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## FRAUD LAW AND MISINFODEMICS

Wes Henricksen\*

### *Abstract*

*During the COVID-19 pandemic, many on whom the public depended for truthful information purposefully or recklessly spread misinformation that put thousands at risk. The term “misinfodemic,” coined in 2019, describes such events where misinformation facilitates the spread of a disease or causes some other health-related outcome. Though the term was only recently defined, the recent misinfodemic was not a new or novel phenomenon. False information is spread to the public all the time. This often results in harm to public health. False claims are communicated by corporations seeking to mislead the public to make more money, by politicians to gain votes and support, and by media outlets to increase viewership and advertising revenue. Although these and other deceptions of the public for profit might be unethical, they are legal. This Article explores the question of why. There are two key components to this analysis, one centered on tort law and the other on the First Amendment. This Article will focus only on tort law aspects. This Article discusses how fraud law developed to focus almost exclusively on personal deceptions while almost entirely ignoring impersonal deceptions like deceptions of the public. As a result, there is most often no tort remedy available to individuals harmed by misinfodemics. This Article prescribes a fix for this gap in the law: treat fraud on the public like any other fraud by prohibiting misinformation and punishing those who spread it. Precedent and policy support imposing civil remedies against those who purposefully or recklessly mislead the public for gain. The important First Amendment aspects of this issue will be addressed in future scholarship.*

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## I. SPREADING MISINFORMATION CAUSES WIDESPREAD HARM TO HEALTH

During the COVID-19 pandemic, many on whom the public depended for truthful information spread misinformation<sup>1</sup> that put thousands at risk.<sup>2</sup> A Columbia

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<sup>1</sup> This Article will refer to false information spread to the public, including what is commonly labeled misinformation, disinformation, and propaganda, as “misinformation.” Accordingly, the term encompasses “false information deliberately and often covertly spread (as by the planting of rumors) in order to influence public opinion or obscure the truth,” *Disinformation*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/disinformation> [<https://perma.cc/84CG-RVJT>] (last visited July 1, 2021), “false information spread in order to deceive people,” *Disinformation*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/dictionary/english/disinformation> [<https://perma.cc/E9HJ-ARNE>] (last visited Aug. 20, 2021), and “[f]alse information which is intended to mislead, especially propaganda issued by a government organization to a rival power or the media.” *Disinformation*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/disinformation> [<https://perma.cc/BUN4-XEQV>] (last visited Aug. 24, 2021). The term also includes “incorrect or misleading information,” *Misinformation*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/misinformation> [<https://perma.cc/9743-U72C>] (last visited July 1, 2021), “wrong information, or the fact that people are misinformed[;] information intended to deceive,” *Misinformation*, CAMBRIDGE DICTIONARY, <http://dictionary.cambridge.org/dictionary/english/misinformation> [<https://perma.cc/8UCM-NEAQ>] (last visited Aug. 20, 2021), and “[f]alse or inaccurate information, especially that which is deliberately intended to deceive.” *Misinformation*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/misinformation> [<https://perma.cc/2MM9-Q7T8>] (last visited July 1, 2021). See also Andrei Richter, *Fake News and Freedom of the Media*, 8 J. INT’L MEDIA & ENT. L. 1, 9–10 (2018) (discussing the modern response to “fake news”).

<sup>2</sup> For example, in a televised announcement on May 22, 2020, the Republican chair for Bexar County, Texas, told audience members and viewers that the COVID-19 pandemic was a Democratic hoax and implored everyone present to take their protective masks off. Sanford Nowlin, *At Rally, Bexar County Republican Chair Cynthia Brehm Claims Coronavirus Is a Democratic Hoax*, SAN ANTONIO CURRENT (May 23, 2020), <https://www.sacurrent.com/the-daily/archives/2020/05/23/at-rally-bexar-county-republican-chair-cynthia-brehm-claims-coronavirus-is-democratic-hoax> [<https://perma.cc/9N96-ULES>]; see also Timothy Burke (@bubbaprog), TWITTER (May 22, 2020, 3:00 PM), <https://twitter.com/bubbaprog/status/1263937751872868353> [<https://perma.cc/U8WH-V3Y3>] (“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.”). Video of the event shows she said, “Why is this happening today? And I’ll tell you why: all of this has been promulgated 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.” Nowlin, *supra*. Public figures also downplayed the dangers of the COVID-19 pandemic. For example, Fox News host, Sean Hannity, stated the following to viewers on February 27, 2020: “And today, thankfully, zero people in the United States of America have died from the coronavirus. Zero. Now, let’s put this in perspective. In 2017, 61,000 people in this country died from influenza, the flu. Common flu. Around 100 people die every single day from car wrecks.” Natalie

University study found that 36,000 lives would have been saved if the United States had implemented social distancing measures just one week earlier.<sup>3</sup> Another study published in *The Lancet* found that 40 percent of the half a million deaths in the first year of the pandemic were avoidable had U.S. leaders implemented reasonable measures to warn the public and slow the spread.<sup>4</sup> Another author noted that President Donald Trump “concealed the threat, impeded the U.S. government’s response, silenced those who sought to warn the public, and pushed states to take risks that escalated the tragedy,” concluding that “[h]e’s personally responsible for tens of thousands of deaths.”<sup>5</sup> Months later, this assessment has proven more accurate than most realized at the time; an investigative report by Bob Woodward that included eighteen interviews with President Trump revealed the President was repeatedly personally informed of the nature of the COVID-19 threat to the United States long before this was public knowledge, and that he later downplayed the pandemic, and admitted to downplaying it, telling the public it was “no worse than the flu” and calling it a political hoax.<sup>6</sup>

There has been bipartisan condemnation of President Trump’s and other Republicans’ refusal to be honest with the American public about the pandemic and

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Moore, *Study Finds More COVID-19 Cases Among Viewers of Fox News Host Who Downplayed Pandemic*, NPR (May 4, 2020), <https://www.npr.org/local/309/2020/05/04/849109486/study-finds-more-c-o-v-i-d-19-cases-among-viewers-of-fox-news-host-who-downplayed-pandemic> [<https://perma.cc/XVM7-44W7>]. Yet another example is provided by the numerous statements of President Donald Trump downplaying the dangers posed by COVID-19. These include telling an audience at a political rally that “the Democrats are politicizing the coronavirus” and that “this is their new hoax.” JM Rieger, *54 Times Trump Downplayed the Coronavirus*, WASH. POST (May 6, 2020, 10:59 AM), [https://www.washingtonpost.com/video/politics/44-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c\\_video.html](https://www.washingtonpost.com/video/politics/44-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c_video.html) [<https://perma.cc/ZY76-HB2S>]. On other occasions, he stated: “If you’re healthy . . . you’ll be fine” (Feb. 29); “It will go away” and “It will disappear” (said on numerous occasions); “It’s something that we have tremendous control over” (Mar. 17); “It’s going to go away, hopefully, at the end of the month, and, if not, it, hopefully will be soon after that.” (Mar. 31). *Id.*

<sup>3</sup> Sen Pei, Sasikiran Kandula & Jeffrey Shaman, *Differential Effects of Intervention Timing on COVID-19 Spread in the United States*, MEDRXIV (May 20, 2020), <https://www.medrxiv.org/content/10.1101/2020.05.15.20103655v1> [<https://perma.cc/94T4-WZME>]; see also Bill Chappell, *U.S. Could Have Saved 36,000 Lives If Social Distancing Started 1 Week Earlier: Study*, NPR (May 21, 2020, 10:34 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/21/860077940/u-s-could-have-saved-36-000-lives-if-social-distancing-started-1-week-earlier-st> [<https://perma.cc/V2KC-GDUD>].

<sup>4</sup> Steffie Woolhandler, David U Himmelstein, Sameer Ahmed, Zinzi Bailey, Mary T. Bassett, Michael Bird, Jacob Bor, David Bor, Olveen Carrasquillo, & Merlin Chowkwanyun, et al., *Public Policy and Health in the Trump Era*, 397 LANCET 705, 711 (2021).

<sup>5</sup> William Saletan, *The Trump Pandemic*, SLATE (Aug. 9, 2020, 7:00 PM), <https://slate.com/news-and-politics/2020/08/trump-coronavirus-deaths-timeline.html> [<https://perma.cc/FG6M-XJRD>].

<sup>6</sup> 60 Minutes, *Inside Donald Trump’s 18 Recorded Interviews with Bob Woodward for His Book “Rage,”* YOUTUBE (Sept. 17, 2020), <https://youtu.be/qvflOQPhUms> [<https://perma.cc/X3EL-R2X4>].

wide acknowledgment that this dishonest messaging with regard to the pandemic worsened it. Republican U.S. Senator Ben Sasse, for example, told an audience that Trump's leadership through the pandemic has not been "reasonable, or responsible, or right."<sup>7</sup> Others have explained "[w]hy Donald Trump keeps bungling the Coronavirus pandemic" or asked, "[i]s it a crime to mishandle a public health response?"<sup>8</sup> Notwithstanding many reasonable voices on both sides of the aisle, some Republicans continue to spread misinformation about COVID-19, such as Republican U.S. Representative-elect Bob Good, who told a crowd of unmasked supporters on December 12, 2020, that the pandemic was "phony."<sup>9</sup> Politics aside, there is broad scientific consensus that the false information spread about COVID-19 in the early days of the pandemic resulted in thousands of deaths.<sup>10</sup>

To understand how misinformation can cause or worsen health crises such as the COVID-19 pandemic, the first step is to recognize that this kind of thing happens all the time. False information is communicated to the public on a daily basis from a wide variety of sources. It is communicated by corporations seeking to mislead the

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<sup>7</sup> *Trump Slams GOP's Sasse, Who Warned of November 'Bloodbath,'* NEWSMAX (Oct. 17, 2020, 1:30 PM), <https://www.newsmax.com/politics/bensasse/2020/10/17/id/992455/> [<https://perma.cc/E29U-AXGK>].

<sup>8</sup> Rachel Bucchino, *Why Donald Trump Keeps Bungling the Coronavirus Pandemic*, NAT'L INTEREST (Dec. 8, 2020), <https://nationalinterest.org/feature/why-donald-trump-keeps-bungling-coronavirus-pandemic-174027> [<https://perma.cc/62EL-QEMX>]; David J. Scheffer, *Is It a Crime to Mishandle a Public Health Response?*, COUNCIL FOREIGN RELS. (Apr. 22, 2020, 9:00 AM), <https://www.cfr.org/article/it-crime-mishandle-public-health-response> [<https://perma.cc/2MU6-9PAL>].

<sup>9</sup> Benjamin Fearnow, *'This Is a Phony Pandemic': GOP Congressman-Elect Praises Maskless Trump Supporters at Rally*, NEWSWEEK (Dec. 12, 2020, 5:32 PM), <https://www.newsweek.com/this-phony-pandemic-gop-congressman-elect-praises-maskless-trump-supporters-rally-1554365> [<https://perma.cc/4YA8-RRQP>]. The full quote is much worse. Representative Good continued to spread the false idea that mask-mandates and other safety measures were tyrannical and contrary to freedom. *Id.* Here is his quote in full:

I can't tell you how great it is to look out there and see your faces. This looks like a group of people that get that this is a phony pandemic. [he paused for applause] It's a serious virus, but it's a virus, it's not a pandemic. It's great to see your faces, you get it. You stand up against tyranny. Thank you for being here today, thank you for saying 'no' to the insanity.

*Id.*

<sup>10</sup> See sources cited *supra* note 3.

public to increase profits,<sup>11</sup> by politicians to gain votes and support,<sup>12</sup> and by certain media outlets to increase viewership and advertising revenue.<sup>13</sup> The reason these

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<sup>11</sup> See Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communications (1977–2014)*, 12 ENV'T RSCH. LETTERS 1, 1 (Aug. 23, 2017) (noting that, based on a review of 187 climate change communications from ExxonMobil, the company's climate change denial message to the public conflicted not only with the scientific community's knowledge but with the findings of ExxonMobil's own scientists); Wes Henriksen, *Deceive, Profit, Repeat: Public Deception Schemes to Conceal Product Dangers*, CARDOZO L. REV. 3–7 (forthcoming 2021) (discussing public deception schemes to conceal product dangers ["PDCPD Schemes"] carried out by the fossil fuel, sugar, tobacco, opioid, and other industries); see also William R. Freudenburg, Robert Gramling & Debra J. Davidson, *Scientific Certainty Argumentation Methods (SCAMs): Science and the Politics of Doubt*, 78 SOC. INQUIRY 2, 11–16 (2008) (discussing patterns of argument known as "Scientific Certainty Argumentation Methods").

<sup>12</sup> In the 2016 election, for example, \$70 million of "outside group" money was spent to help elect Republican Senate candidates in Ohio, Indiana, and Wisconsin, ensuring Republicans retained control of the chamber. Sheldon Whitehouse, *Time to Wake Up: 2018 Year in Review*, MEDIUM (Jan. 10, 2019), <https://medium.com/senator-sheldon-whitehouse/time-to-wake-up-2018-year-in-review-662ab78492ab> [<https://perma.cc/L4U2-J6H8?type=image>]. Of that total, at least \$46 million was directly traceable to fossil fuel industry groups. *Id.* Another \$12 million in "dark money" appears to be tied to fossil fuel interests as well. *Id.* These contributions, in addition to lobbying aimed at Congress, have resulted in politicians making numerous public statements containing misinformation about global warming. One author catalogued 130 members of Congress who had publicly denied or expressed doubt about the existence of global warming or the fact it is being caused by CO<sub>2</sub> emissions. Ellen Cranley, *These Are the 130 Current Members of Congress Who Have Doubted or Denied Climate Change*, BUS. INSIDER (Apr. 29, 2019, 11:36 AM), <https://www.businessinsider.com/climate-change-and-republicans-congress-global-warming-2019-2> [<https://perma.cc/VT4U-PK4M>]; see also Matt Viser, *Just a Lot of Alarmism: Trump's Skepticism of Climate Science Is Echoed Across GOP*, WASH. POST (Dec. 2, 2018, 5:19 PM MST), [https://www.washingtonpost.com/politics/just-a-lot-of-alarmism-trumps-skepticism-of-climate-science-is-echoed-across-gop/2018/12/02/f6ee9ca6-f4de-11e8-bc79-68604ed88993\\_story.html](https://www.washingtonpost.com/politics/just-a-lot-of-alarmism-trumps-skepticism-of-climate-science-is-echoed-across-gop/2018/12/02/f6ee9ca6-f4de-11e8-bc79-68604ed88993_story.html) [<https://perma.cc/E4DS-SAWC>]; Edward L. Rubin, *Regulating Climate Change: Not Science Denial, but Regulation Phobia*, 32 J. LAND USE & ENV'T L. 103, 104 n.3 (2016) ("Climate change denial is the official position of the Republican Party.").

<sup>13</sup> ALLISON FISHER, CAITLIN MURRAY & JASMINE REIGHARD, FOXIC: FOX NEWS NETWORK'S DANGEROUS CLIMATE DENIAL 2019 (David Arkush ed., Aug. 13, 2019) (analyzing climate change messaging in Fox News and finding that the most harmful messages attacking the existence of climate change were "highly concentrated in the network's most popular opinion programs" and that the network's tactics keep climate change deniers in business); see generally Michael P. Vandenbergh, Kaitlin Toner Raimi & Jonathan M. Gilligan, *Energy and Climate Change: A Climate Prediction Market*, 61 UCLA L. REV. 1962, 1986 (2014) ("[W]atching Fox News is correlated with a lower rate of climate-change acceptance, and research finds that 'conservative media use decreases trust in scientists which, in turn, decreases certainty that global warming is happening. By contrast, use of non-conservative media increases trust in scientists, which, in turn, increases certainty

actors spread false information to the public, whether purposefully or recklessly, is to profit or gain some other advantage from the public believing the false message.<sup>14</sup> This spread of misinformation is fraud on the public, which targets many people, as distinguished from personal fraud, which targets individuals.<sup>15</sup> Much of the misinformation spread to the public in this way harms public health.<sup>16</sup>

Although the COVID-19 virus was a novel coronavirus, the way people spread misinformation about it to further their own aims, despite the resulting harm to the health of thousands (or millions) of people, was in no way novel or new. What made the misinformation put out during the COVID-19 pandemic unique, however, was that its effect on public health could be detected immediately.<sup>17</sup> Misinformation spread, for example, by the asbestos industry about the link between asbestos exposure and terminal lung diseases, or by the sugar industry about metabolic diseases caused by their product, was fundamentally different; these deceptions pertained to latent harms that take years or decades to develop.<sup>18</sup> The false information about a fast-spreading novel coronavirus covered up, and resulted in,

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that global warming is happening.”); see also Jay D. Hmielowski, Lauren Feldman, Teresa A. Myers, Anthony Leiserowitz & Edward Maibach, *An Attack on Science? Media Use, Trust in Scientists, and Perceptions of Global Warming*, 23 PUB. UNDERSTANDING SCI. 886 (2013).

<sup>14</sup> See Supran & Oreskes, *supra* note 11; Henricksen, *supra* note 11, at 3–7; Freudenburg et al., *supra* note 11; Whitehouse, *supra* note 12; Cranley, *supra* note 12; Viser, *supra* note 12; Rubin, *supra* note 12; Vandenberg et al., *supra* note 13; Hmielowski et al., *supra* note 13.

<sup>15</sup> See *infra* note 120 & 156 and accompanying text.

<sup>16</sup> See, e.g., James Parker-Flynn, *The Fraudulent Misrepresentation of Climate Science*, 43 ENV'T L. REP. NEWS & ANALYSIS 11098, 11110 (2013) (“Intentional or reckless misinformation greatly increases the risk of [catastrophic consequences to the American public] because it slows or prevents a coordinated and appropriate response to climate change.”); see Henricksen, *supra* note 11, at 3–7; Viser, *supra* note 12; Elaine Nsoesie, *Misinformation, Fake News, and Our Health*, PUB. HEALTH POST (May 20, 2019), <https://www.publichealthpost.org/research/misinformation-fake-news-health/> [https://perma.cc/RF2R-WY8C].

<sup>17</sup> Moore, *supra* note 2; Nowlin, *supra* note 2.

<sup>18</sup> Henricksen, *supra* note 11, at 3–7; see also G. Frost, *The Latency Period of Mesothelioma Among a Cohort of British Asbestos Workers (1978–2005)*, 109 BRIT. J. CANCER (2013), <https://pubmed.ncbi.nlm.nih.gov/23989951/> [https://perma.cc/U4ZB-QSXR]; Karen Selby, *Mesothelioma Latency Period*, ASBESTOS.COM (last updated June 4, 2021), <https://www.asbestos.com/mesothelioma/latency-%20period/> [https://perma.cc/XP8V-5JZG]; Xaver Baur and Arthur L. Frank, *Ongoing Downplaying of the Carcinogenicity of Chrysotile Asbestos by Vested Interests*, 16 J. OCCUPATIONAL MED. & TOXICOLOGY (2021), <https://link.springer.com/article/10.1186/s12995-021-00295-2> [https://perma.cc/6DRT-H2YZ] (discussing disinformation disseminated by industries that mine, manufacture, or sell asbestos or asbestos-containing products).

harms that manifested in mere days.<sup>19</sup> Some have sued those spreading misinformation to hold them liable for the harm they caused.<sup>20</sup>

Writing in *The Atlantic* in August 2019, Nat Gyenes and An Xiao Mina described how misinformation, particularly in the age of social media, can fuel epidemics such as the Ebola virus and measles.<sup>21</sup> They called such outbreaks “misinfodemics.”<sup>22</sup> The term refers to “the spread of a particular health outcome or disease facilitated by viral misinformation.”<sup>23</sup> The misinformation spread during the COVID-19 pandemic fits squarely within this definition.

So, too, this Article argues, do schemes to defraud the public carried out by the fossil fuel, tobacco, and fast-food industries, among others. Like the misinformation spread during the COVID-19 pandemic, the misinformation spread by industries to sell dangerous products—termed Public Deception Schemes to Conceal Product Dangers<sup>24</sup>—cause epidemics of their own. In the case of tobacco and fast food, they are public health epidemics.<sup>25</sup> In the case of the fossil fuel industry, the epidemic is one primarily of environmental and economic destruction, although there are

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<sup>19</sup> See sources cited *supra* note 3; see also Tanu Singhal, *A Review of Coronavirus Disease-2019 (COVID-19)*, 87 INDIAN J. PEDIATRICS 281 (2020).

<sup>20</sup> Washington League for Increased Transparency and Ethics v. Fox Corp., 2020 WL 2759011 (Wash. Super. Ct. May 27, 2020); see Igor Derysh, *Fox News Fights Coronavirus Misinformation Lawsuit: First Amendment Protects “False” Speech*, SALON (Apr. 16, 2020, 5:00 AM EDT), <https://www.salon.com/2020/04/16/fox-news-fights-coronavirus-misinformation-lawsuit-first-amendment-protects-false-speech/> [<https://perma.cc/7LNB-AEGC>]; Igor Derysh, *Washington State Group Sues Fox News and Rupert Murdoch over Its “Deceptive” Coronavirus Coverage*, SALON (Apr. 7, 2020, 3:00 PM EDT), <https://www.salon.com/2020/04/07/washington-state-group-sues-fox-news-and-rupert-murdoch-over-its-deceptive-coronavirus-coverage/> [<https://perma.cc/67NZ-JXEB>].

<sup>21</sup> Nat Gyenes & An Xiao Mina, *How Misinfodemics Spread Disease*, ATLANTIC (Aug. 30, 2018), <https://www.theatlantic.com/technology/archive/2018/08/how-misinfodemics-spread-disease/568921/> [<https://perma.cc/TDT6-CZNX>].

<sup>22</sup> *Id.* Other terms have been used by other sources. Kaleigh Rogers, *How Bad Is the COVID-19 Misinformation Epidemic?*, FIVETHIRTYEIGHT (May 21, 2020, 1:08 PM), <https://fivethirtyeight.com/features/how-bad-is-the-covid-19-misinformation-epidemic/> [<https://perma.cc/DX8R-DYWT>] (“The United Nations secretary-general has warned we’re living through ‘a pandemic of misinformation,’ and the head of the World Health Organization said it’s an ‘infodemic.’”).

<sup>23</sup> Gyenes & Xiao Mina, *supra* note 21.

<sup>24</sup> Henricksen, *supra* note 11, at 3–7.

<sup>25</sup> See *Tobacco*, WORLD HEALTH ORGANIZATION (May 27, 2020), <https://www.who.int/news-room/fact-sheets/detail/tobacco> [<https://perma.cc/VQS8-9L6U>]; Agnieszka Jaworowska, Toni Blackham, Ian G Davies & Leonard Stevenson, *Nutritional Challenges and Health Implications of Takeaway and Fast Food*, 71 NUTRITION REVIEWS 310, 310–318, <https://doi.org/10.1111/nure.12031> [<https://perma.cc/4KDC-7XAZ>] (explaining that, although fast food contributes to negative health outcomes such as obesity, more studies about that relationship are required).



certainly myriad adverse health effects of anthropogenic global warming as well.<sup>26</sup> Accordingly, this Article uses the term “misinfodemic” to broadly encompass all such efforts to spread misinformation in a manner that leads to adverse health outcomes and, at least in the case of the fossil fuel industry, other adverse effects caused by the fraud on the public accomplished by spreading misinformation.

Misinfodemics are harmful by definition.<sup>27</sup> The COVID-19 misinfodemic is no exception. Thousands of people died because countries like Belgium, Italy, and the United States failed to act in time to address the growing pandemic, a result inextricably tied to the spread of misinformation that downplayed the contagiousness, death rate, and overall dangers posed by the COVID-19 virus, or that equated reasonable preventive measures to tyranny.<sup>28</sup> Similarly, millions died (and continue to die) as a result of the tobacco industry’s misinformation campaign.<sup>29</sup> The destructive effect of misinformation can be seen in the results of

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<sup>26</sup> Eric Roston, *Fossil Fuel Pollution Kills 8.7 Million a Year, Twice Previous Estimate*, BLOOMBERG GREEN (Feb. 9, 2021, 12:55 AM MST), <https://www.bloomberg.com/news/articles/2021-02-09/fossil-fuel-pollution-kills-millions-more-than-scientists-knew> [https://perma.cc/3VB3-YMXC] (reporting that despite efforts to slow global warming, “[f]ossil fuels are alone responsible for more than 8 million premature deaths annually”).

<sup>27</sup> See sources cited *supra* notes 22 & 23 and accompanying text.

<sup>28</sup> See sources cited *supra* note 3; Niall McCarthy, *COVID-19 Deaths Per 100,000 Inhabitants: A Comparison*, STATISTA (Mar. 1, 2021), <https://www.statista.com/chart/21170/coronavirus-death-rate-worldwide/> [https://perma.cc/Q3ZD-2842]; Britta L. Jewell & Nicholas P. Jewell, Opinion, *The Huge Cost of Waiting to Contain the Pandemic*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/opinion/covid-social-distancing.html> [https://perma.cc/KQ9W-GX27]; Ben Gittleson, *Study Finds Earlier Coronavirus Restrictions in US Could Have Saved 36,000 Lives. Trump Calls It a ‘Political Hit Job.’*, ABC NEWS (May 21, 2020, 11:42 AM), <https://abcnews.go.com/Politics/study-finds-earlier-coronavirus-restrictions-us-saved-36k/story?id=70808611> [https://perma.cc/5QMH-G6P6]; Christopher Brito, *Almost 36,000 U.S. Coronavirus Deaths Could Have Been Avoided If Social Distancing Began a Week Earlier, Study Finds*, CBS NEWS (May 21, 2020, 3:58 PM), <https://www.cbsnews.com/news/coronavirus-deaths-social-distancing-36000-week-earlier/> [https://perma.cc/D2WH-TP5B]; Isaac Sebenius & James K. Sebenius, *How Many Needless COVID-19 Deaths Were Caused by Delays in Responding? Most of Them*, STAT (June 19, 2020), <https://www.statnews.com/2020/06/19/faster-response-prevented-most-us-covid-19-deaths/> [https://perma.cc/T666-4UZ5]; Science News Staff, *The United States Leads in Coronavirus Cases, But Not Pandemic Response*, SCI. (Apr. 1, 2020, 12:00 PM), <https://www.sciencemag.org/news/2020/04/united-states-leads-coronavirus-cases-not-pandemic-response> [https://perma.cc/6CS3-YEEA].

<sup>29</sup> See Mat Hope, *Revealed: How the Tobacco and Fossil Fuel Industries Fund Disinformation Campaigns Around the World*, DESMOG (Feb. 19, 2019, 11:00 PM), <https://www.desmog.com/2019/02/19/how-tobacco-and-fossil-fuel-companies-fund-disinformation-campaigns-around-world/> [https://perma.cc/7UQW-7C72]; Tim Weber, *Would Government Prohibition of Marijuana Pass Strict Scrutiny?*, 46 IND. L. REV. 529, 540 (2013) (“The World Health Organization reports tobacco use to be the leading preventable cause of death worldwide, estimating it currently causes nearly six million deaths per year.”); Emily

the antivaccination movement, as well as the misinformation campaign by the opioid, e-cigarette, sugar, and pesticide industries, among others.<sup>30</sup>

In each case, the misinfodemic results from misinformation being spread by those on whom the public relies for truthful information, like political leaders.<sup>31</sup> Given the destructiveness of misinfodemics and the easily diagnosable cause of them, it seems a natural conclusion that the way to stop them would be to prohibit misinformation and punish those who spread it. This is how we stop other harmful or undesirable acts such as robbery, defamatory statements, and securities fraud.<sup>32</sup>

But any suggestion to prohibit misinformation or punish those who spread it generates two immediate responses from jurists and legal scholars. The first is: What about the First Amendment?<sup>33</sup> Any discussion of regulating or outright prohibiting

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Plakon, *Reactionary Legislation: The Marjory Stoneman Douglas High School Public Safety Act*, 49 STETSON L. REV. 679, 695 n.149 (2020) (“Cigarette smoking is responsible for more than 480,000 deaths per year in the United States, including more than 41,000 deaths resulting from secondhand smoke exposure. This is about one in five deaths annually, or 1,300 deaths every day.”); Cheryl Kirschner, *Australia’s Tobacco Plain Packaging Law: An Analysis of the Trips Article 20 Challenge at the WTO*, 32 PACE INT’L L. REV. 247, 250–51 (2020) (“In 2017, deaths relating to tobacco use had risen to about 7.2 million people a year, and were forecasted to increase to more than eight million people a year by 2030, exceeding HIV/AIDS, tuberculosis and malaria combined.”).

<sup>30</sup> See, e.g., Wierui Wang & Yan Huang, *Countering the “Harmless E-Cigarette” Myth: The Interplay of Message Format, Message Sidedness, and Prior Experience with E-Cigarette Use in Misinformation Correction*, 43 SCI. COMM. 170 (2021) (e-cigarettes); Deborah Bailin, Gretchen Goldman & Pallavi Phartiyal, *Sugar-Coating Science: How the Food Industry Misleads Consumers on Sugar*, CTR. SCI. & DEMOCRACY, UNION CONCERNED SCIENTISTS (2014) (sugar); Henricksen, *supra* note 11, 4–6, 29 (opioids, pesticides).

<sup>31</sup> See Emily A. Thorson & Stephan Stohler, *Maladies in The Misinformation Marketplace*, 16 FIRST AMEND. L. REV. 442, 451 (2017) (“Misinformation often appears in the context of elections.”); see, e.g., Cranley, *supra* note 12; Rubin, *supra* note 12; Hmielowski et al., *supra* note 13.

<sup>32</sup> See Elizabeth Thompson, *Federal Government Open to New Law to Fight Pandemic Misinformation*, CBC (April 15, 2020, 4:00 AM), <https://www.cbc.ca/news/politics/covid-misinformation-disinformation-law-1.5532325> [<https://perma.cc/8J9C-U5A2>] (“The federal government is considering introducing legislation to make it an offence to knowingly spread misinformation that could harm people . . .”); True North Wire, *Liberals Want New Laws to Punish Those who Spread Coronavirus “Misinformation,”* TRUE NORTH (April 15, 2020), <https://tnc.news/2020/04/15/liberals-want-new-laws-to-punish-those-who-spread-coronavirus-misinformation/> [<https://perma.cc/FZN6-7RDS>]; see Bhavya Dore, *Fake News, Real Arrests*, FOREIGN POL’Y (Apr. 17, 2020, 10:06 AM), <https://foreignpolicy.com/2020/04/17/fake-news-real-arrests/> [<https://perma.cc/7RQX-UD9T>].

<sup>33</sup> Jamie Lund, *Property Rights to Information*, 10 NW. J. TECH & INTELL. PROP. 1, 13 (2011) (“Any proposed regulation of information implicates First Amendment issues . . .”); Thorson & Stohler, *supra* note 31, at 443 (“In the face of this public consternation over misinformation, new questions have emerged about whether and under what circumstances authorities can regulate the spread of misinformation in ways that are consistent with the First Amendment.”); Dallas Flick, *Combating Fake News: Alternatives to Limiting Social*

speech, even deceptive speech like misinformation, becomes quickly entangled in First Amendment doctrine and scholarship.<sup>34</sup> Within the First Amendment question are several important considerations, such as *What constitutes misinformation?*,<sup>35</sup> *Who gets to decide?*,<sup>36</sup> and *Didn't the Supreme Court already decide this issue in United States v. Alvarez?*<sup>37</sup> These must be addressed if the First Amendment question is to be answered. I take up this question in a forthcoming article.<sup>38</sup>

The First Amendment question is intimately interwoven with the second response by jurists and scholars to the suggestion that misinformation be prohibited—*Spreading misinformation is not fraud*.<sup>39</sup> This assertion, if true, would be tragic. It would mean anyone with access to a national platform could mislead the public at will and suffer no adverse legal consequences. It would mean politicians, the media, and corporations could defraud the public at will by profiting off of spreading false messages that sicken and kill people, cause widespread economic damage, and destroy the environment. Of course, this is the current state of the law. Tragic though it may be, this is the everyday reality today, as it is clearly visible to anyone who keeps up with the news or follows national affairs. The avalanche of misinformation—including propaganda and so-called fake news—that saturates the media is a consequence of the fact that the law today virtually ignores

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*Media Misinformation and Rehabilitating Quality Journalism*, 20 SMU SCI. & TECH. L. REV. 375, 390 (2017) (“Because news and information on the Internet carry the same First Amendment protections as that found in traditional print media, the current statutory and legal understanding of the First Amendment and false information apply.”).

<sup>34</sup> See generally Alan Howard, *The Constitutionality of Deceptive Speech Regulations: Replacing the Commercial Speech Doctrine with a Tort-Based Relational Framework*, 41 CASE W. RES. L. REV. 1093 (1991) (discussing how deceptive speech regulations should and will face first amendment challenges); Thorson & Stohler, *supra* note 31, at 443 (“In the face of this public consternation over misinformation, new questions have emerged about whether and under what circumstances authorities can regulate the spread of misinformation in ways that are consistent with the First Amendment.”).

<sup>35</sup> See Thorson & Stohler, *supra* note 31, at 447 (“Any attempt to understand, study, and regulate fake news and misinformation must wrestle with basic definitional issues about how to identify and differentiate among potentially contested claims about the world.”); Flick, *supra* note 33, at 375 (“[F]ake news tends to shift in definition . . .”).

<sup>36</sup> See True North Wire, *supra* note 32 (“[T]he new [Canadian] laws would punish anyone who spreads what the government deems to be dangerous or misleading claims about the coronavirus.”).

<sup>37</sup> *United States v. Alvarez*, 567 U.S. 709 (2012); see generally Flick, *supra* note 33, at 395–96.

<sup>38</sup> See generally Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, SSRN (2021), <https://ssrn.com/abstract=3860211> [<https://perma.cc/QT7A-WBU3>].

<sup>39</sup> See generally *Illinois ex rel. Madigan v. Telemarketing Ass'n*, 538 U.S. 600, 620 (2003); *Alvarez*, 567 U.S. at 718.

the spread of misinformation.<sup>40</sup> The results are catastrophic. They include, for example, millions believing a legitimate U.S. presidential election was stolen through fraud;<sup>41</sup> hundreds of voter suppression laws pushed by Republican state legislatures based on nonexistent voter fraud;<sup>42</sup> an attack on the U.S. Capitol where thousands stormed the building, killing five people including a Capitol Police officer, and injuring 138 other police officers;<sup>43</sup> as well as the opioid crisis, a diabetes epidemic, and global warming.<sup>44</sup> American jurisprudence has removed fraud from

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<sup>40</sup> See *Alvarez*, 567 U.S. at 709 (“[T]he Court has instructed that falsity alone may not suffice to bring the speech outside the First Amendment; the statement must be a knowing and reckless falsehood.”); see generally *id.* at 718.

<sup>41</sup> See, e.g., Ella Lee, *Fact Check: Joe Biden Legally Won Presidential Election, Despite Persistent Contrary Claims*, USA TODAY (Dec. 15, 2020, 3:45 PM), <https://www.usatoday.com/story/news/factcheck/2020/12/15/fact-check-joe-biden-legally-won-presidential-election/6537586002/> [<https://perma.cc/KJE3-YRPW>]; Nick Corasaniti, Reid J. Epstein & Jim Rutenberg, *The Times Called Officials in Every State: No Evidence of Voter Fraud*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/10/us/politics/voting-fraud.html> [<https://perma.cc/L55U-RZHF>]; *60% View Joe Biden’s 2020 Presidential Victory as Legitimate, Quinnipiac University National Poll Finds; 77% of Republicans Believe There was Widespread Voter Fraud*, QUINNIPIAC UNIV. (Dec. 10, 2020), <https://poll.qu.edu/poll-release?releaseid=3734> [<https://perma.cc/UQ6E-PXVR>].

<sup>42</sup> *Voting Laws Roundup: March 2021*, BRENNAN CTR. JUST. (Apr. 1, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-march-2021> [<https://perma.cc/C7AA-92UR>] (discussing how as of March 24, 2021, more than 361 bills that would restrict voting access have been introduced in 47 states).

<sup>43</sup> Khadeeja Safdar, Erin Ailworth & Deepa Seetharaman, *Police Identify Five Dead After Capitol Riot*, WALL ST. J. (Jan. 8, 2021), <https://www.wsj.com/articles/police-identify-those-killed-in-capitol-riot-11610133560> [<https://perma.cc/CY5W-5JJ5>]; Michael S. Schmidt & Luke Broadwater, *Officers’ Injuries, Including Concussions, Show Scope of Violence at Capitol Riot*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/02/11/us/politics/capitol-riot-police-officer-injuries.html> [<https://perma.cc/YK7D-Q3PR>]; ArLuther Lee, *2 Capitol Hill Police Officers Suspended Over Riot*, ATLANTA J. CONST. (Jan. 11, 2021), <https://www.ajc.com/news/breaking-2-capitol-hill-police-officers-suspended-over-riot/XHWWHNA7EZHSNF32QREJROESQI/> [<https://perma.cc/8R74-YTRB>].

<sup>44</sup> Elaine Silvestrini, *Prescription Addiction: Big Pharma and the Opioid Epidemic*, DRUGWATCH (June 29, 2021), <https://www.drugwatch.com/featured/opioid-crisis-big-pharma/> [<https://perma.cc/7Y74-4W3Q>] (opioid crisis); Gary Taubes & Cristin Kearns Couzens, *Big Sugar’s Sweet Little Lies*, MOTHER JONES (Nov. 2012), <https://www.motherjones.com/environment/2012/10/sugar-industry-lies-campaign/> [<https://perma.cc/69A5-DH5Y>] (explaining how the sugar industry’s campaign of misinformation caused epidemics in obesity and diabetes); John Cook, Geoffrey Supran, Stephan Lewandowsky, Naomi Oreskes & Ed Maibach, *America Misled: How the Fossil Fuel Industry Deliberately Misled Americans About Climate Change*, GEO. MASON UNIV. CTR. CLIMATE CHANGE COMM’N (2019), [https://www.climatechangecommunication.org/wp-content/uploads/2019/10/America\\_Misled.pdf](https://www.climatechangecommunication.org/wp-content/uploads/2019/10/America_Misled.pdf) [<https://perma.cc/3D49-YQAT>] (explaining how the fossil fuel industry’s disinformation campaign caused the current global warming crisis); see also *Alvarez*, 567 U.S. at 718–730; Nsikan Akpan, *The Very Real Consequences of Fake News Stories and*

the protection of the First Amendment, but if misinformation is not deemed to be fraud, it is left nearly “untouchable” under the First Amendment.<sup>45</sup> The First Amendment’s protection of those who spread false and misleading messages to the public which cause massive economic harm or harm to health, life, or the environment, pass muster under the First Amendment only so long as they are not considered fraud.<sup>46</sup> This Article questions the assumption, long held by courts and scholars, that deceiving the public, which is impersonal in nature, cannot be treated as fraud on par with personal deceptions carried out one-on-one.<sup>47</sup>

The fraud question must be answered prior to the First Amendment question because the latter depends on the former. Whether or not the First Amendment protects false and misleading communications to the public, which result in harm to the public, depends on whether such communications are fraudulent, a label that often removes First Amendment protections.<sup>48</sup>

This Article addresses the fraud question. That is, it aims to explore why the law does not treat fraud on the public as fraud under tort or any other law. Why, in other words, are the smallest fraud schemes prohibited while the largest and most destructive fraud schemes (on the public) are permitted? Part II gives a broad overview of the ways fraud law fails to address the dissemination of misinformation. Although spreading misinformation results in enormous harm, the law has (always) failed to prohibit misinformation or punish those who spread it. Part III discusses

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*Why Your Brain Can’t Ignore Them*, PBS NEWS HOUR (Dec. 5, 2016, 6:06 PM), <https://www.pbs.org/newshour/science/real-consequences-fake-news-stories-brain-cant-ignore> [<https://perma.cc/N4KH-KJJS>].

<sup>45</sup> See Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 950 (2014); *Alvarez*, 567 U.S. at 723 (citing *Virginia Bd. of Pharmacy*, 425 U.S. 748, 771 (1976) (noting that fraudulent speech generally falls outside the protections of the First Amendment)).

<sup>46</sup> See *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 233 F.3d 981, 992 (7th Cir. 2000) (“Laws directly punishing fraudulent speech survive constitutional scrutiny even where applied to pure, fully protected speech.”); *Alvarez*, 567 U.S. at 717 (noting that “content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories . . .” including fraud (internal quotations omitted)).

<sup>47</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *The Fraud-on-the-Market Tort*, 66 VAND. L. REV. 1755, 1761–63 (2013); *Commodity Trend Serv., Inc.*, 233 F.3d at 993 (holding that regulating commercial speech is constitutional); see also Howard, *supra* note 34, at 1093 (“Under the commercial speech doctrine, deceptive speech that is deemed commercial may be regulated while in general deceptive speech that is deemed noncommercial may not be.”).

<sup>48</sup> *Ill. ex rel. Madigan v. Telemarketing Assocs. Inc.*, 538 U.S. 600, 612 (2003) (“[T]he First Amendment does not shield fraud . . . Like other forms of public deception, fraudulent charitable solicitation is unprotected speech.”); Couture, *supra* note 45, at 950 (explaining that “several jurists and commentators” asserted “that the First Amendment is *per se* inapplicable to ‘fraud’ claims”); *U.S. Sec. Exch. Comm’n v. Park*, 99 F. Supp. 2d 889, 898 (N.D. Ill. 2000) (“Fraudulent speech is simply not entitled to First Amendment protection of any kind.”).

the historical development of fraud law, with a particular focus on how it evolved to focus almost exclusively on personal fraud. This means that frauds on the public, such as those carried out by spreading misinformation, are effectively excluded from the definition of fraud. Part IV discusses the enormous growth in the spread of misinformation from the early 1900s to today. Yet, as this method of defrauding the public has grown, the law has failed to keep up. This has left a gaping hole in the law that favors those willing and able to mislead through misinformation. The result has been misinfodemics like the COVID-19 pandemic and the opioid crisis. Part V connects the dots by demonstrating how the failure of law to prohibit or punish fraud on the public leads directly to the proliferation and growth of misinfodemics. This has happened numerous times and resulted in millions of unnecessary deaths, innumerable illnesses, and other health-related harms, not to mention widespread environmental destruction.

## II. FRAUD LAW FAILS TO PROHIBIT MISINFORMATION OR PUNISH THOSE WHO SPREAD IT

Any discussion of “fraud law” must begin with the caveat that the term is vague, open to interpretation, and cuts across many areas of law.<sup>49</sup> Most scholars (rightly and prudently) narrow their focus to, say, civil common law deceit, criminal fraud, or federal securities fraud.<sup>50</sup> There are many other kinds of fraud claims in addition to these.<sup>51</sup> Yet, any meaningful analysis of why misinformation is permitted must encompass more than any single area of fraud, because it is not, for example, the simple failure of common law fraud, to address misinformation that allows it to proliferate. Instead, it is the fact that *no* fraud law, not on the civil or criminal side, not at the state or federal level, touches misinformation. The total lack of fraud law—

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<sup>49</sup> See, e.g., Joan H. Krause, *Following the Money in Health Care Fraud: Reflections on a Modern-Day Yellow Brick Road*, 36 AM. J.L. & MED. 343, 357 (2010) (referring to “the vague contours of the fraud laws”).

<sup>50</sup> See generally Richard P. Perna, *Deceitful Employers: Common Law Fraud as a Mechanism to Remedy Intentional Employer Misrepresentation in Hiring*, 41 WILLAMETTE L. REV. 233 (2005) (applying common law fraud principles to employment practices); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729 (1999) (describing how fraudulent conduct contributes to various crimes); Jayme Herschkopf, *Morality and Securities Fraud*, 101 MARQ. L. REV. 453 (2017) (analyzing the moral dimension of securities fraud).

<sup>51</sup> These include, for example, false advertising, Medicare fraud, and identity theft. See, e.g., *Colgan v. Leatherman Tool Grp., Inc.*, 38 Cal. Rptr. 3d 36, 48 (2006) (applying California’s False Advertising Law); 18 U.S.C. §§ 1347, 1349 (2019) (establishing health care fraud as a federal crime); *Identity Theft*, NAT’L CONF. ST. LEGS., <https://www.ncsl.org/research/financial-services-and-commerce/identity-theft-state-statutes.aspx> [<https://perma.cc/Y4EH-HUFQ>] (last visited June 29, 2021) (summarizing identity theft statutes in all 50 states, Washington, D.C., Guam, Puerto Rico, and the Virgin Islands).

any fraud law—to prohibit misinformation or punish those who spread it is the shortcoming of the law that must be examined.<sup>52</sup>

This does not require a broad survey of a dozen disparate types of fraud. Fortunately, the different areas of fraud law we now recognize as distinct areas of law—like, for instance, mail and wire fraud under federal criminal statutes, securities fraud under federal statutes and regulations, and consumer protection laws prohibiting deceptive business practices—all grew out of common law deceit and have elements that largely still line up with that ancient tort.<sup>53</sup> Accordingly, it is the development of common law deceit, which grew out of a single judicial decision in England in 1789,<sup>54</sup> that must first be analyzed to begin a meaningful discussion of the current parameters of what we broadly call “fraud.”

Although fraudulent behavior has been around since ancient times,<sup>55</sup> until 1789, there was no law against fraud under common law. For more than 700 years, the

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<sup>52</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 426 (1st Cir. 2007) (noting a “theory of securities fraud” based on the spread of misinformation that depressed stock prices, did not, on its own, support a claim for securities fraud). However, conspiracy to defraud the public has served as a basis for criminal RICO convictions. See also sources cited *infra* note 149, and the corresponding text.

<sup>53</sup> See, e.g., Jill E. Fisch, *The Trouble with Basic: Price Distortion After Halliburton*, 90 WASH. U. L. REV. 895, 900 (2013) (noting that common law fraud “served as the initial source of the elements of federal securities fraud”); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 560 n.21 (5th Cir. 1981) (“The implied cause of action under Rule 10b-5 ‘is essentially a tort claim’ . . . derived from the common law action of deceit.” (citation omitted)); Donald M. Zupanec, Annotation, *Practices Forbidden by State Deceptive Trade Practice and Consumer Protection Acts*, 89 A.L.R. 3d 449 § 3[c] (1979) (“The law of unfair competition, which has its roots in the common-law tort of deceit, has a general concern with protecting consumers from confusion as to source . . . the focus is on the protection of consumers . . .”).

<sup>54</sup> Roberta S. Karmel, *When Should Investor Reliance Be Presumed in Securities Class Actions?*, 63 BUS. LAW. 25, 32 (2007) (“The common law tort of deceit is generally traced to *Pasley v. Freeman* . . .”); Wes Henricksen, *Intended Injury: Transferred Intent and Reliance in Climate Change Fraud*, 72 ARK. L. REV. 713, 725–26 (2020) (“[D]eceit was not recognized as a distinct tort until the 1789 case of *Pasley v. Freeman*.”); 10 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, *AMERICAN LAW OF TORTS* § 32:3 (Monique C.M. Leahy ed., 2021) (“[Deceit] was not recognized as a distinct tort until *Pasley v. Freeman* . . .”).

<sup>55</sup> The fact that deception plays so prominent a role in early written texts demonstrates that fraud has been common among humans since ancient times. *The Iliad* and *The Odyssey*, two of the oldest surviving works of literature, are replete with deceptions—gods deceiving humans, or drugging them into forgetfulness; gods tricking gods up in the heavens; people, deities, and demigods constantly scheming behind one another’s backs, disguising themselves, double-crossing one another, and winning and losing entire wars by deception, such as the deception of Zeus in *The Iliad* and the Trojan Horse in *The Odyssey*. See HOMER, *THE ILIAD* (Alexander Pope trans., 1902); HOMER, *THE ODYSSEY* (Robert Fagles trans., 1996). The Bible actually begins with a story about deception, when, on page one, the devil,

British common law provided no legal remedy to those harmed by another's purposeful deception.<sup>56</sup> That was the law before *Pasley v. Freeman*, a 1789 case that established, with the stroke of the judge's pen, a tort action for fraud against a wrongdoer with whom the plaintiff was in no contractual relationship.<sup>57</sup>

Prior to *Pasley*, it was legal to deceive another and thereby profit off the other's loss as long as the wrongdoer was not in contractual privity with the victim.<sup>58</sup> No legal wrong was committed. If, however, the deception pertained to a contract between the victim and wrongdoer, the victim, in that case, could seek damages.<sup>59</sup> That action was called trespass on the case, a subset of contract law.<sup>60</sup> The plaintiff in a trespass on the case action was suing based on fraud vis-à-vis the contract rather than fraud vis-à-vis the victim.<sup>61</sup> The interference with contract rights was the wrong that necessitated legal intervention. The individual, by contrast, was deemed responsible for whatever harm might come to them resulting from allowing themselves to be defrauded.

*Pasley* changed that. There, the plaintiff, a store owner, sought a credit reference before selling goods to a customer on credit.<sup>62</sup> The defendant vouched for the creditworthiness of the customer even though he knew the customer was, in fact, not trustworthy.<sup>63</sup> In fact, the defendant knew the customer very likely would not pay.<sup>64</sup> Thereafter, the customer left with the purchase and never returned or paid for the goods, resulting in significant loss for the plaintiff.<sup>65</sup> The court there recognized no action at law existed to redress this kind of deception because there was no breach of contract between the defendant, who had merely vouched for the customer's creditworthiness, and the plaintiff, who had lost money due to the customer's failure to pay.<sup>66</sup> Had the plaintiff sued the customer, there would have been an action for

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disguised as a snake, tricks Eve into biting the apple. *Genesis* 3:1–3. There are dozens of parables of deception throughout the Old and New Testaments. Some of them are famous, such as Judas betraying Jesus to obtain 30 silver pieces, Delilah cutting Samson's hair as he slept in exchange for a bribe, and Cain beckoning his brother, Abel, to the field where he killed him. *Matthew* 26:15; *Judges* 16:15–17; *Genesis* 4:15. Others are less well-known.

<sup>56</sup> The common law began in 1066, drawing on codes and rules developed for hundreds of years prior. Mary Ann Glendon, Andrew D.E. Lewis & Albert Roland Kiralfy, *Common Law*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/common-law> [<https://perma.cc/SW3R-GBHB>] (last updated Oct. 30, 2020). Fraud law did not exist prior to the 1789 *Pasley* case. See *Pasley v. Freeman* (1789) 100 Eng. Rep. 450 (K.B.).

<sup>57</sup> See *Pasley*, 100 Eng. Rep. at 451–58.

<sup>58</sup> See *id.* at 451–52.

<sup>59</sup> See *id.* at 453–54.

<sup>60</sup> See 1 AM. JUR. 2D *Actions* § 20 (2021) (“[T]respass on the case may be maintained for a tort involving a breach of a duty arising out of circumstances accompanying an express or implied contract between the parties.”).

<sup>61</sup> See *Chandelor v. Lopus* (1603) 79 Eng. Rep. 3 (KB).

<sup>62</sup> *Pasley*, 100 Eng. Rep. at 450.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 451.

<sup>66</sup> *Id.*



trespass on the case. The plaintiff was apparently unable to locate the customer, and so the defendant was the only person the plaintiff could go after to recover for the loss.<sup>67</sup> The court, after recognizing that no legal claim existed, ruled in the plaintiff's favor anyway.<sup>68</sup> That is, it recognized there was no existing ground to rule in the plaintiff's favor, but it decided to establish a new tort, deceit, and under that new tort ruled in the plaintiff's favor.<sup>69</sup>

All modern fraud law grew out of the *Pasley* decision.<sup>70</sup> The ruling was summarized in the reported case as follows:

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.<sup>71</sup>

There was no mention of reliance, a fraud element added later to the cause of action.<sup>72</sup> What mattered to the court, and justified establishing a new tort action, was the fact that a false assertion was made with intent to deceive and that the victim was damaged.

Resulting damage, which is still a required fraud element,<sup>73</sup> is central to what distinguishes a fraudulent scheme (illegal) from a mere lie or deception (legal).<sup>74</sup> That is, the resulting harm goes directly to the heart of what courts must consider when deciding whether a deception is something that the law should prohibit and punish versus something the law should leave alone. The law, of course, leaves the vast majority of lies alone, as it well should.<sup>75</sup> If, say, someone was to falsely claim

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 451–55, 458.

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

<sup>70</sup> SPEISER ET AL., *supra* note 54 (discussing the history of action for fraud and deceit and noting “[b]ecause of its unfailing link to contractual relations, it was not recognized as a distinct tort until *Pasley v. Freeman* . . .” (quoting *Mother Earth, Ltd. v. Strawberry Camel, Ltd.*, 390 N.E.2d 393, 400 (Ill. App. Ct. 1979)).

<sup>71</sup> *Pasley*, 100 Eng. Rep. at 450.

<sup>72</sup> John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1004 (2006) (noting that today “[r]eliance is a distinct element of the tort action of fraud or deceit”).

<sup>73</sup> See *Tyson Foods, Inc. v. Davis*, 66 S.W.3d 568, 577 (Ark. 2002) (listing the elements of fraud, including damages).

<sup>74</sup> See, e.g., *ComSouth Teleservices, Inc. v. Liggett*, 531 S.E.2d 190, 192 (2000) (listing resulting harm, or “damages,” as a required fraud element).

<sup>75</sup> In his essay *On the Wrongfulness of Lies*, Cass Sunstein outlines two philosophical views on why it is wrong to lie. Sunstein states that the Kantian view “sees lies as a close cousin to coercion” because “they are a violation of individual autonomy and a demonstration of contempt.” Sunstein then notes the utilitarian view “that lies are likely to lead to terrible consequences, sometimes because they obliterate trust, sometimes because

that they prefer coffee to tea, the lie is harmless.<sup>76</sup> Contrast this with a for-profit college telling prospective students that 90 percent of graduates earn over \$100,000 a year immediately after graduation when in reality, less than 5 percent of graduates earn that amount.<sup>77</sup> This lie is different because it causes measurable harm to those who buy into it. Lies regarding how much income a graduate is likely to earn may induce students to incur high costs to attend for-profit schools in the form of unreasonably high tuition and oppressive student loan debt.<sup>78</sup>

Professor Cass Sunstein contrasted harmless lies we accept with harmful lies we condemn. In *On the Wrongfulness of Lies*, Sunstein noted, “the wrongness of many lies consists largely in the damage they inflict or make possible.”<sup>79</sup> Indeed, “[s]ome lies are best seen as a kind of ‘taking’ of people’s liberty or property – in the most extreme cases, even of their life.”<sup>80</sup> Once again, damage is the touchstone element that differentiates a harmless lie from a harmful, and therefore wrongful, one. Notably, damage was also the touchstone factor that compelled the court in *Pasley* to establish the tort of fraud in the first place.

But if resulting damage is a key measure of the wrongfulness of a lie, which it is, then how can it be that today the lies that cause arguably the greatest amount of damage, those that constitute fraud on the public, are allowed and deemed legal at the very same time that lies aimed at individuals, and that cause far less harm on the whole, are deemed illegal fraud? Why are only the smallest and least harmful frauds prohibited, while the largest and most destructive are permitted and, as a result, effectively rewarded? Part of the answer lies in how fraud law developed in the United States.

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they substitute the liar’s will for that of the chooser, who has much better information about the chooser’s welfare than does the liar.” Cass Sunstein, *On the Wrongfulness of Lies*, 1 (Harv. L. Sch. Pub. Law Working Paper No. 21-05, 2020), <https://ssrn.com/abstract=3594420> [<https://perma.cc/WQB5-EPPM>].

<sup>76</sup> Though this lie is generally harmless, one could imagine that the person who was lied to might feel hurt or might change her opinion of the liar if they learn they were lied to. Trust may be lost. And feelings might be hurt. But a white lie such as this is one we generally consider to be harmless. *See also id.* at 3.

<sup>77</sup> Such false or misleading messages have often been communicated to prospective for-profit college students. *See, e.g.,* Sarah Ann Schade, *Reining in the Predatory Nature of For-Profit Colleges*, 56 ARIZ. L. REV. 317, 324 (2014) (noting that “some former employees of for-profit colleges have alleged that various universities conduct ‘wretched fraud’ by manipulating job placement data to create false impressions for potential students”).

<sup>78</sup> *See* Wade Dyke, *Proof Via Strawman*, INSIDE HIGHER ED (June 27, 2014), <https://www.insidehighered.com/views/2014/06/27/essay-questions-use-anecdotal-stories-profit-debate#sthash.NfQuFBuD.dpbs> [<https://perma.cc/DP7P-QFGF>]; Schade, *supra* note 77, at 322–29.

<sup>79</sup> Sunstein, *supra* note 75, at 2.

<sup>80</sup> *Id.*

### III. THE HISTORICAL DEVELOPMENT OF THE LAW OF COMMON LAW DECEIT AND SECURITIES FRAUD HELPS EXPLAIN WHY MODERN FRAUD LAW IGNORES MISINFORMATION

Part of the explanation for why fraud law ignores misinformation is found in how fraud law developed during the century that followed *Pasley*. Common law fraud, out of which other fraud-based torts and criminal statutes have grown, developed along a very narrow line for the better part of the nineteenth century. It was applied almost exclusively to a narrow range of deceits involving one-on-one representations. These were personal frauds, where one deceives another. More specifically, out of more than 300 common law fraud cases I reviewed arising between 1797 (the earliest American fraud case)<sup>81</sup> and 1900, the vast majority of cases pertained to misrepresentations made in purchase and sale transactions of horses,<sup>82</sup> land,<sup>83</sup> and, in the American South, African American slaves.<sup>84</sup> These three categories accounted for 78 percent of fraud cases in my sample group. The other 22 percent arose out of a handful of other kinds of relationships and transactions.

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<sup>81</sup> The earliest fraud case I found in American law was from 1797. *Fenmore v. United States*, 3 U.S. 357 (1797). There, the defendant falsely represented that he was a creditor, and thereby obtained a certificate of stock in the public funds. *Id.* at 363. The government waived the tort and affirmed the transaction to recover the value of the certificate, in *assumpsit*. *Id.* at 364. The Court held this was proper. *Id.*

<sup>82</sup> *See, e.g.*, *Cravins v. Gant*, 20 Ky. 126, 127 (1827); *Cole v. Colburn*, 61 N.H. 499, 499 (1881); *Robeson v. French*, 53 Mass. 24, 24 (1846); *Mahurin v. Harding*, 28 N.H. 128, 128 (1853); *Gilson v. Spear*, 38 Vt. 311, 311 (1865); *Northrup v. Foot*, 14 Wend. 248, 248 (N.Y. Sup. Ct. 1835); *Lummis v. Stratton*, 2 N.J.L. 245, 246 (1807); *West v. Moore*, 14 Vt. 447, 447 (1842); *Hager v. Stillwell*, 3 N.J.L. 901, 901 (1811); *Tyre v. Causey*, 4 Del. (4 Harr.) 425, 425 (1846); *Thompson v. Burgey*, 36 Pa. 403, 403 (1860); *Traylor v. Evertson*, 26 S.W. 637, 637 (Tex. Civ. App. 1894).

<sup>83</sup> *See, e.g.*, *Saunders v. Hatterman*, 24 N.C. (2 Ired.) 32, 32 (1841); *Martin v. Jordan*, 60 Me. 531, 532 (1872); *Alden v. Wright*, 49 N.W. 767, 768 (Minn. 1891); *Anslyn v. Frank*, 8 Mo. App. 242, 244 (Mo. Ct. App. 1880); *Wardell v. Fosdick & Davis*, 13 Johns. 325, 325 (N.Y. Sup. Ct. 1816); *Cain v. Kelly*, 57 Miss. 830, 830 (Miss. 1880); *Pagan v. Newson*, 12 N.C. 20, 20 (N.C. 1826); *Keefe v. Sholl*, 37 A. 116, 116 (Pa. 1897); *Culver v. Avery*, 7 Wend. 380, 380 (N.Y. Sup. Ct. 1831); *Hemmer v. Cooper*, 90 Mass. (8 Allen) 334, 334 (Mass. 1864); *Parker v. Walker*, 46 S.C.L. (12 Rich.) 138, 138 (Ct. App. 1859); *Kern v. Simpson*, 17 A. 523, 523 (Pa. 1889); *Miller v. Craig*, 36 Ill. 109, 111 (Ill. 1864); *Ward v. Luneeen*, 25 Ill. App. 160 (Ill. App. Ct. 1887); *Freyer v. McCord*, 30 A. 1024, 1024 (Pa. 1895); *Nichols v. Bruns*, 37 N.W. 752, 753 (Dakota 1888); *Gwinther v. Gerding*, 40 Tenn. (3 Head) 197, 198 (Tenn. 1859); *Guffey v. Clever*, 23 A. 161, 161 (Pa. 1892).

<sup>84</sup> *See, e.g.*, *Fenwick v. Grimes*, 8 F.Cas. 1144, 1144 (F.C.D.C. 1839); *Brown v. Shields*, 33 Va. (6 Leigh) 440, 440 (Va. 1835); *Waterman v. Mattair*, 5 Fla. 211, 211 (Fla. 1853); *Cozzins v. Whitaker*, 3 Stew. & P. 322, 322 (Ala. 1833); *Minter v. Dent*, 37 S.C.L. (3 Rich.) 205, 205 (S.C. Ct. App. 1832); *Goolsby v. Callahan*, 26 Ga. 366, 366 (Ga. 1858); *Brown v. Gray*, 51 N.C. (6 Jones) 103, 103 (N.C. Ct. App. 1858); *Erwin v. Greenlee*, 18 N.C. (1 Dev. & Bat.) 39, 39 (N.C. 1834); *Rice v. White*, 31 Va. (4 Leigh) 474, 474 (Va. 1833); *Dye v. Wall*, 6 Ga. 584, 584 (Ga. 1849).

These include credit references,<sup>85</sup> the sale of miscellaneous goods or services,<sup>86</sup> and transactions involving intellectual property, forgery, or licensure.<sup>87</sup>

Until the latter half of the nineteenth century, nearly all fraud cases involved personal deception of one kind or another.<sup>88</sup> From the 1860s on, however, cases of fraud on the public were filed in court as tort claims under common law fraud; these were securities fraud claims.<sup>89</sup>

Not all securities fraud claims involve fraud on the public. For example, where a stockbroker makes false representations directly to an investor to persuade the investor to purchase shares in reliance on those false claims, this is a one-on-one deception. Far more securities cases, however, involve fraud on the public. Such fraud often occurs where a company or its representatives make false representations in a prospectus or other publicly disseminated statement that are material to the value of the company's stock, and members of the public purchase (or sell) shares of the company's stock in reliance on these false representations. No one-on-one lie is told. The deceiver directs the misleading message at the public rather than any one person. These fraud on the public schemes involving securities took up a greater and greater percentage of American common law fraud claims in the latter nineteenth century and early twentieth century.<sup>90</sup>

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<sup>85</sup> See, e.g., *Wilson v. Marsh*, 1806 WL 913 (N.Y. Sup. Ct. 1806); *Gallager v. Brunel*, 1826 WL 2116 (N.Y. Sup. Ct. 1826); *Farwell v. Metcalf*, 61 Ill. 372 (1871); *Williams v. Hay*, 46 N.Y.S. 895, 896 (App. Term 1897); see generally *Sims v. Eiland*, 57 Miss. 607 (1880); *Terrell v. Bennet*, 18 Ga. 404, 404 (1855); *Pledger v. Coulter*, 26 Ga. 443, 443 (1858).

<sup>86</sup> See, e.g., *Page v. Alexander*, 84 Me. 83, 24 A. 584 (Me. 1891) (oxen); *Chamberlain v. Robertson*, 52 N.C. 12, 12 (1859) (sale of a gold chain); see also *Weed v. Case*, 1869 WL 6397 (N.Y. Gen. Term. 1869) (deceitful sale of a canal boat); *Wachsmuth v. Martini*, 45 Ill. App. 244, 245 (1892), *aff'd*, 154 Ill. 515, 39 N.E. 129 (1894) (fraudulent clothing sales); *Emerson v. Brigham*, 10 Mass. 197, 197 (1813) (deceitful beef sales); *Looff v. Lawton*, 97 N.Y. 478, 479 (1884) (potential for error within legal services); *Erie City Iron Works v. Barber*, 106 Pa. 125, 133 (1884) (a boiler damaged as a result of deceit).

<sup>87</sup> See, e.g., *Jones v. Scriven*, 8 Johns 453, 453 (N.Y. Sup. Ct. 1811) (dealing with an action brought for deceit for selling "the art of manufacturing pot-ashes"); *Wirtz v. Henry*, 59 Ill. 109, 109 (1871) (handling an action brought for deceitfully inducing the exchange of goods for patent rights); *People v. Oishei*, 45 N.Y.S. 49, 49 (Sup. Ct. 1897) (involving indictment for forgery); *Martachowski v. Orawitz*, 14 Pa. Super. 175, 179 (1900) (surrounding issue of a false claim to hold a liquor license).

<sup>88</sup> See sources cited *supra* notes 82–84 and accompanying text.

<sup>89</sup> See *infra* note 90 and accompanying text.

<sup>90</sup> See, e.g., *Kennedy v. McKay*, 43 N.J.L. 288, 288 (Sup. Ct. 1881); *Humphrey v. Merriam*, 32 Minn. 197, 198–99 (1884); see generally *Whiting's Adm'r v. Crandall*, 78 Mo. 593 (1883); see generally *Foster v. Gibson*, 38 S.W. 144 (Ky. 1896); see generally *Weaver v. Cone*, 12 Pa. Super. 143 (1899); *High v. Berret*, 148 Pa. 261, 23 A. 1004, 1004 (1892); see generally *Crowell v. Jackson*, 53 N.J.L. 656, 23 A. 426 (1891); *Rothmiller v. Stein*, 29 N.Y.S. 707, 707 (Com. Pl.), *aff'd*, 143 N.Y. 581 (1894); *Newbery v. Garland*, 31 Barb. 121 (N.Y. Gen. Term 1860); *McHose v. Earnshaw*, 55 F. 584 (3d Cir. 1893), *aff'd*, 56 F. 606 (3d

One early securities case addressed under common law fraud was *Derry v. Peek*.<sup>91</sup> This case, decided in 1889, is notable for establishing what constitutes a misrepresentation for the purposes of fraud.<sup>92</sup> But for our purposes here, the basic facts are instructive to show how securities fraud was, for more than a century, inadequately addressed under common law. There, a man named Henry Peek was researching companies in which to invest, and in doing so, he reviewed a prospectus from a train company that seemed promising.<sup>93</sup> It stated the company had obtained a government permit from the Board of Trade to begin using electric power for its trains rather than the usual horse-drawn power.<sup>94</sup> This meant the company would, very soon, become far more profitable. Peek bought shares in the company.<sup>95</sup>

The company had not, in fact, obtained a permit to operate on electric power.<sup>96</sup> At the time, however, such permits were virtually always issued as a matter of course; the application was essentially a formality.<sup>97</sup> The train company owners who issued the prospectus had believed sincerely, and with good reason, that their application for the permit would be granted.<sup>98</sup>

The permit was denied.<sup>99</sup> This relegated the train company to using horsedrawn power, which was quickly falling out of use. As a result, the company soon afterward went bankrupt.<sup>100</sup>

Peek sued to recover damages under the only tort available: common law fraud.<sup>101</sup> He argued under *Pasley v. Freeman* that the company's chairman, William Derry, and its other directors had defrauded him into purchasing shares of the company based on the false claim that the company *had obtained* a permit to operate electric-powered trains when it had not.<sup>102</sup> The defendants argued that although the company had not obtained the permit, they sincerely believed the company *would obtain* it.<sup>103</sup> They argued they could not, therefore, have committed fraud since they

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Cir. 1893); *Hornblower v. Crandall*, 7 Mo. App. 220 (1879), *aff'd*, 78 Mo. 581 (1883); *Lare v. Westmoreland Specialty Co.*, 25 A. 812 (Pa. 1893); *Robinson v. Parks*, 24 A. 411 (Md. 1892); *Handy v. Waldron*, 35 A. 884, 884 (R.I. 1896).

<sup>91</sup> *Derry v. Peek* [1889] 14 App. Cas. 337 (appeal taken from C.A.).

<sup>92</sup> Alfred Hill, *Damages for Innocent Misrepresentation*, 73 COLUM. L. REV. 679, 685 (1973).

<sup>93</sup> *Derry*, 14 App. Cas. at 337–38.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 338.

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

<sup>97</sup> *Id.* at 339.

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

<sup>99</sup> *Id.* at 338.

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

<sup>101</sup> *Id.* at 338–39.

<sup>102</sup> *Id.* at 338–39, 356, 363.

<sup>103</sup> *Id.* at 339.

believed what they claimed would, in due course, be true.<sup>104</sup> The trial court agreed.<sup>105</sup> It dismissed Peek's claim.<sup>106</sup>

The grounds for dismissal are key. Neither the defendants nor the court took the position that no fraud occurred because there was no one-on-one deception. Instead, it was taken as a given that making a false claim to the public with the intent that someone rely on it suffices to satisfy the corresponding elements of fraud—namely, misrepresentation, knowledge, intent, justifiable reliance, and resulting damages. Instead, the court's dismissal of the claim centered on the fact that the defendants believed their statement would become true in due time.<sup>107</sup> The court of appeals disagreed and reversed the trial court's order.<sup>108</sup> It held that the defendants lacked reasonable grounds for their belief and therefore misled Peek by making a baseless representation.<sup>109</sup> The defendants appealed to the House of Lords.<sup>110</sup>

The House of Lords sided with the train company. In a 49-page opinion issued by Lord Herschell, the court completely rejected Peek's fraud claim.<sup>111</sup> It held that the company's prospectus statement (that it had received a permit to operate electric trains) was, admittedly, "in some respects inaccurate and not altogether free from imputation of carelessness," but that it was nevertheless "a fair, honest and bonâ fide statement on the part of the defendants, and by no means exposes them to an action for deceit."<sup>112</sup> The court placed particular emphasis on the fact that the company officers and directors honestly believed what they said and had a genuine reasonable basis for such belief.<sup>113</sup> The court then went on to lay out the test—still valid today—that determines what constitutes misrepresentation for the purpose of common law fraud. The court here held, "fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false."<sup>114</sup>

*Derry v. Peek*, widely studied because the court there created the modern definition of what constitutes a misrepresentation, is important here for other reasons. First, it gives an apt example of how securities fraud was addressed under common law fraud prior to the passage of the federal and state securities laws in the early 1900s. Indeed, in the 1800s, no such claim called "securities fraud" existed; it was simply called "fraud" or "deceit."<sup>115</sup> For more than a century, all such claims

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

<sup>105</sup> *Id.* at 338–39, 377–80.

<sup>106</sup> *Id.* at 338–39.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 338–39, 377–80.

<sup>110</sup> *Id.* at 338.

<sup>111</sup> *Id.* at 338–39, 377–80.

<sup>112</sup> *Id.* at 380.

<sup>113</sup> *Id.* at 379.

<sup>114</sup> *Id.* at 374.

<sup>115</sup> Mark A. Helman, *Rule 10B-5 Omissions Cases and the Investment Decision*, 51 *FORDHAM L. REV.* 399, 399–400 (1982) (explaining that the private right of action for

fell under the common law fraud umbrella.<sup>116</sup> But, although securities fraud was covered by common law fraud, plaintiffs in such cases rarely prevailed because, as has been noted by other authors, common law fraud did not adequately address securities fraud claims, leading eventually to the necessity of enacting massive state and federal laws to close this loophole.<sup>117</sup>

The problem, once again, was the fact that common law fraud was not well-suited to address fraud on the public claims such as securities fraud.<sup>118</sup> Basic tort principles dictate that responsibility for loss should be borne by the one whose wrongful conduct caused the loss,<sup>119</sup> but while fraud law was created to address deceptive schemes that harm individual victims, this tort doctrine failed to adequately shift the loss burden to the party whose wrongful conduct caused the loss in securities fraud cases.<sup>120</sup> This was because common law fraud developed primarily to address personal deceptions, but securities fraud is mostly impersonal in nature.<sup>121</sup> It is a fraud on the public.<sup>122</sup>

The proliferation of securities fraud schemes—because no legal doctrine adequately prohibited or punished them—led, in part, to the stock market crash of 1929, and resulted in a major loss of faith in the market.<sup>123</sup> Section 10(b) of the

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securities fraud under Rule 10b-5 drew its elements from common law fraud); *see also* Fisch, *supra* note 53.

<sup>116</sup> Helman, *supra* note 115; *see also* Fisch, *supra* note 53.

<sup>117</sup> *See* Paul N. Edwards, *Compelled Termination and Corporate Governance: The Big Picture*, 10 J. CORP. L. 373, 427–28 (1985) (noting that “Section 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions”).

<sup>118</sup> *See* Edwards, *supra* note 117.

<sup>119</sup> DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 1224 (1980) (“[T]he function of tort is to shift loss sustained by one to the person who . . . caused it or [is] responsible for its happening . . .”).

<sup>120</sup> *See* Edwards, *supra* note 117.

<sup>121</sup> *Id.* at 427–28 (noting that “Section 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions”).

<sup>122</sup> *See* S. REP. NO. 107-146, at 11 (2002) (noting that statute imposing additional penalties on securities fraud defendants “provid[es] for criminal penalties tough enough to make them think twice before defrauding the public”); Joseph C. Long, Michael J. Kaufman & John M. Wunderlich, *The Materiality Requirement—Specific Examples of Materiality Involving Regulatory or Criminal Matters—Self-Incrimination Claims*, 12A BLUE SKY L. § 10:56 (2021) (“[T]he securities acts are intended to provide full and fair disclosure to investors and to prevent securities fraud on the public.”).

<sup>123</sup> *See, e.g.*, Makenna Cooper, *The Stock Market Crash of 1929*, WISER WEALTH MGMT. (June 21, 2021), <https://wiserinvestor.com/the-stock-market-crash-of-1929/> [<https://perma.cc/4ZU9-APRF>] (“There was not one root cause, but rather a handful of mistakes, fraud, speculation, and more that led to the market’s demise.”); *Causes of the Crash 1919–1929*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/education/news-and-education-magazines/causes-crash-1919-1929> [<https://perma.cc/E83E-V3S4>] (last visited July 3, 2021) (while explaining what caused the 1929 crash, the author noted, “[i]nvestors were not protected from fraud or hype and often bought misleading stocks”); S. REP. NO. 73-47, at 2 (1933) (identifying a need to protect and restore investor confidence after the stock market crash of 1929).

Securities Exchange Act of 1934 was passed in response.<sup>124</sup> As one author noted, “Section 10(b) was enacted largely due to the inadequacy of the common law of fraud in impersonal securities transactions.”<sup>125</sup>

Accordingly, one kind of fraud on the public, securities fraud, posed so great a problem at the beginning of the twentieth century that Congress and every state legislature passed laws aimed at closing the loophole that allowed these kinds of frauds on the public to proliferate.<sup>126</sup> Today, these laws protect against one kind of fraud on the public: securities fraud.

#### IV. FRAUD ON THE PUBLIC THROUGH SPREADING MISINFORMATION HAS INCREASED SINCE THE EARLY 1900S, BUT FRAUD LAW HAS FAILED TO KEEP PACE

Securities fraud is only one kind of fraud on the public that became increasingly common, and increasingly problematic, after the turn of the twentieth century. In this same period, modern propaganda—spreading misinformation to shape public opinion to the advantage of the one spreading the misinformation—first appeared and became a highly effective tool widely used by the government, media, and corporate sectors.<sup>127</sup> This involved disseminating messages that swing public opinion in favor of the individual or entity disseminating the message. Because the focus was on effectively manipulating the public, rather than informing the public, these messages often were (and are) false or misleading. Historians have traced the beginnings of modern propaganda to President Woodrow Wilson’s establishment of the first modern propaganda agency, the Committee on Public Information (CPI), where Walter Lippmann and Edward Bernays, both of whom later became well-known for developing the advertising and public relations industries, led the effort

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<sup>124</sup> Edwards, *supra* note 117, at 427–28.

<sup>125</sup> *Id.*; see also Goldberg & Zipursky, *supra* note 47, at 1760 (exploring the role of fraud-on-the market in the context of “impersonal deceits” in tort).

<sup>126</sup> See Danielle Beth Rosenthal, *Navigating the Stormy Skies: Blue Sky Statutes & Conflict of Laws*, 2 STAN. J. COMPLEX LITIG. 97, 101 (2014) (“Today, all fifty states have Blue Sky laws.”).

<sup>127</sup> See Sarah Barringer Gordon, *Commentary: The Creation of a Usable Judicial Past: Max Lerner, Class Conflict, and the Propagation of Judicial Titans*, 70 N.Y.U. L. REV. 622, 635 (1995) (“By the 1920s, [there was a] realization that propaganda, far more than any abstract unity, shaped public desires and predilections . . . .”); EDWARD L. BERNAYS, PROPAGANDA 147–51 (1928) (extolling propaganda as a necessary method to be used by democratic leaders to shape public opinion and set the parameters of debate); WALTER LIPPMANN, THE PHANTOM PUBLIC 110–14 (1925) (discussing how private interests use propaganda to advocate on their own behalf vis-à-vis a public unable to detect or make sense of the propaganda); FREDERICK E. LUMLEY, THE PROPAGANDA MENACE 45 (1933) (asserting that propaganda is “a continuous, omnipresent, and implacable activity” in American society); see also NOAM CHOMSKY, NECESSARY ILLUSIONS: THOUGHT CONTROL IN DEMOCRATIC SOCIETIES (1989); NOAM CHOMSKY & EDWARD S. HERMAN, MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA (1988).



to sway popular opinion to encourage military enlistment and war bond sales.<sup>128</sup> The CPI's purpose was to rally Americans to support the war effort, spreading an aspirational message that was explicitly not tied to truth or reality.<sup>129</sup> The CPI generated and disseminated newspapers, press releases, and films, and also advocated for the suppression of objective reporting.<sup>130</sup> Among positive messages that aimed to reinforce patriotism and enthusiasm for the military, the CPI also disseminated negative messages to generate anti-German sentiment.<sup>131</sup> This effort was so successful that mobs attacked and killed people of German descent.<sup>132</sup> Moreover, numerous German Americans lost their jobs, some were arrested and jailed on sedition charges, and many Americans with German last names changed them to avoid abuse and prejudice.<sup>133</sup> In addition, German-named organizations,

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<sup>128</sup> Dina Temple-Raston & Harvey Rishikof, *Falsehoods and the Patois of Pandemics—A Playbook*, 11 J. NAT'L SEC. L. & POL'Y 213, 214 (2020); see also Christyne J. Vachon, *Crocodile Tears: How Businesses Use Animal Testing Labeling as Propaganda to Increase Profit*, 14 J. ANIMAL & NAT. RES. L. 179, 184 (2018) (referring to Edward Bernays as “the father of public relations”); WALTER LIPPMANN, PUB. OP. 4–10 (Jefferson, 2015 (1922) (describing how people picture the world in their minds and believe that picture to be the world, and that people take as fact not what is fact but what they suppose to be fact).

<sup>129</sup> See Temple-Raston & Rishikof, *supra* note 128, at 214 (noting that one Wilson advisor wrote that, to be effective, the CPI must recognize that “[t]ruth and falsehood are arbitrary terms . . . . The force of an idea lies in its inspirational value. It matters very little if it is true or false.” (alteration in original)).

<sup>130</sup> Christopher B. Daly, *How Woodrow Wilson's Propaganda Machine Changed American Journalism*, SMITHSONIAN MAG. (Apr. 28, 2017), <https://www.smithsonianmag.com/history/how-woodrow-wilsons-propaganda-machine-changed-american-journalism-180963082/> [<https://perma.cc/CQ7F-7ZX6>]; see also Temple-Raston & Rishikof, *supra* note 128, at 214 (noting that the Sedition Act of 1918, key to the CPI's success, “muzzl[ed] the Fourth Estate's ability to write honestly and critically about events,” and made it a criminal offense punishable by up to twenty years in prison if one were to “utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language' about the United States” (citation omitted)).

<sup>131</sup> See Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 957 n.117 (2007); see generally CLAYTON D. LAURIE, *THE PROPAGANDA WARRIORS: AMERICA'S CRUSADE AGAINST NAZI GERMANY* (1996).

<sup>132</sup> See, e.g., Donald R. Hickey, *The Prager Affair: A Study in Wartime Hysteria*, 62 J. ILL. STATE HIST. SOC'Y 117, 122 (1969) (describing the murder of a German Immigrant during WWI, which prompted some to argue for sedition laws, “to prevent the ‘criminal hotheads’ from taking the law into their own hands”).

<sup>133</sup> Jim Robbins, *Pardons Granted 88 Years After Crimes of Sedition*, N.Y. TIMES (May 3, 2006), <https://www.nytimes.com/2006/05/03/us/03pardon.html> [<https://perma.cc/F9SE-DPKJ>] (describing convictions for sedition in Montana during WWI); Kathleen Doane, *Anti-German Hysteria Swept Cincinnati in 1917*, CIN. ENQUIRER (June 6, 2012, 5:39 PM), <https://web.archive.org/web/20140120043547/http://cincinnati.com/blogs/ourhistory/2012/06/06/anti-german-hysteria-swept-cincinnati-in-1917/> (describing “a sudden and ferocious hatred of all things German” in WWI America); LESLIE V. TISCHAUSER, *THE BURDEN OF ETHNICITY: THE GERMAN QUESTION IN CHICAGO 1914–1941* (1990); Jack Simpson, *German*

college classes, commonly used words in English, and even street names and towns had their names changed to avoid association with the German language or culture.<sup>134</sup>

Following World War I, corporate clients like Procter & Gamble, the American Tobacco Company, Cartier Inc., Best Foods, Inc., CBS, the United Fruit Company, General Electric, and Dodge Motors increasingly engaged public relations (“PR”) firms.<sup>135</sup> A PR campaign from Philip Morris aimed to convince the public that smoking was a sign of female empowerment and the feminist movement.<sup>136</sup> Another aimed to convince the public that Ivory soap was medically superior to other soaps.<sup>137</sup> Another public relations campaign, carried out by General Motors, DuPont, and Standard Oil of New Jersey (a precursor to ExxonMobil), involved convincing the public through studies that were underwritten and controlled entirely by the “lead cabal,” that leaded gasoline was safe.<sup>138</sup> Many PR campaigns have had well-documented destructive effects on public health. In particular, the campaign by the tobacco industry misled the public regarding the alleged safety of cigarettes.<sup>139</sup> The tobacco companies knew the truth. They knew smoking cigarettes was linked to cancer and numerous other health maladies.<sup>140</sup> Nevertheless, they kept that knowledge secret and spent millions of dollars to mislead the public into believing that the link between smoking and deteriorating health was not yet well-established or understood.<sup>141</sup> This misinformation is not only well-documented, but indeed

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*Street Name Changes in Bucktown, Part I*, NEWBERRY (Nov. 1, 2011), <http://www.newberry.org/german-street-name-changes-bucktown-part-i> [<https://perma.cc/P5SP-ZH8U>] (describing a “strong backlash against German-Americans and German Culture . . . fed both by wartime nativism and interethnic rivalry”).

<sup>134</sup> See Simpson, *supra* note 133.

<sup>135</sup> Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASHBURN L.J. 635, 675 n.368 (2011); see also EDWARD L. BERNAYS, *BIOGRAPHY OF AN IDEA: MEMOIRS OF PUBLIC RELATIONS COUNSEL* 817–820 (1965) (listing former public relations clients of Bernays, including American Cigar Company, American Distilling Company, American Tobacco Company, Dodge Brothers, Inc., General Electric, General Motors, Procter & Gamble Company, United Fruit Company, and Westinghouse Corporation).

<sup>136</sup> Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1290 (2020).

<sup>137</sup> BERNAYS, *supra* note 135, at 343–44 (stating that Bernays hired a hospital consultant to comment in support of the soap, capitalizing on the fact that the soap was white and unscented).

<sup>138</sup> Jamie Lincoln Kitman, *The Secret History of Lead*, NATION (Mar. 2, 2000), <https://www.thenation.com/article/archive/secret-history-lead/> [<https://perma.cc/ZE4K-2HLK>].

<sup>139</sup> Press Release, Tobacco Settlement Endowment Tr., *Big Tobacco Guilty of Lying to the Public*, (Oct. 3, 2017), <https://tset.ok.gov/content/big-tobacco-guilty-lying-public> [<https://perma.cc/3PLZ-MNFX>].

<sup>140</sup> *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1105–08, 1119–20, 1122–24 (D.C. Cir. 2009) (per curiam).

<sup>141</sup> *Id.* at 1124–29.

multiple U.S. Courts of Appeal have held that tobacco companies “knowingly and actively conspired to deceive the public about the health risks and addictiveness of smoking for decades.”<sup>142</sup> This finding is based on extensive documents unearthed by investigations into the tobacco industry’s practices over the course of more than half a century. One example is a 1969 internal memorandum prepared at the Brown & Williamson Tobacco Corp. (B&W).<sup>143</sup> The memorandum was drafted by J. W. Burgard and addressed to R. A. Pittman, B&W’s senior marketing supervisor.<sup>144</sup> The memorandum stated, “Our consumer I have defined as the mass public, our product as doubt, our message as truth – well stated, and our competition as the body of anti-cigarette fact that exists in the public mind.”<sup>145</sup> The memo added, “Doubt is our product since it is the best means of competing with the ‘body of fact’ that exists in the mind of the general public. It is also the means of establishing a controversy.”<sup>146</sup>

This infamous memorandum spells out in black and white the necessary model for any fraudulent scheme. The deceiver must purport to tell the truth and to convince the victim that what is being said is the truth. But truth is the deceiver’s enemy. Or, as the memorandum puts it, the opposition is “fact.”<sup>147</sup> This is the same model used by numerous industries to mislead the public into accepting, purchasing, and using products that cause catastrophic harm to public health and the environment. The fossil fuel industry, like the tobacco industry, put its dedication to this principle in writing. A 1998 memorandum prepared by the American Petroleum Institute, a fossil fuel industry advocacy group, proclaimed, “Victory will be achieved when . . . [a]verage citizens ‘understand’ (recognize) uncertainties in climate science.”<sup>148</sup> The quotation marks around the word “understand” are particularly interesting. The authors of the memorandum recognized that the goal was to mislead. The fossil fuel industry wanted the public not to understand, but to “understand.” This same business model—selling a dangerous product to the public by lying about the dangers it poses—has been used by dozens of other industries, including the sugar, opioid, fast food, asbestos, and pesticide industries.<sup>149</sup> Every one of these frauds on the public resulted in a misinfodemic. The epidemics of illnesses and other health harms that resulted from these industries (sugar, opioid, fast food, asbestos, pesticide) are so widely known that readers will be familiar with the harms caused by each industry by simply reading each industry’s name.

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<sup>142</sup> Disc. *Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 562 (6th Cir. 2012) (citing *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1105–08, 1119–20, 1122–24 (D.C. Cir. 2009) (per curiam)).

<sup>143</sup> STANTON A. GLANTZ, JOHN SLADE, LISA A. BERO, PETER HANAUER & DEBORAH E. BARNES, *THE CIGARETTE PAPERS* 187–90 (1998).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 190.

<sup>146</sup> *Id.* at 190–91.

<sup>147</sup> See sources cited *supra* note 142 and accompanying text.

<sup>148</sup> JANET SAWIN & KERT DAVIES, GREENPEACE, *DENIAL AND DECEPTION: A CHRONICLE OF EXXONMOBIL’S EFFORTS TO CORRUPT THE DEBATE ON GLOBAL WARMING* 4 (2002).

<sup>149</sup> See generally Henricksen, *supra* note 11, at 4–7.

Industries that sell dangerous products are not the only ones who stand to benefit by misleading the public in a way that spreads disease or other health outcomes. Politicians spread false messages that harm public health.<sup>150</sup> The media, too, spread such messages.<sup>151</sup> Indeed, the media is the primary means by which corporate and political leaders may influence public opinion, including by spreading false messages that generate misinfodemics.<sup>152</sup> Studies have shown that media corporations possess their own motives for spreading false or misleading messages, often termed “fake news” as of late.<sup>153</sup> These include increasing profits, growing their audience, attracting advertisers, and maximizing shareholder value.<sup>154</sup>

Any discussion of political, corporate, or media messages, of course, engenders important First Amendment questions. As stated earlier, these will be addressed in subsequent scholarship. What is too often overlooked, however, is the gaping loophole in the tort law of fraud that first appeared a century ago and has since grown dangerously. This gap in the fraud law is closely interrelated to the First Amendment questions because fraudulent speech is unprotected, and so the exact contours of what constitutes fraudulent speech are vitally important.<sup>155</sup>

But to determine what constitutes fraudulent speech, one must first determine what constitutes fraud. And when one analyzes the last two centuries of fraud law carefully, a troubling picture emerges. There is, on one hand, the development of what constitutes unlawful or tortious fraud, beginning with *Pasley v. Freeman* and continuing through the establishment of separate and independent fraud claims, such as 10b-5 securities fraud. But on the other hand, there is a near-complete absence of laws addressing fraud on the public. Today, “fraud law” doctrine consists of myriad splintered definitions and distinct claims across the state and the federal laws.<sup>156</sup>

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<sup>150</sup> See sources cited *supra* notes 2, 3 & 7 and accompanying text.

<sup>151</sup> *Id.*

<sup>152</sup> Natali Helberger, *The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power*, 8 DIGIT. JOURNALISM 842, 845 (2020).

<sup>153</sup> See Joshua A. Braun & Jessica L. Eklund, *Fake News, Real Money: Ad Tech Platforms, Profit-Driven Hoaxes, and the Business of Journalism*, 7 DIGIT. JOURNALISM, no. 1, (2019); Edward S. Herman, *The Propaganda Model: A Retrospective*, 1 JOURNALISM STUD. 101 (2000); see generally Peter Vanderwicken, *Why the News Is Not the Truth*, HARV. BUS. REV. 144 (1995).

<sup>154</sup> Braun & Eklund, *supra* note 153, at 5, 10, 15.

<sup>155</sup> See, e.g., *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (noting that the First Amendment generally does not protect fraudulent speech).

<sup>156</sup> The concept of fraud law encompasses numerous legal doctrines, including common law fraud, misrepresentation, deceit, securities fraud, mail fraud, wire fraud, truth in lending laws, truth in advertising laws, and other fraud-like or fraud-based claims and defenses. See, e.g., 18 U.S.C. § 1341 (federal mail fraud); *id.* § 1343 (federal wire fraud); CAL. CORP. CODE § 25541 (West 2021) (California securities fraud); FLA. STAT. § 517.301 (2020) (Florida

With the exception of securities fraud, these laws focus overwhelmingly on prohibiting and punishing personal deceit, which most often involves one-on-one deception—that is, where the target of the fraud is an individual or a member of a small identifiable group—has led some to claim fraud is always personal.<sup>157</sup> Under this view, only personal frauds targeting identifiable victims count as “fraud.”<sup>158</sup>

Yet, securities fraud, which is one of the most widely prosecuted areas of fraud law,<sup>159</sup> is almost never personal. It is a fraud on the public. Securities fraud is so impersonal that the Supreme Court has eliminated the personal reliance requirement in securities fraud cases, applying instead the fraud on the market presumption.<sup>160</sup> “[F]raud on the market is a . . . doctrine of federal securities-fraud law that can be invoked by any Rule 10b-5 plaintiff” to establish a “rebuttable presumption of classwide reliance on public, material misrepresentations . . .” aired to the general public.<sup>161</sup> In a fraud-on-the-market case, plaintiffs are not required to show that “they themselves actually relied on any particular misrepresentation or omission . . . . Instead they need only show that they relied on the integrity of the price of the stock as established by the market, which in turn [was] influenced by the information or

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securities fraud); N.Y. GEN. BUS. LAW §§ 352–353 (McKinney 2021) (New York securities fraud); TEX. REV. CIV. STAT. ANN. art. 581, § 33-1, *repealed by* Securities Act, Government Code § 4001.001 et seq., effective Jan. 1, 2022 (West 2021) (Texas securities and investment advising fraud); 17 C.F.R. § 240.10b-5 (2020) (federal securities fraud); *West v. JPMorgan Chase Bank*, 154 Cal. Rptr. 3d 285, 295 (Cal. Ct. App. 2013) (California common law fraud); *GEICO Gen. Ins. Co. v. Hoy*, 136 So. 3d 647, 651 (Fla. Dist. Ct. App. 2013) (Florida common law fraud); *Norddeutsche Landesbank Girozentrale v. Tilton*, 48 N.Y.S.3d 98, 105 (N.Y. App. Div. 2017) (New York common law fraud); *Zaidi v. Shah*, 502 S.W.3d 434, 441 (Tex. App. 2016) (Texas common law fraud).

<sup>157</sup> *See United States v. Ragland*, 72 F.3d 500, 503 (6th Cir. 1996) (noting that fraud “is entirely personal”).

<sup>158</sup> *See, e.g., Goldberg et al., supra* note 72, at 1026 (concluding that fraud is “private or relational” in nature, and therefore reliance is a necessary element because it establishes the personal relationship between the wrongdoer and the victim); *see also Ragland*, 72 F.3d at 503 (noting that fraud “is entirely personal”).

<sup>159</sup> For example, the SEC Division of Enforcement’s 2020 Annual Report revealed that in fiscal year 2020, a total of \$4.68 billion was ordered in penalties and disgorgement in SEC enforcement actions prosecuting securities fraud. Stephanie Avakian, *SEC Division of Enforcement 2020 Annual Report*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 19, 2020), <https://corpgov.law.harvard.edu/2020/11/19/sec-division-of-enforcement-2020-annual-report/> [<https://perma.cc/JGY8-5QXR>].

<sup>160</sup> *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 461 (2013) (noting that in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), “the Court endorsed the ‘fraud-on-the-market’ theory, which permits certain Rule 10b–5 plaintiffs to invoke a rebuttable presumption of reliance on material misrepresentations aired to the general public”).

<sup>161</sup> *Id.* at 462–63.

lack of it”<sup>162</sup> which has been “misrepresented or withheld by the defendant.”<sup>163</sup> This effectively removes the personal reliance requirement from securities fraud cases.

The existence of a securities fraud doctrine, particularly because it lacks any personal reliance element, destroys any idea that fraud must always be personal. But securities fraud is not alone. Other frauds on the public have likewise been deemed illegal and prosecuted. For example, the United States Department of Justice (DOJ) sued several major tobacco companies for fraudulent and unlawful conduct that amounted to defrauding the public.<sup>164</sup> The DOJ argued that the tobacco defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO) “by engaging in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, ‘light’ cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction.”<sup>165</sup> The court there agreed with the DOJ. In its opinion, the court held that the tobacco defendants unlawfully deceived the public in a number of ways. Specifically, the defendants there “falsely denied the adverse health effects of smoking,”<sup>166</sup> “falsely denied that nicotine and smoking are addictive,”<sup>167</sup> “falsely denied that they manipulated cigarette design and composition so as to assure nicotine delivery levels which create and sustain addiction,”<sup>168</sup> and “falsely represented that light and low tar cigarettes deliver less nicotine and tar and, therefore, present fewer health risks than full-flavor cigarettes.”<sup>169</sup> The court held that these and other deceptive practices whereby the industry conspired to defraud the public, violated RICO.<sup>170</sup>

In another line of tobacco litigation cases, the so-called *Engle* progeny cases in Florida,<sup>171</sup> the Eleventh Circuit held that “plaintiffs need not demonstrate that they

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<sup>162</sup> *In re* Convergent Techs. Sec. Litig., 948 F.2d 507, 512 n.2 (9th Cir. 1991), amended on denial of reh’g, (Dec. 6, 1991); *In re* Phillips Petroleum Sec. Litig., 738 F. Supp. 825 (D. Del. 1990).

<sup>163</sup> 69A AM. JUR. 2D *Securities Regulation—Federal* § 1105 (2021).

<sup>164</sup> See *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 26–27 (D.D.C. 2006) (“The Government alleged that [the tobacco industry d]efendants have violated, and continue to violate [the RICO Act] by engaging in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, ‘light’ cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction.”).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 854 (capitalization removed for stylistic purposes).

<sup>167</sup> *Id.* at 856 (capitalization removed for stylistic purposes).

<sup>168</sup> *Id.* at 858 (capitalization removed for stylistic purposes).

<sup>169</sup> *Id.* at 858 (capitalization removed for stylistic purposes).

<sup>170</sup> *Id.* at 839, 899–900.

<sup>171</sup> These cases were originally part of a 1994 putative class action filed against several tobacco companies. See *In re Engle Cases*, 767 F.3d 1082, 1086 (11th Cir. 2014). After the class was certified, trials on liability and damages were conducted, resulting in awards of compensatory and punitive damages. See *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 441

relied on specific statements from cigarette companies to establish detrimental reliance for fraud-based claims under Florida law.”<sup>172</sup> Indeed, “Florida law permits an *Engle*-progeny jury to infer reliance based on evidence that the plaintiff was exposed to the disinformation campaign and harbored a misapprehension about the health effects and/or addictive nature of smoking.”<sup>173</sup> Thus, the Eleventh Circuit there found:

To decide whether the evidence was sufficient to raise an inference of detrimental reliance, [the court] must determine “[w]hether, considering all evidence and drawing all reasonable inferences in favor of [the plaintiff], any reasonable juror could have inferred that [he] was exposed to [the Tobacco Companies’] decades-long, pervasive disinformation campaign and was accordingly confused regarding the health effects or addictive nature of smoking cigarettes such that [he] may have behaved differently had [he] known the true facts.”<sup>174</sup>

Thus, in certain extreme cases where a fraud on the public has been so catastrophic as to either collapse the economy (securities fraud) or cause tens of millions of deaths per year (tobacco), the law has stepped in to put a stop to it by labeling it “fraud.” But these are exceptions. Misinformation, like that spread to inflate a company’s stock price or to hide the dangers posed by a product, are almost uniformly allowed under the law.<sup>175</sup> They are almost never deemed fraud. If one reads the news, turns on the TV, or scrolls a social media feed, one is bombarded by false messages aimed at manipulating the thoughts, choices, and behavior of the public.<sup>176</sup> Misinformation aimed to mislead the public, though legal, often causes

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(Fla. Dist. Ct. App. 2003), *aff’d in part and rev’d in part on other grounds*, 945 So. 2d 1246 (Fla. 2006). The class was subsequently decertified and the punitive damages award vacated. *Id.* at 442. The Florida Supreme Court affirmed decertification of the class, the vacating of punitive damages, and permitted the individual plaintiffs to pursue individual damages actions within one year of its mandate, with res judicata effect as to certain findings. *Engle v. Liggett Grp., Inc.*, 945 So.2d 1246, 1269 (Fla. 2006); *see also* Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs*, 53 GA. L. REV. 1305, 1316–19 (2019) (discussing the *Engle* progeny cases).

<sup>172</sup> *Kerrivan v. R.J. Reynolds Tobacco Co.*, 953 F.3d 1196, 1211 (11th Cir. 2020) (referencing *Philip Morris USA, Inc. v. McCall*, 234 So. 3d 4, 14 (Fla. Dist. Ct. App. 2017)) (discussing that a fraudulent concealment claim in an *Engle* case need not be limited to reliance on a deceptive statement); *see also* *Philip Morris USA, Inc. v. Duignan*, 243 So. 3d 426, 439–40 (Fla. Dist. Ct. App. 2017) (finding that it was unnecessary for a plaintiff to prove detrimental reliance on a particular statement in an *Engle* progeny case).

<sup>173</sup> *Kerrivan v. R.J. Reynolds Tobacco Co.*, 953 F.3d 1196, 1211 (11th Cir. 2020) (quoting *Cote v. R.J. Reynolds Tobacco Co.*, 909 F.3d 1094, 1108 (11th Cir. 2018)).

<sup>174</sup> *Kerrivan*, 953 F.3d at 1211 (quoting *Cote*, 909 F.3d at 1108).

<sup>175</sup> *See* *Henricksen*, *supra* note 11.

<sup>176</sup> *See generally* G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1039, 1063 (2020) (“Whether through social media, blogs, email, newspaper

harm to the public's economic, health, or environmental wellbeing.<sup>177</sup> Moreover, the false claims that are allowed through the mass media, and thereby to reach millions of people, would in many cases be prohibited if made one-on-one.<sup>178</sup> Why? Because fraud law has developed in a way to focus almost exclusively on personal fraud while ignoring (or outright rewarding) fraud on the public.

Accordingly, it is legal to defraud millions of people in a way that confers wealth, power, and political office on the deceiver while depriving the public of money, property, health, and in some cases, life itself. The smallest frauds, such as one-on-one schemes, are prohibited and punished. The largest and most destructive frauds are permitted and rewarded. The fact that this contradiction is not a major scandal is a testament to the success of those who carry out and benefit from defrauding the public.

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headlines, or doctored images and videos, the public is indeed bombarded by information, and much of it is misleading or outright false. Much of it, in fact, is propaganda.”).

<sup>177</sup> See *supra* Part I.

<sup>178</sup> While fraud committed by an individual, such as a physician, can be redressed by the courts, equivalent fraudulent claims made on social media sites by politicians are more difficult to address. Imagine, for example, if you went to your doctor and, during the visit, she told you COVID-19 can be cured with a supplement she has for sale in her office. Imagine further that she tells you not to wear a mask because it is the doctor's supplements, and not a mask, that protects you, and that even if you catch COVID-19 it is no worse than the flu. If, based on these statements, you bought the doctor's supplements, took them, and then went maskless and, as a result, caught COVID-19 and experienced adverse symptoms, you could sue the doctor for fraud. Assuming the other elements were met (such as intent, reasonable reliance, and resulting damages), you could establish the false representation element through the doctor's false statements. See, e.g., The Associate Press, *New Jersey Doctor Convicted of ALS Patient Fraud*, NY DAILY NEWS (Sept. 5, 2007, 10:49 PM) <https://www.nydailynews.com/news/crime/new-jersey-doctor-convicted-als-patient-fraud-article-1.244637> [<https://perma.cc/3U3Z-H52P>] (discussing how an ALS doctor, Dr. DeMarco, was sentenced to 57 months in prison for falsely claiming she had a stem cell therapy cure for Lou Gehrig's disease); see also *DeMarco v. U.S.*, No. 07-4249 (JHR), 2009 WL 689630, at \*1 (D.N.J. Mar. 9, 2009) (discussing the basic facts and procedural history of the *United States v. DeMarco* criminal case). Thus, it is illegal for a doctor (whom the patient relies on for accurate medical information) to make a knowing misrepresentation about the dangers posed by COVID-19, but it is legal for a political leader (on whom the public relies for information on current events, including the pandemic) to make equally harmful, self-serving, and false representations about the COVID-19 virus and pandemic. See Nowlin, *supra* note 2 (explaining how in a May 22, 2020 televised announcement, the Republican chair for Bexar County, Texas, told audience members and viewers that the COVID-19 pandemic was a Democratic hoax and implored everyone present to take their protective masks off).



V. BECAUSE FRAUD ON THE PUBLIC IS ALMOST UNIFORMLY NOT DEEMED FRAUD, AND IS THEREFORE LEGAL, WRONGDOERS ARE PERMITTED TO DISSEMINATE MISINFORMATION, LEADING TO MISINFODEMICS

The spreading of misinformation has become a widely used method for accumulating and retaining wealth and power. Corporations and their wealthy owners use it to make money.<sup>179</sup> Politicians use it to gain votes and support.<sup>180</sup> Media outlets use it to increase viewership and advertising revenue.<sup>181</sup> These parties mislead the public in ways that would be illegal if done one-on-one.<sup>182</sup> The result has been widespread devastation to human health and life.<sup>183</sup>

There are far too many specific examples of the harm to public health caused by fraud on the public. I will discuss only one representative example: the opioid epidemic. Manufacturers and sellers of opioid painkillers are alleged to have spent years hiding and downplaying the addictiveness and destructiveness of the drug.<sup>184</sup> Led early on by the number one market leader, OxyContin, the industry allegedly spent millions of dollars to mislead the public about the dangers posed by opioids.<sup>185</sup> Internal documents from Purdue Pharma, the maker of OxyContin, show that from 1996 to 2002, the company's marketing of the drug became more and more aggressive, focusing increasingly on marketing directly to patients,<sup>186</sup> and in doing

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<sup>179</sup> See sources cited *supra* note 11.

<sup>180</sup> See sources cited *supra* note 12.

<sup>181</sup> See sources cited *supra* note 13.

<sup>182</sup> See sources cited *supra* note 178.

<sup>183</sup> See *supra* Part I; see also Parker-Flynn, *supra* note 16.

<sup>184</sup> See, e.g., John R. Roby, *Broome Weighs Lawsuit Against Opioid Drugmakers*, PRESSCONNECTS (Oct. 25, 2016, 6:55 PM) <https://www.pressconnects.com/story/news/local/2016/10/25/broome-weighs-lawsuit-against-opioid-drugmakers/92707512/> [<https://perma.cc/7NJH-RBFB>]; Alfonse D'Amato, *Long Island Can't Give Up the Fight Against Opioids*, LONG ISLAND HERALD (Sept. 15, 2016), <https://www.liherald.com/stories/long-island-cant-give-up-the-fight-against-opioids,83726> [<https://perma.cc/4LGL-PUSG>].

<sup>185</sup> See Scott Neuman & Alison Kodjak, *Drugmakers Spent Millions Promoting Opioids to Patient Groups, Senate Report Says*, NPR (Feb. 13, 2018, 4:24 AM), <https://www.npr.org/sections/thetwo-way/2018/02/13/585290752/drugmakers-spent-millions-promoting-opioids-to-patient-groups-senate-report-says> [<https://perma.cc/2R9C-5D4Y>]; see also Jonathan H. Marks, *Lessons from Corporate Influence in the Opioid Epidemic: Toward a Norm of Separation*, J. BIOETHICAL INQUIRY 1 (2020) (detailing how Purdue Pharma and other opioid manufacturers paid millions of dollars to industry groups to advocate on behalf of opioid makers).

<sup>186</sup> See Fred Schulte, *Purdue Pharma's Sales Pitch Downplay Risk of Opioid Addiction*, KEISER HEALTH NEWS (Aug. 17, 2018), <https://www.healthleadersmedia.com/clinical-care/purdue-pharmas-sales-pitch-downplayed-risks-opioid-addiction> [<https://perma.cc/SK-F6-G8ED>]; see also David Armstrong, *Sackler Embraced Plan to Conceal OxyContin's Strength from Doctors, Sealed Testimony Shows*, PRO PUBLICA (Feb. 21, 2019, 1:45 PM) <https://www.propublica.org/article/richard-sackler-oxycontin-oxycodone-strength-conceal-from-doctors-sealed-testimony> [<https://perma.cc/NGG2-QL4Y>].

so, hiding the drug's addictiveness.<sup>187</sup> Purdue's six-page pamphlet for patients, titled "OxyContin: A Guide to Your New Pain Medicine," stated, "Your health care team is there to help, but they need your help, too."<sup>188</sup> The pamphlet added that OxyContin is for treating "pain like yours that is moderate to severe and lasting for more than a few days."<sup>189</sup> "To patients or family members worried about addiction, Purdue's pamphlet said: 'Drug addiction means using a drug to get "high" rather than to relieve pain. You are taking opioid pain medication for medical purposes. The medical purposes are clear, and the effects are beneficial, not harmful.'"<sup>190</sup>

It wasn't just patients fooled by Purdue's misinformation campaign. Doctors bought into it too.<sup>191</sup> One doctor who admitted he fell for Purdue Pharma's deceit later reflected on how brazenly the deception was pulled off. "In hindsight, he said, Purdue's sales tactics seem 'almost a satire of an unscrupulous corporation that really has no interest in understanding the implications and complications of people using their drugs.'"<sup>192</sup>

Purdue also paid a New York City production company to shoot a series of videos aimed at persuading doctors to prescribe OxyContin and patients to request the drug and take it.<sup>193</sup> The videos featured testimonials by patients and an unsubstantiated claim by a medical doctor named Alan Spanos that only less than 1 percent of opioid users become addicted.<sup>194</sup> Purdue paid Dr. Spanos \$3,400 as a "physician spokesman" in the videos.<sup>195</sup> The videos contain numerous claims now known to be blatantly false.<sup>196</sup> In one video produced in 1998, for example, Dr. Spanos claimed:

There's no question that our best, strongest pain medicines are the opioids . . . in fact, the rate of addiction amongst pain patients who are treated by doctors is much less than one percent. They don't wear out.

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<sup>187</sup> See Fred Schulte, *Purdue Pharma's Sales Pitch Downplay Risk of Opioid Addiction*, KEISER HEALTH NEWS (Aug. 17, 2018), <https://www.healthleadersmedia.com/clinical-care/purdue-pharmas-sales-pitch-downplayed-risks-opioid-addiction> [<https://perma.cc/SK-F6-G8ED>].

<sup>188</sup> See Schulte, *see supra* note 186.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* ("Dr. Michael Barnett, a physician and assistant professor at the Harvard T.H. Chan School of Public Health, said that some of Purdue's early marketing claims may have seemed reasonable to many doctors 20 years ago . . . [he further stated] 'I think a lot of physicians are coming to the realization that a lot of what we were taught about pain management was pure conjecture [and] I feel foolish for believing it.'").

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*; see also Katie Mettler, *How Misleading Marketing Got America Addicted*, WASH. POST (Feb. 21, 2018), <https://www.washingtonpost.com/graphics/2018/national/amp-stories/oxycontin-how-misleading-marketing-got-america-addicted/> [<https://perma.cc/NU-W2-3DPB>].

<sup>195</sup> *Id.*

<sup>196</sup> See *id.*

They go on working. They do not have serious medical side effects. And so these drugs, which I repeat, are our best, strongest pain medications, should be used much more than they are for patients in pain.<sup>197</sup>

From “January 1998 [to] June 2001, Purdue distributed 16,000 copies of the video to doctors, who showed them to selected patients.”<sup>198</sup>

The results of this fraud on the public are familiar to most readers. In the words of one doctor, “[t]hese drugs [opioids] are in a class of their own when it comes to the harms that they have caused.”<sup>199</sup> By 2004, OxyContin was the most abused drug in the United States.<sup>200</sup> In recent years and up to the present, opioid pain drugs have killed more than 130 Americans a day.<sup>201</sup> The opioid epidemic, led by a small handful of giant pharmaceutical companies, has been labeled “the worst public health crisis in American history.”<sup>202</sup> Americans today consume 80 percent of the world’s opioids.<sup>203</sup> And for one of the most potent and dangerous kinds of opioids, hydrocodone, the USA consumes 99 percent.<sup>204</sup> Opioid use has been a death sentence for thousands and resulted in addiction and misery for millions of others. The dangers of addiction were not only never mentioned in the opioid manufacturers’ marketing push, they were actively downplayed.<sup>205</sup>

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<sup>197</sup> See Mettler, *supra* note 194; CHRIS MCGREAL, AMERICAN OVERDOSE: THE OPIOID TRAGEDY IN THREE ACTS 45–48 (2018); Our Amazing World, *Purdue Pharma OxyContin Commercial*, YOUTUBE (Sept. 22, 2016) <https://www.youtube.com/watch?v=Er78Dj5hyeI> [<https://perma.cc/8JZ5-AZYB>].

<sup>198</sup> Schulte, *supra* note 186.

<sup>199</sup> *Id.*; see also Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2622774/> [<https://perma.cc/B3FF-GRCZ>].

<sup>200</sup> See Van Zee, *supra* note 199, at 221.

<sup>201</sup> See *Opioid Crisis*, HEALTH RES. SERVS. ADMIN., <https://www.hrsa.gov/opioids> [<https://perma.cc/6R4W-QH9J>] (last visited July 5, 2021).

<sup>202</sup> Neil Howe, *America’s Opioid Crisis: A Nation Hooked*, FORBES (Nov. 30, 2017, 1:42 PM), <https://www.forbes.com/sites/neilhowe/2017/11/30/americas-opioid-crisis-a-nation-hooked/#47f440f56a57> [<https://perma.cc/C2A6-N8F2>]; see also Jessica Bruder, *The Worst Drug Crisis in American History*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/books/review/beth-macy-dopesick.html> [<https://perma.cc/62YW-JEBC>].

<sup>203</sup> See Laxmaiah Manchikanti, Bert Fellows, Hary Ailinani & Vidyasagar Pampati, *Therapeutic Use, Abuse, and Nonmedical Use of Opioids: A Ten-Year Perspective*, 13 PAIN PHYSICIAN 401, 402 (2010), <https://www.ncbi.nlm.nih.gov/pubmed/20859312> [<https://perma.cc/6UCU-EK7X>].

<sup>204</sup> See Laxmaiah Manchikanti, Bert Fellows, Hary Ailinani & Vidyasagar Pampati, *Therapeutic Use, Abuse, and Nonmedical Use of Opioids: A Ten-Year Perspective*, 13 PAIN PHYSICIAN 401, 402 (2010), <https://www.ncbi.nlm.nih.gov/pubmed/20859312> [<https://perma.cc/6UCU-EK7X>].

<sup>205</sup> See Fred Schulte, *Purdue Pharma’s Sales Pitch Downplay Risk of Opioid Addiction*, KEISER HEALTH NEWS (Aug. 17, 2018), <https://www.healthleadersmedia.com/clinical-care/purdue-pharmas-sales-pitch-downplayed-risks-opioid-addiction> [<https://perma.cc/SK-F6-G8ED>].

The fallout from this fraud on the public has caused an outcry from, among others, political and community leaders.<sup>206</sup> It has also generated numerous lawsuits against pharmaceutical companies to hold them liable for the deception.<sup>207</sup> Despite the public and legal pushback, the owners of the opioid manufacturers responsible for the epidemic have enriched themselves through fraud on the public. For example, the Sackler family, owners of Purdue Pharma, reaped billions in profits because Purdue misled the public on the dangers and addictiveness of opioids.<sup>208</sup> The Justice Department was ultimately successful in getting Purdue Pharma to plead guilty to conspiracy to defraud (RICO charges), in an agreement that provided for approximately \$5 billion in fines and forfeitures.<sup>209</sup> Notably, however, no criminal charges were brought against any individual defendants,<sup>210</sup> and doubt has been expressed about the prospect that the Sackler family will suffer any adverse financial consequences as a result of the plea.<sup>211</sup>

Ultimately, the opioid epidemic, like the tobacco crisis, arose as a result of large industries misleading the public and making billions while doing it. Like the tobacco crisis, some of the companies responsible for the opioid epidemic ultimately pled guilty to RICO criminal charges.<sup>212</sup> But these pleas largely failed to hold the owners

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<sup>206</sup> See, e.g., Press Release, Dick Durbin, U.S. Senator, Durbin Sends Letter to DEA Calling for Stricter Limits of Opioid Pills (July 19, 2016), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-sends-letter-to-dea-calling-for-stricter-limits-of-opioid-pills-> [<https://perma.cc/47P5-FXG7>].

<sup>207</sup> See, e.g., Ted Gregory, *Collar Counties Target Opioid Manufacturers: Lawsuits Seek Accountability for U.S. Epidemic*, CHI. TRIB. (Dec. 22, 2017), [https://digitaledition.chicagotribune.com/tribune/article\\_popover.aspx?guid=dc13a879-7e93-42f7-b13e-214e6977fa93](https://digitaledition.chicagotribune.com/tribune/article_popover.aspx?guid=dc13a879-7e93-42f7-b13e-214e6977fa93) [<https://perma.cc/SF66-ENCC>]; Jasper Scherer, *Bexar County Suing Opioid Manufacturers, Distributors*, SAN ANTONIO EXPRESS NEWS (Oct. 4, 2017), <https://www.expressnews.com/news/local/article/Bexar-County-suing-opioid-manufacturers-12251102.php> [<https://perma.cc/Q4X9-UZUT>]; Nadia Kounang, *States Investigate Opioid Manufacturers*, CNN HEALTH (June 16, 2017, 1:32 PM), <https://www.cnn.com/2017/06/16/health/state-attorney-generals-investigate-opioids> [<https://perma.cc/L8Z2-8S2V>]; John C. Moritz, *6 States Sue Maker of OxyContin as They Battle Expenses, Human Costs of Opioid Crisis*, USA TODAY (last updated May 16, 2018, 8:37 AM ET), <https://www.usatoday.com/story/news/nation-now/2018/05/15/six-attorney-generals-opioid-lawsuits/612721002/> [<https://perma.cc/5EBX-BC5V>].

<sup>208</sup> See Patrick Radden Keefe, *The Sackler Family's Plan to Keep Its Billions*, NEW YORKER (Oct. 4, 2020), <https://www.newyorker.com/news/news-desk/the-sackler-family-plan-to-keep-its-billions> [<https://perma.cc/HZ9U-N9EC>].

<sup>209</sup> Press Release, U.S. Dep't Just., Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies (Nov. 24, 2020) (on file with author).

<sup>210</sup> *Id.* (noting that at the time of the press release no charges were brought against individuals; although the criminal resolution “do[es] not include the criminal release of any individuals, including members of the Sackler family”).

<sup>211</sup> See Keefe, *supra* note 208.

<sup>212</sup> See, e.g., DEP'T OF HEALTH AND HUM. SERVS. & DEP'T OF JUST., HEALTH CARE FRAUD AND ABUSE CONTROL PROGRAM ANNUAL REPORT FOR FISCAL YEAR 2019 16 (June

of the opioid manufacturing companies accountable for the opioid epidemic, and tort plaintiffs continue to face challenges in holding opioid manufacturers liable.<sup>213</sup> Even if such liability were to be made available today, it would be little comfort to the hundreds of thousands of victims that perished through being defrauded into taking opioid painkillers, nor the millions of family members who will never see their loved ones again, nor the millions more in the grip of terrifying addiction. The academic term “misinfodemic” fails to capture the full horror of what the spread of misinformation is doing to large segments of the public.

Common law fraud remains largely ineffective against such schemes. This failure of fraud law to address fraud on the public opened the door to “the worst public health crisis in American history.”<sup>214</sup> It also allowed General Motors, Dupont, and Standard Oil of New Jersey (precursor to ExxonMobil) to poison the entire globe with leaded gasoline.<sup>215</sup> It caused millions of deaths, and continues to cause millions of deaths every year, from cigarettes and other tobacco products.<sup>216</sup> It caused

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2020) (“In July 2019, a part owner of several pain clinics pleaded guilty in the Eastern District of Tennessee to a Racketeering Influenced Corrupt Organization (RICO) conspiracy charge in connection with a large pill-mill prosecution involving illegal operation of pain clinics in Tennessee and Florida which prescribed vast quantities of opioids and generated revenues of over \$21 million.”).

<sup>213</sup> See, e.g., Keefe, *supra* note 208 (detailing how the Sackler family, owners of Purdue Pharma, have so far evaded personal liability for the opioid crisis they helped create); Stephen Wilks, *Chasing the Fruits of Misery: Confronting the Historical Relationships Between Opioid Revenues, Offshore Financial Centers, and International Regulatory Networks*, 41 NW. J. INT’L L. & BUS. 1, 2, 5 (2020) (stating that “[a]s the opioid crisis continues to claim lives throughout the U.S., tort litigants have faced challenges pursuing Purdue Pharma - one of the drug makers responsible for aggressively promoting OxyContin while downplaying the drug’s addictive effects”; during Purdue Pharma’s negotiations with tort plaintiffs, “outside auditors discovered the Sacklers caused Purdue to wire billions out of the country and into offshore financial centers, accelerating the pace of these transactions, which represented a far greater sum than amounts offered to plaintiffs during settlement talks.”).

<sup>214</sup> Howe, *supra* note 202; see also Van Zee, *supra* note 199; Bruder, *supra* note 202.

<sup>215</sup> Jamie Lincoln Kitman, *The Secret History of Lead*, NATION (Mar. 2, 2000), <https://www.thenation.com/article/archive/secret-history-lead/> [<https://perma.cc/2HTQ-3Y8T>].

<sup>216</sup> See, e.g., U.S. DEP’T HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 7* (2014), [https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf\\_NBK179276.pdf](https://www.ncbi.nlm.nih.gov/books/NBK179276/pdf/Bookshelf_NBK179276.pdf) [<https://perma.cc/Z955-RK2R>] (“Since the first Surgeon General’s report in 1964 more than 20 million premature deaths can be attributed to cigarette smoking.”). 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, May–June 2012, <http://www.motherjones.com/politics/2012/05/tobacco-book-golden-holocaust-robert-proctor> [<https://perma.cc/A95R-XA6H>] (last visited July 2, 2021). Worldwide, the number is even more grim; it is estimated one hundred million people were

childhood developmental problems through the use of toxic pesticides such as DDT.<sup>217</sup> It caused mesothelioma, asbestosis, and other deadly lung diseases from asbestos.<sup>218</sup> It also caused epidemics in obesity, heart disease, diabetes, and other diseases from consuming fast food, soda, and sugar.<sup>219</sup> The massive amount of

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killed by tobacco in the twentieth century, and that as many as one billion are expected to die from tobacco in this century. *The Global Tobacco Epidemic*, CAMPAIGN FOR TOBACCO FREE KIDS (2020), [https://www.tobaccofreekids.org/assets/global/pdfs/en/global\\_tobacco\\_epidemic\\_en.pdf](https://www.tobaccofreekids.org/assets/global/pdfs/en/global_tobacco_epidemic_en.pdf) [<https://perma.cc/4V8L-PXVE>]; Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999). Worldwide, the number is even more grim; it is estimated one hundred million people were killed by tobacco in the twentieth century, and that as many as one billion are expected to die from tobacco in this century. *The Global Tobacco Epidemic*, CAMPAIGN FOR TOBACCO FREE KIDS (Mar. 2020), [https://www.tobaccofreekids.org/assets/global/pdfs/en/global\\_tobacco\\_epidemic\\_en.pdf](https://www.tobaccofreekids.org/assets/global/pdfs/en/global_tobacco_epidemic_en.pdf) [<https://perma.cc/4V8L-PXVE>]; Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 480 (1999) (“The number of deaths caused by smoking surpasses the combined totals for alcohol, suicide, homicide, AIDS, cocaine, heroine, and motor vehicles.”).

<sup>217</sup> University of California – Berkeley, *DDT In Mothers Linked to Developmental Delays in Children, UC Berkeley Study Finds*, SCIENCE DAILY (July 5, 2006), [www.sciencedaily.com/releases/2006/07/060705090426.htm](http://www.sciencedaily.com/releases/2006/07/060705090426.htm) [<https://perma.cc/U45Q-3L3L>]; *but see* Todd A. Jusko, Thomas D. Koepsell, Rebecca J. Baker, Teri A. Greenfield, Eric J. Willman, M. Judith Charles, Stuart W. Teplin, Harvey Checkoway & Irva Hertz-Picciotto, *Maternal DDT Exposures in Relation to Fetal and 5-Year Growth*, 17 EPIDEMIOLOGY 6, 692–700 (2006).

<sup>218</sup> *Asbestos-Related Lung Diseases*, NAT’L HEART, LUNG & BLOOD INST., <https://www.nhlbi.nih.gov/health-topics/asbestos-related-lung-diseases> [<https://perma.cc/GW57-93BQ>] (last visited June 29, 2021); *see also* Brooke T. Mossman & J. Bernard L. Gee, *Asbestos-Related Diseases*, 320 NEW ENG. J. MED. 1721, 1721–30 (1989); Gideon Mark, *Issues in Asbestos Litigation*, 34 HASTINGS L.J. 871, 871–73 (1983).

<sup>219</sup> S. Stender, J. Dyerberg & A. Astrup, *Fast Food: Unfriendly and Unhealthy*, 31 INT’L J. OBESITY 887, 887–890 (2007); Henricksen, *supra* note 11 (discussing how public deception schemes to conceal product dangers [“PDCPD Schemes”] carried out by the fossil fuel, sugar, tobacco, opioid, and other industries are permitted under the law) (sugar and sugary drinks); *see also* Anahad O’Connor, *How the Sugar Industry Shifted the Blame to Fat*, N.Y. TIMES (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/well/eat/how-the-sugar-industry-shifted-blame-to-fat.html?module=inline> [<https://perma.cc/6XEL-G6LQ>]; Cristin E. Kearns, Laura A. Schmidt, Dorie Apollonio & Stanton Glantz, *The Sugar Industry’s Influence on Policy*, SCIENCE (May 4, 2018), <https://www.ncbi.nlm.nih.gov/pubmed/29724946> [<https://perma.cc/FYM3-HMKE>]; Cristin E. Kearns, Stanton A. Glantz & Laura A. Schmidt, *Sugar Industry Influence on the Scientific Agenda of the National Institute of Dental Research’s 1971 National Caries Program: A Historical Analysis of Internal Documents*, 12 PLOS MED. 1 (2015), <https://www.ncbi.nlm.nih.gov/pubmed/25756179> [<https://perma.cc/TTQ2-KLDG>]; Robert H. Lustig, Laura A. Schmidt & Claire D. Brindis, *The Toxic Truth About Sugar*, 482 NATURE 27, 27–29 (Feb. 2, 2012), <https://www.nature.com/articles/482027a> [<https://perma.cc/A8SF-R232>]; Elyse S. Powell,

damage to human health and life from fraud on the public is likely impossible to catalog in its entirety. It is clear, however, that the toll these misinfodemics take on society is far heavier than most realize.

## VI. CONCLUSION

Implementing a legal framework that prohibits misinformation and punishes those who spread it will be difficult, even apart from the First Amendment issues. But it is necessary. The principle underlying the need for this gap-filler law is simple: we must treat fraud on the public like any other fraud. To do this, Congress or the courts will need to impose civil remedies on those who defraud the public through spreading misinformation. This would finally give a remedy to those harmed by such schemes.

The fact that no tort doctrine provides adequate compensation to those harmed by the dissemination of misinformation runs counter to the public policy of shifting the loss to those responsible for causing it.<sup>220</sup> Today, those who suffer an opioid overdose after being told opioids are “safe” or who suffer lung damage from COVID-19, which they contracted after refusing to wear a mask in response to being told not to, bear the cost of the loss alone. The victims pay for the harm. Under basic tort principles, however, the loss should be shifted to those responsible.<sup>221</sup> In the two examples above, these responsible parties would be those who spread misinformation about opioids and those who spread misinformation about COVID-19, respectively.

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Lindsey P. Smith-Taillie & Barry M. Popkin, *Added Sugars Intake Across the Distribution of US Children and Adult Consumers: 1977–2012*, 116 J. ACAD. NUTRITION & DIETETICS 1543, 1543–50 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5039079/> [<https://perma.cc/Q39E-RLFX>].

<sup>220</sup> See, e.g., *Siegel v. Howell*, No. CV 980409394S, 1999 WL 966540, at \*4 (Conn. Super. Ct. Oct. 13, 1999) (noting “[t]he policy purpose of shifting the loss to responsible parties”); Dragan M. Cetkovic, *Loss Shifting: Upstream Common Law Indemnity in Products Liability*, 61 DEF. COUNS. J. 75, 88 (1994) (discussing “the policy aim of shifting the total loss to the party responsible for the creation of the risk”).

<sup>221</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 33 TD No. 3 (AM. L. INST. 2003) (discussing “expanding the scope of liability for intentional tortfeasors beyond that which the risk standard might impose”); RESTATEMENT (THIRD) OF TORTS: INTEN. TORTS TO PERSONS § 110 TD No. 1 (AM L. INST. 2015) (noting that “the principle that scope of liability should be expanded in the case of intentional torts is also a potent one, at least for those intentional tortfeasors who display significant culpability”); see also Andrew L. Merritt, *Consistent Model of Loss Causation in Securities Fraud Litigation: Suiting the Remedy to the Wrong*, 66 TEX. L. REV. 469, 502 (1988) (noting that “courts have not hesitated to expand the scope of liability for intentional wrongdoers”); *Seidel v. Greenberg*, 260 A.2d 863, 871 (N.J. Super. Ct. Law Div. 1969) (“It is well settled that where the acts of a defendant constitute an intentional tort or reckless misconduct, as distinguished from mere negligence, the aggravated nature of his acts is a matter to be taken into account in determining whether there is a sufficient causal relation to plaintiff’s harm to make the actor liable therefor.”).

Closing this gap in the law would further another tort policy aim, which is to expand the scope of liability for those who commit intentional, wrongful conduct.<sup>222</sup> As stated in the Restatement (Third) of Torts, if one’s “fault lies in his intent and his act rather than in identification of a particular victim, then liability for the intent and the act seems perfectly appropriate even if the particular victim was not the intended one.”<sup>223</sup> This makes clear that fraud on the public by those who purposefully carry it out should make the wrongdoer liable to those eventually harmed as a direct result of the spread of misinformation. Moreover, the Restatement goes on to state “that an intentional aggressor should bear the risk that his aggression will lead to unintended injury or that the aggressor should be subjected to appropriate incentives to deter the aggression.”<sup>224</sup>

Thus, from a tort perspective, there is ample support to expand liability to wrongdoers who purposefully spread misinformation and, as a result, cause cognizable resulting harm to members of the public.<sup>225</sup> Congress and the courts should work to further the principle that a fraud on the public should be treated as a fraud like any other. Until this is done, misinfodemics like the COVID-19 pandemic and the opioid crisis will continue to proliferate.

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<sup>222</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 33 TD No. 3 (AM. L. INST. 2003).

<sup>223</sup> RESTATEMENT (THIRD) OF TORTS: INTEN. TORTS TO PERSONS § 110 TD No. 1 (AM L. INST. 2015) (quoting DAN B. DOBBS, THE LAW OF TORTS § 46 (2000)).

<sup>224</sup> *Id.*

<sup>225</sup> The related First Amendment issues, as stated earlier, will be addressed in later scholarship. *See* sources cited *supra* notes 41–45 & 48 and accompanying text.