

## Freedom to Lie?

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Three score and eight weeks ago, Hillary Rodham Clinton and Donald J Trump with a bunch of other people set forth on this continent a new presidential campaign unparalleled in its length, frustration, divisiveness and abasement. We gather here this morning as survivors in the last two days of this grueling campaign. The question it forces us to contemplate this morning is whether we will bury, in addition to the virtues of civility and rational discussion, the notion that there is such a such thing as truth. It is often said that truth is the first casualty in war. This Presidential campaign may go down in history as our first civil war without actual bloodshed.

Of course truth always takes a beating in the quadrennial jousts. Some of us may remember the Swift Boat campaign against John Kerry in 2004, which tried to paint a war hero into a coward. And lest we think that UUs are somehow above all this, one of the worst presidential campaigns from the point of view of truth was between John Adams and Thomas Jefferson in 1800; Adams was clearly a Unitarian and Jefferson arguably so, but Adams' supporters fomented a campaign to portray Jefferson as an atheist.

But the present contest seems particularly discouraging. Two recent articles in the *New York Times* highlight a perilous situation:

I read Friday's piece by Timothy Egan called "The Post- Truth Presidency." a moment ago.

The other *New York Times* article appeared Wednesday, a piece by Farhad Manjoo. Manjoo is a technology journalist who wrote a book in 2008 arguing that the Internet is changing our sense of reality, and he returned to that theme in this week's article titled "How the Internet Is Loosening Our Grip on the Truth."

"Polls show that many of us have burrowed into our own echo chambers of information. In a recent Pew Research Center survey, 81 percent of respondents said that partisans not only differed about policies, but also about 'basic facts.'

"For years, technologists and other utopians have argued that online news would be a boon to democracy. That has not been the case.

"More than a decade ago, as a young reporter covering the intersection of technology and politics, I noticed the opposite. The internet was filled with 9/11 truthers, and partisans who believed against all evidence that George W. Bush stole the 2004 election from John Kerry, or that Barack Obama was a foreign-born Muslim."

In the last 24 hours there has been an amazing demonstration of the Trump campaign's utter indifference to truth. A Fox news anchor had reported that some FBI agents were saying that new discoveries on Clinton's emails meant that she was likely to be indicted. There was nothing to back this up, and the anchor was forced to retract it. But Trump had already used it in a rally. Trump campaign manager Kellyann Conway appeared on Brian Williams show on MSNBC, and Williams asked her now that Fox had walked the story back, was Trump going to do so? She replied, "Well the damage has been done to Hillary Clinton. No matter how it's termed the voters are hearing it for what it is – a culture of corruption."

In other words, no, we put out misinformation but we'll take no responsibility for

correcting it.

With that attitude of blase indifference to truth, Lord help the voters trying to sort out the egregious lies of this campaign.

In a situation like this, we may yearn to appeal to a higher power. Can't God reveal to us what the truth is? Or failing God, the government? Can't we set up a truth commission and have people with impressive credentials deliberate write learned articles and debate and deliberate for days or weeks and announce their conclusions and have everybody accept them?

Or if we can't have the definitive truth from on high, at least can't the government make it a crime to lie? Lock people up when they fib. That ought to make them think twice about going off the truth.

There are actually many statutes on the books which make it a crime to lie in specific contexts. But none apply to a Presidential election.

The song we sang a moment ago says it's a sin to tell a lie. The question I'm asking is should it also be a crime? It's a tempting proposition, but it's would turn into a nightmare, and I'd like to explain why. The reason making it a crime to lie in general is a nightmare is because of another value we hold as dear as we hold truth, and that is freedom. In religion, freedom of thought and opinion; in constitutional law freedom of speech, free exercise of religion and freedom of the press, constitutional values so important they are contained in the First Amendment.

While some of us may consider some of these constitutional freedoms absolute, the courts do not. A good illustration came this week in a court in Charlottesville Virginia. Several years ago, a young woman at the University there alleged that she had been gang-raped at a fraternity house; all the fraternity brothers denied the charge. The magazine Rolling Stone did an article on it which was very sympathetic to the alleged victim's claims and very critical of the University's handling of it, depicting a female administrator as cold and callous. As it turns out, the magazine missed several cues that the alleged victim's story was not quite what it appeared to be and ultimately the rape claim collapsed. The administrator then sued Rolling Stone for libel, and this week got a jury verdict in her favor.

Libel is an old civil cause of action, the gist of which is damage to a person's reputation because of false statements, because of lies. Libel is in the news because lawyers for a certain candidate for president have been threatening libel suits against media outlets with great regularity in this campaign.

They do this of course, to discourage the critical reporting which, among other things calls their client out on the lies he was telling on the campaign trail. Though the media outlets so far have not been cowed, it is commonplace that threat of a libel lawsuit can very much chill the free exercise of speech and the press. In the 1964 case of New York Times vs. Sullivan, the US Supreme Court realized the inherent tension between free speech and libel lawsuits, and they made a very wise compromise where the person who says he or she was libeled is a public official. Courts have held that a central point of the First Amendment is to encourage robust debate and discussion about the conduct of public officials. If person who claims he or she was libeled is a public official, the First Amendment guarantee of freedom of speech limits the libel suit so that the complaining party can only win if he or she can show actual malice, that is that the publisher knew the statements were false when they published them or acted in reckless disregard of their truth or falsity. This is the very high hurdle which the administrator in Charlottesville, who was considered a public official, had to surmount, and she did it, she won.

The heart of libel is a lie whose publication causes an injury to an individual's reputation, and that really doesn't fit what we might want in this presidential season. Some of the lies of this campaign have hurt the pride of certain groups and insulted everyone's intelligence, but there is no such thing as group libel in America; so Mexicans, Muslims, women, Gold Star families, all the groups who have been maligned in this campaign would not have a libel or slander suit.

But could Congress pass a law making it a crime to make a false statements in the course of a campaign for public office? After all, if I'm applying for a \$100 grant from my local arts council the government requires that there be this draconian language at the bottom of the application warning me that any false statements could land me in the clink. If we're going to threaten shoestring arts organizations with imprisonment, why shouldn't we threaten those who aspire to pull the ultimate levers of power?

It's a tempting proposition but it would be a nonstarter under a case decided in 2012 called *U.S. v. Alvarez*. Alvarez was a well known figure in his corner of California, not least because he was always claiming to be something he was not. One of the things he claimed to be was a Medal of Honor recipient, and it happened that Congress had passed a special law called the Stolen Valor Act making it illegal to falsely claim to have earned any military honor. The U.S. Supreme Court said in a 6-3 decision that this statute violated the First Amendment because it criminalized simply lying. Here's a key paragraph of the opinion:

“Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, *Nineteen Eighty-Four* (1949) (Centennial ed. 2003).

Let me stop right there. Notice, to justify his argument Justice Anthony Kennedy is not citing a Supreme Court case, nor a statute passed by Congress or any other court. He is citing a novel. If you remember Orwell's *Nineteen Eighty-Four*, written just after the Second World War, it is set in a totalitarian future which resembles Nazi and Communist regimes of the recent past and present, and the protagonist Winston Smith is employed at the Government Ministry of Truth, where his job is to rewrite history. The world is divided into three empires, perpetually at war, and his empire Oceania is sometimes allied with Eastasia against Eurasia, and sometimes vice versa. And if they are now allied with Eurasia, the books and newspapers have got to say they were always allied with Eurasia, so Winston Smith is kept very busy manufacturing lies for the government.

So when Justice Kennedy says our constitutional tradition is against having a Ministry of Truth, he's saying that it's not American to have an agency concerned with truth as such.

Now let me read you the rest of the paragraph:

“Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. See, e.g., *Virginia Bd. of Pharmacy*, 425 U. S., at 771 (noting that fraudulent speech generally falls outside the protections

of the First Amendment). But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."

In other words, the First Amendment prevents the government from making lying by itself a crime. If, however, you use lying to get something you're not entitled to, or what Kennedy called a "material advantage," the government can punish that.

In other words, if I lie to the government that I have a PhD in Genetics and apply for a \$2 Million grant to investigate a genetic cure for Alzheimer's, they can come down on me with both feet, because I got a material advantage from my lie.

But don't politicians get a material advantage? Sometimes they win elections on the basis of lies. That's not only material, it's the whole game.

Yet I agree with Kennedy, as bad as candidate lies are, and they are very bad, it would be contrary to all our traditions to put government in the position of being the censor or arbiter.

For the ultimate judges of what is true or what is a lie must be the people themselves. The government does occasionally conduct official inquiries; it conducted one into John Kennedy's assassination, it conducted one into the attacks of 9/11. These inquiries came to official conclusions, but there are still plenty of people in the country who are convinced that JFK was killed by a massive conspiracy, that the government knew about the 9/11 attacks in advance, just as there are still people convinced that Barack Obama was born in Kenya or that he is a Muslim.

Freedom of speech and freedom of thought must mean that people are free to reject government conclusions. For governments themselves clearly do lie; they are no better than the people who make them up.

When I was a young adult, the US government consistently lied about a matter vital to my own life: the War in Vietnam. General William Westmoreland was a cousin of mine, but I have to say he clearly misled the Pentagon about the body counts and the prospects for winning: he was always seeing a light at the end of the tunnel. So when a top secret government report on the conduct of the war came into the possession of the New York Times, it was very much in the public interest to publish it, though the government went to court to try to stop it. And 45 years ago yesterday, Beacon Press at the UUA took up the challenge and published the whole thing, facing down the Nixon administration.

Now you may be wondering whether this sermon is a political rant or a law lecture, or whether it is going to get to anything religious. I think the Pentagon Papers provides the link. Our religious tradition is heretical. It looks with suspicion on any institution which advances a claim to be the repository of all truth, as the Christian church did for centuries. Jesus is quoted in John's gospel as saying, I am the way, the Truth and the life. The Roman Catholic church claimed his role, claimed to be a repository of truth. It famously insisted that the earth was the center of the universe and the sun revolved around it. Do you remember the Timothy Egan quote I gave earlier? One in four Americans still haven't gotten the news that the earth revolved around the sun five hundred years later. But the fact that some people wallow in ignorance is a

good argument for better schools, not for having government be arbiters of truth. In our heretical tradition, we identify with Galileo. I talked in UU 101 last week about martyrs for Unitarian beliefs like Michael Servetus and Francis David, but Galileo belongs in that company as well; though he was not killed, he was forced to recant his scientific conclusions because they were in conflict with the official position of the church.

And the church was wrong.

Truth may be an elusive butterfly, there may be no absolute or eternal truths but I don't think that all truth is relative or that there can't be lies. I have a saying that some questions are too important to have only one right answer, but that does not mean they can't have a wrong answer. There are definitely positions that are factually wrong, claims that are contrary to any evidence, however it may be to our advantage to think otherwise. There is no alternative universe or frame of reference in which it is true that I have a PhD in genetics or a bungalow in the Cayman Islands.

Even if the Constitution would permit Congress to pass a law making lying by itself criminal, don't hold your breath waiting for them to do it. Every politician who has ever lived, including George Washington, has at some time fudged the facts. Rather than locking up the liars, let us seek to educate the citizens. I would like to see critical thinking skills taught from elementary school on up. It is a basic survival technique to be able to determine who is telling the truth and, I don't think watching a lot of cop shows on television really improves your discernment.

It has been a long and grueling and disgusting and depressing campaign. America is deeply divided, and will continue to be on Wednesday morning no matter what the outcome of the election. Yet the people will speak, and directions will be set out. Democracy is messy and imperfect, but despite all the lies, I have faith that government of the people, but the people and for the people will not perish from the earth.

Amen.

Reading

Timothy Egan "The Post Truth Presidency" NYT Nov. 4, 2016

We can say with absolute certainty that the Chicago Cubs ended a 108-year spell of futility and won the World Series. The Curse of the Billy Goat is dead. We also know with absolute certainty that on the dawn following the last out, the sun rose over Chicago, my dad's hometown, at 7:26 a.m.

But with nearly everything else, we choose to believe what we want. Segregation lives. Reality no longer bites — it sorts. This coming Election Day, separate theaters for red and blue voters will open so that viewers can get their political news inside the comfort of their own fact bubbles.

Of all the concerns facing a Madam President, governing in a post-truth environment may be the biggest challenge. Perhaps a third of American adults now believe a few Big Lies. And those Big Lies may be nearly impossible to dislodge, because in the course of this awful election, even fact-checking became suspect. ...

It's bad enough that one in four Americans believes that the sun revolves around the earth. But how many people believe, as Donald Trump insists, that the murder rate is the highest it has been in 45 years?

"The press never talks about it," said Trump, barely a week ago. They don't talk about it because it's not true. The murder rate is less than half what it was in the peak year of 1980, and lower than at any time between 1965 and 2009.

Ah, but the truth is rigged. If it wasn't, you would all know that the United States government was complicit in the 9/11 attacks on its own people. Well, you'd know it if you listened to Alex Jones, the conspiracy theorist whose relationship to the truth is like that of a vegan to a porterhouse steak.

No surprise, Trump has praised this rabid dog with a microphone. "Your reputation is amazing," he told Jones. And the wackosphere has responded in kind. It's not just the Ku Klux Klan newspaper that supports Trump, or retired propagandists from the old K.G.B. Jones told the Republican presidential nominee that 90 percent of his radio show's listeners are with him.

Trump's falsities come in three forms. There's the vanity lie — about his hair, his height or his wealth. There's the denial of something he said or did, easily rebutted. And then there's the worst kind, causing lasting damage — the lie about democracy itself, or climate change, which he calls a hoax. ...

This passes with a shrug in part because Trump is so good for cable television. His rallies are carried live, often without context. CNN is projected to make an extra \$100 million from the Trump circus. On top of that, the networks have added party hacks to their paid rosters — spewers of misinformation in the service of a candidate.

"It may not be good for America," said Les Moonves, the CBS head, on Trump's media ubiquity, "but it's damn good for CBS."