed as an effort to prohibit the use of “secret science,” the approach would use data transparency as the basis for relying on scientific evidence in rulemaking.<sup>25</sup> For the reasons Professor Cortez describes, this “secret science” requirement uses transparency as a pretext for discounting relevant and reliable scientific information.<sup>26</sup> At the same time, EPA acted to exclude scientists who receive research grants from the agency from scientific advisory panels while allowing industry-funded scientists to participate.<sup>27</sup> Selective disclosures of information another mischief that Cortez persuasively asserts can be used to target political oppo-

polling that shows that “many Americans are questioning not only whether they are obtaining objective facts . . . but also whether objective facts exist at all”).

18. Cortez, *supra* note 1, at 326.

19. *Id.* at 326–30.

20. *Id.* at 332–35.

21. *Id.* at 346–48.

22. *Id.* at 330–32.

23. *Id.* at 332–35.

24. *Id.* at 336–37.

25. *Id.*

26. *Id.*

27. *Id.* at 336.

nents and blame social and economic problems on defined groups such as immigrants.<sup>28</sup>

Two recent examples involving public health research illustrate the potential consequences of playing mischief with information practices. In 1996, Congress enacted a provision prohibiting funds for the U.S. Centers for Disease Control and Prevention (CDC) from being used “to advocate or promote gun control.”<sup>29</sup> The National Rifle Association was displeased with the results of earlier CDC-funded studies that had found that the presence of a gun in the home was associated with an increased the risk of homicide.<sup>30</sup> Known as the Dickey Amendment because Representative Jay Dickey of Arkansas was the lead sponsor, Congress extended this constraint to the National Institutes of Health in 2011.<sup>31</sup> While this provision did not by its terms *prohibit* research aimed at reducing injuries and deaths due to gun violence, uncertainty about the meaning of the statutes had a chilling effect on research even as firearms deaths mounted.<sup>32</sup> The 2018 spending bill, adopted shortly after the Marjory Stoneman Douglas High School shooting in Parkland, Florida, retained the Dickey Amendment, but was accompanied by report language clarifying that while advocacy for gun control continued to be prohibited, the Secretary of Health and Human Services had acknowledged that the CDC was authorized to conduct research on gun violence.<sup>33</sup> Researchers are not convinced that funding levels will support the research. They remain concerned that uncertainty persists because, for example, research conclusions connecting the presence of guns to violence could be construed as advocacy.<sup>34</sup>

This episode illustrates two of the forms of information mischief Professor Cortez identifies. First, the continued failure to generate research on a pressing public health problem is an impediment to identifying and im-

28. *Id.* at 337–38.

29. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). For discussion of the history of this constraint on use of CDC funding, see Allen Rostron, *The Dickey Amendment on Federal Funding for Research on Gun Violence: A Legal Dissection*, 108 AM. J. PUB. HEALTH 865, 865–67 (July 2018).

30. Rostron, *supra* note 29, at 866 n.1 (discussing a 1993 study funded by CDC).

31. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 785 (2011). See Rostron, *supra* note 29, for discussion of legislative lead sponsor.

32. Rostron, *supra* note 29. For death toll on gun violence since first enactment of the Dickey Amendment, see Sheila Kaplan, *The Case for Studying Gun Violence*, N.Y. TIMES, Mar. 12, 2018, at D1.

33. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141; Rostron, *supra* note 29, at 866.

34. Rostron, *supra* note 29; Nell Greenfield Boyce, *Spending Bill Lets CDC Study Gun Violence; But Researchers Are Skeptical it Will Help*, NPR (Mar. 23, 2018), <https://www.npr.org/sections/health-shots/2018/03/23/596413510/proposed-budget-allows-cdc-to-study-gun-violence-researchers-skeptical> [https://perma.cc/D2VY-JTEK].

plementing useful policies. Second, the ability of an interest group, in this case the National Rifle Association, to leverage its influence to benefit its goal of resisting gun controls introduces troubling bias into the policymaking process, similar to the EPA policy of allowing industry representatives to participate in the agency's scientific advisory panels while scientists receiving agency research funding are excluded.

A second example of structuring agency research to accommodate the interests of industry can be found in the recent controversy involving research activities of the National Institute of Alcohol Abuse and Alcoholism (NIAAA), a component of the National Institutes of Health (NIH). In one NIH-funded study, researchers explored the association between alcohol marketing and underage drinking. Research showing that cigarette advertising makes teenagers more likely to smoke caused researchers to ask whether beer and other alcohol ads might have a similar effect.<sup>35</sup> According to an article in *STAT*, scientists received several hundred thousand dollars annually between 2011 and 2014 and produced 27 published papers, including a study that found a link between teen exposure to alcohol brand advertising and teen consumption.<sup>36</sup> Industry criticized the research as reflecting a “neo-prohibitionist agenda.”<sup>37</sup> The *STAT* article outlines a chronology establishing a connection between the NIAAA decision in 2015 to curtail the advertising study while NIAAA was pursuing gifts from alcohol industry organizations to fund a study on the effects of moderate alcohol use relating to health issues such as cancer and cardiovascular health.<sup>38</sup> After this industry involvement in setting the NIAAA research agenda came to light through media scrutiny, in June 2018, the NIH announced that it would “end funding to the Moderate Alcohol and Cardiovascular Health Trial.”<sup>39</sup> This decision adopted the recommendation of the Advisory Committee to the [NIH] Director, which noted “significant process irregularities in the development of the funding opportunities” that undermined the integrity of the research and the credibility of the competitive funding process.<sup>40</sup>

35. Sharon Begley, *NIH rejected a study of alcohol advertising while pursuing industry funding for other research*, *STAT* (Apr. 2, 2018), <https://www.statnews.com/2018/04/02/nih-rejected-alcohol-advertising-study/> [https://perma.cc/47GN-DCV5].

36. See generally Craig S. Ross et al., *The Relationship Between Brand-Specific Alcohol Advertising on Television and Brand-Specific Alcohol Consumption by Underage Youth*, 38 *ALCOHOLISM* 2234 (July 2014); Sharon Begley & Andrew Joseph, *Controversial NIH study of ‘moderate drinking’ will be terminated after scathing report*, *STAT* (June 15, 2018), <https://www.statnews.com/2018/06/15/nih-report-controversial-alcohol-study/> [https://perma.cc/2AGE-NB57].

37. Begley & Joseph, *supra* note 36.

38. *Id.*

39. News Release, Nat'l Insts. of Health, NIH to end funding for Moderate Alcohol and Cardiovascular Health trial, (June 15, 2018) (on file with the National Institutes of Health).

40. *Id.*

Like the perceived restrictions on research relating to gun violence, this series of events involving studies of alcohol advertising and the health effects of alcohol use grew out of agency obeisance to industry interests at the expense of adhering to policies promoting research integrity. The scrutiny of these decisions in the media and the oversight of the research community ensured that the public became aware of the efforts of industry to bias the information generated by government-funded research.

Worth noting about both of these examples is that the events transcend more than one administration. In the case of the limitation on gun research, Congress has constrained research for more than 20 years. The useful research on alcohol advertising began during the Obama administration, but the problems with industry interference with NIAAA alcohol research also began during the Obama administration. The NIH terminated the controversial moderate drinking study during the Trump administration. Without diligent oversight and transparency, no administration is immune from efforts to manipulate the research record that informs public policy.

## II. THE DANGERS OF INFORMATION MISCHIEF: LESSONS FROM DYSTOPIAN LITERATURE

Propounding “alternative facts” that may be disseminated through sympathetic news media and on social media platforms, and government engaging in the information mischief practices documented in Professor Cortez’s article and here, call to mind the techniques of authoritarian regimes imagined in detail in the dystopian literature. George Orwell describes the oppressive regulation of information in service of the regime in *1984*.<sup>41</sup> Regime slogans signify the goal of changing understandings of reality:

WAR IS PEACE

FREEDOM IS SLAVERY

IGNORANCE IS STRENGTH<sup>42</sup>

The constant state of war causes the people to overlook discontent with the government in exchange for domestic unity of purpose. Slavery of the rank and file enables freedom for leaders. Ignorance of the rank and file is strength for the government.

Orwell explores the consequences of this manipulation and fabrication through the protagonist in *1984*, Winston, whose work was part of an elab-

41. GEORGE ORWELL, *1984* (Signet Classic 1950) (1949).

42. *Id.* at 4, 16, 27.



orate and comprehensive system involving the continuous alteration of every publication or other record to suit the political needs of the moment. The incongruously named “Ministry of Truth” managed this process through which the regime altered the historical record. Orwell describes a process that worked to eliminate any ability to prove that falsification had occurred because no record existed beyond a person’s own memory.<sup>43</sup>

[I]f all records told the same tale—then the lie passed into history and became truth. ‘Who controls the past . . . controls the future: who controls the present controls the past.’ . . . All that was needed was an unending series of victories over your own memory.<sup>44</sup>

The regime Orwell describes called this process of altering the historical record “reality control” or “doublethink.”<sup>45</sup> In the Orwellian world, “doublethink” is the ability simultaneously to hold two completely contradictory opinions while believing both of them.<sup>46</sup> Through this process, the claim of the regime to have improved social conditions could not be contradicted, because no information existed against which the current status could be compared.<sup>47</sup> Propaganda agencies ensured that the popular literature consumed by the public would reflect the same carefully-curated narrative.<sup>48</sup>

Similarly, the dystopian society depicted by Margaret Atwood in *The Handmaid’s Tale* uses public indoctrination, media control, and restricted access to reading materials to promote, unquestioned, the Gilead regime’s version of events.<sup>49</sup> In Gilead, the regime assigns blame for social difficulties and challenges to disfavored groups and uses the control of information to marginalize and deport many.<sup>50</sup>

Recent events undermining democratic institutions in several countries have given rise to a growing body of scholarly work analyzing the charac-

43. *Id.* at 34–36; *see generally id.* at 39–63.

44. *Id.* at 34–35.

45. *Id.* at 35.

46. *Id.*

47. *See id.* at 59–60.

48. *Id.* at 43.

49. MARGARET ATWOOD, *THE HANDMAID’S TALE* 174–75 (Anchor Books 1998) (1986) (describing the coup, the suspension of the Constitution, censoring and closing down the press by the Gilead regime); *see also id.* at 156–57, 184 (the handmaid, Offred, provided with magazines and reading materials, forbidden to women); *see, e.g., id.* at 46–47, 55, 71–72, 117–19 (instructing and indoctrinating the handmaids social role in the Gilead regime); *id.* at 82–84 (state-controlled media reports of efforts to eradicate opposition).

50. *Id.* at 32–33 (doctors who performed abortions when legal); *id.* at 201 (Jews); *id.* at 246–50 (infertile women relegated to colonies with toxic environmental conditions).

teristics of actual authoritarian regimes.<sup>51</sup> In *How Democracies Die*, Steven Levitsky and Daniel Ziblatt present a “set of four behavioral warning signs that can help us know an authoritarian when we see one.”<sup>52</sup> The fourth warning sign is “readiness to curtail civil liberties of opponents, including media” which includes supporting “laws or policies that restrict civil liberties, such as expanded libel or defamation laws, or laws restricting protest, criticism of the government, or certain civic or political organizations.”<sup>53</sup> Trump’s statements about changing the libel or defamation laws and regulatory threats aimed at media organizations are intended to delegitimize criticisms of his administration’s policies and to focus attention on his preferred narrative. These actions constitute other examples of “information mischief.” In *1984*, actions of this type are depicted as promoting orthodoxy—that is encouraging the public not to think by relying on administration approved sources that relieve the public of the need to think for themselves.<sup>54</sup>

### III. PROTECTING THE PUBLIC FROM INFORMATION MISCHIEF: THE NEED FOR IMPROVED REGULATION TO PROTECT PRIVACY AND ACCESS

The irony of the Trump administration’s pretextual reliance on a goal of protecting the privacy of regulated parties in removing information about agency enforcement actions from agency websites is that the United States has a comparatively weak legal infrastructure for protecting the privacy of individually identifiable information collected by social media organizations and other business entities.<sup>55</sup> This privacy justification for deregulatory actions is particularly ironic because Congress used proce-

51. E.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); CAN IT HAPPEN HERE: AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018).

52. LEVITSKY & ZIBLATT, *supra* note 51, at 21–24, 65–67; Stephen Holmes, *How Democracies Perish*, in CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA, *supra* note 51, at 395, 400–01 (among the factors cumulatively undermining public and elite confidence in the genius of democratic politics across many advanced democracies is the failure of the media during the 2016 presidential campaign to function as a check on power, but instead as a “conveyer and magnifier of slander, disinformation, conspiracy theories, and politically calculated lies” which had the effect of weakening public confidence in one of the essential pillars of democracy—media pluralism). Holmes also notes that “[c]itizens cannot rely solely on their government to provide them with the information they need to decide if their elected officials are acting intelligently and in the public interest.” Holmes, *supra*, at 400–01.

53. LEVITSKY & ZIBLATT, *supra* note 51, at 24. Professor Cortez’s paper focuses on the actions of the government institutionally, not on Trump’s actions individually. Trump’s complaints about “fake news” and threats to change the libel laws are intended to intimidate media and silence criticism. *Id.* at 181–82.

54. ORWELL, *supra* note 41, at 53.

55. See *supra* note 19 and accompanying text.

dures under the Congressional Review Act<sup>56</sup> to adopt a joint resolution rescinding the Federal Communication Commission (FCC) privacy rule adopted in late 2016 to regulate internet service providers.<sup>57</sup> President Trump signed the disapproval resolution on April 3, 2017. The rules would have limited how internet service providers could use customer information such as browsing habits and location information without consumer consent. In supporting the rescission of the rule, industry groups had argued that the competitive market constrained business practices and that existing laws was sufficient to give consumers control over the use of this information.<sup>58</sup>

This Trump administration reversal of an Obama era regulation was consistent with the general fate of efforts to enact comprehensive privacy regulation in the United States. The United States has no general or “omnibus” national privacy regulatory scheme, but only laws governing particular sectors of the economy or certain technologies.<sup>59</sup> In contrast, an omnibus General Data Protection Regulation governs the collection, processing, storage, and transfer of personal information in the European Union.<sup>60</sup> Criminal law enforcement, national security, health data, government records, financial data, consumer data, education privacy, and the employment context all have separate privacy regulations in the United States which can be augmented by state law.<sup>61</sup> This approach leaves gaps. For example, in the area of health information privacy, the federal Health Insurance Portability and Accountability Act<sup>62</sup> enacted in 1996 provides the baseline protection, though, as in many areas, states can augment its protections. The implementing regulations protect personally identifiable health

56. 5 U.S.C. § 801 (2012).

57. Joint Resolution, Pub. L. No. 155-22, 131 Stat. 88 (2017) (“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Federal Communications Commission relating to ‘Protecting the Privacy of Customers of Broadband and Other Telecommunications Services’ (81 Fed. Reg. 87274 (December 2, 2016)), and such rule shall have no force or effect.”).

58. Brian Fung, *Republicans voted to roll back landmark FCC privacy rules. Here’s what you need to know.*, WASH. POST (Mar. 28, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/03/28/republicans-are-poised-to-roll-back-landmark-fcc-privacy-rules-heres-what-you-need-to-know/?utm\\_term=.34d8eeac2e3e](https://www.washingtonpost.com/news/the-switch/wp/2017/03/28/republicans-are-poised-to-roll-back-landmark-fcc-privacy-rules-heres-what-you-need-to-know/?utm_term=.34d8eeac2e3e) [<https://perma.cc/9VJD-BVVS>].

59. DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 1094, 1095 (6th ed. 2018). In marked contrast, the European Union has taken the omnibus approach to privacy regulation, relying on sector-specific laws to adjust to unique aspects of sectoral situations. The General Data Protection Regulation, which took effect on May 25, 2018, was the successor to the European Union Data Protection Directive enacted in 1995. *Id.* at 1095. The European approach has had a tremendous influence on the development of comprehensive privacy legislation throughout the world. *Id.* at 1094.

60. *Id.*

61. *See generally id.*

62. Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered titles of U.S.C.).

information collected and maintained by designated covered entities, health care providers, health plans, and health care clearinghouses.<sup>63</sup> Because the United States lacks an omnibus privacy statute, the same health information collected and maintained by any other type of entity—such as a health club—would not be protected by the HIPAA privacy regulation. Another example is that the requirements for responses to data breaches are subject to federal and myriad state requirements.

In March 2015, the Obama administration released a proposal for a Consumer Privacy Bill of Rights Act.<sup>64</sup> The proposal adopts generally recognized privacy principles and moves toward establishing an omnibus baseline for privacy protection in the United States to promote public confidence, to streamline compliance for business, and to promote ease of interaction in the international context. Privacy advocates received the proposal as a constructive first step in addressing privacy protections for personal data, but identified weaknesses.<sup>65</sup> Almost concurrently, the Administration engaged industry and consumer groups in an effort to create voluntary practices for technologies such as mobile apps, but this process encountered difficulties with both business groups and consumer advocates.<sup>66</sup>

The Consumer Privacy Bill of Rights Proposal and the rescinded FCC privacy regulation grew out of public concern with the regular stream of data breach notifications coming from businesses.<sup>67</sup> Senator Mark R. Warner came to understand the risks associated with using internet products and services in his role investigating Russian interference in the 2016 election as Vice Chair of the Senate Select Committee on Intelligence

63. 45 C.F.R. § 160.102 (2018).

64. *Administration Discussion Draft: Consumer Privacy Bill of Rights Act of 2015*, WHITEHOUSE.GOV, <https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/letters/cpr-act-of-2015-discussion-draft.pdf> [<https://perma.cc/DFH4-3GCL>].

65. *Analysis of the Consumer Privacy Bill of Rights Act*, CTR. FOR DEMOCRACY & TECH. (Mar. 2, 2015), <https://cdt.org/insight/analysis-of-the-consumer-privacy-bill-of-rights-act/> [<https://perma.cc/MFM8-VWKT>].

66. Natasha Singer, *Federal Efforts in Data Privacy Move Slowly*, N.Y. TIMES, Feb. 28, 2016, at B1.

67. Recent examples of breaches include: Equifax (2017 breach exposed 143 million consumer records including information such as Social Security numbers); Anthem (2015 breach exposed employee and patient information including income data, Social Security numbers and dates of birth); Ashley Madison (2013 breach exposed 33 million user accounts); Target (2013 breach exposed 43 million credit card accounts and information on 70 million customers). Matthew Goldberg, *13 data breaches that stung US consumers*, BANKRATE.COM (Nov. 30, 2018), <https://www.bankrate.com/finance/banking/us-data-breaches-1.aspx#slide=10> [<https://perma.cc/XW3L-BCS9>]. For a recent examination of the role of business in extracting profit from human experience mediated by technology, see SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

Committee.<sup>68</sup> He has prepared a draft White Paper on Potential Policy Proposals for the Regulation of Social Media and Technology Firms.<sup>69</sup> The paper identifies three areas of focus for policymakers:

[1] [U]nderstanding the capacity for communications technologies to promote disinformation that undermines trust in our institutions, democracy, free press, and markets[;]

[2] [promoting] consumer protection in the digital age[; and]

[3] [recognizing that the] rise of a few dominant platforms poses key problems for long-term competition and innovation across multiple markets.<sup>70</sup>

Given that Professor Cortez's paper on "information mischief" is the impetus for this comment, that Senator Warner's White Paper focuses on policies aimed at addressing the ability of technology to be exploited to disseminate disinformation and misinformation is significant. Among the White Paper recommendations is creating a "[p]ublic [i]nitiative for [m]edia [l]iteracy [to address] the challenge of misinformation and disinformation in the long-term . . . [to arm citizens] with the critical thinking skills necessary to protect against malicious influence."<sup>71</sup> The White Paper also recommends adopting comprehensive data protection legislation using the EU General Data Protection Regulation as the model among several other consumer and competition reforms.<sup>72</sup>

In another deregulatory move, the Trump Administration's FCC repealed "net neutrality" regulations adopted in 2015 when Obama appointees led the agency. The Obama rules brought broadband service providers under the jurisdiction of the FCC by classifying the services as utilities under the Communications Act.<sup>73</sup> These rules would have prohibited internet service providers from discrimination against lawful content by block-

68. U.S. Senator Mark R. Warner, *Biography*, SENATE.GOV, <https://www.warner.senate.gov/public/index.cfm/biography> [<https://perma.cc/6M5D-HLVQ>].

69. U.S. Senator Mark R. Warner, Potential Policy Proposals for Regulation of Social Media and Technology Firms (Aug. 20, 2018) (unpublished white paper) (on file with the Federal Trade Comm'n, [https://www.ftc.gov/system/files/documents/public\\_comments/](https://www.ftc.gov/system/files/documents/public_comments/) [<https://perma.cc/YAM2-MS9T>]).

70. *Id.* at 1–5.

71. *Id.* at 12.

72. *Id.* at 15. In another noteworthy development, Governor Jerry Brown signed the California Consumer Privacy Act in June 2018. CAL. CIV. CODE §§ 1798.100–1798.198. This law is heralded as a comprehensive set of protections modeled on the EU General Data Protection Regulation. *E.g.*, Mark G. McCreary, *The California Consumer Privacy Act: What You Need to Know*, N.J. L.J. (Dec. 1, 2018), <https://www.law.com/njlawjournal/2018/12/01/the-california-consumer-privacy-act-what-you-need-to-know/> [<https://perma.cc/7XNR-KM2D>]; Lothar Determann, *Analysis: The California Consumer Privacy Act of 2018*, INT'L ASS'N PRIVACY PROFS. (July 2, 2018), <https://iapp.org/news/a/analysis-the-california-consumer-privacy-act-of-2018/#> [<https://perma.cc/34E2-6VLH>].

73. Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015) [hereinafter *Net Neutrality Order*] (the 2015 FCC decision to enforce net neutrality).

ing websites or apps, slowing the transmission of legal content—a practice known as throttling, and providing faster service for users who paid premiums.<sup>74</sup>

In the press release announcing its “Restoring Internet Freedom Order,” which took effect on June 11, 2018, the FCC stated that the order “replaces unnecessary, heavy-handed regulations that were developed way back in 1934 with strong consumer protections, increased transparency, and common-sense rules that will promote investment and broadband deployment.”<sup>75</sup> While presenting a full analysis of the arguments for and against an FCC net neutrality rule is beyond the scope of this comment, the characterization of the repeal is Orwellian in several respects. The “freedom” protected is the ability of the internet service providers to engage in blocking, throttling, and paid prioritization activities that could be anti-competitive, make essential services such as telemedicine transmission too slow because of throttling or too expensive because of the need to pay a premium to ensure timely connectivity.<sup>76</sup> With the repeal of the regulation, consumers and businesses now no longer have the legal right to be free from these practices. The justification for repealing the rule was to promote investment in broadband that, according to the FCC majority, the Obama rule impeded.<sup>77</sup> What is apparent, however, is that the repeal of the net neutrality regulation reflects the Trump administration bias that markets will protect consumers because of competition and rules requiring disclosure of “network management practices, performance, and commercial terms of service.”<sup>78</sup> This deference to the regulated industry is similar to the industry deference reflected in the policy on gun violence research and industry efforts to influence alcohol research.<sup>79</sup> With the repeal of the net neutrality rule, the only means of enforcement is under the Federal Trade Commission’s power to police for anticompetitive acts or unfair and deceptive trade practices.<sup>80</sup> As the FCC order notes, the FTC is the federal agen-

74. See Keith Collins, *How the Repeal of Net Neutrality Could Affect You*, N.Y. TIMES, June 11, 2018, at B3.

75. Restoring Internet Freedom, 33 FCC Rcd. 311 (2018). The FCC press release announcing the order can be viewed at *Restoring Internet Freedom*, FCC.GOV, <https://www.fcc.gov/restoring-internet-freedom> [<https://perma.cc/L3UQ-YDKG>]. The mention of the year 1934 in the press release refers to the year the Communications Act was originally adopted, but it has been amended several times in the intervening years. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. While it is difficult for legislation to keep pace with rapidly evolving technologies, the characterization of the regulatory tools as archaic is overstated.

76. Collins, *supra* note 74.

77. *Id.*; *Net Neutrality Order*, 30 FCC Rcd. at paras. 88–108.

78. *Net Neutrality Order*, 30 FCC Rcd. at para. 157.

79. *Id.*

80. *Id.*

cy with principal enforcement authority over internet practices that harm consumers and others.<sup>81</sup>

### CONCLUSION

Professor Cortez's paper and this discussion demonstrate that current law should be strengthened to guard against information mischief by the government and to protect consumers from business intrusions on privacy and other information harms as well. As both Professor Cortez and Senator Warner recognize, however, ensuring that the public has the capacity and the resources to serve as a check on government and its information practices will be essential if the democracy is to avoid falling victim to misinformation and disinformation. Dystopian literature and recent work exposing the fragility of democratic institutions suggests that, in addition to wise government policies, the people themselves must take responsibility for understanding and critically evaluating information, disinformation, and misinformation, to hold government accountable.

81. See SOLOVE & SCHWARTZ, *supra* note 59, at 846 (noting FTC's authority under 15 U.S.C. § 45 to enforce against "unfair or deceptive acts or practices in or affecting commerce").