

# Privacy and Propaganda

WES HENRICKSEN\*

## I. THE FEDERAL RIGHT TO PRIVACY PROVIDES CERTAIN PROTECTIONS AGAINST GOVERNMENT INTRUSION INTO PRIVATE LIFE, INCLUDING “DECISIONAL AUTONOMY”

The United States Constitution contains a litany of enumerated individual rights.<sup>1</sup> These include, for instance, the right to free speech, the right to be free from unreasonable searches, and the right to equal protection of the laws.<sup>2</sup> The right to privacy, however, is not among these enumerated rights.<sup>3</sup> Nowhere in the Constitution can the words “right to privacy,” or any variation on that phrase, be found.<sup>4</sup> Nevertheless, today it is beyond question that there is, indeed, a federal constitutional right to privacy.<sup>5</sup> This is based on the principle that “[t]he Supreme Court has . . . created a sphere of protectable interests, emanating from those rights explicitly set forth in the Bill of Rights, that are ‘implicit in the concept of ordered liberty,’ or are ‘so rooted in the traditions and conscience of our people as to be ranked fundamental.’”<sup>6</sup> These are rights that are not explicitly stated in the Constitution, but that are nevertheless interpreted by the Supreme Court as being grounded in the Constitution. One such right is the right to privacy,<sup>7</sup> which “appears early and often in Supreme Court jurisprudence.”<sup>8</sup>

As noted by Professor Eugene McCarthy, the right to privacy “arises in relation to issues across the spectrum of constitutional law: search and seizure, choosing what and where to teach children, the ability to marry whom we choose, the right to die, and, of course, our reproductive rights relating to sex, contraception, and abortion.”<sup>9</sup> Of course, the Supreme Court’s “centuries-long articulation of the right to privacy . . . culminate[d] in

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\* Associate Professor, Barry University Dwayne O. Andreas School of Law. Thank you to Dean Leticia Diaz and Barry University School of Law for their support for this article. Thank you to Adriana Almeida and Ana Romero for excellent research assistance.

<sup>1</sup> See, e.g., U.S. CONST. amends. I, IV, XIV (enumerating the individual rights of Freedom of Speech, Free Exercise of Religion, Freedom Against Unreasonable Searches and Seizures, Due Process, and Equal Protection).

<sup>2</sup> See *id.*

<sup>3</sup> See U.S. CONST. amends. I–IX (no right to privacy in the Bill of Rights); *Childers v. Dallas Police Dep’t*, 513 F. Supp. 134, 145 (N.D. Tex. 1981) (“The Constitution does not on its face enumerate a substantive right to privacy.”).

<sup>4</sup> U.S. CONST. amends. I–IX; *Childers*, 513 F. Supp. at 145.

<sup>5</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>6</sup> *Childers*, 513 F. Supp. at 145–46 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

<sup>7</sup> See *supra* note 5.

<sup>8</sup> Eugene McCarthy, *In Defense of Griswold v. Connecticut: Privacy, Originalism, and the Iceberg Theory of Omission*, 54 WILLAMETTE L. REV. 335, 338 (2018).

<sup>9</sup> *Id.* (internal footnotes omitted) (citing *Boyd v. United States*, 116 U.S. 616 (1886); *Katz v. United States*, 389 U.S. 347 (1967); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y Sisters*, 268 U.S. 510 (1925); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973)).

*Griswold v. Connecticut*, the case that officially—and controversially—established a constitutional right to privacy in 1965.”<sup>10</sup>

Writing for a 7–2 majority in *Griswold v. Connecticut*, Justice William O. Douglas asserted that a general right to privacy is present in the “penumbras,” or zones, created by the specific liberty interests enumerated in several amendments in the Bill of Rights, including the First, Third, Fourth, and Ninth Amendments.<sup>11</sup> Famously, Justice Douglas wrote:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers ‘in any house’ in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.<sup>12</sup>

Justice Douglas then emphasized that “[t]he Ninth Amendment provides: ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’”<sup>13</sup> This set the stage for recognizing unenumerated rights, including the right to privacy. The Court later added that, “[t]o some extent, the Fifth Amendment too ‘reflects the Constitution’s concern for . . .’ . . . the right of each individual ‘to a private enclave where he may lead a private life.’”<sup>14</sup>

The federal right to privacy covers and protects two distinct spheres of privacy interests: (1) “informational privacy” and (2) “decisional autonomy.”<sup>15</sup> Informational privacy includes the “individual interest in avoiding disclosure of personal matters.”<sup>16</sup> Decisional autonomy, in contrast, is “the interest in independence in making certain kinds of important decisions.”<sup>17</sup> This decisional autonomy protection has been extended to “basic decisions” “about family, parenthood, and bodily integrity.”<sup>18</sup> The U.S. Supreme Court has held that this decisional autonomy right protects the right of married and unmarried couples to access and use

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<sup>10</sup> McCarthy, *supra* note 8, at 338.

<sup>11</sup> *Griswold*, 381 U.S. at 483–84.

<sup>12</sup> *Id.* at 484.

<sup>13</sup> *Id.*

<sup>14</sup> *Whalen v. Roe*, 429 U.S. 589, 608 (1977).

<sup>15</sup> *Doe v. Att’y Gen. of the United States*, 941 F.2d 780, 795 (9th Cir. 1991) (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)) (informational privacy); *Carey v. Population Serv. Int’l*, 431 U.S. 678, 684 (1977) (decisional autonomy).

<sup>16</sup> *Doe*, 941 F.2d at 795.

<sup>17</sup> *Carey*, 431 U.S. at 678, 684 (1977).

<sup>18</sup> *State Constitutional Right to Privacy*, Cal. Prac. Guide Privacy Law Ch. 2-A (Westlaw) (citing *People of the State of Cal. v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996)).

contraceptives<sup>19</sup>; the right to engage in same-sex relationships and to enter into same-sex marriage<sup>20</sup>; and the right to be free from compelled intrusion into the body for blood, breathalyzer, and urine tests.<sup>21</sup> The decisional autonomy protection covered the right to choose to have an abortion from 1973 to 2022.<sup>22</sup>

More recently, in the *Dobbs v. Jackson Women’s Health*<sup>23</sup> decision, the Court overruled *Roe*<sup>24</sup> and *Casey*,<sup>25</sup> thereby holding that a woman’s right to choose whether to have an abortion is not protected by the right to privacy.<sup>26</sup> Or rather, within the decisional autonomy realm of the right to privacy, laws infringing on the right to choose to have an abortion are no longer subject to strict scrutiny, but rather are now subject to rational basis review.<sup>27</sup> What is unclear is whether rational basis review applies to other laws affecting “decisional autonomy” rights.<sup>28</sup> In the *Dobbs* decision, the majority noted that the *Roe* decision was, in the Court’s words, “remarkably loose in its treatment of the constitutional text.”<sup>29</sup> “It held,” the Court added, “that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned.”<sup>30</sup> As noted by others, “the *Dobbs* decision is somewhat inaccurate in its description of the legal issue at play in the case.”<sup>31</sup> The *Dobbs* majority’s cavalier attitude toward the right to privacy, which it emphasized “was also not mentioned” in the Constitution’s

<sup>19</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (married couples); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (unmarried couples).

<sup>20</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

<sup>21</sup> *Skinner v. Ry. Lab. Exec. Ass’n*, 489 U.S. 602, 616–17 (1989).

<sup>22</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>23</sup> *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

<sup>24</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>25</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>26</sup> *Dobbs*, at U.S. 231 (2022).

<sup>27</sup> In overruling *Roe*, the Court held there is no federal constitutional right to abortion. *Dobbs*, at U.S. 302 (2022). What *Dobbs* may mean for other “decisional autonomy” rights is unclear. The majority limited its decision to “the constitutional right to abortion and no other right,” and emphasized that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.” *Id.* at 290. As noted by the dissent, the majority’s rationale could apply to other rights. *Id.* at 2319 (Breyer, J., dissenting) (“The lone rationale for what the majority does today is that the right to elect an abortion is not ‘deeply rooted in history’ ... The same could be said, though, of most of the rights the majority claims it is not tampering with”). As if to underscore the point, Justice Thomas, in his concurring opinion, stated the Court has a “duty” to reconsider and overrule its “substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*” and a “duty to ‘correct the error’ established in those precedents.” *Id.* at 2301–02 (Thomas, J., concurring). *Dobbs* makes clear that laws “regulating abortion, like other health and welfare laws,” are subject to rational basis review. *Id.* at 301; see also *Raidoo v. Moylan*, 75 F.4th 1115, 1121 (9th Cir. 2023) (applying *Dobbs* and holding Guam’s abortion law requiring in person informed consent subject to rational basis review).

<sup>28</sup> *Dobbs*, 597 U.S. at 393 (Breyer, J., and Sotomayor & Kagan, JJ. dissenting); see also *L.W. v. Skrmetti*, 73 F.4th 408, 417 (6th Cir. 2023) (applying *Dobbs* and categorizing Tennessee law prohibiting gender-affirming surgeries and certain medical treatments for transgender minors as “health and welfare” legislation).

<sup>29</sup> *Dobbs*, 597 U.S. at 235.

<sup>30</sup> *Id.*

<sup>31</sup> Layne Huff, *The Ninth Amendment: An Underutilized Protection for Reproductive Choice*, 37 J.L. & HEALTH 105, 120 (2024).

text, “tends to imply that the right to privacy is of dubious origin rather than established by over a hundred years of Supreme Court jurisprudence.”<sup>32</sup>

What the *Dobbs* decision means for other “decisional autonomy” rights is not clear. The Court’s majority opinion limited its holding to “the constitutional right to abortion and no other right,” and it emphasized that “[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”<sup>33</sup> However, the dissent noted that the majority’s rationale could apply to other rights.<sup>34</sup> Moreover, in his concurring opinion, Justice Thomas asserted that the Court has a “duty” to reconsider and overrule its “substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*,” as well as a “duty to ‘correct the error’ established in those precedents.”<sup>35</sup>

Not surprisingly, *Dobbs* “has widely been taken to spell doom for the constitutional ‘right to privacy.’”<sup>36</sup> However, as noted by Professors Carmel Shachar and Carleen Zubrzycki, “there is another important—and underexplored—strand to the Supreme Court’s right-to-privacy jurisprudence, which *Dobbs* expressly left untouched: the right to informational, rather than decisional, privacy.”<sup>37</sup> The *Dobbs* majority opinion distinguished between “two very different meanings of the term [privacy]: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference.”<sup>38</sup> “The latter, the Court suggested, is at risk after *Dobbs* (and was eliminated in the abortion context), but the former remains viable.”<sup>39</sup> Thus, although the Court could have eliminated the right to privacy wholesale, it declined to do so. Instead, the majority distinguished two distinct species of privacy, and clarified that the abortion issue only implicates one.<sup>40</sup> As a result, as noted by Professors Shachar and Zubrzycki, it appears that at least informational privacy is still protected under the *Dobbs* ruling.<sup>41</sup> Of course, “[p]ost-*Dobbs*, the constitutional right to privacy in the United States is heavily reliant on the disposition of the Court.”<sup>42</sup> But the ultimate ramifications for dimensions of the federal right to privacy, particularly

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<sup>32</sup> *Id.* Notably, Professor Mary Anne Franks asserted that *Roe* was, from inception, “a fundamentally flawed decision” because it “made the mistake of framing the right against forced birth as a right of privacy instead of a right to bodily integrity;” Mary Anne Franks, *The Supreme Court as Death Panel: The Necropolitics of Bruen and Dobbs*, 98 N.Y.U. L. REV. 1881, 1897 (2023).

<sup>33</sup> *Dobbs*, 597 U.S. at 290.

<sup>34</sup> *Id.* at 362–63 (Breyer, J., dissenting) (“The lone rationale for what the majority does today is that the right to elect an abortion is not ‘deeply rooted in history’ ... The same could be said, though, of most of the rights the majority claims it is not tampering with.”).

<sup>35</sup> *Id.* at 332 (Thomas, J., concurring).

<sup>36</sup> Carmel Shachar & Carleen Zubrzycki, *Informational Privacy After Dobbs*, 75 ALA. L. REV. 1, 2 (2023).

<sup>37</sup> *Id.*

<sup>38</sup> *Dobbs*, 597 U.S. at 273.

<sup>39</sup> Shachar & Zubrzycki, *supra* note 36, at 2 (citing *Dobbs*, 597 U.S. at 273).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Note, *Human Rights Devolution: Integrating International Law into State Abortion Governance*, 137 HARV. L. REV. 2342, 2359 (2024).

those other than “informational privacy,” are difficult to nail down without further guidance from the Court, and are therefore being hotly debated.<sup>43</sup>

## II. FLORIDA’S RIGHT TO PRIVACY PROVIDES STRONGER PROTECTIONS THAN ITS FEDERAL COUNTERPART

### A. States, including Florida, have an express constitutional right to privacy

Although the federal Constitution does not provide for an explicit “right to privacy,”<sup>44</sup> and indeed does not even refer to “privacy” anywhere in the whole of the document,<sup>45</sup> eleven states have explicitly included a right to privacy in their respective state constitutions.<sup>46</sup> Many of these states have explicitly provided for a right to privacy stronger and more broadly-applicable than is available under the federal constitution.<sup>47</sup> Under applicable federalism principles, states are empowered to do this. As one court clarified, “[s]tates may place more rigorous restraints on governmental intrusions than those imposed by Federal Constitution, and in any given state, Federal Constitution represents floor for basic freedoms, and State Constitution the ceiling.”<sup>48</sup>

States that have passed their own constitutional right to privacy provisions include Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, Washington, and New Hampshire.<sup>49</sup> For example, Art. I, Section 1 of California’s state constitution provides, “All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining . . . privacy.”<sup>50</sup> Likewise, Montana’s constitution, in Article II, Section 10, provides, “The right of

<sup>43</sup> See, e.g., Jacob Wenner, *Without Due Process of Law: The Dobbs Decision and Its Cataclysmic Impact on the Substantive Due Process and Privacy Rights of Ohio Women*, 37 J.L. & HEALTH 187 (2024); Mikayla Domingo, *One Nation, Under Dobbs: How Dobbs v. Jackson Women’s Health Impacts Data Privacy for All*, 15 U. CHI. L. SCI. & TECH. J. 35 (2024); Monika Jordan, *The Post-Dobbs World: How the Implementation of Fetal Personhood Laws Will Affect In Vitro Fertilization*, 57 UIC. CHI. L. REV. 249 (2024); Rebecca Feinberg, *The Future of IVF Post Dobbs*, 37 J.L. & HEALTH 35 (2023).

<sup>44</sup> See *supra* note 3.

<sup>45</sup> See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 34 (Rachel E. Barkow, Erwin Chemerinsky, Richard A. Epstein, Ronald J. Gilson, James E. Krier, Tracy L. Meares, Richard K. Neumann, Jr., Robert H. Sitkoff, David Alan Sklansky eds., 8th ed. 2024) (noting that “the United States Constitution does not specifically mention privacy.”).

<sup>46</sup> Joanna Gardner, *Refusing to Hew to the Federal Floor—Florida Supreme Court Finds Mandatory Waiting Period Prior to Abortion Unconstitutional. Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017), 71 RUTGERS U.L. REV. 1277, 1282 n.24 (2019).

<sup>47</sup> See *infra* notes 49-54.

<sup>48</sup> Singletary v. Costello, 665 So.2d 1099, 1103 (Fla. Dist. Ct. App. 1996).

<sup>49</sup> See ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, §§ 6–7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7; N.H. CONST. art. 2-b (as of December 2018). See also *Privacy Protections in State Constitutions*, NAT’L CONF. OF STATE LEG. (last visited Nov. 7, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx>; Ken Gormley & Rhonda G. Hartman, *Privacy and the States*, 65 TEMP. L. REV. 1279, 1282 (1992) (“Five states—California, Alaska, Montana, Hawaii, and Florida—added fundamental personal decision privacy language to their constitutions between the years of 1972 and 1980, directly in response to the national mood swing following *Griswold* [v. Connecticut] and *Roe* [v. Wade].” (footnotes omitted)); *N. Fla. Women’s Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 619, 674 n.6 (Fla. 2003) (collecting cases where the right to privacy has been “implicated in a wide range of matters dealing with personal privacy”); Gardner, *supra* note 46.

<sup>50</sup> CAL. CONST. art. I, § 1.

individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”<sup>51</sup>

Each state crafts its own particular wording for its own right to privacy. Some additional examples of state right to privacy constitutional provisions. Arizona’s constitution provides, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>52</sup> Louisiana’s constitution provides, “Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.”<sup>53</sup> And Alaska’s constitution provides, “The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.”<sup>54</sup> Accordingly, some state right to privacy clauses tie the right more closely to the right against unreasonable searches and seizures, such as Louisiana’s right to privacy,<sup>55</sup> while others take a broader approach, creating a right to privacy that encompasses a wider range of conduct and circumstances, such as the right to privacy under Arizona’s and Alaska’s state constitutions.<sup>56</sup>

Florida’s constitutional right to privacy, which will be a principal focus of the analysis and argument made in this article, is contained in Article I, Section 23. That section provides, “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”<sup>57</sup> The first sentence of the section sets out the state’s right to privacy. It, like the privacy right contained in other state constitutions, encompasses a greater breadth of privacy interests, and covers more protection to individuals in those interests, than the federal Constitution.<sup>58</sup> That is, it is broader in scope than the protection provided in the United States Constitution.<sup>59</sup>

Florida’s right to privacy encompasses at least two different categories of interest. The first is “the individual interest in avoiding disclosure of personal matters,” while the second is “the interest in independence in making certain kinds of important decisions.”<sup>60</sup> Like other constitutional rights, Florida’s right to privacy is not absolute. Under it, the

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<sup>51</sup> MONT. CONST. art. II, § 10.

<sup>52</sup> ARIZ. CONST. art. II, § 8.

<sup>53</sup> LA. CONST. art. I, § 5.

<sup>54</sup> ALASKA CONST. art. I, § 22.

<sup>55</sup> See LA. CONST. art. I, § 5.

<sup>56</sup> See ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8.

<sup>57</sup> FLA. CONST. art. I, § 23.

<sup>58</sup> See *Vazzo v. City of Tampa*, 415 F. Supp. 3d 1087 (M.D. Fla. 2019).

<sup>59</sup> See *id.*

<sup>60</sup> *G.P. v. State*, 842 So. 2d 1059, 1062 (Fla. Dist. Ct. App. 2003).

government may intrude on a person's right to privacy, including their "right to be let alone and free from governmental intrusion into the person's private life," if the government has a compelling interest for doing so.<sup>61</sup> To decide whether the right to privacy has been impacted, the individual's subjective expectation and the values of privacy that our society aims to promote are considered.<sup>62</sup>

*B. Florida's right to privacy protects against government intrusion into private life and individual autonomy*

According to the Florida Supreme Court, since the people of the state "enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution."<sup>63</sup> This enumerated individual right<sup>64</sup> was approved by Florida voters and added to the state constitution in 1980.<sup>65</sup> It provides, in relevant part: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."<sup>66</sup> This privacy clause contains no express standard of review for evaluating government intrusions into a person's private life.<sup>67</sup> But the state supreme court subsequently adopted the same strict scrutiny standard that applies to violations of federal fundamental rights, including the federal right to privacy; accordingly, an intrusion into a person's private life, in violation of Florida's privacy right, will be struck down as unconstitutional unless the government can show the law or government action was narrowly tailored to achieve a compelling government purpose.<sup>68</sup>

"The Florida Supreme Court has adopted a test to assess the claim of an article I, section 23 privacy violation."<sup>69</sup> "First, courts must determine whether the individual possesses a legitimate expectation of privacy in the information or subject at issue."<sup>70</sup> "If so, the burden shifts to the State to show (a) that there is a compelling state interest warranting the intrusion into the individual's privacy and (b) that the intrusion is accomplished by the least intrusive means."<sup>71</sup> By way of example, two cities' juvenile curfew ordinances were challenged as violating the article I, section 23 right to privacy. There, the court held the ordinances were not narrowly tailored to achieve a compelling governmental purposes of protecting

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<sup>61</sup> See *Thomas v. Smith*, 882 So. 2d 1037, 1044 (Fla. Dist. Ct. App. 2004) (quoting Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 74 (1983)).

<sup>62</sup> See *id.*

<sup>63</sup> *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul.*, 477 So. 2d 544, 548 (Fla. 1985).

<sup>64</sup> See *Adelman v. Boy Scouts of America*, 276 F.R.D. 681, 694 (S.D.Fla. 2011).

<sup>65</sup> FLA. CONST. art. I, § 23.

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

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

<sup>68</sup> *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985).

<sup>69</sup> *State v. Tamulonis*, 39 So. 3d 524, 528 (Fla. Dist. Ct. App. 2010).

<sup>70</sup> *Id.* (citing *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul.*, 477 So. 2d 544, 547 (Fla. 1985)).

<sup>71</sup> *Id.* (citing *Winfield v. Div. of Pari-Mutuel Wagering, Dep't of Bus. Regul.*, 477 So. 2d 544, 547 (Fla. 1985)).

juveniles from crime and reducing juvenile criminal acts.<sup>72</sup> The ordinances violated the juveniles' constitutional right to privacy (and right to freedom of movement).<sup>73</sup> The court reached this conclusion based on four findings. First, statistical data failed to establish the necessary nexus between governmental interest and classification created by one city's ordinance.<sup>74</sup> Second, broad city-wide coverage of both cities' curfews included otherwise innocent and legal conduct by minors, even where they had permission of their parents. Third, curfew the cities' ordinances imposed criminal penalties on juveniles and parents for second and subsequent curfew violations.<sup>75</sup> And finally, one city's ordinance imposed criminal penalties on business operators knowingly permitting juveniles on their premises during curfew hours.<sup>76</sup>

Because Florida's privacy right is explicitly enumerated in its constitution, it should be unsurprising that "[w]hile both the state and federal constitutions protect individuals from arbitrary and unreasonable governmental interference with a person's right to life, liberty, and property, the state constitution embraces more privacy interests, and extends more protection to those interests than its federal counterpart."<sup>77</sup> Florida's Article I, Section 23 does this by "by declaring that an individual in the state has the right to be let alone and free from governmental intrusion into the person's private life."<sup>78</sup> In adopting this explicit constitutional right, "Floridians opted for more protection from governmental intrusion than was afforded under the federal constitution."<sup>79</sup> Accordingly, "[t]he state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart."<sup>80</sup>

Florida is permitted to expand privacy protections to its citizens above and beyond those available under the federal constitution. As explained by the Florida Supreme Court, "in any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling."<sup>81</sup> What this means in practical terms is that while "states may not limit personal freedoms beyond that which the federal constitution permits," "it is a clear tenet under our system of government that . . . states *may* place more rigorous restraints on government intrusion than required

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<sup>72</sup> State v. J.P., 907 So. 2d 1101 (Fla. 2004).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1119.

<sup>75</sup> *Id.* at 1106–07.

<sup>76</sup> *Id.* at 1118.

<sup>77</sup> 10A Fla. Jur. 2d Constitutional Law § 361 (citing D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013)); Vazzo v. City of Tampa, 415 F. Supp. 3d 1087 (M.D. Fla. 2019); Green v. Alachua County, 323 So. 3d 246 (Fla. 1st DCA 2021); Wakeman v. Dixon, 921 So. 2d 669 (Fla. 1st DCA 2006); Board of County Comm'rs of Palm Beach County v. D.B., 784 So. 2d 585 (Fla. 4th DCA 2001); State v. J.P., 907 So. 2d 1101 (Fla. 2004); Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998).

<sup>78</sup> 10A Fla. Jur. 2d Constitutional Law § 361 (citing D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013)); *see also* FLA. CONST. art. I, § 23.

<sup>79</sup> Wakeman v. Dixon, 921 So. 2d 669, 671–72 (Fla. Dist. Ct. App. 2006) (internal quotation marks omitted).

<sup>80</sup> Von Eiff v. Azicri, 720 So. 2d 510, 514 (Fla. 1998).

<sup>81</sup> Singletary v. Costello, 665 So. 2d 1099, 1103 (Fla. Dist. Ct. App. 1996) (quoting Traylor v. State, 596 So.2d 957, 962 (Fla. 1992)).

by the federal constitution, statutes, or case law.”<sup>82</sup> Like the federal right of privacy, Florida’s right is an individual one.<sup>83</sup> It “was not intended to provide absolute guarantee against all governmental intrusion into private life of individual.”<sup>84</sup> But it “includes a fundamental right to the sole control of one’s person, which covers an individual’s control over or the autonomy of the intimacies of personal identity and a physical and psychological zone within which an individual has the right to be free from intrusion or coercion, whether by government or by society at large.”<sup>85</sup> Moreover, Florida’s “constitutional right of privacy ensures that individuals are able to determine for themselves when, how, and to what extent information about them is communicated to others.”<sup>86</sup> It also “encompasses a person’s right to the sole control of his or her person and the right to determine what shall be done with his own body”<sup>87</sup>—though this component of the right was later curtailed in *Planned Parenthood of Southwest and Central Florida*<sup>88</sup>—as well as “family privacy.”<sup>89</sup> Just how far Florida’s privacy protections extend has not been fully clarified or articulated by Florida courts. But it is clear from the guidance available that the protections are, in some areas, broad in scope, while in others they are clearly no more expansive than the rights under the federal right of privacy.

The right to family privacy is one area where Florida’s privacy protection is broader than its federal counterpart. The federal privacy right, of course, protects certain “fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children.”<sup>90</sup> Moreover, “[p]reserving the family and raising one’s children is also a constitutionally protected interest under [Florida] state law.”<sup>91</sup> Unlike the federal privacy right, however, “[t]he privacy provision of the Florida Constitution includes specific protection against state interference, either via the judicial system or legislation, in parents’ fundamental right to raise their children, except in those cases where the child is threatened with harm.”<sup>92</sup> Of course, while Florida’s constitution does, indeed, “protect the right of parents to raise their children free from unwarranted governmental interference, that state right is subordinate to the directives of the Federal Constitution under the Supremacy Clause.”<sup>93</sup>

The right to abortion, by contrast, stands as an example of a component of the right to privacy where Florida’s protections appear no broader than those under the federal Constitution. Although the supreme

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<sup>82</sup> *State v. Washington*, 114 So. 3d 182, 186 (Fla. Dist. Ct. App. 2012) (emphasis added).

<sup>83</sup> See *Adelman*, 276 F.R.D. at 694.

<sup>84</sup> Florida Bd. of Bar Exam’r Re: Applicant, 443 So.2d at 74.

<sup>85</sup> *Green v. Alachua Cnty.*, 323 So. 3d 246, 253 (Fla. Dist. Ct. App. 2021).

<sup>86</sup> *Weaver v. Myers*, 229 So. 3d 1118, 1126 (2017).

<sup>87</sup> *Burton v. State*, 49 So. 3d 263, 265 (2010) (quotation marks omitted).

<sup>88</sup> *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 87–88 (Fla. 2024).

<sup>89</sup> *Tallahassee Mem’l Reg’l Med. Ctr., Inc. v. Petersen*, 920 So. 2d 75, 80 (Fla. 2006).

<sup>90</sup> 10A Fla. Jur. 2d Constitutional Law § 364.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (footnotes omitted) (citing *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013); *Kazmierczak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998); *P.B. v. Fla. Dep’t. of Child. and Fams.*, 335 So. 3d 804 (Fla. Dist. Ct. App. 2022); *Forbes v. Chapin*, 917 So. 2d 948 (Fla. Dist. Ct. App. 2005); *D.M.T. v. T.M.H.*, 129 So. 3d 320 (Fla. 2013).

<sup>93</sup> 10A Fla. Jur. 2d Constitutional Law § 364.

court of Florida held that the state right to privacy under article I, section 23 protected the right to choose to have an abortion prior to the Supreme Court's 2022 *Dobbs* decision,<sup>94</sup> that protection evaporated along with the federal right under the *Dobbs* decision. To show just how radical of a curtailing of privacy rights this was, it requires a glimpse of the Florida Supreme Court's championing of the right to choose to have an abortion prior to *Dobbs*. In *In re T.W.*, for instance, the Florida Supreme Court asserted unambiguously that "Florida's privacy provision is clearly implicated in a woman's decision of whether or not to continue her pregnancy."<sup>95</sup> "We can conceive of few more personal or private decisions," the court continued, "concerning one's body that one can make in the course of a lifetime, except perhaps the decision of the terminally ill in their choice of whether to discontinue necessary medical treatment."<sup>96</sup> The court then quoted Professor Laurence Tribe:

Of all decisions a person makes about his or her body, the most profound and intimate relate to two sets of ultimate questions: first, whether, when, and how one's body is to become the vehicle for another human being's creation; second, when and how—this time there is no question of "whether"—one's body is to terminate its organic life.<sup>97</sup>

The Florida Supreme Court was not done. It went on to clarify that "[t]he decision whether to obtain an abortion is fraught with specific physical, psychological, and economic implications of a uniquely personal nature for each woman."<sup>98</sup> The court then, citing the Supreme Court, added that "[t]he Florida Constitution embodies the principle that '[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision ... whether to end her pregnancy. A woman's right to make that choice freely is fundamental.'"<sup>99</sup>

Then, *Dobbs* happened. Shortly thereafter, in 2024, the Florida Supreme Court overturned its 1989 decision that the state's Constitution protected the right to abortion.<sup>100</sup> The court ruled that the Constitution's "right to be let alone" under article I, section 23 does not cover abortion.<sup>101</sup> To reach this conclusion, the Florida Supreme Court analyzed newspapers, dictionaries, and other sources from the era when the privacy amendment was adopted, 1980.<sup>102</sup> The court concluded that the amendment was not intended or thought to cover abortion.<sup>103</sup> Accordingly, the state legislature

<sup>94</sup> *In re T.W.*, 551 So. 2d 1186, 1187 (Fla. 1989).

<sup>95</sup> *Id.* at 1192.

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

<sup>97</sup> *Id.* (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1337–38 (2d ed. 1988)).

<sup>98</sup> *In re T.W.*, 551 So. 2d 1187, 1193 (Fla. 1989) (citing *Roe*, 410 U.S. at 153).

<sup>99</sup> *Id.* (quoting *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

<sup>100</sup> *Planned Parenthood of Sw. & Cent. Fla.*, *supra* note 88 at 67.

<sup>101</sup> *Id.* at 71.

<sup>102</sup> *Id.* at 86–88.

<sup>103</sup> *Id.* at 87–88.

had the authority to regulation abortion, which it did with a 15-week abortion ban.<sup>104</sup> Subsequently, on May 1, 2024, Florida's six-week abortion ban went into effect.<sup>105</sup> This ban has few exceptions, such as rape and incest, and doctors who perform abortions face severe penalties, including imprisonment and loss of medical licenses.<sup>106</sup> The voters of Florida had an opportunity to enshrine a constitutional right to choose to have an abortion when they voted on Amendment 4 in November 2024.<sup>107</sup> However, the amendment did not obtain the 60 percent needed to pass, receiving only 57 percent of the vote.<sup>108</sup>

On balance, then, it appears clear from the Florida jurisprudence on this issue that although the state's Constitution (1) contains an explicit right to privacy in article I, section 23, which the Federal Constitution lacks, and (2) that explicit right to privacy contains language that could be more expansively interpreted, it has not, to date, generally been so expansively interpreted. Rather, it is construed slightly more broadly in some contexts, such as with regard to the right to raise one's own children,<sup>109</sup> and no more broadly at all in others, such as with regard to the right to choose to have an abortion.<sup>110</sup> Accordingly, although the existence and express terms of Florida's constitutional right to privacy set it apart from its federal counterpart, its precise contours and scope are apparently not necessarily settled and clear. However, given the existence and express terms of article I, section 23,<sup>111</sup> there exists room to argue for a somewhat more expansive scope of the right of privacy in Florida, and this article is exploring one such potential zone of coverage. That is, given that the section, by its terms, guarantees "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life,"<sup>112</sup> this necessarily implicates the need to define what the freedom encompasses. Does "the right to be let alone and free from governmental intrusion" include some protections against coercive or manipulative state-sponsored messages? Might it protect state residents from intentional false messages communicated by the government for the purpose of deceiving, or even harming, them? The answer to these questions might well be, ultimately, in the negative. But even if it is, that does not obviate the need to at least explore these questions to determine what protections are encompassed by article I, section 23, and just what safeguards, if any, it might provide against government propaganda, defined as "the

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<sup>104</sup> *Id.* at 87.

<sup>105</sup> Jennifer D. Oliva, *Expecting Medication Surveillance*, 93 FORDHAM L. REV. 509, 521 (2024).

<sup>106</sup> FLA. STAT. § 390.0111 (2024); Elizabeth S. Scott, *Comment on Part 4 Essays: Goodwin and Dailey and Rosenbury*, 91 U. CHI. L. REV. 633, 637–38 n.34 (2024).

<sup>107</sup> Brandon Girod, *Florida's Amendment 4 on Abortion Failed with 57% of Votes. What Happened?*, PENSACOLA NEWS JOURNAL (Nov. 6, 2024, 11:14 AM), <https://www.pnj.com/story/news/politics/elections/2024/11/06/florida-amendment-4-failed-despite-support-what-happened/76090647007/>.

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

<sup>109</sup> 10A Fla. Jur. 2d Constitutional Law § 364.

<sup>110</sup> *Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 87 (Fla. 2024).

<sup>111</sup> FLA. CONST. art. I, § 23.

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

government’s knowing or reckless propagation of verifiably false or misleading statements of fact on matters of public concern.”<sup>113</sup>

### III. PROPAGANDA INVADES PEOPLE’S AUTONOMOUS THOUGHTS, BELIEFS, AND DECISIONS

If an express constitutional safeguard against “government intrusion into [a] person’s private life” is to be taken to mean what it says, it must be interpreted to protect against state interference with an individual’s “private” behaviors and choices, which are in many ways the core essence of one’s private life.<sup>114</sup> “Private life,” after all, encompasses a great swath of our own individual existence that we consider to be of our own domain and not open to the public.<sup>115</sup> Just how broad is the term “private life”? So broad, in fact, that some assert it is “neither possible nor necessary” to precisely define it.<sup>116</sup> To give an idea of its scope, however, let us look at one attempt at a definition:

*Private life* means the personal and family life of a person, his living environment consisting of a person’s dwelling with its private territory and other private premises which the natural person uses for his economic, commercial or professional activities as well as the mental and physical inviolability of the natural person, his honour and reputation, secret personal facts, the natural person’s photographs or other images, his personal health information, private correspondence or other communications, personal views, convictions, habits and other data which may be used only with his consent.<sup>117</sup>

That is, it encompasses what the two words that make up the term plainly mean—the first component being “life,” which involves an individual’s existence and everything that includes, and the second component being “private,” which separates out those parts of a person’s existence that can be considered public and which are held out to and shared with the wider world.<sup>118</sup> Of course, the term “private life” is “a very broad and by no means exhaustive notion.”<sup>119</sup> As a result, “[d]octrine and jurisprudence generate from time to time and case by case new elements that can be included in the private life of [individuals] and this fact makes

<sup>113</sup> Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 818 (2020) (This article adopts Professor Corbin’s definition of the term “government propaganda,” set out in her article, *The Unconstitutionality of Government Propaganda*. *Id.* at 818, 826–37).

<sup>114</sup> Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 204 (1983) (quoting FRANKLYN S. HAMAN, *SPEECH AND LAW IN A FREE SOCIETY* 6–7 (1981)).

<sup>115</sup> *Private Life Definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/private-life> (last visited Jan. 26, 2025).

<sup>116</sup> Sohail Aftab, *Reconciling the Freedom of Expression with the Right to Privacy: Protecting Private Life from Media Invasions Under the ECHR*, 109 IUS GENTIUM 127, 142 (2024).

<sup>117</sup> *Private Life Definition*, *supra* note 115.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

the work of the judicial system very difficult in guaranteeing and respecting this right and identifying violations presumed in this respect.”<sup>120</sup>

The aspects of one’s life that one expects to be private, as opposed to public, and has a *right* to keep private, must include, at a minimum, that person’s own thoughts, views, beliefs, and ideas.<sup>121</sup> That is, “respect for autonomy is a principle in which there is an acknowledgement that individuals have the ‘right to hold views, make choices, and to take actions based on personal values and beliefs.’”<sup>122</sup> “In addition to being a moral right of autonomous individuals—broadly construed as individuals who are capable of making their own decisions—the ability of autonomous individuals to hold views, make decisions, and act on their personal values and beliefs is a constitutionally-protected right.”<sup>123</sup>

This sphere of one’s private life, “the ability of autonomous individuals to hold views, make decisions, and act on their personal values and beliefs,”<sup>124</sup> is, of course, primarily protected by the First Amendment’s free speech and free exercise clauses,<sup>125</sup> but under article 1, section 23, it either is, or should be, protected under the right of privacy as well. As noted by Professor William M. Brooks, “the foundation of our status as free and rational beings rests on an ability to reach conclusions about what is good and then act on these beliefs.”<sup>126</sup> Naturally, then, an express constitutional right that protects against “governmental intrusion into the person’s private life” clearly should protect against government efforts to invade a person’s most private autonomous zone—the inside of their mind, where they hold their most private beliefs, and where they make their own personal decisions.<sup>127</sup> This is the very intrusion aimed at by propaganda in

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<sup>120</sup> *Id.*

<sup>121</sup> See Thomas D. Harter, *Is There a Moral Obligation for Health Care Organizations to Develop Robust Advance Care Planning Programs?*, 10 ST. LOUIS U. J. HEALTH L. & POL’Y 45, 58–59 (2016) (discussing how, through the autonomy principle, “individuals have the right to hold views, make choices, and to take actions based on personal values and beliefs,” and this right is constitutionally protected (internal quotation marks omitted)).

<sup>122</sup> *Id.* at 58.

<sup>123</sup> *Id.* at 58–59 (footnote omitted) (quoting TOM. L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMED. ETHICS* 103, 58 (5th ed. 2001)).

<sup>124</sup> *Id.* at 58.

<sup>125</sup> U.S. CONST. amend. I; William M. Brooks, *Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials*, 53 U. MEM. L. REV. 255, 285 (2022) (“The autonomy theory of the First Amendment rests on a belief that “[i]ndividuals, within the limits of their intellectual and emotional development, their physical environment, and the restraints which may be imposed on them by other persons, are capable of free choice and are responsible for the behavior which they choose. The philosophy of free speech presumes the existence of the freedom to accept or reject the alternatives which are offered.” (quoting Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199, 204 (1983)); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977) (Supreme Court has asserted that “at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one’s beliefs should be shaped by his mind and his conscience rather than coerced by the State.”); William M. Brooks, *Democracy on the Edge: Use the First Amendment to Stop False Speech by Government Officials*, 53 U. MEM. L. REV. 255, 285 (2022) (“Justice Robert Jackson elaborated on the meaning of the concept of autonomy when he said ‘[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field, every person must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us’” (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))).

<sup>126</sup> Brooks, *supra* note 125.

<sup>127</sup> FLA. CONST. art. I, § 23; Harter, *supra* note 121.

general, and government propaganda in particular. And where propaganda seeks to deceive or mislead—that is, where the propaganda’s message is intentionally false or misleading—it amounts to nothing more than a self-serving lie disseminated to a mass captive audience.

*A. Lies intrude into the private life and individual autonomy of the one lied to*

Every lie consists of “a statement by one who does not believe it but intends to make someone else believe it.”<sup>128</sup> Thus, it “has three parts: (1) a message (2) communicated to another by a speaker who does not believe the message to be true but (3) intends to cause listeners to believe it to be true.” In telling a lie, the speaker deprives the listener of their ability to self-govern in their own decision-making process.<sup>129</sup> This makes lying very effective—thus, in contexts where lying is permitted or goes unpunished, this confers a benefit and advantage on those willing to use dishonesty to further their own agenda.<sup>130</sup> “This follows from the notion that a lie distorts the reasoning process of the victim, interfering with her rational deliberation; the lie robs one of her ability to make rational choices concerning her beliefs and course of conduct—it is an assault on her integrity as an individual.”<sup>131</sup> As noted by Professor Gregory Klass, “[w]e are social creatures who cannot help but rely on information we receive from others to navigate the world around us.”<sup>132</sup> Thus, “[d]eception thus strikes at the heart of the faculty of reason, and so it is especially difficult to guard against.”<sup>133</sup>

Just how difficult it is to guard against deception has only recently come to light with social science research by Kim B. Serota, Timothy R. Levine, and Franklin J. Boster, and others.<sup>134</sup> In fact, the findings in Levine’s book *Duped* make clear it may well be impossible, as an individual, to effectively guard against being deceived.<sup>135</sup> In the book, Levine examined four decades of deception detection research, including

<sup>128</sup> WES HENRICKSEN, IN FRAUD WE TRUST: HOW LEADERS IN POLITICS, BUSINESS, AND MEDIA PROFIT FROM LIES-AND HOW TO STOP THEM 21 (2024); see also Arnold Isenberg, *Deontology and the Ethics of Lying*, 24 PHIL. AND PHENOMENOLOGICAL RSCH 463, 466 (1964); CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 22 (2021).

<sup>129</sup> See, e.g., Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73, 75 (2015) (noting that some “government lies . . . deprive their targets of the ability meaningfully to exercise voting, reproductive, or other protected rights”).

<sup>130</sup> See Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 707, 714–15 (2018).

<sup>131</sup> Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 535 (2011); see also Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529, 1546 (1998) (noting that “a lie interferes with its victim’s rational deliberation [and] . . . robs a person of her prospects for making certain rational choices about what to do or what to believe”).

<sup>132</sup> Klass, *supra* note 130 at 715.

<sup>133</sup> *Id.*

<sup>134</sup> See generally TIMOTHY LEVINE, *DUPED: TRUTH-DEFAULT THEORY AND THE SOCIAL SCIENCE OF LYING AND DECEPTION* (Univ. of Ala. Press 2020); Kim B. Serota and Timothy R. Levine, *A Few Prolific Liars: Variation in the Prevalence of Lying*, 34 J. OF LANG. AND SOC. PSYCH. 138, 138–57 (2014); Kim B. Serota, Timothy R. Levine, & Franklin J. Boster, *The Prevalence of Lying in America: Three Studies of Self-Reported Lies*, 36 HUM. COMMUN RSCH. 2, 2–25 (2010).

<sup>135</sup> See generally LEVINE, *supra* note 134.

hundreds of individual studies, to look at how well individuals detect lies.<sup>136</sup> In the aggregate, across these hundreds of studies, test subjects were able to detect lies about 54 percent of the time.<sup>137</sup> This number held steady regardless of whether the lie was read, seen, or heard.<sup>138</sup> It was also constant across cultures, languages, and geographic regions.<sup>139</sup> According to these studies, then, people’s lie detection ability—regardless of age, education, or IQ—is only slightly higher than random chance.<sup>140</sup> This means flipping a coin to determine if someone is lying is nearly as effective a method of deception detection as human perception, skill, and intuition.<sup>141</sup> Because we are so powerless against lies, at least when it comes to our own natural abilities, people deceived by those manipulating them for their own self-serving purposes are victimized in ways we have historically not fully appreciated. After all, we create our picture of the world, and of ourselves, almost entirely by way of information we read, see, and hear, which we believe to be true, but which we cannot with certainty determine accuracy or truthfulness.<sup>142</sup>

This is our only manner of perceiving the world and ourselves; “[o]ur minds continually consume, produce, and attempt to integrate ideas about ourselves and the world that purport to be true.”<sup>143</sup> But of course, much of what we “learn” from things we read, see, and hear—from the news, from social media, and from family, friends, and colleagues—is untrue. “Learning” false information makes one less informed than they were before “learning” it.<sup>144</sup> But because people possess no natural ability to detect falsehoods—written, verbal, or otherwise—they have no consistently reliable way of knowing whether what they read, see, or hear is real or fake, whether the person communicating the message is telling the truth or lying, or whether the communicator is even a person at all.<sup>145</sup> Discovering objective truth is something the scientific method is well-equipped to accomplish,<sup>146</sup> but that we are not.<sup>147</sup> We do not form our own beliefs on objectively verifiable facts, but on “a variety of subjective,

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<sup>136</sup> *Id.* at 10.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Levin, supra note 134.*

<sup>141</sup> *Id.*; see also HENRICKSEN, *supra* note 128, at 27.

<sup>142</sup> LEVINE, *supra* note 134, at 3–15.

<sup>143</sup> SAM HARRIS, *THE MORAL LANDSCAPE*, 14 (Free Press, 2010).

<sup>144</sup> See LEVINE, *supra* note 134, at ix–xii, 3–14 (2020) (noting, inter alia, “We all are perceptually blind to deception. We are hardwired to be duped.”).

<sup>145</sup> See *id.* at 3–14, 17–26.

<sup>146</sup> See Steven R. Salbu, *Off-Label Use, Prescription, and Marketing of FDA-Approved Drugs: An Assessment Legis. and Regul. Pol’y*, 51 FLA. L. REV. 181, 197 (1999) (referring to the scientific method as one “in which ‘[t]he objective data determine what is to be accepted as scientific truth’”) (quoting Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 73 (1994)).

<sup>147</sup> See Michael Curtis, *Introduction to* WALTER LIPPMANN, *PUBLIC OPINION* xvi (Transaction 1991) (1922) (noting, “[t]he real external environment is too big, too complex and too fleeting for direct acquaintance by citizens” and “[t]he key problem . . . [is] people take as facts not what is, but what they perceive to be facts”). WALTER LIPPMANN, *PUBLIC OPINION* 3–5 (1922) (telling about an isolated island where, at the start of the first World War, English, French, and Germans lived together in harmony until six weeks into the war, when they learned they had, for six weeks, been mortal enemies, and noting that “whatever we believe to be a true picture, we treat as if it were the environment itself.”).

personal, emotional, and psychological” factors.<sup>148</sup> And someone who tells a lie exploits this fundamental aspect of human nature.

Against this backdrop, it is clear that those who communicate a lie undermine the autonomy of the individuals lied to.<sup>149</sup> That is, “lies that are told for the purpose of influencing behavior . . . involve a denial of autonomy in the sense that they interfere with a person’s control over her own reasoning process.”<sup>150</sup> It does this in a very simple way. Communicating an intentionally false message with the aim of convincing the listener it is true “hinders autonomy by giving listeners false belief as to the world around them and the actual choices available to them.”<sup>151</sup> This, according to Professor Courtney Cox, makes lying “a direct violation of autonomy.”<sup>152</sup> This is not a new idea. Immanuel Kant explained in 1785 that “lies are morally wrong when speakers undermine listener autonomy by seeking to use their listeners as a means to the speakers’ own ends, rather than treating listeners as ends in themselves.”<sup>153</sup>

According to Kant, then, because lies are calculated to deceive the listener, they are immoral.<sup>154</sup> That is, they are immoral because their purpose is to deceive, to manipulate.<sup>155</sup> A lie, then, is a manner of using the listener for the speaker’s own self-serving purposes. “One can never assent to lying: either one does not know of the lie (e.g., a false promise to repay) and so cannot assent, or else does know, and so assents to what the liar seeks . . .”<sup>156</sup> Autonomous individuals are free to believe or disbelieve what they choose, and in this context, such free and autonomous individuals will sometimes make bad choices.<sup>157</sup> “But a choice based on misinformation is not fully autonomous, especially if the misinformation was provided by someone attempting to influence the recipient’s behavior.”<sup>158</sup> This is the nonautonomous choice bad faith propaganda forces onto individuals. It introduces false or misleading claims into the minds of listeners, obscuring the truth and manipulating people into making choices and engaging in behaviors that (1) are based on false beliefs purposefully imposed on them, and (2) to the benefit of those who disseminated the propaganda.

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<sup>148</sup> MICHAEL SHERMER, *THE BELIEVING BRAIN: HOW WE CONSTRUCT BELIEFS AND REINFORCE THEM AS TRUTHS* 6 (2011). See also Timothy R. Levine, *Truth-Default Theory (TDT): A Theory of Human Deception and Deception Detection*, 33 *J. LANG. SOC. PSYCH.* 378, 378–92 (2014) (introducing Truth-Default Theory, which holds people default to truth when receiving new information, and do so for evolutionary adaptive purposes.)

<sup>149</sup> Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Const. Meaning of Graphic Disclosure*, 99 *CORNELL L. REV.* 513, 526 (2014).

<sup>150</sup> David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334, 354 (1991).

<sup>151</sup> GOODMAN, *supra* note 149, at 526.

<sup>152</sup> Courtney M. Cox, *Legitimizing Lies*, 90 *GEO. WASH. L. REV.* 297, 354 (2022).

<sup>153</sup> Helen Norton, *Powerful Speakers and Their Listeners*, 90 *U. COLO. L. REV.* 441, 443 (2019) (citing IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 63–65 (James W. Ellington trans., 3d ed. 1993) (1785)).

<sup>154</sup> IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 63–65 (James W. Ellington trans., 3d ed. 1993) (1785)).

<sup>155</sup> *Id.*

<sup>156</sup> COX, *supra* note 152, at 354.

<sup>157</sup> KLASS, *supra* note 130, at 715.

<sup>158</sup> *Id.*

*B. Bad faith propaganda spreads self-serving falsehoods intended to deceive the public*

The purpose of propaganda is to surreptitiously manipulate the desires, beliefs, emotions, and behaviors of large groups of people.<sup>159</sup> It is essentially a tool used for control and influence over public opinion, choice, and action.<sup>160</sup> Its key features “are thus a speaker’s *hidden* efforts to shape listeners’ decision-making that *target* and *exploit* those listeners’ vulnerabilities in ways that the targets are not consciously aware of, and in ways that those targets could not easily become aware of if they were to try.”<sup>161</sup> This has been well-understood since the early twentieth century.<sup>162</sup> “By the 1920s, [there was a] realization that propaganda...shaped public desires and predilections.”<sup>163</sup> In 1928, Edward Bernays observed that “[t]he conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society.”<sup>164</sup> Bernays continued: “Those who manipulate this unseen mechanism of society constitute an invisible government which is the true ruling power of our country. We are governed, our minds are molded, our tastes formed, our ideas suggested, largely by men we have never heard of.”<sup>165</sup>

Propaganda has been not only well understood, but also well studied, since the first half of the twentieth century.<sup>166</sup> To summarize, because people lack firsthand knowledge about most matters, they form their beliefs based on what they read, see, and hear about what others are saying about things going on in the world.<sup>167</sup> The technique of persuading the public through mass-diffused messages is called propaganda – a process that can be used for good or for evil.<sup>168</sup> It could, on one hand, be used to spread messages that are truthful, helpful to society, or at least

<sup>159</sup> Daniel Susser, Beate Roessler & Helen Nissenbaum, *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 26 (2019).

<sup>160</sup> See, e.g., EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* (Pantheon Books, 1988) (arguing that the mass media operates on a “propaganda model” by misleading the public and defending powerful interests).

<sup>161</sup> Helen Norton, *Manipulation and the First Amendment*, 30 WM. & MARY BILL RTS. J. 221, 224–25 (2021).

<sup>162</sup> See WALTER LIPPMANN, *THE PHANTOM PUBLIC* 112–14 (1927) (describing how propaganda is used by government and private interests to manipulate the public); FREDERICK E. LUMLEY, *THE PROPAGANDA MENACE* 45 (1933) (noting that propaganda is a major force affecting public opinion.)

<sup>163</sup> Sarah Barringer Gordon, *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).

<sup>164</sup> EDWARD BERNAYS, *PROPAGANDA* 9 (1928); see also WALTER LIPPMANN, *PUBLIC OPINION* 248 (1922): “That the manufacture of consent is capable of great refinements no one, I think, denies. The process by which public opinions arise is certainly no less intricate than it has appeared in these pages, and the opportunities for manipulation open to anyone who understands the process are plain enough . . . [a]s a result of psychological research, coupled with the modern means of communication . . .”

<sup>165</sup> EDWARD BERNAYS, *PROPAGANDA* 9 (1928).

<sup>166</sup> See, e.g., Herman C. Beyle, *Determining the Effect of Propaganda Campaigns*, 179 ANNALS AM. ACAD. POL. SOC. SCI. 106, 106–13 (1935); Melvin R. Marks & Wilson L. Taylor, *A Methodological Study of the Effects of Propaganda*, 65 J. SOC. PSYCH. 269, 269–77 (1965); *United States v. Haldeman*, 559 F.2d 31, 154–55 (D.C. Cir. 1976) (discussing how “[d]uring World War II, a team of psychologists studied the propaganda effect of orientation films,” and were surprised to learn how deeply the intended message penetrated test subjects’ minds, even long after the propaganda) (discussing RUDOLF FLESCHE, *THE ART OF CLEAR THINKING* 165–66 (Collier-MacMillan 1969))).

<sup>167</sup> See Curtis, *supra* note 147; see also LIPPMANN, *supra* note 147.

<sup>168</sup> See G. Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037, 1045–46 (2020) (articulating some positive examples and some negative examples of uses of propaganda).

communicated in good faith.<sup>169</sup> On the other hand, it could also be, and often has been, used to spread messages that are knowingly false and communicated in bad faith.<sup>170</sup> Most messages spread to the public, like messages in general, likely fall somewhere along the spectrum between true and false. Those that fall far over at the false end of the spectrum, which involve the dissemination of knowingly or recklessly false messages,<sup>171</sup> constitute a class of propaganda I will refer to as “bad faith propaganda,” which deserves closer scrutiny. As is the case with intentional falsehoods communicated one-on-one, intentional falsehoods communicated to the masses—bad faith propaganda—always poses a threat to individual autonomy and often poses threats to society and individual well-being.<sup>172</sup>

As noted by Professor Helen Norton, whenever an individual is purposefully deceived by another, that deceit is an exploitation of the vulnerabilities of the one deceived.<sup>173</sup> In this way, one who spreads bad faith propaganda robs those who are duped of the dignity of independent thought.<sup>174</sup> The intentional falsehoods embedded in bad faith propaganda are, thus, an assault on the autonomy of the one lied to.<sup>175</sup> This is necessarily true for any lie, even one told to a single person, but this principle is amplified where a lie is aimed at manipulating large numbers of people, as is the case with bad faith propaganda.

Bad faith propaganda has deleterious effects beyond those suffered by the individual or individuals duped. It harms society in numerous ways. The massive amount of falsehoods disseminated by those who hold the public megaphone—by politicians, industry leaders, media figures, etc.—“destroy[s] public confidence in all kinds of sources of information, from the news media to public officials, and these falsehoods give the impression that ‘everyone is lying’ or ‘all of it is lies’.”<sup>176</sup> Ironically, “the cynicism caused by those spreading self-serving falsehoods actually makes it even easier [to manipulate the public] because when objective sources of information seem untrustworthy, people gravitate instead toward partisan sources whose messages they are predisposed to agree with.”<sup>177</sup> This, in turn, makes it even easier for those who hold the public megaphone to profit off spreading bad faith propaganda.

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<sup>169</sup> *Id.*

<sup>170</sup> See Sara Dillon, *The Propaganda Conundrum: How to Control This Scourge on Democracy*, 23 OR. REV. INT’L L. 123, 124 (2022) (presenting a broad definition of propaganda).

<sup>171</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 287–88 (1964) (the “knowingly or recklessly false” standard).

<sup>172</sup> See Dillon, *supra* note 170, at 123–24 (noting threats posed by political and corporate propaganda).

<sup>173</sup> NORTON, *supra* note 151, at 225.

<sup>174</sup> HENRICKSEN, *supra* note 128, at 108.

<sup>175</sup> See, e.g., Christine M. Korsgaard, *What’s Wrong with Lying?* in PHIL. INQUIRY: CLASSIC AND CONTEMP. READINGS, 577–85 (Adler & Elgin eds., Hackett Publ’g Co. 2007); See also SUNSTEIN, *supra* note 128; Paul Faulkner, *What’s Wrong with Lying?*, 75 PHIL. & PHENOMENOLOGICAL RESEARCH. 535, 536–38, 555 (2007); SEANA V. SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, & THE LAW 121, 144–45, 152 (Princeton Univ. Press, 2014); Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, in CREATING THE KINGDOM OF ENDS, 133–58 (Cambridge Univ. Press 1986).

<sup>176</sup> HENRICKSEN, *supra* note 128, at 108.

<sup>177</sup> *Id.*

One underappreciated dimension to the issue of bad faith propaganda is the asymmetrical power dynamic between speaker and listener. Propaganda, by its nature, is a method of communicating with the public at large, and is therefore available only to those who speak to large segments of the public.<sup>178</sup> Accordingly, those who disseminate propaganda constitute an elite and powerful minority in society. It is only those who can push a message out to millions that have propaganda at their disposal. This includes, for instance, political leaders and their surrogates, high-level government officers, wealthy corporations, and members of the media whose messages reach a broad audience.<sup>179</sup> Thus, any speaker who spreads propaganda is in a powerful position. They, thus, necessarily hold immense advantage, in terms of both information and power, over their listeners. And in that context, where the speaker holds so great an advantage over the listener, “their speech can more readily harm their listeners through deception or coercion.”<sup>180</sup> Those who spread propaganda “can mislead or muscle their listeners in ways that strike us as unfair and sometimes dangerous.”<sup>181</sup>

Indeed, the power to persuade the public to vote for a candidate, to buy a product, to want certain things or to dress a particular way, or to support a war or government policy, is an awesome power. As Bernays pointed out, the ones who hold the public megaphone, and therefore “manipulate this unseen mechanism of society constitute . . . the true ruling power of our country.”<sup>182</sup> They shape our beliefs, desires, tastes, choices, and behavior.<sup>183</sup>

All of this pertains to propaganda in general. But there are certain constitutional doctrines implicated when the one disseminating propaganda is the government, as opposed to a private speaker such as a corporation, a public relations firm, a social media influencer, or a pundit on a major news network. When the government engages in the spreading of bad faith propaganda, it implicates at least two important areas of constitutional freedoms. The first one consists of the liberties contained in the First Amendment, including free speech, free exercise, and establishment.<sup>184</sup> When the government imposes its own message on the people, it may interfere with the people’s rights with regard to speech and thought, as well as worship and belief.<sup>185</sup> These aspects of bad faith propaganda have been explored to some extent by other scholars.<sup>186</sup> The other constitutional

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<sup>178</sup> Dillion, *supra* note 170.

<sup>179</sup> HENRICKSEN, *supra* note 128, at 37.

<sup>180</sup> Norton, *supra* note 153, at 442–43.

<sup>181</sup> *Id.*

<sup>182</sup> BERNAYS, *supra* note 164, at 9.

<sup>183</sup> *Id.*

<sup>184</sup> U.S. CONST. amend. I.

<sup>185</sup> *Id.*

<sup>186</sup> See generally, e.g., Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 818 (2020); Alex Sinha, *Lies, Gaslighting and Propaganda*, 68 BUFF. L. REV. 1037 (2020); Russell L. Weaver, *Should Congress (Or, for That Matter, A New Federal Authority) Regulate Social Media?*, 58 GA. L. REV. 1057, 1060 (2024); Emily E. Burton, *American Star Chamber: Online Misinformation, Government Intervention, & the Intellectual Matrix of the First Amendment*, 32 CATH.

freedom implicated by bad faith government propaganda is the right of privacy. Could intentional falsehoods disseminated by the government, which are intended to mislead the public for the government's own self-serving purposes, be a violation of privacy rights? Does Florida's more robust privacy protections provide protections against bad faith government propaganda that might not be covered by the federal privacy right? If this right is implicated, what legal standard should be applied to determine the constitutionality of a law or government action? Part V will explore these questions.

#### IV. BAD FAITH GOVERNMENT PROPAGANDA ARGUABLY VIOLATES FLORIDA'S RIGHT TO PRIVACY

The means to disseminate messages to large segments of the public, something necessary to engage in the practice of propaganda, is available almost exclusively to an elite minority.<sup>187</sup> Indeed, until recently, the access was absolutely exclusive; before the rise of social media in the early 2000s,<sup>188</sup> those outside the elite minority had virtually no access to the means of spreading messages to the masses. Now, however, there is at least a possibility, albeit small, that non-elites might disseminate a message that ends up viewed by, and may potentially influence, large numbers of people.<sup>189</sup> Even today, however, the elite minority still remains in almost exclusive control of the ability to push messages out to the general public, and this minority includes, for instance, wealthy corporations, industry trade groups, politicians with a national platform, media platforms with millions of users, and media figures with large audiences.<sup>190</sup> This does not mean these elites are in any way less moral or honest than non-elites; rather, while people on the whole are willing in varying degrees to deceive others for self-serving purposes, only this elite subset has access to the means to do so effectively on a scale out of reach to most.<sup>191</sup>

Because the individuals and entities that make up this elite group are able to speak to the public at large, they possess what is often referred to as the proverbial public megaphone, meaning their voices reach large

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U.J.L. & TECH. 79, 102–105 (2024); Philip A. Hamburger, *Courting Censorship*, 4 J. FREE SPEECH L. 195, 197–98 (2024); Richard A. Clarke, *Hostile State Disinformation in the Internet Age*, 5 J. FREE SPEECH L. 187, 194–95 (2024); SUNSTEIN, *supra* note 128; RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT* 106 (Yale Univ. Press, 2022).

<sup>187</sup> HENRICKSEN, *supra* note 128, at 37.

<sup>188</sup> See Alexandra Paslawsky, *The Growth of Social Media Norms and Governments' Attempts at Regulation*, 35 FORDHAM INT'L L.J. 1485, 1490 (2012) (discussing “[t]he rise of social media,” which occurred in the early 2000s).

<sup>189</sup> See, e.g., Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1148–50 (2018) (concluding that, on Twitter, falsehoods “spread farther, faster, deeper, and more broadly than the truth in all categories of information” despite the fact that the spreaders of falsehoods tended to be accounts of users who “had significantly fewer followers,” “followed significantly fewer people,” “were significantly less active on Twitter,” “were verified significantly less often,” “and had been on Twitter for significantly less time”).

<sup>190</sup> HENRICKSEN, *supra* note 128, at 37. (This should not be misconstrued as a criticism of *all* elites. Any group of people will contain a diverse range of individuals within it who possess varying degrees of willingness and motive to deceive others for self-profit. But only elites have the means to carry this out reliably on a large scale.).

<sup>191</sup> *Id.*

audiences and can influence people's behavior.<sup>192</sup> But one of the loudest megaphones, if not *the* loudest megaphone, is held, not by any of these other elites, but by the government.<sup>193</sup> Federal and state governments possess enormous power to spread messages—both by way of words and by way of action or inaction—that are heard and heeded by large segments of the public.<sup>194</sup> In a democratic republic like ours, this means that not only does our government reflect, at least to a degree, the views and preferences of the people,<sup>195</sup> but the government also tailors and manipulates the people's views and preferences for its own ends.<sup>196</sup> Indeed, the fact “American presidents and top government officials can craft news content and influence public opinion”<sup>197</sup> has been long understood.<sup>198</sup>

To give a now-historical example, one author noted that “the Bush Administration was particularly adept at choking the executive branch's information chain by preventing unfavorable information from entering discourse and manipulating press coverage with favorable information.”<sup>199</sup> The lies of the Bush Administration, in fact, were catalogued and counted. The Center for Public Integrity (CPI), a nonprofit journalism organization, “assembled a database of 935 ‘patently false statements’ and hundreds of additional misleading statements made by President Bush, Secretary of State Powell, Secretary of Defense Rumsfeld, Vice President Cheney, National Security Advisor Rice, Undersecretary of Defense Wolfowitz, and Press Secretaries Fleischer and McClellan about alleged Iraqi weapons of mass destruction (WMDs) and ties to al-Qaeda.”<sup>200</sup>

Such historical examples of possible bad faith government propaganda hold at least two advantages over contemporary examples. First, truth or falsity of any assertion or idea, whether expressed by the

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<sup>192</sup> See, e.g., Sallie T. Sanford, *Nobody Knew How Complicated: Constraining the President's Power to (Re)shape Health Reform*, 45 AM. J. L. & MED. 99, 120 (2019) (“The presidential megaphone has long been used, by Republicans and Democrats alike, to advocate with the public and with Congress for legislative solutions to expand access to high quality health care.”); Saura Masconale & Simone M. Sepe, *Citizen Corp.: Corporate Activism and Democracy*, 100 WASH. U. L. REV. 1, 54–55 (2022) (“[C]itizens realize that a small group of investors has the corporate megaphone at their *exclusive* disposal to influence the public discourse around divisive societal ends.”).

<sup>193</sup> See Sallie T. Sanford, *Nobody Knew How Complicated: Constraining the President's Power to (Re)shape Health Reform*, 45 AM. J. L. & MED. 99, 99–101 (2019).

<sup>194</sup> *Id.* at 111; see also Nikolas Guggenberger, *Moderating Monopolies*, 38 BERKELEY TECH. L.J. 119, 142 (2023) (noting “there are good arguments to deny any head of state or government a private digital megaphone through which they can amplify misinformation or stoke public rage and political violence” because of the enormous power governments have when given access to such a megaphone).

<sup>195</sup> See, e.g., Bruce E. H. Johnson & Sarah K. Duran, *A View from the First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy*, 87 WASH. L. REV. 495, 495 (2012) (quoting ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 19 (2012), “[D]emocracy requires that government action be tethered to public opinion’ because ‘public opinion can direct government action in an endless variety of directions.’”); Jeffrey Jacobsen, *Georgia v. Public.Resource.org—A Missed Opportunity for Democracy*, 36 BERKELEY TECH. L. J. 1437, 1439 (2021) (“Democratic governments must be responsive to the public opinion for consent to be valid.”).

<sup>196</sup> *Id.* at 1439 (“Certain government works carry great weight when informing the public opinion because they are official statements from the government itself on how it is governing.”).

<sup>197</sup> Robert Bejesky, *Press Clause Aspirations and the Iraq War*, 48 WILLAMETTE L. REV. 343, 348 (2012).

<sup>198</sup> See *supra* notes 162, 163, & 164.

<sup>199</sup> Bejesky, *supra* note 187.

<sup>200</sup> *Id.* at 34849.

government or anyone else, is much less easily determined in the short-term than it is in the long-term, with the benefit of hindsight.<sup>201</sup> That is, it is far more difficult to know with certainty which of today's ideas are true or false than it is to know with certainty which ideas of long ago were true or false.<sup>202</sup> Second, contemporary examples of possible bad faith government propaganda are often highly politically-charged. Pointing out apparent falsehoods spread by any current government leader or party is likely to upset those ideologically aligned with the political leader or party accused of spreading the falsehood. Notwithstanding these downsides of providing examples of contemporary possible bad faith government propaganda, giving no such examples presents its own disadvantages. Without contemporary examples, the discussion is relegated to theory, untethered to the realities of current life and society.

Accordingly, I will present a handful of examples of potential bad faith propaganda—i.e., containing arguably false or misleading assertions—disseminated by government leaders on both sides of the political aisle over the past few years. To be sure, neither the Left nor the Right holds a monopoly on falsehoods, though partisans on both sides of the aisle tend to believe the other side is far more dishonest.<sup>203</sup> Accordingly, contemporary readers who identify strongly with the Left or the Right will likely bristle at examples of possible falsehoods on their own side of the political aisle. But this should not make us shy away from the issue; if we are to have a legal standard for falsity, we must be able to apply that standard with just as much force to those with whom we agree as we do to those with whom we disagree. If we cannot do that, the standard itself would be meaningless.<sup>204</sup>

#### *A. Falsehoods are asserted by speakers on both sides of the political aisle*

Let us look at a handful of examples of messages likely to have been spread in a manner that was knowingly or recklessly false<sup>205</sup>—and possibly fraudulent, as has been argued elsewhere<sup>206</sup>—by those in government, or aspiring to be in government, starting with messages disseminated by the

<sup>201</sup> See JOHN STUART MILL, *ON LIBERTY*, 36 (1859) (noting that “every age ha[s] held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present”).

<sup>202</sup> See *Id.*

<sup>203</sup> See Kevin Vallier, *Political Trust*, 47 *BYU L. REV.* 1275, 1276 (2022) (“Each side sees the other as behaving badly, creating suspicion on both sides of the political aisle.”). In fairness, however, at least one study concluded the Right lies more than the Left. See Anna Lamb, *Rising ‘epidemic of political lying’*, *HARVARD GAZETTE* (Dec. 4, 2024), <https://news.harvard.edu/gazette/story/2024/12/rising-epidemic-of-political-lying/> (discussing a study that found “55 percent of the statements made by Republicans and investigated by PolitiFact were false, while 31 percent of those made by Democrats were.”).

<sup>204</sup> See, e.g., MANUFACTURING CONSENT: NOAM CHOMSKY AND THE MEDIA at 02:10 (1992) (“If you believe in freedom of speech, you believe in freedom of speech for views you don’t like. Goebbels was in favor of freedom of speech for views he liked. So was Stalin. If you’re in favor of freedom of speech, that means you’re in favor of freedom of speech precisely for views you despise”); Nadine Strossen, *Children’s Rights v. Adult Free Speech: Can They Be Reconciled?*, 29 *CONN. L. REV.* 873, 882 (1997) (quoting Voltaire) (“I may not agree with you, but I will defend to the death your right to say it”).

<sup>205</sup> See *supra* notes 113 & 171.

<sup>206</sup> See HENRICKSEN, *supra* note 128, at 64–88; Wes Henricksen, *On the Legality of Defrauding the Public*, 107 *MARQ. L. REV.* 1043, 1071–85 (2024).

Right. One more caveat is in order, however. This is a very short list of political lies. The list, of course, could go on ad nauseam. After all, as noted by economist Thomas Sowell, “In politics, the goal is not truth but votes. If most voters believe what is said, that rhetoric is a success, as far as politicians are concerned.”<sup>207</sup> Accordingly, “[i]f you took all the deception and fraud out of politics, there might not be a lot left.”<sup>208</sup> Thus, any such list of political lies is, by necessity, woefully incomplete and selective. I’ll touch on three examples from both sides of the political aisle.

The first example from the Right is the stolen election lie arising out of the 2020 U.S. presidential election. Before, during, and after the election, Trump claimed that the only way his opponent might win the election was through cheating or massive fraud.<sup>209</sup> In his book *Cheap Speech*, Professor Richard Hasen detailed a number of Trump’s false claims and bad faith efforts to overturn the 2020 election:

By the Saturday after Election Day, it was apparent that Joe Biden had sufficient leads in enough states to win the presidency by an Electoral Margin of 306 to 232. Rather than concede the race once the outcome became clear and news networks had called it for Biden, Trump repeatedly and falsely claimed victory—even a “landslide”—arguing that the reported results were marred by fraud, pointing in part to his ephemeral Election Night leads, based on only partial vote counts in key states.

He and his allies brought dozens of suspect lawsuits across the United States calling the election results into question, but once in court, his lawyers did not present any real evidence of significant voter fraud anywhere in the United States. When his lawsuits began to fail, he called on Republican state legislatures to thwart the will of the people by selecting phony slates of Trump electors for the Electoral College. He tried to pressure the Georgia secretary of state to “find” 11,780 votes—one more than Biden’s margin of victory—to flip the results to Trump. He leaned on Republican governors and the U.S. Department of Justice to help in his efforts to declare the results fraudulent. About three weeks after the election Trump, without conceding, allowed the transition process to begin while still falsely claiming voter fraud.<sup>210</sup>

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<sup>207</sup> THOMAS SOWELL, SOCIAL JUSTICE FALLACIES 51 (2023).

<sup>208</sup> THOMAS SOWELL, DISMANTLING AMERICA 71 (2010).

<sup>209</sup> See, e.g., Marshall Cohen & Daniel Dale, *Fact check: 12 Election Lies Trump Is Using to Set the Stage to Dispute a Potential 2024 Defeat*, CNN (Sept. 30, 2024, 12:00 AM), <https://www.cnn.com/2024/09/30/politics/fact-check-trump-election-lies-2024/index.html>; see generally Wes Henricksen & Broderick Betz, *The Stolen Election Lie and the Freedom of Speech*, 127 PENN ST. L. REV. PENN STATIM 111 (2023).

<sup>210</sup> HASEN, CHEAP SPEECH at 4.

For weeks, Trump continued spreading false and misleading—and totally baseless—claims that the election had been stolen by his opponent.<sup>211</sup> “By mid-December 2020, President Trump had spent months insisting to his base that the only way he could lose the election was a dangerous, wide-ranging conspiracy against them that threatened America itself.”<sup>212</sup> For instance, on December 19, Trump tweeted: “Statistically impossible to have lost the 2020 Election. Big protest in D.C. on January 6th. Be there, will be wild!”<sup>213</sup> On December 26, he tweeted: “If a Democrat Presidential Candidate had an Election Rigged & Stolen, with proof of such acts at a level never seen before, the Democrat Senators would consider it an act of war, and fight to the death. Mitch & the Republicans do NOTHING, just want to let it pass. NO FIGHT!”<sup>214</sup> A mere fourteen minutes later, he tweeted: “The ‘Justice’ Department and the FBI have done nothing about the 2020 Presidential Election Voter Fraud, the biggest SCAM in our nation’s history, despite overwhelming evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th.”<sup>215</sup> Then, on January 1, Trump tweeted: “The BIG Protest Rally in Washington, D.C., will take place at 11.00 AM on January 6th . . . StopTheSteal!”<sup>216</sup> What occurred next is detailed in the “Trial Memorandum of the U.S. House of Representatives in the Impeachment Trial of President Donald J. Trump”:

As January 6 approached, and President Trump’s other attempts to overturn the election failed (including his schemes at DOJ), he further escalated his call to arms. On January 4, he gave an angry speech in Dalton, Georgia, warning that “Democrats are trying to steal the White House . . . [y]ou can’t let it happen. You can’t let it happen,” and “they’re not taking this White House. We’re going to fight like hell, I’ll tell you right now.” The next day, on January 5, he tweeted: “Washington is being inundated with people who don’t want to see an election victory stolen by emboldened Radical Left Democrats. Our Country has had enough, they won’t take it anymore! We hear you (and love you) from the Oval Office. MAKE AMERICA GREAT AGAIN!” Trump made it clear that his goal was to prevent the election results from being certified: “I hope the Democrats, and even more importantly, the weak and ineffective RINO section of the Republican Party, are looking at the thousands of people pouring into

<sup>211</sup> See *supra* note 209; see *supra* note 210.

<sup>212</sup> Jamie Raskin, Diana DeGette, David Cicilline, Joaquin Castro, Eric Swalwell, Ted Lieu, Stacey Plaskett, Madeleine Dean, Joe Neguse, *Trial Memorandum of the U.S. House of Representatives in the Impeachment Trial of President Donald J. Trump*, IN RE IMPEACHMENT OF DONALD J. TRUMP, February 2, 2021, at 12–14 (bold font and footnotes omitted), <https://int.nyt.com/data/documenttools/impeachment-manager-brief/77a0a0d89423b554/full.pdf>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

D.C. They won't stand for a landslide election victory to be stolen. @senatemajldr @JohnCornyn @SenJohnThune”<sup>217</sup>

To date, Trump—recently elected to his second term in office<sup>218</sup>—and other Republicans have continued to repeat and perpetuate the stolen election lie.<sup>219</sup>

The second example from the political Right comprises a handful of lies in Trump's announcement that he would run for the 2024 presidential nomination. Trump claimed he had “built the greatest economy in the history of the world,” that America surrendered \$85 billion worth of military equipment to the Taliban in the Afghanistan withdrawal, and that his administration had “filled up” the Strategic Petroleum Reserve but that under Biden it has been “virtually drained.”<sup>220</sup> All statements were false. In fact, Trump's economy was not the strongest in the history of the world by any reasonable measure; the value of the military equipment was only \$7.1 billion, much of it inoperable before withdrawal; and in fact, the Strategic Petroleum Reserve not only was not “drained”—virtually or otherwise—under Biden, but in fact contained less when Trump left office than when he took office.<sup>221</sup>

The third example from the Right is an oft-repeated falsehood that Trump stated during a press conference in which he told 163 lies in 64 minutes.<sup>222</sup> It is the accusation that those on the Left—in this case, presidential candidate Kamala Harris and her running mate Tim Walz—are for “open borders.”<sup>223</sup> In reference to Walz, Trump said: “He doesn't want to have borders.”<sup>224</sup> This accusation has no evidence to support it; it is a gross misrepresentation the Democratic platform position on immigration.<sup>225</sup>

Turning to falsehoods disseminated by the Left, the first was an assertion by Biden and other Democrats during the 2024 presidential campaign that Trump is a fascist, and would become a dictator immediately if once again elected to the office.<sup>226</sup> This became a

<sup>217</sup> Raskin, *Trial Memorandum*, at 12–14.

<sup>218</sup> Franco Ordoñez, *How Trump Won a Second Term as President in 2024*, NPR (Nov. 6, 2024, 9:53 AM), <https://www.npr.org/2024/11/06/g-s1-33007/how-trump-won-policies>.

<sup>219</sup> See, e.g., Molly Bohannon, *Vance Avoids Saying Trump Lost 2020 Race—Again—In Latest Interview*, FORBES (Oct. 13, 2024, 2:31 PM), <https://www.forbes.com/sites/mollybohannon/2024/10/13/vance-again-avoids-saying-trump-lost-2020-race-in-latest-interview/>.

<sup>220</sup> Linda Qiu, *In Announcing 2024 Bid for Presidency, Trump Echoes Old Falsehoods*, N.Y. TIMES (Nov. 16, 2022), <https://www.nytimes.com/2022/11/16/us/politics/trump-fact-check.html>; Daniel Dale & Paul LeBlanc, *Fact Check: 20 False and Misleading Claims Trump Made in His Announcement Speech*, CNN (Nov. 16, 2022, 10:21 AM), <https://www.cnn.com/2022/11/15/politics/fact-check-trump-announcement-speech-2024/index.html>.

<sup>221</sup> *Id.*

<sup>222</sup> Domenico Montanaro, *162 Lies and Distortions in a News Conference. NPR Fact-checks Former President Trump*, NPR (Aug. 11, 2024, 07:00 AM), <https://www.npr.org/2024/08/11/nx-s1-5070566/trump-news-conference>.

<sup>223</sup> *Id.*

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

<sup>225</sup> *Id.*

<sup>226</sup> Samantha Waldenberg & Michael Williams, *Biden Believes Trump is a Fascist, White House Says*, CNN (Oct. 23, 2024, 4:16 PM), <https://www.cnn.com/2024/10/23/politics/biden-trump-fascism/index.html>.

Democratic talking point during the campaign.<sup>227</sup> Although certainly the terms “fascist” and “dictator” may have someone flexible definitions, any fair objective interpretation would apply these terms to autocrats such as Vladimir Putin, Bashar al-Assad, or Kim Jong-Un. The term fascist was coined with the rise of Mussolini in Italy, Hitler in Germany, and Franco in Spain.<sup>228</sup> Although “fascist” has clear historical roots, its definition might arguably be broader than its original use and meaning, but nevertheless it must reasonably encompass what it has always been understood to mean, which is totalitarian government.<sup>229</sup> Accordingly, the assertion that Trump is akin to prior autocratic leaders who led under the banner of fascism, or that his presidency would bear any actual likeness to them, is not only a stretch, but much closer to a falsehood than to any truthful or accurate statement. It lacks credible evidence, particularly given the fact Trump served as president for four years previously and although there are certainly well-founded policy and ideological critiques against his presidency, his term in office was not a fascist dictatorship in the manner of Mussolini, Hitler, or Franco. Moreover, even if the accusation was arguably an opinion or belief, or mere hyperbole, it was asserted in a manner as to serve as a grave warning, if not an assertion of plain fact.<sup>230</sup> Yet, the behavior of Biden and other Democrats in the immediate aftermath of the 2024 election demonstrated they clearly, in truth, did not expect Trump to be a fascist dictator; rather, Biden conducted the ceremonial meetings and transfer of power duties of office in the same manner as would be the case for any other regular, non-fascist political opponent.<sup>231</sup>

The second leftwing falsehood was Biden’s assertion that Trump was the only president in history to not attend his successors inauguration.<sup>232</sup> Shortly after the 2024 election, Biden was interviewed, and he said, “The only president to ever avoid an inauguration was the guy that’s about to be inaugurated.”<sup>233</sup> This falsehood, like the one above that painted Trump as a fascist dictator, are part of a wider leftwing narrative aimed at convincing

<sup>227</sup> See, e.g., Eric Bradner et al., *Takeaways from Kamala Harris’ CNN town hall*, CNN (Oct. 23, 2024, 10:57 PM), <https://www.cnn.com/2024/10/23/politics/takeaways-kamala-harris-town-hall/index.html>; Michael S. Schmidt, *As Election Nears, Kelly Warns Trump Would Rule Like a Dictator*, N.Y. TIMES (Nov. 6, 2024), <https://www.nytimes.com/2024/10/22/us/politics/john-kelly-trump-fitness-character.html>.

<sup>228</sup> See Barbara Pozzo, *Masculinity Italian Style*, 13 NEV. L.J. 585, 597 (2013); Olivia B. Waxman, *What to Know About the Origins of Fascism’s Brutal Ideology*, TIME (March 22, 2019, 2:46 PM), <https://time.com/5556242/what-is-fascism/>.

<sup>229</sup> See Daniel Gordon, *Life’s Complexities: Rethinking Barnette, the Flag, Totalitarianism, and the First Amendment*, 17 U. MASS. L. REV. 142, 162–63 (2022) (discussing how the fascist movement was understood to mean totalitarian government, “which concerns itself not only with political organization and political tendency, but with the whole will and thought and feeling of the nation”) (quoting Giovanni Gentile, *The Philosophic Basis of Fascism*, 6 FOREIGN AFFS. 290, 299 (1928)).

<sup>230</sup> See *supra* note 226; see *supra* note 227.

<sup>231</sup> See Michael D. Shear, *Trump and Biden Make Nice at the White House, at Least for 29 Seconds*, N.Y. TIMES (Nov. 13, 2024), <https://www.nytimes.com/2024/11/13/us/politics/trump-biden-white-house.html>.

<sup>232</sup> Taija PerryCook, *Biden Called Trump the Only President to Avoid Successor’s Inauguration. Here’s Why He Was Wrong*, FACT CHECK (Jan. 2, 2025), <https://www.snopes.com/fact-check/presidents-didnt-attend-inauguration/>.

<sup>233</sup> *Id.*

the public that Trump is a wildly unqualified and dangerous choice for president, although he served previously as president and, in the 2024 election, a majority of Americans voted for him.<sup>234</sup> Indeed, Trump won the popular vote by more than two million votes.<sup>235</sup>

The third leftwing falsehood is the assertion that biological sex categories of men and women, and the differences caused by these sex categories, are unsupported by science, if not entirely nonexistent.<sup>236</sup> During the 2024 election, for example, a Democratic state representative from New Hampshire argued against a state law providing that schools should provide separate locker rooms for boys and girls, and stated, “The term ‘biological male’ has no commonly accepted definition.”<sup>237</sup> Moreover, leftwing congressional witnesses have also denied that biological males have physical and physiological advantages over biological females when debating the issue of transgender participation in athletics,<sup>238</sup> notwithstanding the fact males’ athletic advantages are scientifically uncontroversial and well-known by athletes themselves.<sup>239</sup> In fairness, many asserting falsehoods at odds with biology on this issue likely do so to further well-meaning aims, such as protecting the rights of

<sup>234</sup> *US Presidential Election Results 2024*, BBC, <https://www.bbc.com/news/election/2024/us/results>.

<sup>235</sup> *Id.*

<sup>236</sup> See, e.g., Evan Lips, *NH Dem Says There’s No ‘Accepted Definition’ of ‘Biological Male’*, NH JOURNAL (Oct. 10, 2024), <https://nhjournal.com/nh-dem-says-theres-no-accepted-definition-of-biological-male/>.

<sup>237</sup> *Id.*

<sup>238</sup> See Elad Vaida, *NCAA President says it’s ‘Debatable’ That Male Athletes Have an Advantage Over Female Opponents, gets Grilled by Sen. Kennedy*, CAMPUS REFORM (Dec. 18, 2024, at 4:32 PM); PBS NewsHour, *Senate Judiciary Committee hearing on LGBTQ+ rights as Pride Month continues*, at 1:43–1:50 (YouTube, June 21, 2023), <https://www.youtube.com/watch?v=95yMXFv2geA>; Elizabeth Troutman, *Riley Gaines Grand Slams Queer Activist’s Senate Testimony That Men Can’t Beat Serena Williams*, FOX NEWS (June 21, 2023, at 2:51 PM), <https://www.foxnews.com/politics/riley-gaines-grand-slams-queer-activists-senate-testimony-men-cant-beat-serena-williams>; Shayna Medley & Galen Sherwin, *Banning Trans Girls From School Sports Is Neither Feminist Nor Legal*, ACLU (March 12, 2019), <https://www.aclu.org/news/lgbtq-rights/banning-trans-girls-school-sports-neither-feminist-nor-legal> (arguing there is “ample evidence that girls can compete and win against boys”).

<sup>239</sup> See, e.g., Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, Duke Law School, CTR. FOR SPORTS L. & POL’Y, <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf> (observing that world track and field records held by women were, in one year, beaten by dozens to hundreds of boys under eighteen, and by thousands of adult male athletes, and arguing that the difference in performance “isn’t the result of boys and men having a male identity, more resources, better training, or superior discipline,” but rather the boys’ and men’s “androgenized body”); Regarding the assertion that the Williams sisters can beat male tennis players, see, e.g., *Serena Williams on David Letterman 22 August 2013*, at 5:25-6:00 (YouTube, July 13, 2017), <https://www.youtube.com/watch?v=6ALxFXyRno8> (interview in which Serena Williams explains that men’s and women’s tennis are “completely different sports,” that the men are faster, and serve and hit the ball harder, and that if she, a top-ranked women’s tennis player, were to play Andy Murray, one of the top men’s players, she would lose 6-0 and 6-0 “in about five to six minutes, maybe ten minutes”); Chris Oddo, *The Man Who Beat Venus and Serena Back-to-Back*, TENNIS NOW (Nov. 7, 2017), <https://tennisnow.com/the-man-who-beat-venus-and-serena-back-to-back/> (recounting how at the 1998 Australian Open, Serena and Venus Williams both claimed they could beat any male tennis player outside the top 200, and the 203rd ranked player, Karsten Braasch, accepted the challenge and beat the sisters 6-1 and 6-2, respectively, in back-to-back matches); *WTA year-end rankings for 1998*, TENNIS ABSTRACT, <http://tennisabstract.com/reports/wtaRankings1998.html> (showing both Williams sisters ranked in the top 20 in the women’s tennis rankings in 1998).

transgender individuals—a critical and complex contemporary issue<sup>240</sup>—but well-meaning aims do not change a factual falsehood into truth. The question posed in this article is whether any such falsehood expressed by the government, on this issue or on any other, might violate the right to privacy.

*B. Why some intentional government falsehoods might violate the right to privacy*

Florida’s constitution guarantees that “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life.”<sup>241</sup> The scope of a person’s “private life” is certainly open to interpretation, but has already been held to include at least some personal choices,<sup>242</sup> and might reasonably be interpreted to cover at least some autonomous thoughts, ideas, and beliefs.<sup>243</sup> That is, much of our own independent thoughts, ideas, and beliefs are part of our own private life we expect not to be interfered with by the government.<sup>244</sup> This is particularly true when it comes to thoughts, ideas, and beliefs (as well as decisions) at the core of the democratic process, such as the choice of which policies are best for ourselves and society.<sup>245</sup> Although the government likely cannot avoid *all* intrusions into our private mental life in these areas, intentional falsehoods calculated to mislead and deceive might well cross the line into protected territory.<sup>246</sup> Such a government invasion of these most personal

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<sup>240</sup> See generally, Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894 (2019); Lewis A. Grossman, *Criminalizing Transgender Care*, 110 IOWA L. REV. 281 (2024); Ashley Attia, *Explicit Equality: The Need for Statutory Protection Against Anti-Transgender Employment Discrimination*, 25 S. CAL. INTERDISC. L. J. 151 (2016); Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895 (2007); Erin E. Clawson, *I Now Pronoun-Ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN STATE L. REV. 247 (2019); Sophia Ureta-Fulan, *Litigating the Future of Youth’s Access to Gender-Affirming Care*, 51 UC L. CONST. Q. 283 (2024); Casey Smith, *An Overview of Transgender Laws, Legislation, and Litigation in Kansas*, 93 KAN. B.J. 35 (2024); Amanda K. Baumle, Steven Boutcher, M.V. Lee Badgett, & Donald Tomaskovic-Devey, *Enforcement Agencies and an Emerging Category of Law: Examining EEOC Processing of Sexual Orientation and Gender Identity Charges*, 58 L. & SOC’Y REV. 607 (2024).

<sup>241</sup> FLA. CONST. art. I, § 23.

<sup>242</sup> See Nancy C. Marcus, *Reclaiming Personal Privacy Rights Through the Freedom of Intimate Association*, 54 SETON HALL L. REV. 1047, 1068–69 (2024) (discussing the Supreme Court’s interpretation of the federal right of privacy to protect several “intimate life choices,” including whether to engage in certain sexual conduct, whether to purchase or use contraceptives, and, until *Dobbs*, whether to choose to have an abortion, at least up to a certain point in the pregnancy).

<sup>243</sup> See Norton, *supra* note 128, at 75; Klass *supra* note 130, at 714–15, and; Druzin, *supra* note 131, at 535.

<sup>244</sup> Indeed, one of the reasons the freedom of speech is deemed fundamental in American jurisprudence is that speech is the verbalization of thought, and thus regulating speech is one manner of regulating thought. See Lucas Swaine, *Does Hate Speech Violate Freedom of Thought?*, 29 VA. J. SOC. POL’Y & L. 1, 11–16 (2022) (discussing the interplay between the “freedom of thought” and the “freedom of speech”); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 186 (1997) (noting that “the Court has drawn a line between acceptable government regulation of lies and unacceptable attempts to regulate thoughts”).

<sup>245</sup> See e.g., Norton, *supra* note 129 (noting that some “government lies . . . deprive their targets of the ability meaningfully to exercise voting, reproductive, or other protected rights”); STRUDLER, *supra* note 132 (noting that “a lie interferes with its victim’s rational deliberation [and] . . . robs a person of her prospects for making certain rational choices about what to do or what to believe”).

<sup>246</sup> *Id.*

and private areas of one's life, accordingly, arguably fit within the scope of Florida's—and perhaps other states'—privacy rights, particularly as they cover a broader scope of decisional privacy than that protected by the federal Constitution.<sup>247</sup>

However, whether bad faith government propaganda amounts to an actual “intrusion” into this area of individuals' private life—in the constitutional sense—is another question, as is whether such an intrusion into the right of privacy should nevertheless be tolerated.<sup>248</sup> Consider the stolen election lie. This was a falsehood disseminated, based on the evidence, in a manner that was either knowingly false or with reckless disregard as to its falsity.<sup>249</sup> Moreover, it must have been asserted, by those who first manufactured and spread it, as with most communications, with the intent of making those who heard it believe it to be true.<sup>250</sup> This, in other words, was a purposeful manipulation of millions of people on a matter of enormous importance: the integrity and outcome of a presidential election. Moreover, given the asymmetrical dynamic between speaker and listener when it comes to government propaganda, the manipulation of public opinion via the powerful government megaphone smacks as even more wrongful than would be the case of a private individual lying to another private individual.<sup>251</sup> Arguably, then, the stolen election lie is a significant intrusion into the individual decision-making processes of millions of people, something that might run afoul of the right to privacy.<sup>252</sup>

This argument is not without valid critiques. One counterargument might be that the whole idea of considering government lies to potentially violate a constitutional right to privacy would lead to a slippery slope of holding that *all* government lies must be such violations. A second critique might be that even if government lies could violate the right to privacy, in theory, enforcing this right would necessitate empowering the government to become an arbiter of truth akin to Orwell's Ministry of Truth in the novel *1984*.<sup>253</sup> And if that were the case—so this critique might continue—that would lead to two outcomes, both absurd. The first is that if the government falsehood at issue was communicated by the current government or ruling party, then that would mean the government possesses the power to assert that the message is true, regardless of its actual truthfulness or falsity. And second, if the alleged lie was communicated by a prior government, or under a different political party,

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<sup>247</sup> *City of N. Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995).

<sup>248</sup> *See Id.* (noting that Florida's right to privacy “was not intended to be a guarantee against all intrusion into the life of an individual”); *Machovec v. Palm Beach Cnty.*, 310 So. 3d 941, 948 (Fla. Dist. Ct. App. 2021) (noting that Florida's right to privacy “is not absolute”).

<sup>249</sup> *See supra* note 210, at 110.

<sup>250</sup> The bad faith intention of the speaker is key to the analysis. *See, e.g.*, Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 170 (1997) (“The State can and should regulate speech that, by attempting to override the thought processes of other individuals, disrespects their rational capacities.”).

<sup>251</sup> *See Norton, supra* note 129.

<sup>252</sup> *See Wells, supra* note 250.

<sup>253</sup> GEORGE ORWELL, 1984 (1949).

then the government possesses the power to assert the message is false, regardless of its actual truthfulness or falsity. In other words, both counterarguments assert that the whole idea of empowering the state to punish bad faith government propaganda leads—so the arguments go—inevitably to undesirable, if not downright tyrannical, results.<sup>254</sup>

In response, however, it is worth noting that although the concerns expressed in both counterarguments are valid, such critiques must grapple with the very real danger now posed by bad faith government propaganda.<sup>255</sup> That is, though proposed solutions pose their own problems and risks, so too does the status quo. The free-flowing falsehoods disseminated by the state are a problem in need of addressing, one way or another.<sup>256</sup> A democratic process where candidates can simply manufacture and disseminate largescale intentional falsehoods intended to mislead voters might have always posed dangers, but in today's digital world the dangers have multiplied.<sup>257</sup> Moreover, there are a number of reasons why the Ministry of Truth argument against punishing largescale falsehoods misses the mark.<sup>258</sup> But those issues are being addressed elsewhere.<sup>259</sup>

More to the point, however, there is an important distinction to be made between falsehoods that are clearly false statements of fact, such as the stolen election lie, and other statements that present a more problematic issue, such as statements that might arguably be an opinion, viewpoint, or interpretation. Almost all of the other government falsehoods listed above—apart from the stolen election lie—are of this far more problematic kind of lie; that is, they are not, strictly-speaking, provably false statements of fact. Trump's lies about having “built the greatest economy in the history of the world,” about the value of the surrendered military equipment tied to the withdrawal from Afghanistan, and about how his administration had “filled up” the Strategic Petroleum Reserve but that Biden had “virtually drained” it are all matters well within the scope of interpretation of events, rather than strict facts that might be provable in court as either true or false.<sup>260</sup> The same can be said about Trump's

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<sup>254</sup> Regarding both counterarguments, *see, e.g.*, Eugene Volokh, *When Are Lies Constitutionally Protected?*, 4 J. FREE SPEECH L. 685, 690 (2023) (noting there are some areas of speech where “it is perilous to permit the state to be the arbiter of truth”) (quoting *United States v. Alvarez*, 567 U.S. 709, 751–52 (2012) (Alito, J., dissenting)).

<sup>255</sup> *See, e.g.*, *United States v. Miller*, 605 F. Supp. 3d 63, 66–67 (D.D.C. 2022) (noting that the stolen election lie culminated in the January 6, 2020 attack on the U.S. Capitol); Edward D. Cavanagh, *Countering the Big Lie: The Role of the Courts in the Post-Truth World*, 107 CORNELL L. REV. ONLINE 64, 80 (2022) (same).

<sup>256</sup> Russell L. Weaver, *Remedies for “Disinformation”*, 55 U. PAC. L. REV. 185, 190 (2024) (discussing ways that society might be able “to try to tackle the problem of disinformation”); Russell L. Weaver, *Fake News and the Covid-19 Pandemic*, 9 J. INT'L MEDIA & ENT. L. 273, 281 (2021) (“Disinformation regarding the pandemic has created various societal problems.”).

<sup>257</sup> Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL'Y REV. 353, 355–56 (2022).

<sup>258</sup> HENRICKSEN, *supra* note 128, at 177–78.

<sup>259</sup> *See generally* Mark Tushnet, *Epistemic Disagreement, Institutional Analysis, and the First Amendment Status of Lies*, 4 J. FREE SPEECH L. 651 (2023); *cf.* Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367 (2017).

<sup>260</sup> Qiu, *supra* note 220; *see also* Dale & LeBlanc, *supra* note 220.

accusation that his opponents wanted “open borders.”<sup>261</sup> By contrast, when it comes to the integrity of an election, an assertion that it was “stolen” through “massive fraud” is quite plainly a statement of fact that is either true or false. That is not to say there is *no* wiggle room for hyperbole or insults on such matters. But the stolen election lie went much further than saying, for instance, that “my opponent is a crook” or “a cheat” or something vague like that. It specifically asserted the election was literally “stolen” through “fraud.” That is something that either occurred or it didn’t. (We know, of course, that it did not happen.<sup>262</sup>) Trump’s other lies discussed in this paragraph were likewise false,<sup>263</sup> but proving so in a court of law—or rather, permitting a claim of falsity to move forward in a court of law on these topics—would be far more problematic.

The same can be said for all but one of the lies from the Left. This includes that assertion that Biden and others believe Trump is a fascist and would rule the United States as a dictator<sup>264</sup> and the assertion that science does not support the existence of, or differences between, the sexes of male and female.<sup>265</sup> In both cases, although the assertions are arguably factually false, they could just as easily be framed as statements of opinion or viewpoint, rather than statements of provable and falsifiable fact. And the third falsehood from the Left discussed, that Trump was the only president in history to not attend his successors inauguration,<sup>266</sup> although it is provably false, and thus a pure statement of falsifiable fact, is nevertheless of such little consequence, not only politically but societally, that such a falsehood should not subject the speaker to any serious legal repercussions notwithstanding its provable falsity. This highlights the balancing that must occur if courts were to wade into the waters of finding falsehoods to potentially violate the right of privacy. As is the case in the First Amendment context, numerous factors should be taken into account when regulating such falsehoods. Professor Cass Sunstein’s four-pronged approach is a helpful starting point. He suggests looking at state of mind of the speaker, magnitude of harm the falsehood causes, the likelihood of harm, and the timing of harm.<sup>267</sup> These factors, at a minimum, should be taken into account and given due weight when drawing the constitutional line on intrusions into these areas of private life. Any such intrusions, of

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<sup>261</sup> Montanaro, *supra* note 222.

<sup>262</sup> See *supra* note 210 at 4; *supra* note 212 at 12–14; *supra* note 255.

<sup>263</sup> See *supra* notes 220 & 222.

<sup>264</sup> Samantha Waldenberg & Michael Williams, *Biden believes Trump is a fascist, White House says*, CNN (last visited Oct. 23, 2024), <https://www.cnn.com/2024/10/23/politics/biden-trump-fascism/index.html>.

<sup>265</sup> See, e.g., Evan Lips, *NH Dem Says There’s No ‘Accepted Definition’ of ‘Biological Male’*, NH JOURNAL (last visited Oct. 10, 2024), <https://nhjournal.com/nh-dem-says-theres-no-accepted-definition-of-biological-male/>.

<sup>266</sup> Taija PerryCook, *Biden Called Trump the Only President to Avoid Successor’s Inauguration. Here’s Why He Was Wrong*, SNOPE: FACT CHECK (Jan. 2, 2025), <https://www.snopes.com/fact-check/presidents-didnt-attend-inauguration/>.

<sup>267</sup> See SUNSTEIN, *supra* note 128 at 14–17.

course, infringe a fundamental right and therefore must pass strict scrutiny.<sup>268</sup>

It is the coercive and deceitful nature of propaganda,<sup>269</sup> particularly when it is provably false, that supports the idea of regulating it, not only under the First Amendment but as potentially a violation of the right of privacy. “[P]ropaganda, unlike persuasion, seeks only the satisfaction of the propagandist.”<sup>270</sup> Moreover, “[o]ne of propaganda’s key characteristics is that the speaker mobilizes it for their own benefit, rather than for the audience’s, so that its goal is inherently negative.”<sup>271</sup> For that reason, others have already argued that “government propaganda undermines core goals of the Free Speech Clause, most notably the promotion of democratic self-governance,” and should therefore be regulable.<sup>272</sup> This is particularly true given that propaganda, by its nature, “serve[s] a nefarious and antidemocratic purpose that is itself at least partly concealed in the expression of the propaganda.”<sup>273</sup> Because it “is designed to change group behavior in a manner advantageous to the propagandist,” propaganda should, some argue, not enjoy full First Amendment protections, but rather be treated as akin to other deceitful, self-serving speech that harms others.<sup>274</sup>

Moreover, the Supreme Court has made clear that each state has the “power,” if not the obligation, “to shelter its people from ... fraud.”<sup>275</sup> Thus, efforts to defraud people, even if targeted at the public at large, are something within the states’ purview to protect against. Courts have already decided this, at least in certain limited kinds of cases, such as those involving tobacco and asbestos injuries. For instance, federal district court in New York held that “[m]isrepresentations made to the public at large may give rise to a claim of fraud so long as the plaintiff was part of the class of persons intended to receive the misrepresentations.”<sup>276</sup> Similarly, one court in Georgia held:

Even where the representations are made to the public at large, or to a particular class of persons, as long as they are given with the intention of influencing any member of the public or of the class to whom they may be communicated,

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<sup>268</sup> See, e.g., *Green v. Alachua Cnty.*, 323 So. 3d 246, 250 (Fla. Dist. Ct. App. 2021); *7020 Ent., LLC v. Miami-Dade Cnty.*, 519 F. Supp. 3d 1094, 1104 (S.D. Fla. 2021); *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1253 (Fla. 2017); *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004).

<sup>269</sup> BETH S. BENNETT & SEAN PATRICK O’ROURKE, *A Prolegomenon to the Future Study of Rhetoric and Propaganda: Critical Foundations*, in READINGS IN PROPAGANDA AND PERSUASION: NEW AND CLASSIC ESSAYS 51, 63 (Garth S. Jowett & Victoria O’Donnell eds., 2006).

<sup>270</sup> *Id.*

<sup>271</sup> Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 826 (2020).

<sup>272</sup> *Id.* at 829.

<sup>273</sup> Sara Dillon, *The Propaganda Conundrum: How to Control This Scourge on Democracy*, 23 OR. REV. INTL. L. 123, 124 (2022).

<sup>274</sup> *Id.*; see also Corbin, *supra* note 271, at 829.

<sup>275</sup> *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533 (1949).

<sup>276</sup> *In re Simon II Litig.*, 211 F.R.D. 86, 140 (E.D.N.Y. 2002).

any one injured through the proper reliance thereon may secure redress.<sup>277</sup>

Arguably, efforts to defraud the public at large are at least as serious as efforts to defraud individual victims. Some bad faith government propaganda fits squarely into this category of intentional falsehoods. Certainly, the stolen election lie was disseminated to the public at large to influence people's opinions and political decisions. Certainly, the stolen election lie caused cognizable harm. It also caused, and continues to cause, an enormous amount of less quantifiable or measurable injury, particularly with regard to our democratic institutions and the functioning of our electoral democracy.

Accordingly, at least some of the government's purposeful manipulation of people's beliefs and decisions, and ultimately their lives, when based on intentional falsehoods and when done in bad faith, arguably intrudes into the private lives of those duped by the propaganda. Whether such intrusion justifies regulation and what that regulation might look like are questions for another day. My aim here is merely to highlight the fact that bad faith government propaganda raises not only freedom of speech and fraud concerns,<sup>278</sup> but right of privacy concerns as well.

#### V. CONCLUSION

Some privacy protections against intrusions into a person's "private life" are already recognized in law: family relations, reproduction, health, and personal information.<sup>279</sup> But other dimensions of "private life" are mostly, if not entirely, ignored, such as "the mental and physical inviolability of the natural person."<sup>280</sup> The purposeful manipulation of individuals, when done one on one, is largely covered by various fraud laws,<sup>281</sup> and therefore calls for no right of privacy analysis. But bad faith government propaganda largely avoids regulation under the fraud laws. Therefore, if there is a solution to be found for how to either punish wrongdoers who purposefully disseminate bad faith propaganda, or to compensate victims harmed by it, courts and legislatures may need to look outside the traditional fraud context. One option for regulation might be the right of privacy under state constitutions.

Of course, it is an open question whether courts or legislatures should do anything at all to combat bad faith government propaganda, or any propaganda for that matter. The Supreme Court has a long history of skepticism with regard to regulatory fixes to combat harmful false speech.<sup>282</sup> Indeed, beginning almost 75 years ago the Supreme Court

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<sup>277</sup> *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183, 193 (S.D. Ga. 1982).

<sup>278</sup> Henricksen, *On the Legality of Defrauding the Public*, *supra* note 206 at 1093.

<sup>279</sup> *See supra* Section III.B.

<sup>280</sup> *Private Life Definition*, *supra* note 115.

<sup>281</sup> Henricksen, *On the Legality of Defrauding the Public*, *supra* note 206 at 1062–63.

<sup>282</sup> *See, e.g.*, *Dennis v. United States*, 341 U.S. 494, 503 (1951) (noting that "speech can rebut speech, propaganda will answer propaganda"); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J.,

answered the questions I raise here by making clear the answer lies not in more regulations but in more speech. In *Dennis v. United States*,<sup>283</sup> for example, the Court held that “speech can rebut speech, propaganda will answer propaganda.”<sup>284</sup> Of course, while the idea that “the solution to false speech is more speech” has a long history, so too do counterarguments against the idea.<sup>285</sup> Too often, more speech does not lead to truth, nor does it provide relief to victims harmed by the falsehood.<sup>286</sup>

Nevertheless, there are good reasons for advancing cautiously while seeking solutions to the problem of bad faith government propaganda. At the end of the day, it is an issue centered on speech. Propaganda, though it may be false, though it may be disseminated in bad faith and for self-serving purposes, is nevertheless speech. The First Amendment stands as a crucial protection against government overreach when it comes to regulating speech. That foundational protection has no exception for any category of speech called “propaganda.” Nor does it have an exception for false speech.<sup>287</sup> I and others have argued elsewhere that at least some intentional falsehoods disseminated to the public in bad faith, which cause substantial harm, should not enjoy full First Amendment protections.<sup>288</sup> But this is a call for delicate and precise action to regulate only a narrow subset of propaganda that would satisfy all elements of “fraud on the public.”<sup>289</sup> That is, the falsehoods at issue in my call for regulation are limited to those that would satisfy all the elements of fraud, which narrows the scope of application to great degree with juxtaposed with the overall universe of falsehoods disseminated to the public. The free speech and fraud aspects of this issue are, of course, important. But state constitutions have provided another avenue to potentially allow regulation of some of the most harmful bad faith government propaganda. This makes it at least worth considering whether such purposeful and bad faith efforts to manipulate the behavior and decisions of people might justifiably be deemed an intrusion into their “private life.”

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concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (“However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

<sup>283</sup> *Dennis v. United States*, 341 U.S. 494, 503 (1951).

<sup>284</sup> *Id.*

<sup>285</sup> See, e.g., David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991) (criticizing the arguments underpinning the consequentialist justification of the “more speech” principle).

<sup>286</sup> See generally Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65 (2014) (analyzing whether the “more speech” principle is accurate or useful); Richard K. Sherwin, *Anti-Speech Acts and the First Amendment*, 16 HARV. L. & POL’Y REV. 353, 362 (2022) (calling the “more speech” principle “ineffectual”).

<sup>287</sup> *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion).

<sup>288</sup> See, e.g., HENRICKSEN, *supra* note 128, at 270.

<sup>289</sup> *Id.* at 188.

