

FAKE NEWS & FILM: HOW ALTERNATIVE FACTS INFLUENCE THE NATIONAL DISCOURSE

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I. INTRODUCTION

Aliens invade New Jersey! Hitler loves the Jews! 9/11 was a false flag operation! Ludicrous, preposterous, and ridiculous statements all, and yet each of these reports was at one point passed off and positioned as a truthful account.

Fake news is not a new political tool. In 1782, Benjamin Franklin published a claim that George III “furnished the Savages with hatchets and scalping knives, and engages them to fall upon our defen[s]eless farmers, and murder them with their wives and children.”¹ While there is little evidence the King of England actually commissioned indigenous Americans to murder colonial families, Franklin’s publications riled a country still engaged in revolution.

In contemporary America, the trope “fake news” gained greater visibility after the 2016 Presidential Election. Political factions weaponized the rallying cry of “fake news” as a method of branding reports considered critical and events deemed unfavorable. By simply labeling credible information “fake news,” authenticity could be discredited. While this phrase cast a pall on objective journalism, a door was simultaneously

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1. BENJAMIN FRANKLIN & WILLIAM TEMPLE FRANKLIN, *MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN* 38 (London, H. Colburn vol. II 1818); *see also From Benjamin Franklin to James Hutton, 7 July 1782*, FOUNDERS ONLINE: NATIONAL ARCHIVES, <http://founders.archives.gov/documents/Franklin/01-37-02-0377> (last updated Feb. 1, 2018).

opened for alternative facts to gain legitimacy. Everything could be called into question and reality could be modified for persuasive purposes.

For fake newsmakers, motion pictures became a powerful tool in the subtle art of persuasion. Over time, producers of pseudo-documentaries have developed increasingly sophisticated techniques for bending facts and warping truth. But what is “fake news”? Not all dramatic license or creative chronology is deceptive and dishonest. Rather, fake news can be defined as the publication of knowingly false, deliberately misleading, or purposefully manipulated content intended to influence the recipient of the information.

Two works created by Orson Welles and Kurt Gerron demonstrated the wide-ranging spectrum of fake news: for thrilling entertainment and horrifying fraud. Welles, the Boy Genius of Hollywood, began his career with a stunt that is remembered as a masterwork of fake news. His radio play adaptation of *War of the Worlds* “mimicked the format” of breaking newscasts for dramatic intensity. Audience reaction became legendary. At the opposite end of the scale, a Jewish director named Kurt Gerron was compelled by the Nazi Ministry of Film to produce a pseudo-documentary that presented scenes of a “pleasant and agreeable” life in a Nazi concentration camp. The work of mid-century marketing men, Edward Bernays, Ivy Lee, and Carl Byoir developed “public relations into an art form.” Their techniques were incorporated into politically charged documentaries that have had profound effects on democracy and the American experience.

Fake news has deep roots in creative culture and political posturing, but its power was increased by the projected image. Motion pictures establish an intimate connection with viewers, elevating the intensity of the messaging and making it ripe for abuse. Mass media content is not mere entertainment but an expression and reflection of collective values. The story of fake news and film shows the development of the audiovisual medium, its role in defining the social and political landscape of America, and its ability to change the way we think.

II. THREATS FROM ABOVE

The panic began just after eight o’clock on Sunday, October 30, 1938. Listeners tuned to the Columbia Broadcasting System in New York and affiliated stations around the country were transfixed by reports of a meteor

crash-landing outside of Princeton, New Jersey and killing an estimated 1,500 people.²

Within minutes news of the disaster grew more horrific. Audiences were riveted to their radios by reports of invaders from the planet Mars. Gray aliens with oily tentacles and toothy saliva-dripping mouths wriggled out of their landing ships with weapons of mass destruction.³ “Wait! Something’s happened!” The news reporter on the scene panicked into his microphone.

A humped shape is rising out of the pit. . . . Good Lord, they’re turning into flame! . . . The woods. The barns. It’s coming this way. (Crash of microphone, then dead silence.)

Announcer—Ladies and gentlemen, I have just been handed a message. At least forty people, including six state troopers lie dead in a field east of the village of Grovers Mill, their bodies burned and distorted beyond all possible recognition.⁴

The reaction was panic-stricken. Phone calls overwhelmed the *New York Times* switchboard. Hysteria broke out around the city.

“I heard that broadcast and almost had a heart attack,” said Louis Winkler of 1322 Clay Avenue, the Bronx. “I didn’t tune it in until the program was half over, but when I heard the names and titles of Federal, State, and municipal officials . . . I was convinced that it was the [real] McCoy. I ran out into the street with scores of others and found people running in all directions.”⁵

There was fear in the streets of Harlem, Queens, and Manhattan. Thousands of calls flooded into the Newark and Jersey City police headquarters.⁶ Within an hour the frenzy spread nationwide—San Franciscans believed “an overwhelming force had invaded the United States from the air [and] was in the process of destroying New York.”⁷ Residents of Atlanta, Baltimore, Birmingham, Boston, Charlottesville, Chicago, Dallas, Denver, Indianapolis, Kansas City, Los Angeles, Milwaukee,

2. *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES (Oct. 31, 1938), <http://query.nytimes.com/mem/archive/pdf?res=9800E6DA163BEE3ABC4950DFB6678383629EDE> [hereinafter *Radio Listeners in Panic*].

3. *Excerpts From the ‘War’ Broadcast*, N.Y. TIMES (Nov. 1, 1938), <http://query.nytimes.com/mem/archive/pdf?res=9E01E7D9163BEE3ABC4953DFB7678383629EDE> [hereinafter *Excerpts From the ‘War’ Broadcast*].

4. *Id.*

5. *Radio Listeners in Panic*, *supra* note 2.

6. *Id.*

7. *Scare is Nation-Wide*, N.Y. TIMES (Oct. 31, 1932), <http://query.nytimes.com/mem/archive/pdf?res=9800E6DA163BEE3ABC4950DFB6678383629EDE> [hereinafter *Scare is Nation-Wide*].

Minneapolis, New Orleans, Omaha, Pittsburgh, Richmond, Salt Lake City, and St. Louis each planned their response to the alien attack.⁸ In Tulsa, two heart attacks were reported due to excitement caused by the broadcast.⁹ “Mass hysteria mounted so high in some cases that people told the police and newspapers they ‘saw’ the invasion.”¹⁰ And then just as soon as it began, it was over.

Within one hour’s time the alien assault was resolved. The once-powerful Martian antagonists lay silent, “hungry birds pecking and tearing shreds of flesh from their dead bodies.”¹¹ Orson Welles signed off for the Mercury Theater and at 9 p.m. the modern classical music of José Iturbi’s orchestra filled the airwaves.¹²

War of the Worlds brought Orson Welles to national attention. The twenty-three-year-old impresario had launched a Sunday night radio program called *Mercury Theatre on the Air* four months earlier in July 1938.¹³ In his weekly programming, Welles showcased his distinctive voice to present adaptations of classic works such as *Treasure Island* in July, *The Count of Monte Cristo* in August, and *Julius Caesar* in September.¹⁴ For his Halloween Eve selection, Welles selected a pulpy thriller published forty years earlier.¹⁵ Incorporating the basic elements of H. G. Wells’s *War of the Worlds*, Orson brilliantly gamed the “breaking news” format. In his modernized update, Orson introduced a swinging jazz

8. *Id.*

9. “War of the Worlds” Broadcast Radio Causes Panic, UPI (Oct. 30, 1938), <https://www.upi.com/Archives/1938/10/30/War-of-the-Worlds-Radio-Broadcast-Causes-Panic/6020848264213/>.

10. Scare is Nation-Wide, *supra* note 7; see also Hysteria Ensued in Charlottesville After Broadcast of Martian Attack on New Jersey in 1938, THE DAILY PROGRESS (Oct. 31, 2017), http://www.dailyprogress.com/125yearsofprogress/hysteria-ensued-in-charlottesville-after-broadcast-of-martian-attack-on/article_f6028d18-bdb5-11e7-933a-ef8022409f98.html; Chris Foran, Milwaukee Didn’t Panic Over Radio’s ‘War of the Worlds.’ Or Did It?, MILWAUKEE JOURNAL SENTINEL (Oct. 30, 2017), <https://www.jsonline.com/story/life/green-sheet/2017/10/30/milwaukee-didnt-panic-over-radios-war-worlds-did-it/798285001/>; Drama Thriller Makes Invasion Much Too Real, THE HELENA INDEPENDENT, Oct. 30, 1938, at 3; Radio Drama Gives Nation Big Jitters, THE HONOLULU ADVERTISER, Oct. 30, 1938, at 1.

11. Excerpts From the ‘War’ Broadcast, *supra* note 3.

12. Radio Programs Scheduled for Broadcast This Week, N.Y. TIMES (Oct. 23, 1938), <http://query.nytimes.com/mem/archive/pdf?res=9903E2D81031EE3ABC4B51DFB6678383629EDE>.

13. Orson Welles - Mercury Theater - 1938 Recordings, INTERNET ARCHIVE (1938), <https://archive.org/details/OrsonWelles-MercuryTheater-1938Recordings> [hereinafter 1938 Recordings].

14. *Id.*; The Microphone Will Present, N.Y. TIMES, Aug. 28, 1938, at S124; Radio Programs Scheduled for Broadcast this Week, N.Y. TIMES (Sept. 11, 1938), <http://query.nytimes.com/mem/archive/pdf?res=940DE5DE103CEF3ABC4952DFBF668383629EDE>.

15. 1938 Recordings, *supra* note 13.

performance that was intermittently interrupted by “this just in” breaking news updates. The result blended the boundary between reportage and dramaturgy. Orson Welles grayed the area between fact and fiction and created a landmark in pop culture history.

Recent historians have challenged the notion that Welles’s *War of the Worlds* triggered a panic. Commemorating the broadcast’s 75th anniversary, *Slate Magazine* ran a story that disputed the mass media myth. “Far fewer people heard the broadcast—and fewer still panicked—than most people believe today,” wrote Jefferson Pooley and Michael Socolow.¹⁶ The media myth-busters reviewed ratings and market share and found that only 2% of the 5,000 households surveyed were tuned to Mercury Theatre on the Air that evening.¹⁷ “98 percent of those surveyed were listening to something else, or nothing at all, on Oct. 30, 1938. This miniscule rating is not surprising. Welles’ program was scheduled against one of the most popular national programs at the time—ventriloquist Edgar Bergen’s *Chase and Sanborn Hour*, a comedy-variety show.”¹⁸

So how was Welles’ *War of the Worlds* elevated into pop culture mythos? Pooley and Socolow point to print media coverage of the broadcast.

Radio had siphoned off advertising revenue from print during the Depression, badly damaging the newspaper industry. So the papers seized the opportunity presented by Welles’s program to discredit radio as a source of news. The newspaper industry sensationalized the panic to prove to advertisers and regulators that radio management was irresponsible and not to be trusted.¹⁹

Indeed, two days after the debunked Martian invasion, the *New York Times* opined on the dangers of new media newscasts in an editorial entitled “Terror by Radio”:

Radio ought to act promptly to prevent a repetition of the wave of panic in which it inundated the nation Sunday night . . . the sobering fact remains that thousands, from one end of the country to the other, were frightened out of their senses . . . taxing the police and hospitals, confusing traffic and choking the usual means of communication. What began as ‘entertainment’ might have readily ended in disaster.²⁰

16. Jefferson Pooley & Michael Socolow, *The Myth of the ‘War of the World’s’ Panic*, SLATE (Oct. 28, 2013), http://www.slate.com/articles/arts/history/2013/10/orson_welles_war_of_the_worlds_panic_myth_the_infamous_radio_broadcast_did.html.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Terror by Radio*, N.Y. TIMES, Nov. 1, 1938, <https://timesmachine.nytimes.com>

Pooley and Socolow theorized that the newspaper industry, threatened by the public's engagement with broadcast radio, either exaggerated the reactions to Welles' radio play or fabricated tales of terror.²¹ The *New York Times* concluded their assessment with a finger wagging: "Radio officials should have thought twice before mingling this new technology with fiction so terrifying."²² *Editor & Publisher*, an esteemed newspaper trade journal covering the journalism industry since 1901, warned "the nation as a whole continues to face the danger of incomplete, misunderstood news over a medium which has yet to prove, even to itself, that it is competent to perform the news job."²³ These publications argued that broadcast news was unreliable and untrustworthy compared to the tried and tested dispatches of ink stained print journalists. Fearing competition from a new medium, traditional mainstream paper pushers cried out that radio listeners risked hearing "fake news."

Within forty-eight hours of the *War of the Worlds* programming, the Federal Communications Commission (FCC) stepped in to assess the real or potential threat posed by fake news from radio transmissions.²⁴ Frank R. McNinch, chairman of the FCC, led the hastily launched investigation, requesting transcripts and electric recordings of the show.²⁵ The danger posed by Welles's stunt was difficult to gauge. "I withhold final judgment until later," McNinch stated, "but any broadcast that creates such general panic and fear as this one is reported to have done is, to say the least, regrettable."²⁶ By December 6, the case was closed.²⁷ Reported the *Times*: "The Federal Communications Commission announced today it would take no action against the Columbia Broadcasting System or the stations which carried the Orson Welles *War of the Worlds* radio program, because in its

/timesmachine/1938/11/01/98205873.html?action=click&contentCollection=Archives&module=LedeAsset®ion=ArchiveBody&pgtype=article&pageNumber=22.

21. See Pooley & Socolow, *supra* note 16.

22. *The Legend of the 'War of the Worlds'*, PBS (Oct. 30, 2013), <https://www.pbs.org/newshour/nation/the-legend-of-the-war-of-the-worlds>.

23. JOSEPH CAMPBELL, GETTING IT WRONG: DEBUNKING THE GREATEST MYTHS IN AMERICAN JOURNALISM 41 (2nd ed. 2017).

24. *FCC to Scan Script of 'War' Broadcast*, N.Y. TIMES (Nov. 1, 1938), <http://query.nytimes.com/mem/archive/pdf?res=9F03E1DA163BEE3ABC4953DFB7678383629EDE>.

25. *Id.*

26. *FCC Is Perplexed on Steps to Take*, N.Y. TIMES (Nov. 1, 1938), <http://query.nytimes.com/mem/archive/pdf?res=9501EEDA163BEE3ABC4953DFB7678383629EDE>.

27. *'Mars' Radio Case Closed*, N.Y. TIMES (Dec. 6, 1938), <http://query.nytimes.com/mem/archive/pdf?res=9E04E0DA173BEE3ABC4E53DFB4678383629EDE>.

judgment ‘steps sufficient to protect the public interest have been taken by the CBS since the broadcast which panicked the country.’”²⁸

No aliens had landed and no FCC rule had been violated, but Hollywood history was minted. Universal Pictures jumped on the Martian invasion bandwagon in an effort to capitalize on Welles’ radio broadcast, announcing the release of *Mars Attacks the World* (1938). “The film, which is a recut edition of [Universal’s] serial *Flash Gordon’s Trip to Mars*,” the *Times* stated, “was scheduled for January release but has been moved up.”²⁹ Buster Crabbe, the actor who played Flash Gordon, provided B-movie thrills as Orson rocked up to the Hollywood A-list. Within five months of the *War of the Worlds* broadcast, RKO Pictures entered negotiations with Welles,³⁰ which ultimately granted the then-twenty-six-year-old artist the keys to the kingdom with a *carte blanche* limitless budget.³¹ Welles directed, produced, starred in, and co-wrote *Citizen Kane* (1941). His debut was widely considered the most accomplished motion picture made in Hollywood, and recognized with nine Academy Award nominations. *Kane* topped “best of” lists for decades, beloved for its striking deep focus cinematography, its non-linear narrative structure, and the riveting performance of its leading man. For a time, Orson Welles was the symbol of filmmaking genius, but as he aged Welles came to personify lost promise.

From shocking the nation with a Sunday night radio drama about space invaders to peddling Paul Masson wine in late career television advertisements, Orson Welles demonstrated the highest highs and lowest lows of life in the public eye. His *War of the Worlds* may have ruffled feathers in living rooms around the country but it definitely sounded alarms at assignment desks in the nation’s most influential newsrooms. Radio broadcasts threatened the lock that print journalists held and their reaction was to use Welles’s *War* as a strawman to discredit the new technology with the slur of “fake news.”

Very much like a Welles film, the myth and the reality of the *War of the Worlds* broadcast demonstrates several levels of meaning and intrigue. In a milestone of pop culture and media history, Orson Welles, the Boy Genius of Hollywood’s Golden Age, made his mark with a masterwork of fake news.

28. *Id.*

29. *Id.*

30. *Id.*

31. ORSON WELLES: INTERVIEWS 119 (Mark W. Estrin ed. 2002).

III. MASTERS OF SPIN

While the nation's attention was troubled by peril from the skies, whether Martian invasion or radio transmission, a more insidious threat was creeping into American culture. This was the menace of manipulative marketing. Fake news formulated for foreign interests in the United States presented a subtle danger. Around the same time that Orson Welles was in pre-production on his *War of the Worlds* radio play and the editorial board at the *New York Times* was considering strategic action against broadcast journalism, a public relations professional named Carl Byoir picked up a new account. He would represent the Third Reich in American media.³²

Byoir was not alone in his mastery of spin. Together with PR pioneers Ivy Lee and Edward Bernays, these proto-“Mad Men” demonstrated an expertise in crafting selected subject matter into carefully positioned corporate communications. These three marketing masterminds contributed to the creation of the fake news phenomenon in the age of mass communications.

Edward Bernays has widely been credited as the “Father of Public Relations.”³³ Born in 1891 Vienna to a prominent family, Bernays was the nephew of Sigmund Freud.³⁴ Edward idolized his famous uncle and incorporated cutting edge Freudian concepts into his practice of publicity.³⁵ With these tools and techniques, Bernays developed a methodology he dubbed “the engineering of consent.”³⁶ As America entered World War I, Bernays was conscripted to the Committee on Public Information (CPI).³⁷ His mission: to influence public opinion and drum up enthusiasm for America's entry into the theater of battle.³⁸ Bernays saw his role as “psychological warfare,” tasked with winning hearts and minds.³⁹

Incorporating his military experience into civilian practice, Bernays was the first to recognize business applications for the concepts of indoctrination. “The only difference between ‘propaganda’ and

32. *Carl Byoir Dead; Publicist was 68*, N.Y. TIMES (Feb. 4, 1957), <https://timesmachine.nytimes.com/timesmachine/1957/02/04/87210409.pdf> [hereinafter *Byoir Dead*].

33. *Edward Bernays, ‘Father of Public Relations’ and Leader in Opinion Making, Dies at 103*, N.Y. TIMES (Mar. 10, 1995), <http://www.nytimes.com/1995/03/10/obituaries/edward-bernays-father-public-relations-leader-opinion-making-dies-103.html?pagewanted=print> [hereinafter *Father of Public Relations*].

34. *Id.*

35. *See id.*

36. Edward L. Bernays, *The Engineering of Consent*, 250 THE ANNALS OF THE AM. ACAD. 113, 114 (1947).

37. *See id.* at 115.

38. EDWARD BERNAYS, PUBLIC RELATIONS 114 (1955).

39. *Id.*

‘education,’ really, is in the point of view,” he wrote in *Crystallizing Public Opinion* (1923).⁴⁰ “The advocacy of what we believe in is education. The advocacy of what we don’t believe in is propaganda.”⁴¹ Taking the next step, Bernays theorized that by manipulating public opinion and guiding behavior, a savvy publicist could wield dominion over the masses.⁴² In his book *Propaganda* (1928), he asked, “If we understand the mechanism and motives of the group mind, is it not possible to control and regiment the masses according to our will without them knowing it?”⁴³

Bernays found that two of the most useful tools in the art of coercion were fear and fashion. For Hugh Moore’s Dixie Cup Company, Bernays created a disinformation campaign to convince consumers that disposable cups were the most sanitary drinking option.⁴⁴ Setting up an official-sounding organization called the Committee for the Study and Promotion of the Sanitary Dispensing of Food and Drink, Bernays promulgated fake news that warned of disease—including syphilis—spread from re-used glasses. “Be safe! No lips ever touch a Dixie brim until it touches yours.”⁴⁵ For another client, Lucky Strike, Bernays’s market research revealed that women objected to the brand’s green cigarette package because it clashed with the season’s stylish colors. For the fix, the PR guru moved to make green fashionable by sponsoring “a green fashion luncheon, green [gala] balls (at which green gowns were worn), and window displays of green suits and dresses.”⁴⁶ The campaign was a brilliant success, according to sales figures.⁴⁷

While fear and fashion were effective tools, Bernays recognized that the most powerful method of influencing the public was in the projected image.⁴⁸ “The American motion picture is the greatest unconscious carrier of propaganda in the world today,” he wrote in *Propaganda*.⁴⁹

The future of fake news in film was evident to Edward Bernays only a single year after *The Jazz Singer* (1927) wow’ed audiences and launched

40. EDWARD BERNAYS, *CRYSTALLIZING PUBLIC OPINION* 200 (Ig Publ’g. 2011) (1923).

41. *Id.*

42. *See id.* at 71.

43. *Id.*

44. *See* LARRY TYE, *THE FATHER OF SPIN: EDWARD L. BERNAYS AND THE BIRTH OF PUBLIC RELATIONS* 59 (Henry Holt & Co. 2002) (1998); *see also* MANON PARRY, *BROADCASTING BIRTH CONTROL: MASS MEDIA AND FAMILY PLANNING* 91 (2013).

45. TYE, *supra* note 44, at 59.

46. *Id.*

47. *Id.*

48. *See* EDWARD BERNAYS, *PROPAGANDA* 166 (Ig Publ’g 2005) (1928) [hereinafter BERNAYS, *PROPAGANDA*].

49. *Id.*

the talking picture revolution. A continent away, a young Josef Goebbels, the future Reich Minister of Public Enlightenment and Propaganda of Nazi Germany, became an admirer of Bernays's work.⁵⁰ Goebbels found that fear, fashion, and film would become a powerful cocktail for the steering of mass opinion.

Ivy Ledbetter Lee fired up his publicity machine in 1914. Unlike Bernays, Lee's practice focused on more overtly political clients.⁵¹ When the Colorado Fuel and Iron Company controlled by John D. Rockefeller Jr. went up against 1,200 miners and their families protesting dismal work conditions, violence erupted.⁵² Corporate security forces killed twenty miners firing machine guns into the crowd at a standoff at the Ludlow depot.⁵³ More workers perished—including women and children—in the charged events that followed. Still, the strike continued for over a year.⁵⁴ One might call the Ludlow Massacre a public relations nightmare for Rockefeller's concerns. As the public sided with the workers, Lee went on the offensive. He planted stories in the press that the United Mine Workers Association was spreading lies about the event, that they had initiated the violence. Disgusted by his tactics, the writer Carl Sandburg coined a poetic nickname, christening Lee "Poison Ivy."⁵⁵

Lee's work at Ludlow impressed some of the Twentieth Century's more malevolent powers. By the 1920s, Lee may have been engaged by

50. Ron Chernow, *First Among Flacks*, N.Y. TIMES (Aug. 16, 1998), <http://www.nytimes.com/1998/08/16/books/first-among-flacks.html>.

51. *Compare Lee, as Advisor to Nazis, Paid \$25,000 by Dye Trust*, N.Y. TIMES (July 12, 1934), <https://timesmachine.nytimes.com/timesmachine/1934/07/12/94549978.pdf> [hereinafter *Adviser to Nazis*], with TYE, *supra* note 44, at 59 (listing examples of Bernays's clients as Cartier, Dodge, and Dixie cups).

52. See Mara Bovsun, *Justice Story: Women, Kids Killed in Bloody 1913 Massacre During Coal Strike*, N.Y. DAILY NEWS, (Sept. 8, 2013), <http://www.nydailynews.com/news/justice-story/justice-story-women-kids-die-1913-coal-strike-article-1.1448949>.

53. *Fired Machine Gun in Ludlow Battle*, N.Y. TIMES (May 21, 1914), <https://timesmachine.nytimes.com/timesmachine/1914/05/21/100090088.pdf> [hereinafter *Machine Gun*]; see also Bovsun, *supra* note 52.

54. See Mike McPhee, *Mining Strike Site in Ludlow gets Feds' Nod*, THE DENVER POST (June 27, 2009), <https://www.denverpost.com/2009/06/27/mining-strike-site-in-ludlow-gets-feds-nod/>; *45 Dead, 20 Hurt, Scores Missing, in Strike War*, N.Y. TIMES (Apr. 22, 1914) <https://timesmachine.nytimes.com/timesmachine/1914/04/22/100307839.pdf>; *Machine Gun*, *supra* note 53; *Hold Rockefeller at Fault in Strike*, N.Y. TIMES (Aug. 28, 1915), <https://timesmachine.nytimes.com/timesmachine/1915/08/28/100175130.pdf>; see Bovsun, *supra* note 52.

55. See JONATHAN H. REES, REPRESENTATION AND REBELLION: THE ROCKEFELLER PLAN AT THE COLORADO FUEL AND IRON COMPANY 15, 20-23 (2010).

representatives of the newly established U.S.S.R.⁵⁶ “Ivy L. Lee, the best known and most expensive of publicity agents” reported the *New York Times*, “has begun to display keen interest in the recognition of the Soviet Government of Russia by the United States.”⁵⁷ Despite writing letters to American captains of industry on behalf of the Soviet Union, to his death Lee claimed his interest in Communist Russia was personal and not a professional engagement.⁵⁸

When the National Socialist German Workers’ Party assumed control of Germany, they looked to Lee.⁵⁹ Before a congressional hearing, Lee testified that the German Dye Trust reached out to him within three months of Hitler’s election.⁶⁰ The Trust offered to retain the publicist for \$25,000 a year—over \$465,000 in 2017 dollars.⁶¹ This was on top of an additional \$33,000 salary paid to Lee’s twenty-eight-year-old son stationed in Berlin.⁶² Lee acknowledged that the Dye Trust, IG Farben, was the most important corporate conglomerate in Germany; however, it has never been determined whether Lee was aware that one of Farben’s products was the pesticide Zyklon-B, the poison gas used on concentration camp prisoners at Auschwitz.⁶³ Congress questioned Lee’s entanglement with Axis interests, but death saved him from what could have been his own worst PR nightmare—putting a pleasant face on Nazis by promoting the interests of German chemical industrialists.

Public Relations executive Carl Byoir found a similar dilemma with history’s least welcome client. In 1933, a Nazi agent posing as an operative of the German Tourist Information Office hired Carl Byoir & Associates.⁶⁴ Considered to be one of New York’s ace publicists, Byoir was commissioned by the German agent to place positive stories in the American press intended to portray National Socialists sympathetically and influence public perception of Nazis to U.S. audiences.⁶⁵

56. See *Ivy Lee Moved to Aid the Soviet*, N.Y. TIMES (Mar. 28, 1926), <https://timesmachine.nytimes.com/timesmachine/1926/03/28/119063913.pdf>.

57. *Id.*

58. *Ivy Lee Dies at 57 of Brain Ailment*, N.Y. TIMES (Nov. 10, 1934).

59. *See Adviser to Nazis*, *supra* note 51.

60. *Id.*

61. *Inflation Calculator*, BUREAU OF LABOR STATISTICS, <https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=25%2C000&year1=193401&year2=201710> (last visited Mar. 1, 2018).

62. *See Adviser to Nazis*, *supra* note 51.

63. Jonathan Charles, *Former Zyklon-B Maker Goes Bust*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/3257403.stm> (last updated Nov. 10, 2003).

64. *See Viereck Got \$2,000 from Nazi Consul*, N.Y. TIMES (July 11, 1934), <https://timesmachine.nytimes.com/timesmachine/1934/07/11/93633068.pdf> [hereinafter *Viereck*].

65. *See id.*

A decade and a half earlier, Byoir had begun his career alongside Edward Bernays. During World War I, both men served on the Committee for Public Information (CPI).⁶⁶ While Bernays developed an expertise in steering public opinion, Byoir's strength lay in sowing discontent. At the CPI, Byoir formed the League of Oppressed Nations, a shadow organization aimed at creating "morale problems in Central European nations."⁶⁷

In civilian life, Byoir built one of New York's leading PR firms with a strong sense of corporate responsibility. He directed a public service film entitled *The War Against Depression* for the American Legion and became noted for his charity balls to raise money to fight polio.⁶⁸ Then in 1933, George Sylvester Viereck, a purported representative of the German Tourist Board, scheduled a meeting with Byoir.⁶⁹ Viereck sought help in promoting tourist travel in Germany.⁷⁰ Regarding the Jewish problem, Viereck commented "Chancellor Hitler said he had not declared war on the Jews . . . but that the Jews had declared war on him."⁷¹

The Byoir firm issued several press releases and pamphlets and within a year was under investigation by the FBI.⁷² Brought to testify before the House Committee on Un-American Activities, Byoir was alleged to be acting as "Hitler's 'first agent'" in America.⁷³ Byoir responded that the charges were "scurrilous and outrageous."⁷⁴ Although the publicist's name was ultimately cleared,⁷⁵ the hearing had repercussions. In 1938, Congress passed 22 U.S.C. § 611 *et seq.*, the Foreign Agents Registration Act (FARA).⁷⁶ FARA required the registration of, and disclosures by, agents of foreign principals, who are engaged in political or quasi-political activities.⁷⁷ The law specifically targeted men like Byoir and Lee, engaged in lobbying, advertising, public relations, and fundraising for foreign

66. See TYE, *supra* note 44, at 19; *Byoir Dead*, *supra* note 32.

67. *Byoir Dead*, *supra* note 32.

68. *Id.*

69. See Viereck, *supra* note 64.

70. See *id.*

71. See *id.*

72. See *id.*; see *Byoir Dead*, *supra* note 32.

73. *Dies Group Offers to Hear Byoir Reply*, N.Y. TIMES (June 5, 1940), <https://timesmachine.nytimes.com/timesmachine/1940/06/05/113087650.pdf>.

74. *Id.*

75. *F.B.I. Clears Byoir on Patman's Charges*, N.Y. TIMES (July 17, 1940), <https://timesmachine.nytimes.com/timesmachine/1940/07/17/91582196.pdf>.

76. Exec. Order No. 9176, 3 C.F.R. 1165 (1938-1943).

77. 22 U.S.C. § 611(a)-(d) (2012).

principals.⁷⁸ Seeking to undercut the covert nature of the publicist's persuasive operations, FARA requires agents to make public disclosure of their identities, activities, receipts, and disbursements.⁷⁹

Combining Freudian stratagem, targeted demographic information, and persuasively crafted content, early public relations professionals discovered ways to weaponize the First Amendment. Edward Bernays was the first to approach the art of marketing from a systematic and scientific perspective, applying the work of his uncle Freud to selling cigarettes and suggesting competitors' products may be hazardous.⁸⁰ Bernays's colleagues and contemporaries, Ivy Lee and Carl Byoir, took it a step further, approaching the potentially subversive messages of foreign actors as just another product to be peddled. While the First Amendment broadly protects speech, Congress enacted the FARA with hopes that this law would safeguard an unsuspecting American public from inadvertently accepting politically manipulative messages unawares.⁸¹ The weakness in FARA is its voluntary disclosure mechanism; it is through this legislative loophole that foreign agents can operate under the cover of free speech.⁸²

The masters of spin, like Lee and Byoir, were adept at manipulating content to support their paid-for-positions. When prepared statements masquerading as authoritative news flow into the stream of American media, they become all but impossible to trace, poisoning the well of reliable information.

IV. LIFE IS BEAUTIFUL IN A NAZI CONCENTRATION CAMP

Edward Bernays was the first communications executive to systematically apply psychological theory toward crafting persuasive content intended to influence consumer behavior.⁸³ In the 1930s he learned that his book, *Crystallizing Public Opinion*, occupied a privileged position

78. *See id.*

79. *See* 22 U.S.C. § 612(a) (2012); U.S. DEP'T OF JUST., U.S. ATTORNEY'S MANUAL: CRIMINAL RESOURCE MANUAL § 2062 (1998), <https://www.justice.gov/usam/criminal-resource-manual-2062-foreign-agents-registration-act-enforcement>.

80. *See* BERNAYS, PROPAGANDA, *supra* note 48, at 71-72, 75; *see supra* text accompanying notes 45-47 (discussing examples where Bernays altered fashion trends to match Lucky Strike's signature cigarette's color and promulgated fake news concerning dangers of competitors' re-used glass cups).

81. *See* 22 U.S.C. § 611(a)-(d) (2012).

82. *See* Ben Freeman, Ph. D. & Lydina Dennett, *Loopholes, Filing Failures, and Lax Enforcement: How the Foreign Agents Registration Act Falls Short*, POGO (Dec. 16, 2014), <http://www.pogo.org/our-work/reports/2014/loopholes-filing-failures-lax-enforcement-how-the-foreign-agents-registration-act-falls-short.html>.

83. *See* TYE, *supra* note 44, at 91-92.

in the library of Nazi Propaganda Minister Josef Goebbels.⁸⁴ “They were using my books as the basis for a destructive campaign against the Jews of Germany,” the marketing man recalled in his 1965 autobiography.⁸⁵ “This shocked me, but I knew any human activity can be used for social purposes or misused for antisocial ones.”⁸⁶

A member of Hitler’s inner circle, Joseph Goebbels helped craft the Nazi political platform and held direct oversight over all modes of communication in the Third Reich. Filmmaker Leni Riefenstahl captured Goebbels in action at the 1934 Nuremberg Rally in her film *Triumph of the Will* (1935).⁸⁷ In his speech, Goebbels thundered, “Power based on guns may be good but it is far better and more gratifying to win and hold the hearts of the people.”⁸⁸ The Bernays method of manipulating information and crafting targeted positioning statements played an important role in selling the Nazi message to the German masses.

Motion pictures were considered among the most important tools in disseminating propaganda in Nazi Germany.⁸⁹ While Riefenstahl was a prestige director on special projects, answering only to Adolf Hitler himself, Goebbels appointed Fritz Hippler to be the Head of the Cinema Department of the Reich Ministry of Propaganda.⁹⁰

Hippler began his career in the Nazi newsreel division in 1935.⁹¹ Although too young to participate in World War I,⁹² he saw Germany’s crucial shortcoming in its communications strategy. In an article entitled *Film as a Weapon*, the rising Nazi movie mogul wrote: “At the beginning of the [First] World War, Germany was completely helpless in this area, while its enemies had a dangerous weapon in their smoothly functioning newsreel systems.”⁹³ Hippler reached the German masses with incendiary

84. *Id.*

85. EDWARD L. BERNAYS, BIOGRAPHY OF AN IDEA: MEMOIRS OF PUBLIC RELATIONS COUNSEL EDWARD L. BERNAYS 652 (1965).

86. *Id.*

87. TRIUMPH DES WILLENS [TRIUMPH OF THE WILL], 30:00–30:49 (Leni Riefenstahl-Produktion 1935).

88. *Id.* at 30:34–30:49.

89. *Culture in the Third Reich: Overview*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005207> (last visited Feb. 12, 2018).

90. *See Nazi Says ‘Honor’ Dictates Film Ban*, N.Y. TIMES (Berlin), Mar. 9, 1941, at 18.

91. ERIK BARNOUW, DOCUMENTARY: A HISTORY OF THE NON-FICTION FILM 141 (2d rev. ed. 1983).

92. *See* Roel Vande Winkel, *Nazi Germany’s Fritz Hippler, 1909–2002*, 23 HIST. J. FILM, RADIO & TELEVISION, no. 2, 2003, at 91.

93. Fritz Hippler, *Der Film als Waffe*, 7 UNSER WILLE UND WEG 21 (1937), translated at *Film as a Weapon*, GERMAN PROPAGANDA ARCHIVE, <http://research.calvin.edu/german-propaganda-archive/hippler1.htm> (last visited Mar. 4, 2018).

propaganda, directing newsreels such as *Feldzug in Polen* (*Campaign in Poland*, 1940) and overseeing production on *Feuertaufe* (*Baptism of Fire*, 1939) and *Sieg im Westen* (*Victory in the West*, 1941).⁹⁴

While commanding the top spot in the Nazi film industry as the highest-ranking motion picture executive, Hippler continued to direct films. Among his works was a notorious pseudo-documentary entitled *Der ewige Jude* (*The Eternal Jew*, 1940). This virulently Anti-Semitic hate film juxtaposed Jews with rats and recorded rabbis engaged in the ritual slaying of a cow in keeping Kosher. Hippler depicted Jews as uncivilized and parasitic people, abnormal and depraved, degenerate. “We spoke to the soul, to the unconscious of the population,” Hippler told Bill Moyers in a 1983 interview.⁹⁵

Fritz Hippler’s documentaries riled up the German base with images of blitzkrieg and bigoted stereotypes. But another pseudo-documentary green lit under the Nazi film mogul’s regime exemplified fake news to a horrifying degree. That film, directed by Kurt Geron, has been alternatively titled *Der Fuehrer Schenkt den Juden eine Stadt* (*Hitler Gives the Jews a City*, 1944), *Ein Dokumentarfilm aus dem jüdischen Siedlungsgebiet* (*A Documentary Film of the Jewish Resettlement*), or *Theresienstadt*, more commonly known as *Hitler Gives the Jews a City*. *Hitler Gives the Jews a City* is unequalled as the mid-century apogee of fake news.

Hitler Gives the Jews a City’s director, Kurt Geron, was a Jewish performer who dominated the outlandish Berlin nightclub scene during the Weimar Republic with his rotund physique and deep resonating baritone voice.⁹⁶ Geron appeared in numerous films, including E.A. Dupont’s circus phantasmagoria *Variété* (*Variety*, 1925), and G.W. Pabst’s psychodrama *Tagebuch einer Verlorenen* (*Diary of a Lost Girl*, 1929), but he was a larger-than-life character in search of his great role. The closest Geron came to finding that perfect part was playing “Tiger” Brown in the stage premiere of Bertolt Brecht and Kurt Weill’s *The Threepenny Opera*.⁹⁷

94. Vande Winkel, *supra* note 92, at 92.

95. John Corry, *TV View; Bill Moyers Looks at a Changing America*, N.Y. TIMES (Jan. 8, 1984), <http://www.nytimes.com/1984/01/08/arts/tv-view-bill-moyers-looks-at-a-changing-america.html>. In the interview Hippler went on to state: “I am convinced Hitler was a very great man . . . his only fault was to lose the war.” *Id.* (quoting *A Second Look: The Democrat and the Dictator*, MOYERS & CO. (July 11, 1989), <http://billmoyers.com/content/the-democrat-and-the-dictator/>).

96. See Lyn Gardner, *Laugh or We Shoot*, THE GUARDIAN (June 1, 2001, 9:52 PM), <https://www.theguardian.com/culture/2001/jun/02/1>.

97. See *id.*

Here, Gerron introduced audiences to the classic song of murder and mayhem, “Mack the Knife”:⁹⁸

Oh, the shark, babe, has such teeth, dear
And it shows them pearly white.
Just a jackknife has old MacHeath, babe
And he keeps it, out of sight.⁹⁹

By the coming of the sound-film era, Gerron was able to combine his impressive voice with his plus-size presence. Still, he never received his big break. Appearing in *Der blaue Engel* (*The Blue Angel*, 1930), even Gerron’s girth was overshadowed by the towering talents of Marlene Dietrich and Emil Jannings.

As the Nazis came to power in 1933, Gerron was banned from performing on stage.¹⁰⁰ He fled first to France, then to the Netherlands, where he was detained at the Westerbork “transit” camp.¹⁰¹ The Nazi Commandant of Westerbork, Albert Gemmeker, enjoyed musical theater and granted preferential treatment to his star-inmates.¹⁰² By 1944, Gerron was transferred to Theresienstadt concentration camp in Czechoslovakia. There, Gerron organized a musical revue called “Karussell” (Carousel) and was soon presented with an offer he couldn’t refuse.¹⁰³ With international pressure mounting to permit the Red Cross access to enter and inspect Hitler’s internment centers, Theresienstadt was cleaned up, sanitized, and designated as a “show camp.” To divert suspicions of abuse, Theresienstadt would be presented to the world as a sunny haven where German Jews could “retire” in safety.¹⁰⁴ This was a Nazi deception; Theresienstadt was

98. *See id.*

99. “*Mack the Knife (from The Threepenny Opera)*” Lyrics, LETSSINGIT, <https://www.letssingit.com/original-cast-lyrics-mack-the-knife-from-the-threepenny-opera-ljkzmfxf> (last visited Feb. 14, 2018) [hereinafter *Mack the Knife*].

100. *See* Tom Tugend, *Rare Nazi Propaganda Film Showcases Theresienstadt as ‘Paradise’ for Inmates*, JEWISH TELEGRAPHIC AGENCY (May 2, 2011, 3:45 PM), <https://www.jta.org/2011/05/02/arts-entertainment/rare-nazi-propaganda-film-showcases-theresienstadt-as-paradise-for-inmates>; *see also* WILLIAM FARINA, *THE GERMAN CABARET LEGACY IN AMERICAN POPULAR MUSIC* 70 (2013) (explaining that Gerron was “practically shoved out of Germany in 1933 by the Nazis”).

101. *Kurt Gerron*, MUSIC AND THE HOLOCAUST, <http://holocaustmusic.ort.org/places/camps/western-europe/westerbork/gerronkurt/> (last visited Feb. 16, 2018) [hereinafter *Gerron*]; *see also* *Westerbork*, MUSIC AND THE HOLOCAUST, <http://holocaustmusic.ort.org/places/camps/western-europe/westerbork/> (last visited Feb. 16, 2018) (explaining that Westerbork was a transit camp, rather than a death or work camp).

102. FARINA, *supra* note 100, at 70; *see also* *The Holocaust - Lest we Forget - Theatre*, <http://www.holocaust-lestweforget.com/theatre.html> (last visited Mar. 2, 2018).

103. *See Gerron*, *supra* note 101.

104. *Id.*; *see also* FARINA, *supra* note 100, at 71.

actually a collection center for deportation to the death camps of Eastern Europe.¹⁰⁵

In 1944, Gerron was told that “if he made a film about Theresienstadt, his life would be spared.”¹⁰⁶ Under the worst circumstances the frustrated filmmaker was given a chance to resume his career as a director. He felt that he had missed his big break in civilian life, so Gerron poured heart and soul into this production.

The result was the pseudo-documentary *Hitler Gives the Jews a City*. Shot in the summer of 1944, the picture shows Jews living a life of leisure, practicing crafts and playing sports. Women knit sweaters. Men cut garments and weld metal into useful items. Dark haired children frolicked happily in an idyllic setting. But behind the scenes the happiness was forced. One survivor of Theresienstadt recalled the production:

Bathed in sweat, Gerron begged us urgently, “Do what I show you, when I laugh, laugh with me!” And he began his contagious, irresistible laugh, during which he wobbled his fat belly, so that we really had to laugh, even though the situation for him and for us was anything but laughable.¹⁰⁷

Gerron’s record of *Hitler Gives the Jews a City* is the exemplar of fake news. Under sunny skies families smiled for the camera. Life was beautiful in the Nazi camp. Yet the specter of death loomed just off screen. Between 1941 and 1945, 140,000 Jews passed through Theresienstadt.¹⁰⁸ More than 100,000 people, including 10,000 children, perished.¹⁰⁹

The pretend paradise of Theresienstadt deceived international overseers,¹¹⁰ the truth was too unbelievable to accept. The irony is that it was a Jewish man who produced this deceitful picture. According to eyewitness reports, Gerron marched with others onto the field on which he had filmed a soccer match only weeks earlier.¹¹¹ Kneeling before an SS officer he pleaded for safe passage, “I made the film for you.”¹¹² But there

105. *Theresienstadt*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005424> (last visited Feb. 16, 2018).

106. Gardner, *supra* note 96; see also Elvis Mitchell, Film Review, *Putting a Smiley Face on a Nazi Camp*, N.Y. TIMES (Dec. 12, 2003), <http://www.nytimes.com/2003/12/12/movies/film-review-putting-a-smiley-face-on-a-nazi-camp.html>.

107. Gardner, *supra* note 96.

108. Elinor Fuchs, *A Mordant Tale of the Holocaust*, N.Y. TIMES (Mar. 2, 1997), <http://www.nytimes.com/1997/03/02/theater/a-mordant-tale-of-the-holocaust.html>.

109. *Id.*

110. See *Deceiving the Public*, U.S. MEM’L HOLOCAUST MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007822> (last visited Feb. 17, 2018).

111. Gardner, *supra* note 96.

112. *Id.*

was no mercy. Gerron was sent to Auschwitz in October 1944.¹¹³ Observers say that as he walked into the gas chamber he was singing his signature song.¹¹⁴

On the sidewalk, sunny morning
Lies a body just oozin' life.
And someone's sneakin' 'round the corner
Could that someone be Mack the Knife?¹¹⁵

Nazi film executives must have been satisfied with *Hitler Gives the Jews a City*. In his interview with Bill Moyers, Director of the Reich's film program Fritz Hippler explained his formula for generating effective propaganda: distill "complicated things [] to make them as simple as possible . . . then repeat it! Repeat it every day. Simplify and repetition."¹¹⁶ *Hitler Gives the Jews a City* presented a sham reality where Jews enjoyed the comforts of a pleasant life while Germans suffered and died under Allied bombardment.¹¹⁷ The whitewashed world of *Hitler Gives the Jews a City* duped the Red Cross, but by the time the picture was completed it had little propaganda value.¹¹⁸ The war was nearing its conclusion. Within weeks of wrapping production, the camp was closed and its entire population sent to Auschwitz.¹¹⁹

In the end, the fake news of *Hitler Gives the Jews a City* fooled no one. Still, the film stands as a testament to the lowest point in the history of media. *Hitler Gives the Jews a City* is a warning signal, a cautionary example that demonstrates the improper use of purported non-fiction for deceptive, appalling, and amoral purposes.

V. THE NEW ERA OF FAKE NEWS

After World War II, the influence of fake news became less obvious. Alternative facts transformed into public relations and positioning, marketing and consumer profiling. But beneath the surface, divisions in the body politic were deepening in America.

Sixty years after the end of WWII, in 2004, frustrated factions surged into popular culture with a series of aggressively partisan and unexpectedly

113. *Id.*

114. See Gardner, *supra* note 96.

115. *Mack the Knife*, *supra* note 99.

116. Interview by Bill Moyers with Fritz Hippler, Chief Filmmaker for the Nazi Party (May 9, 1984), <http://billmoyers.com/content/wwii-propaganda-battle/>.

117. Gardner, *supra* note 96.

118. *Id.*

119. *Id.*

profitable documentaries. The film that started this trend was Michael Moore's *Fahrenheit 9/11* (2004) with its condemnation of President George W. Bush. Following *Fahrenheit 9/11* came a chorus of right-leaning responses led by *Celsius 41.11: The Temperature at Which the Brain... Begins to Die* (2004), *FahrenHYPE 9/11* (2004), and *In the Face of Evil: Reagan's War in Word and Deed* (2004).¹²⁰ Although filmmakers utilized misinformation and persuasive propaganda as ideological tools long before these pictures, the trend that began with *Fahrenheit 9/11* has come to represent ground zero for the modern fake news phenomenon in popular culture and mass media.

Michael Moore designed *Fahrenheit 9/11* as a vehicle to focus on the increasing fear, distrust, and social instability in the aftermath of the September 11 terrorist attacks.¹²¹ Fifteen years earlier the director had emerged on the scene with an unexpectedly popular documentary.¹²² In *Roger & Me* (1989), Moore trailed Roger B. Smith, intending to confront the General Motors chief executive about harm caused by the auto factory's layoffs in Flint, Michigan. Moore never got the interview, but he did get audiences, earning over \$6.7 million—the most profitable documentary released to that date.¹²³ Moore cast himself as an ordinary guy at the mercy of powerful forces. Self-consciously costumed in a baseball hat, worn jeans, and loose fitting clothes, the canny filmmaker aimed to expose institutional hypocrisy. Resuming his average American character for *Fahrenheit 9/11*, Moore marched on Washington D.C. and harangued congressmen, asking whether they would enlist their own children to fight in Iraq. Their non-answers were telling. Moore delighted in awkward moments of revelation with his guerilla-style of exposé filmmaking.

In addition to Moore's confrontational technique, *Fahrenheit 9/11* employed humor, music, and an editorial momentum to present a conspiratorial view of George W. Bush's regime.¹²⁴ Among other

120. CELSIUS 41.11: THE TEMPERATURE AT WHICH THE BRAIN... BEGINS TO DIE (Adams County Productions 2004); FAHRENHYPE 9/11 (Savage Pictures 2004); IN THE FACE OF EVIL: REAGAN'S WAR IN WORD AND DEED (Bannon Films 2004); see generally Sharon Waxman, *Non-Fiction Films Turn a Corner; 'Fahrenheit' Shows Approval of Audiences and of Distributors*, N.Y. TIMES (July 5, 2004), <http://www.nytimes.com/2004/07/05/movies/nonfiction-films-turn-corner-fahrenheit-shows-approval-audiences-distributors.html> [hereinafter Waxman, *Non-Fiction Films Turn a Corner*].

121. See Associated Press, 'Fahrenheit 9/11' Raises Republican Temperatures, HATTIESBURG AMERICAN, June 21, 2004, at 4B [hereinafter Associated Press, *Temperatures*].

122. See generally Waxman, *Non-Fiction Films Turn a Corner*, *supra* note 120.

123. *Roger & Me*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=rogerandme.htm> (last visited Mar. 2, 2018).

124. See Waxman, *Non-Fiction Films Turn a Corner*, *supra* note 120.

controversial ideas, the film (a) alleged links between the families of Bush and bin Laden; (b) claimed that Saudi nationals were secretly spirited out of the U.S. after the attacks; and (c) purported that the destruction of the World Trade Center was a ruse to commence unrelated military action in Iraq.¹²⁵ While *Fahrenheit 9/11* presented dark theories as hidden insight and potential explanations for events that shocked most Americans, at the core of Moore's entertaining exercise are suppositions, assumptions, and alternative facts. In an otherwise flattering article on the film, *New York Times* op-ed columnist Paul Krugman commented, "It would be a better movie if it didn't promote a few unproven conspiracy theories. . . . Viewers may come away from Mr. Moore's movie believing some things that probably aren't true."¹²⁶

The immense success of *Fahrenheit 9/11* dwarfed even *Roger & Me*.¹²⁷ The documentary scored the highest honor at the Cannes Film Festival, awarded the Palme d'Or.¹²⁸ Domestically, *Fahrenheit 9/11* became the highest-grossing non-fiction of all time on its first weekend in release, taking in \$21.8 million.¹²⁹ By the end of the year, *Fahrenheit 9/11* proved to be a magnet for political activists: it earned over \$119 million at box offices around the country.¹³⁰ The picture's record as most profitable and largest earning documentary still stands, fourteen years after its release.

Fahrenheit 9/11 was praised by film critics and applauded by ticket-buying audiences, but there were ominous signs that boded poorly for fact-based films. For American audiences accustomed to "reality TV" content, the accuracy of *Fahrenheit 9/11* was "close enough."¹³¹ This did not go unnoticed by industry commentators. "Given the growing popularity of documentaries, some filmmakers and movie executives say there is a need for a more vigorous debate about definitions and standards," wrote

125. Paul Krugman, Opinion, *Moore's Public Service*, N.Y. TIMES (July 2, 2004), <http://www.nytimes.com/2004/07/02/opinion/moore-s-public-service.html>.

126. *Id.*

127. Associated Press, *Moore's 'Fahrenheit 9/11' Tops \$100M at Box Office*, HATTIESBURG AMERICAN, July 26, 2005, at 6B.

128. Sharon Waxman, *The Political 'Fahrenheit' Sets Record at Box Office*, N.Y. TIMES (June 28, 2004), <http://www.nytimes.com/2004/06/28/movies/the-political-fahrenheit-sets-record-at-box-office.html> [hereinafter Waxman, *Sets Record*].

129. *Id.*

130. Sharon Waxman, *Big Films, but a Year of Smaller Audiences*, N.Y. TIMES (Dec. 20, 2004), <http://www.nytimes.com/2004/12/20/movies/big-films-but-a-year-of-smaller-audiences.html>.

131. See generally Waxman, *Sets Record*, *supra* note 128. Although pioneering unscripted shows such as MTV's *The Real World* (1992) began to attract audiences after the WGA strike of 1988, the "reality TV" format found mainstream popularity in America with *Survivor* (CBS, 2000), *Big Brother* (CBS, 2000), *The Amazing Race* (CBS, 2001) and *American Idol* (Fox, 2002).

journalist Sharon Waxman in the *New York Times*.¹³² “[F]or example, voters from the Academy of Motion Picture Arts and Sciences do not scrutinize the accuracy of a film” in nominations for the documentary Oscar.¹³³ Despite Waxman’s insightful comments, there was pushback within the community of documentary filmmakers. One of the leading voices of fact-based film, Errol Morris, claimed the Academy Award for Best Documentary that year, 2004.¹³⁴ Commenting on Michael Moore’s broadside, Morris mused, “Does it make sense to talk about a movie being true or false? I’m not sure it does. In fact I’m pretty sure it doesn’t.”¹³⁵ At this moment the genre of documentary film turned a corner, shifting focus from investigative journalism to provocative presentation.

Michael Moore made an energetic and entertaining motion picture, but he played fast and loose with facts, selectively choosing evidence to support his positions. In an interview with ABC News, the director commented that he saw his film as more of an “op-ed piece” than a work of objective journalism.¹³⁶ This intent transformed *Fahrenheit 9/11* from documentary to agitprop. Viewers generally think of documentary or non-fiction fact-based film in terms of *cinéma vérité* or direct cinema, styles and philosophies that aim to observe reality and present it truthfully, striving for objectivity. Agitprop, on the other hand, was pioneered by Soviet filmmakers including Sergei Eisenstein and Dziga Vertov.¹³⁷ Using political slogans and curated facts in films such as *Kino-Pravda* (1925), *October* (1928), and *Enthusiasm* (1931), these cinema stylists aimed to shape public opinion and mobilize popular support.¹³⁸ In these scenarios, agitprop filmmakers did not aspire to merely record and represent but rather advocate their party position and indoctrinate the viewer.

Fahrenheit 9/11 keyed up Michael Moore’s anti-Bush base but the picture also had the effect of stimulating voices in the opposing viewpoint. At first the effect of *Fahrenheit 9/11* was underestimated. A month before the film’s release, Jim Dyke, a communications advisor to George W. Bush and spokesman for the Republican National Committee, believed there was

132. See Waxman, *Non-Fiction Films Turn a Corner*, *supra* note 120.

133. *Id.*

134. *Id.*

135. *Id.*

136. See Associated Press, *Temperatures*, *supra* note 121.

137. Walter Robinson, *How the Avant Garde Became Agitprop: Art and Film of the USSR at the Jewish Museum*, *OBSERVER* (Oct. 28, 2015), <http://observer.com/2015/10/how-the-avant-garde-became-agitprop-art-and-film-of-the-ussr-at-the-jewish-museum/>.

138. KINO-PRAVDA NO. 21 - LENINSKAIA KINO-PRAVDA. KINOPOEMA O LENINE (Kultkino 1925); OCTOBER (TEN DAYS THAT SHOOK THE WORLD) (Sovkino 1928); ENTHUSIASM (Ukrainfilm 1931).

no need to prepare a public challenge to the picture.¹³⁹ One of the first Republican operatives to realize the power of Moore's film was David Bossie.¹⁴⁰

In 2001, David Bossie became the head of Citizens United, a conservative 501(c)(4) Political Action Committee (PAC).¹⁴¹ Unlike the mainstream Republican political machine, Bossie was quick to recognize the persuasive influence of Moore's film and the effect of Moore's extensive advertising campaign.¹⁴² As the picture's release date drew near, Bossie petitioned the Federal Election Commission (FEC) to classify *Fahrenheit 9/11*'s marketing spots as political advertisements and subject to rules that restrict broadcasts of electioneering materials.¹⁴³ That complaint was dismissed.¹⁴⁴ The anti-*Fahrenheit 9/11* contingent would have to consider innovative means and methods to counter Michael Moore's popular picture.

Their answer was to fight fire with fire. It took Citizens United a mere six weeks to produce its first film.¹⁴⁵ *Celsius 41.11...The Temperature at Which the Brain Begins to Die* (2004) was positioned as a rebuttal to *Fahrenheit 9/11* and hit theaters within four months of Moore's jeremiad.¹⁴⁶ Bossie's picture is vastly different from Moore's in terms of tone. Moore approaches his subject with humor and vitriol, paced briskly; the film's trailer grooves to the classic rock anthem "I'd Love to Change the World" by Ten Years After.¹⁴⁷ The trailer for *Celsius 41.11*, on the other hand, is

139. Jim Rutenberg, *A Film to Polarize Along Party Lines*, N.Y. TIMES (May 17, 2004), <http://www.nytimes.com/2004/05/17/movies/a-film-to-polarize-along-party-lines.html>; see also Jim Dyke, JDA FRONTLINE, <http://www.jdafrontline.com/jim-dyke/> (last visited Feb. 17, 2018).

140. Elaine Dutka, *GOP Filmmaker's Post-'Fahrenheit' Temperature? '41.11'*, L.A. TIMES (Sept. 16, 2004), <http://articles.latimes.com/2004/sep/16/nation/na-celsius16> [hereinafter Dutka, *GOP*].

141. *Who We Are: David N. Bossie*, CITIZENS UNITED, <http://www.citizensunited.org/about-david-bossie.aspx> (last visited Feb. 17, 2018).

142. Jim Rutenberg, *The 2004 Campaign: Advertising; Movie Ads or Political Ads? Complaint Says Line Is Too Fine*, N.Y. TIMES (June 27, 2004), <http://www.nytimes.com/2004/06/27/us/2004-campaign-advertising-movie-ads-political-ads-complaint-says-line-too-fine.html> [hereinafter Rutenberg, *Campaign Advertising*].

143. *Id.*

144. Glen Justice, *Election Board Restricts Ads for Anti-Kerry Film*, N.Y. TIMES (Sept. 10, 2004), <http://www.nytimes.com/2004/09/10/politics/campaign/election-board-restricts-ads-for-antikerry-film.html>.

145. John Tierney, *Like 'Fahrenheit 9/11,' Except Bush is the Hero*, N.Y. TIMES (Sept. 30, 2004), <http://www.nytimes.com/2004/09/30/movies/like-fahrenheit-911except-bush-is-the-hero.html>.

146. David Kirkpatrick, *Arts, Briefly: 'Fahrenheit' vs. 'Celsius'*, N.Y. TIMES, (Oct. 19, 2004), <http://www.nytimes.com/2004/10/19/arts/movies/arts-briefly-fahrenheit-vs-celsius.html>.

147. See *Fahrenheit 9/11 Theatrical Trailer*, <http://www.imdb.com/title/tt0361596/>

cut to a dirge-like piano plodding Beethoven's *Moonlight Sonata* under images of the World Trade Center attack, the destruction of U.S.S. Cole, a Middle Eastern man's hand severed by a machete in punishment, and a barbaric bare-shirted whipping.¹⁴⁸ In her review for the *New York Times*, Manohla Dargis observed: "If you didn't know where the new film '*Celsius 41.11*' was coming from you certainly get the picture when the filmmakers cut from an image juxtaposing Michael Moore with Hitler straight to an image of John Kerry and John Edwards."¹⁴⁹ Ultimately, Dargis found the film ineffectual: "[A] didactic screed that has all the verve of a PowerPoint presentation and all the subtlety of a Homeland Security red alert."¹⁵⁰

From a factual/fake news perspective, *Celsius 41.11* dropped all pretense of objectivity or balanced inquiry. One red state reviewer commented that it was impossible to separate actuality from commentary in *Celsius 41.11*.¹⁵¹ Furthermore, he wrote, "Some of the film's charges are troubling, such as the accusation that [President Bill] Clinton refused to broker the surrender of bin Laden in 1997 because of a feud with the CIA."¹⁵² For audiences alienated from *Fahrenheit 9/11*, *Celsius 41.11* served as a counterpoint, equally sensational and extreme.

While *Celsius 41.11* appealed to a certain type of viewer, from a political and financial perspective the picture was a disappointment.¹⁵³ Several months earlier, David Bossie requested that the FCC review *Fahrenheit 9/11* and consider regulating the picture's promotional material under campaign finance guidelines.¹⁵⁴ The FCC had rejected Bossie's efforts; however, now the panel turned around and deemed *Celsius 41.11* to be electioneering communication.¹⁵⁵ Citizens United argued their organization qualified as news media and could operate under an exemption that protected editorial content.¹⁵⁶ In a unanimous 4-0 ruling, the panel

videoplayer/vi681967897?ref=vi_nxt_ap (last visited Feb. 17, 2018).

148. See Citizensunited, *Trailer for Celsius 41.11* (Feb. 23, 2007), <https://www.youtube.com/watch?v=pP6yInwv50>.

149. Manohla Dargis, *Lowering the Subtlety of Political Discourse*, N.Y. TIMES (Oct. 22, 2004), <http://www.nytimes.com/2004/10/22/movies/lowering-the-subtlety-of-political-discourse.html>.

150. *Id.*

151. Duane Dudek, '*Celsius 41.11*' Takes Aim at John Kerry and Company, THE TENNESSEAN, Oct. 23, 2004, at 3D.

152. *Id.*

153. Elaine Dutka, '*Celsius 41.11*' lacks '9/11' heat, L.A. TIMES (Oct. 27, 2004), <http://articles.latimes.com/2004/oct/27/entertainment/et-celsius27> [hereinafter Dutka, *Celsius*].

154. See Rutenberg, *Campaign Advertising*, *supra* note 142.

155. Justice, *supra* note 144.

156. *Id.*

denied Citizens' claim.¹⁵⁷ The bad news continued. Opening weekend the film attracted only \$100,000 failing to recoup the film's modest \$900,000 budget.¹⁵⁸

Despite an adverse ruling and paltry box office, *Celsius 41.11* stands at the beginning of a trend that energized right-leaning documentary filmmaking. Its arch competitor, *Fahrenheit 9/11*, might have garnered acclaim and reaped in lucre, but *Celsius 41.11* won over an enthusiastic following and inspired zealously Republican directors. Novice filmmaker Michael Wilson said he was motivated by "righteous indignation" to make *Michael Moore Hates America* (2004).¹⁵⁹ The picture played to sympathetic audiences at conservative venues including the Liberty Film Festival, the American Renaissance Film Festival, and the Traverse Bay Freedom Film Festival, but the majority of revenue derived from DVD sales marketed at churches and to special interest groups.¹⁶⁰

With less bombast than *Celsius 41.11* and greater professionalism than *Michael Moore Hates America*, came *FahrenHYPE 9/11* (2004). Written by Dick Morris and directed by Alan Peterson, *FahrenHYPE* made a dedicated effort to refute many of the claims in Michael Moore's documentary.¹⁶¹ In addition to Morris, a former advisor to President Clinton-turned-firebrand Republican, *FahrenHYPE*'s gallery of experts carried legitimate authority, featuring conservative pundit Ann Coulter, Representative Peter King (R-NY), former NYC Mayor Ed Koch, former Georgia Governor Zell Miller, and actor turned activist Ron Silver.¹⁶² Instead of shocking images or gimmicky gotcha-interviews, *FahrenHYPE* provided a platform for apparently reasoned responses to *Fahrenheit 9/11*.¹⁶³ Ann Coulter: "This is a movie [*Fahrenheit 9/11*] based on lies."¹⁶⁴

157. *Id.*

158. Dutka, *Celsius*, *supra* note 153; *see also* Dutka, *GOP*, *supra* note 140.

159. Sandra Cohen, *Technology Brings Democratic Process to Documentaries*, WAUSAU DAILY HERALD, Nov. 24, 2005, at D.

160. Kathryn Schulz, *Con Flicks*, N.Y. TIMES MAGAZINE (Oct. 24, 2004), <http://www.nytimes.com/2004/10/24/magazine/con-flicks.html>; R. Kinsey Lowe, *Conservative Filmmakers Get a Fest of Their Own*, L.A. TIMES (Sept. 30, 2004), <http://articles.latimes.com/2004/sep/30/news/wk-lowes30>; Associated Press, *'Harry Potter' Author Tops List as Best-seller*, THE INDIANA GAZETTE, July 8, 2005, at 22.

161. Davishart, *Turning Up The Heat On Moore*, NATIONAL REVIEW (Oct. 20, 2004, 12:37 PM), <http://www.nationalreview.com/article/212599/turning-heat-moore-davishart>.

162. Robert Koehler, *Farenhype 9/11*, VARIETY (Oct. 26, 2004, 9:48 PM), <http://variety.com/2004/film/reviews/fahrenhype-9-11-1200529926/>.

163. Robert Koehler, *Michael Moore Hates America*, VARIETY (Oct. 6, 2004, 4:13 PM), <http://variety.com/2004/film/markets-festivals/michael-moore-hates-america-1200530480/>.

164. Jeff Hays Films, *Farenhype 9/11 Trailer*, YOUTUBE (June 15, 2012), <https://www.youtube.com/watch?v=vkhAdjLCTEw>.

Zell Miller: “The terrorist threat is real. It’s everyday, it’s real.”¹⁶⁵ Dick Morris: “Somebody has to explain that nobody took it [the terrorist threat] seriously before George Bush on 9/11.”¹⁶⁶ Setting aside the issues of truth, fact checking, and objective reliability, *FahrenHYPE* functioned as the antidote to Michael Moore’s Bush-bashing blockbuster for conservative audiences.

Aside from *Celsius 41.11*, *FahrenHYPE*, and *Michael Moore Hates America*, the year 2004 saw the increasing activity of conservative filmmakers as they became more skillful and less restrained in shaping reality to their worldview. For decades, conservative ideologues had yearned to develop a system of schooling surrogates who could be “indoctrinated . . . with right wing ideas and then mobilized, organized, and directed to disseminate them.”¹⁶⁷ Advances in technology made that dream possible and played an important role in the growth of independent documentary production. Digital cameras and non-linear editing transformed an enterprise that was once prohibitively expensive into an activity that could be undertaken by anyone with a point of view and money to buy or rent equipment.

No longer was major funding or professional training strictly necessary. Encouraged by Michael Moore’s monumental success, right-leaning filmmakers were encouraged to respond. Productions such as *George W. Bush: Faith in the White House* (2004), *Brainwashing 101* (2004), and *Stolen Honor* (2004) spoke to Republican audiences. The movement elevated its own celebrities, such as Ann Coulter featured in *Is It True What They Say About Ann?* (2004), Ben Stein in *Expelled: No Intelligence Allowed* (2008), and Andrew Breitbart in *Hating Breitbart* (2012). These dissidents reveled in their estrangement from pop culture in *Rated R: Republicans in Hollywood* (2004). From this explosion of alternative filmmaking a superstar emerged, the director of a documentary entitled *In the Face of Evil: Reagan’s War in Word and Deed* (2004): Steve Bannon.

Steve Bannon’s career took him from the sidelines of battle to the inner sanctum of investment banking on Wall Street, instilling in him a combative vision of the American experience. In 1980, as a junior Navy officer, Bannon was stationed on a destroyer in the Persian Gulf involved in the ill fated attempt to rescue American hostages in Iran.¹⁶⁸ Although his

165. *Id.* at 1:04-1:07.

166. *Id.* at 1:13-1:18.

167. Heather Boushey, Book Review, *Minority Rule*, N.Y. TIMES (Aug. 20, 2017).

168. Michael Kranish & Craig Whitlock, *How Bannon’s Navy Service During the Iran Hostage Crisis Shaped His Views*, WASH. POST (Feb. 10, 2017),

role was insignificant, the botched mission affected his worldview as an example of “failed military and presidential leadership.”¹⁶⁹ Five years later, in 1985, Bannon joined Goldman Sachs as an associate and soon became involved with Hollywood from an investment angle.¹⁷⁰ His experience as a motion picture producer was unimpressive until the conservative awakening of 2004. His directorial debut, *In the Face of Evil*, deified Ronald Reagan as a holy crusader and a visionary hero who stood alone to destroy the tyranny of the Soviet Socialism.¹⁷¹ It was through the medium of documentary that Bannon built his dark vision of the world. Mainstream film reviewers took notice:

Though heavier than most on messianic zeal, Mr. Bannon—Roman Catholic filmmaker, conservative-film financier, Washington networker and Hollywood deal-chaser—is emblematic of a new wave in Hollywood . . . pushing overtly political projects in the blogosphere and at conservative festivals, including last year’s Liberty Film Festival in West Hollywood, at which Mr. Bannon’s *In the Face of Evil* won an award.¹⁷²

It was after a screening in Beverly Hills that Bannon met Andrew Breitbart¹⁷³ and formed an alliance that would take the war veteran-investment banker-turned-documentary director into the inner circle of the Republican spin machine.

Joining with David Bossie and Citizens United, Bannon’s next film focused on undocumented immigrants in *Border War: The Battle Over Illegal Immigration* (2006).¹⁷⁴ Kevin Knoblock, who previously directed *Celsius 41.11*, helmed *Border War*, but Bannon’s hand in the production is evident, modulating the hyperbole, delivering greater production values,

https://www.washingtonpost.com/politics/how-bannons-navy-service-during-the-iran-hostage-crisis-shaped-his-views/2017/02/09/99f1e58a-e991-11e6-bf6f-301b6b443624_story.html?utm_term=.4bfcc7b94ab3.

169. *Id.*

170. Connie Bruck, *How Hollywood Remembers Steve Bannon*, NEW YORKER (May 1, 2017), <https://www.newyorker.com/magazine/2017/05/01/how-hollywood-remembers-steve-bannon>.

171. Ned Martel, Movie Review, *Ronald Reagan, in Black and White*, N.Y. TIMES (Oct. 29, 2004), <http://www.nytimes.com/2004/10/29/movies/ronald-reagan-in-black-and-white.html?mtrref=www.google.com&gwh=ACD285E196772686A4D98CE1227D2E7C&gwt=pay>.

172. James Ulmer, *On the Right Side of the Theater Aisle*, N.Y. TIMES (June 26, 2005), <http://www.nytimes.com/2005/06/26/movies/on-the-right-side-of-the-theater-aisle.html>.

173. Chris Keller & Thomas Suh Lauder, *How Steve Bannon Became the Face of a Political Movement with Roots in Los Angeles*, L.A. TIMES (Aug. 24, 2017), <http://www.latimes.com/projects/la-pol-populist-los-angeles/>.

174. *Border War: The Battle Over Illegal Immigration*, IMDB, <http://www.imdb.com/title/tt0878106/> (last visited Feb. 17, 2018).

and scoring sound bites from conservative A-listers like Mel Gibson.¹⁷⁵ Still, the picture failed to find a broad audience. It merely “transmitted [a] sense of general anxiety and outrage and an insistence that an unspecified ‘something’ must be done to solve this ‘problem.’”¹⁷⁶

Allied with Citizens United, Steve Bannon wrote, produced, and directed a trilogy of documentaries that stand as examples of fake news and contemporary conservative ideology. The trilogy began with *In the Face of Evil*, which introduced the idea of an eternal conflict between America and forces of darkness.¹⁷⁷ Transforming the picture from partisan documentary to pure agitprop, *In the Face of Evil* concluded with a montage dissolving slowly between the World Trade Center attack to Adolf Hitler to Muslim extremists and Osama bin Laden.¹⁷⁸ His message: the war continues.

The next Bannon/Citizens United film, *Generation Zero* (2010) expands on the continuing battle between good and evil.¹⁷⁹ Here, Bannon’s philosophy expounds on history as multi-generational eighty-year cycles. The cycle begins with a crisis that disrupts society, such as the Revolutionary War, the Civil War, or World War I. Next, a new social order arises that brings with it a period of stability and prosperity. Over the next generation, society becomes overripe, decadent, and corrupt. This leads to another crisis and the cycle continues. The lesson: peace and prosperity cannot be attained without tearing down the degraded prior regime. *Generation Zero* makes the case for a coming war to reset the world. The lynchpin of the trilogy arrived with *Torchbearer* (2016). In this documentary, Bannon directed viewers to the balm of Gilead: Christianity.¹⁸⁰ *Torchbearer* posits the theory that the country lost its greatness when people turned away from God.¹⁸¹ However, as the narrator Phil Robertson, best known as the patriarch of reality-TV juggernaut *Duck*

175. See CitizensUnited, *Trailer for Border War: The Battle Over Illegal Immigration*, YOUTUBE (Feb. 23, 2007), <https://www.youtube.com/watch?v=FE1pu6pDI34>.

176. Mark Olsen, *Director Fails to Take Control of Border War*, L.A. TIMES (Sept. 1, 2006), <http://articles.latimes.com/2006/sep/01/entertainment/et-border1>.

177. *In The Face of Evil: Reagan’s War in Word and Deed*, IMDB, <http://www.imdb.com/title/tt0427380/> (last visited Feb. 17, 2018).

178. Quinn Panetta, *In the Face of Evil Reagan’s War in Word and Deed*, YOUTUBE (Sept. 1, 2016), <https://www.youtube.com/watch?v=nVkmi90nXP4>.

179. *About The Film*, GENERATION ZERO, <http://www.generationzeromovie.com/about.html> (last visited Feb. 17, 2018).

180. Ken Klukowski, *‘Torchbearer’ Movie An Urgent Wake-Up Call For American Christians*, BREITBART (Oct. 5, 2006), <http://www.breitbart.com/faith/2016/10/05/torchbearer-movie-urgent-wake-call-american-christians/>.

181. *Id.*

Dynasty, hints that America can become great again and return to glory by embracing faith.¹⁸²

While Bannon's alternative historical/political philosophy might seem extreme and apocalyptic, his ideas appealed to a broad enough demographic to guide his chosen candidate to the White House. Through his documentary films Steve Bannon brought fringe views into the mainstream.

Back in 2004, Michael Moore guided ideologically driven documentary filmmaking to its highest level of popularity. *Fahrenheit 9/11* spoke to a large audience that was dissatisfied with the Bush regime and the war in Iraq. But Moore's film also motivated opposing forces to respond. In these films, persuasive positioning and unbending political allegiance superseded factual analysis and objective integrity. Ultimately, Steve Bannon's trilogy represents the culmination of the counter-movement. Bannon's documentaries shaped American history to fit his ominous vision, and in doing so, laid the foundation to change America itself.

VI. LEGITIMIZING FAKE NEWSMAKERS

Alex Jones has claimed that NASA faked the moon landing.¹⁸³ The Sandy Hook shooting was a ruse to promote gun control.¹⁸⁴ The Oklahoma City bombing was an inside job.¹⁸⁵ 9/11 was a false flag operation.¹⁸⁶ The Bill and Melinda Gates Foundation is a cover for a eugenics operation aimed at depopulating the Earth to make room for the elites.¹⁸⁷ While each

182. Quartz, *The Films of Steve Bannon*, YOUTUBE (Mar. 15, 2017), <https://www.youtube.com/watch?v=ulgOc4kyprQ>; see also Adam Wren, *What I Learned Binge-Watching Steve Bannon's Documentaries*, POLITICO (Dec. 2, 2017), <https://www.politico.com/magazine/story/2016/12/steve-bannon-films-movies-documentaries-trump-hollywood-214495>.

183. *The Apollo Moon Landings Exposed in 2014*, INFOWARS (Jan. 3, 2014), <https://www.infowars.com/the-apollo-moon-landings-exposed-in-2014/>.

184. Erik Ortiz, *Megyn Kelly Defends Interview With Infowars Host Alex Jones*, NBC NEWS (June 13, 2017, 12:04 PM), <https://www.nbcnews.com/news/us-news/megyn-kelly-defends-interview-infowars-host-alex-jones-n771516>; Graham Lanktree, *Alex Jones Refuses to Apologize for Sandy Hook Conspiracy Theory*, NEWSWEEK (June 19, 2017, 6:52 AM), <http://www.newsweek.com/alex-jones-megyn-kelly-sandy-hook-infowars-627129>.

185. *Proof The OKC Bombing Was An Inside Job*, INFOWARS (Dec. 17, 2011), <https://www.infowars.com/proof-the-okc-bombing-was-an-inside-job/> [hereinafter *OKC Bombing*].

186. Jeremy Stagl, *Where Did 9/11 Conspiracies Come From?*, SLATE (Sept. 6, 2011, 7:00 AM), http://www.slate.com/articles/news_and_politics/trutherism/2011/09/where_did_911_conspiracies_come_from.html.

187. Aron Dykes, *9/11 Inside Job: Ten Years Later*, INFOWARS (Sept. 10, 2011), <https://www.infowars.com/911-inside-job-ten-years-later/>; *OKC Bombing*, *supra* note 185; *Bill Gates Confronted by Infowars Reporter*, INFOWARS (Mar. 7, 2013), <https://www.infowars.com/infowars-confronts-bill-gates-on-eugenics-vaccine-program->

of these claims is far-fetched to the point of delusion, Jones has managed to expose veracity just often enough to maintain a degree of authority. Among his more verifiable claims were early warnings about NSA cellphone spying, domestic drones, and the perils of genetically modified food.¹⁸⁸ Jones has proven himself a major force in the rise of fake news.

The Texas-based shock jock is an excitable commentator with an insatiable thirst for conspiracy and the keen eye to see connections everywhere. In the mid-1990s Jones launched “Infowars” as a terrestrial and Internet radio program declaring: “There’s a war on for your mind!”¹⁸⁹ In his stream of consciousness style, he entertained and indoctrinated audiences with visions of a new reality where alternative facts competed with objective data. Years before Steve Bannon’s right leaning documentaries and Michael Moore’s liberal left wing polemics, Alex Jones was an elemental force in the weaponizing of fake news.

In addition to his Infowars portal, Jones pushed the limits of fact-based films. In *America Destroyed by Design* (1998), Jones focused on how “the sovereignty of the United States [wa]s being subordinated to the globalist interests.”¹⁹⁰ He followed up with *9/11: The Road to Tyranny* (2002), which “[d]etail[ed] the birth of a global police state, the history of government sponsored terrorism, the modern implementation of fear-based control, and the future plans of the New World Order.”¹⁹¹ In 2005, Jones contributed to *Loose Change* (2005), one of the most compelling pictures in a cycle of “9/11 Truther” films.¹⁹² *Loose Change* had the distinction of being discovered on Osama bin Laden’s personal computer recovered during the raid on his compound that resulted in the al-Qaeda mastermind’s death.¹⁹³ This instance represents a full circle of fake news: a speculative-

exclusive/; Alexander Zaitchik, *Meet Alex Jones*, ROLLING STONE (Mar. 2, 2011), <https://www.rollingstone.com/politics/news/talk-radios-alex-jones-the-most-paranoid-man-in-america-20110302>.

188. Molly Hennessy-Fiske & Steve Padilla, *The World May Be Out To Get Alex Jones, Master of Conspiracy. But He’s Scored a Win With Donald Trump*, L.A. TIMES (Nov. 19, 2016), <http://www.latimes.com/nation/la-na-alex-jones-20161119-story.html>.

189. See generally INFOWARS, <https://www.infowars.com/> (last visited Feb. 17, 2018).

190. *Who Is Alex Jones and What Is The Infowar? . . . And Why Should You Care?*, INFOWARS, <https://www.infowars.com/about-alex-jones-show/> (last visited Feb. 17, 2018).

191. *Id.*

192. Rick Paulas, *The “9/11 Was An Inside Job” Guy Has Some Regrets*, OUTLINE (Aug. 25, 2017), <https://theoutline.com/post/2179/reflecting-on-loose-change-in-the-age-of-fake-news-9-11-inside-job?zd=3&zi=4cpglxel>.

193. Tim Marcin, *Osama Bin Laden Had “Loose Change,” A 9/11 Conspiracy Theory Documentary, In His Secret Compound*, NEWSWEEK (Nov. 11, 2017), <http://www.newsweek.com/osama-bin-laden-loose-change-911-conspiracy-theory-truther-documentary-699852>.

fact film that pinned the attack on the World Trade Center on internal U.S. forces being viewed by the very terrorist that planned the attack.

By the mid-2000s, Alex Jones had come to represent a dynamic but fringe element in the spectrum of political commentary. Citizens United had once occupied a similarly marginal position.

Washington-based Republican lobbyist Floyd Brown founded Citizens United in 1988. With his “28-year-old aide de camp, David Bossie,”¹⁹⁴ the organization made a name for itself by funding a highly visible attack ad during the Bush-Dukakis presidential campaign.¹⁹⁵ *Weekend Passes* quickly became an infamous spot, criticized as pandering to base racial fear.¹⁹⁶ The anti-Dukakis ad focused on an African American prison inmate named Willie Horton, who had allegedly raped and murdered a white woman while free on a weekend furlough.¹⁹⁷ Two years later, the group produced another ad so incendiary that President George H. W. Bush called it “offensive and counterproductive” and asked for it to be pulled from the air.¹⁹⁸

As Bossie took control of the PAC in 2001,¹⁹⁹ Citizens United evolved. The organization expanded from thirty-second commercials to feature length documentaries beginning with *Celsius 41.11* in 2004.²⁰⁰ Their object of ire soon shifted from *Fahrenheit 9/11* and Michael Moore to Hillary Clinton. When Citizens United produced a pseudo-documentary entitled *Hillary: The Movie* (2008), the stage was set for a battle royale.²⁰¹

From a technical standpoint, *Hillary: The Movie* was an improvement on Citizens United’s earlier efforts. With flashy editing, an entrancing electronic score, and GOP star power including Ann Coulter, Newt

194. Catherine S. Manegold, *A Clinton Nemesis Revels in the Role*, N.Y. TIMES (Apr. 24, 1994), <http://www.nytimes.com/1994/04/24/us/a-clinton-nemesis-revels-in-the-role.html?pagewanted=all>.

195. Andrew Rosenthal, *Bush Acts to Quiet Storm Over TV Ad on Thomas*, N.Y. TIMES (Sept. 6, 1991), <http://www.nytimes.com/1991/09/06/us/bush-acts-to-quiet-storm-over-tv-ad-on-thomas.html>.

196. Morgan Whitaker, *The Legacy of the Willie Horton Ad Lives On, 25 Years Later*, MSNBC (Oct. 21, 2013), <http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives>.

197. Rosenthal, *supra* note 195.

198. Steven A. Holmes, *Bush Criticizes Ad Backing Thomas*, N.Y. TIMES (Sept. 5, 1991), <http://www.nytimes.com/1991/09/05/us/bush-criticizes-ad-backing-thomas.html>.

199. Michelle Cottle, *Meet the New Bossie, Same as the Old Bossie*, THE ATLANTIC (Sept. 6, 2016), <https://www.theatlantic.com/politics/archive/2016/09/meet-the-new-bossie-same-as-the-old-bossie/498698/>.

200. Dutka, *Celsius*, *supra* note 153.

201. Philp Rucker, *Citizens United Used ‘Hillary: The Movie’ to Take on McCain-Feingold*, WASH. POST (Jan. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012103582.html>.

Gingrich, Mark Levin, and Dick Morris, the film was engineered to appeal to a broader audience.²⁰² It was from the legal standpoint that *Hillary* ran afoul of electioneering regulations. Ostensibly to promote a video on demand (VOD) release of the picture, Citizens United purchased airtime to run two ten-second ads and one thirty-second ad scheduled to air within thirty days of the 2008 primary election.²⁰³ These commercial spots potentially violated the Bipartisan Campaign Reform Act of 2002 (BCRA), which prohibited electioneering communications broadcast within thirty days of a primary or sixty days of a general election.²⁰⁴

Citizens United attempted to persuade the court that they were part of the news media because the organization distributed newsletters, position papers, video documentaries, infomercials, and books.²⁰⁵ Before the District Court for the District of Columbia, “[l]awyers for the group argued that . . . *Hillary: The Movie* was no different from documentaries seen on television news shows like *60 minutes* and *Nova*. [This] prompted skepticism and at one point, outright laughter from the judges.”²⁰⁶ The District Court’s *per curiam* opinion denied Citizens United its motion for preliminary injunction, which would have enjoined the Federal Election Commission from enforcing the BCRA.²⁰⁷

On appeal to the Supreme Court, *Citizens United v. FEC* became a landmark on the issue of First Amendment and corporate speech. The High Court’s decision overruled the prior ruling and rejected the FEC’s regulations governing political speech funded by corporate entities.²⁰⁸ *Citizens United* was controversial for its permissive stance on framing money raised by political operatives as protected speech. President Obama chimed in with concerns the ruling was “a green light to a new stampede of special interest money in our politics.”²⁰⁹ But *Citizens United* holds a more nuanced meaning with regard to partisan producers and fake newsmakers.

202. ‘*Hillary*’ Producer is Ready for Obama, Too, WASH. TIMES (Jan. 15, 2008), <https://www.washingtontimes.com/news/2008/jan/15/hillary-producer-is-ready-for-obama-too/>.

203. Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 320-21 (2010).

204. *Id.*

205. Justice, *supra* note 144.

206. Court Puts Limits on ‘*Hillary: The Movie*’, N.Y. TIMES (Jan. 16, 2008), <http://www.nytimes.com/2008/01/16/us/politics/16ads.html>.

207. Citizens United v. Fed. Election Comm’n, 530 F.Supp. 2d 274, 275 (D.C. 2008).

208. Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS (Jan. 21, 2015), <https://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics>.

209. David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22donate.html>.

With *Citizens United*, producers of fake news were granted legitimacy in the political discourse. Standing their ground, the PAC declared *Hillary* was “just a documentary film that examines certain historical events.”²¹⁰ The High Court rejected this claim, the plurality opined “[s]ome members of the public might consider *Hillary* to be insightful and instructive; [while] some might find it to be neither high art nor a fair discussion on how to set the Nation’s course.”²¹¹ Ultimately, these choices “are not for the Government to make.”²¹² With this ruling, equalizing all political speech under the protections of the First Amendment, conspiracy hacks were placed on an equal footing with mainstream journalists.

Alex Jones, once a fringe player, gained the confidence of Donald Trump, ascendant to the Presidency.²¹³ Both the President and the public shared a distrust of deep state government, large corporations, and the mainstream media. Jones fed off this fear. As newspaper subscriptions dropped off, devastated by the Internet, a new generation of unconventional correspondents like Jones thrived.

Citizens United had an unforeseen consequence. In the aftermath of the decision, alternative newsmakers were able to exploit striking claims that strain the limits of veracity with full constitutional protections.²¹⁴ After decades of development, fake news was on a level playing field with objective reality.

VII. CONCLUSION

Fake news is a virus that has entered the body politic and contaminated the system of free speech and democracy. While most potent when delivered by electronic media, the deliberate use of false, misleading, or manipulated content intended to influence its audience has a long history as the weapon of choice in the arsenal of political factions.

James Madison regarded as an inevitable part of democracy the rise of factions: citizens united “by some common impulse of passion [] or of interest, adverse to the rights of other citizens, or to the permanent and

210. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 325 (2010) (internal quotation marks omitted).

211. *Id.* at 372.

212. *Id.*

213. Manuel Roig-Franzia, *How Alex Jones, Conspiracy Theorist Extraordinaire, Got Donald Trump’s Ear*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/lifestyle/style/how-alex-jones-conspiracy-theorist-extraordinaire-got-donald-trumps-ear/2016/11/17/583dc190-ab3e-11e6-8b45-f8e493f06fcd_story.html?utm_term=.516109a69d9a.

214. Jason M. Shepard, *Campaigning as the Press: Citizens United and Problem of Press Exemptions in Law*, 16 CHAP. J.L. & POL’Y 137, 137-39 (2011).

aggregate interests of the community.”²¹⁵ He considered the potential for mischief and malfeasance and pondered the diagnosis. Either remove the cause or control the effects, he wrote in “Federalist Paper No. 10.”²¹⁶ Removing the cause would have a dire consequence, intruding on personal liberties, “a remedy worse than the disease.”²¹⁷ To Madison, the only possible alternative was to control the effects of a faction, a mechanism he believed would be self-regulated by the electorate of a democratic republic.²¹⁸

Madison’s vision of a self-regulating system gravitating toward the public good would not square with Twentieth Century social development. How could the Founding Fathers have predicted marketing men positioning their products as healthy and stylish, influencing and steering popular opinion? How could the Founding Fathers have anticipated the artistic use and amoral manipulation of purportedly factual materials in the work of Orson Welles and Kurt Geronzo?

Long simmering, a disruption occurred in 2004 popular culture that sharply split the United States.²¹⁹ The dam broke when Michael Moore released a President Bush-bashing documentary that energetically and enthusiastically made its case unconcerned by twisting the truth for dramatic effect.²²⁰ Moore’s fact-based film was true enough and felt true to its audiences, a concept that fake news/pundit/comedian Stephen Colbert called “truthiness.”²²¹ Bush supporters and GOP operatives shot back with a series of pseudo-documentaries that became increasingly effective and influential. This wave of filmmakers was more brazen in their claims, crafting conspiracy theories and character assassination from a germ of fact. Madison’s factions were out of the bottle and had grown too outspoken to silence or self-correct.

The law could not tame this growing threat. Two years after *Citizens United* cleared the way for partisan productions, the Supreme Court handed down its decision on *United States v. Alvarez*.²²² In *Alvarez*, the Court threw out the Stolen Valor Act, which had prohibited false presentation as a

215. THE FEDERALIST NO. 10, at 54 (James Madison) (E.H. Scott ed., 1894).

216. *Id.*

217. *Id.*

218. *Id.* at 56-57.

219. Bill Schneider, ‘Fahrenheit 9/11’ Sparks Controversy and Wins Attention, CNN (June 25, 2004), <http://www.cnn.com/2004/ALLPOLITICS/06/25/moore.film/>.

220. Philip Shenon, *Michael Moore is Ready for His Close-Up*, N.Y. TIMES (June 20, 2004), <http://www.nytimes.com/2004/06/20/movies/michael-moore-is-ready-for-his-close-up.html>.

221. *Id.*; see also *The Colbert Report: The Word – Truthiness*, COMEDY CENTRAL (Oct. 17, 2005), <http://www.cc.com/video-clips/63ite2/the-colbert-report-the-word—truthiness>.

222. *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality opinion).

decorated military officer.²²³ This decision had broad consequences on First Amendment rights, effectively enshrining a constitutional right to lie. “The remedy for speech that is false is speech that is true,” wrote Justice Kennedy.²²⁴ Taken together, the Supreme Court’s holdings in *Citizens United* and *Alvarez* created legal equivalence between fake news and objective non-partisan fact-based journalism.

There is another legal theory, somewhat academic and unlikely actionable, that is relevant to the discussion of fake news. This strategy would draw on the concept of constitutional originalism, or interpreting the constitution by the Framers’ likely intent at the time of enactment. In late 2017, Professor Jud Campbell analyzed *Natural Rights and the First Amendment* in the Yale Law Review.²²⁵ His study speculated that the originalist construction of free speech was confined to a far more narrow field of protected rights than what we experience and expect today.²²⁶ In fact, “the freedom to express thoughts . . . was limited to *honest* statements—not efforts to deceive others,” wrote Campbell concerning a 1788 Pennsylvania case.²²⁷ That case, *Respublica v. Oswald*, situated on the cusp of the founding era, found it significant “to distinguish between [communications] which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame.”²²⁸ Based on this understanding, the Founding Fathers may not have afforded broad First Amendment protections to fake news.

The conclusions of Campbell’s research point to a counter-intuitive result.²²⁹ The generally left leaning groups that oppose the pseudo-documentaries of Steve Bannon and Alex Jones could be in the position of favoring the originalist approach to the Framers’ intent underlying the notion of free speech.²³⁰ Champions of the First Amendment could be placed in the position of favoring regulations to maintain objectivity and clarity in the realm of non-partisan journalism. It is unlikely, however, that the First Amendment would ever be recalibrated to favor communications aimed at the public good over self-serving speech.

223. *Id.*

224. *Id.* at 727.

225. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L. J. 246, 253-57 (2017).

226. *Id.* at 258-61.

227. *Id.* at 282.

228. *Respublica v. Oswald*, 1 U.S. 319, 325 (Pa. 1788).

229. Campbell, *supra* note 225, at 319-21.

230. *Id.*

A century ago the seeds of disinformation were planted.²³¹ Few realized the risk as public relations and propaganda infiltrated news sources. Those seeds gave way to poison fruit as producers of fake news infotainment and conspiracy-ridden content found legitimacy within the mass media ecosystem.²³² The next challenge, determining “true” reports from misleading or manipulated content, must be handled at an individual level. The story of fake news and film sheds light on the evolution of disinformation but offers no easy answers on how to control deceptive content.

231. *See supra* Part I.

232. *See supra* Part V.

Notable “Fake News” Films and Productions

Film	Director	Distributor	Notable Personnel
Mercury Theatre on the Air Presents “War of the Worlds” (1938)	Orson Welles	Columbia Broadcasting System	
<i>Der Führer schenkt den Juden eine Stadt</i> (Hitler Gives a City to the Jews, 1944)	Kurt Gerron	SS-Central Office for the Settlement of the Jewish Question in Bohemia and Moravia	Fritz Hippler, Director of Film Production at the Reich Ministry of Public Enlightenment and Propaganda
<i>Weekend Passes</i> , the Willie Horton attack ad (1988)	Larry McCarthy	Americans for Bush	Floyd Brown, creative executive
<i>America Destroyed by Design</i> (1998)	Alex Jones	Infowars.com	
<i>9/11: The Road to Tyranny</i> (2002)	Alex Jones	Infowars.com	
<i>Fahrenheit 9/11</i> (2004)	Michael Moore	Lions Gate/Columbia TriStar	
<i>Celsius 41.11: The Temperature at Which the Brain Begins to Die</i> (2004)	Kevin Knoblock	Citizens United Productions	
<i>FahrenHYPE 9/11</i> (2004)	Alan Peterson	Trinity Home Entertainment	

Film	Director	Distributor	Notable Personnel
<i>911: In Plane Site</i> (2004)	William Lewis	BridgeStone Media Group	
<i>In the Face of Evil: Reagan's War in Word and Deed</i> (2004)	Steve Bannon	American Vantage Media	
<i>Loose Change</i> (2005)	Dylan Avery	Louder than Words	
<i>Border War: The Battle Over Illegal Immigration</i> (2006)	Kevin Knoblock	Citizens United Productions	Steve Bannon and David Bossie, Executive Producers
<i>Death of a President</i> (2006)	Gabriel Range	Newmarket Films	
<i>Endgame: Blueprint for Global Enslavement</i> (2007)	Alex Jones	The Disinformation Company	
<i>Hillary: The Movie</i> (2008)	Alan Peterson	Citizens United Productions	David Bossie, Executive Producer
<i>Hype: The Obama Effect</i> (2008)	Alan Peterson	Citizens United Productions	David Bossie, Executive Producer
<i>The Obama Deception</i> (2009)	Alex Jones	Alex Jones Productions	
<i>Generation Zero</i> (2010)	Steve Bannon	Citizens United Productions	
<i>Don't Tread On Me: Rise of the Republic</i> (2010)	William Lewis	William Lewis Films	
<i>District of</i>	Steve	Rocky Mountain	

Film	Director	Distributor	Notable Personnel
<i>Corruption</i> (2012)	Bannon	Pictures	
<i>Behold a Pale Horse: America's Last Chance</i> (2012)	Chuck Untersee	Heartland Pictures	Featuring Charlie Daniels
<i>Torchbearer</i> (2016)	Steve Bannon	ARC Entertainment/Citizens United Productions	David Bossie, Executive Producer
<i>Mainstream: How Hollywood Movies and the New York Media Are Promoting the Globalist Agenda</i> (2017)	James Jaeger	Matrix Entertainment/Oath Keepers	
<i>Fahrenheit 11/9</i> (2018)	Michael Moore	TBD	