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What Lawyers Can and Should Do about Mendacity in Politics

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What Lawyers Can and Should Do About Mendacity in Politics

*Heidi Li Feldman**

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I. INTRODUCTION

Donald Trump has brought new attention to the mendacity of politicians. Both major national newspapers have reported tallies of Trump's false and misleading claims.¹ On November 14, 2017, The Washington Post reported that in the 298 days that President Trump has been president, he had made 1,628 false or misleading claims, telling them at a rate of nine per day in the thirty-five days

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1. *In 365 Days, President Trump Has Made 2,140 False or Misleading Claims*, WASH. POST, https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm_term=.b22a8f3a6c87 (last updated Jan. 19, 2018); David Leonhardt & Stuart A. Thompson, *Trump's Lies*, N.Y. TIMES (last updated Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/06/23/opinion/trumps-lies.html>.

prior to November 14.² Trump, the Post reported, has made fifty false or misleading claims “that he as repeated three or more times.”³ The Post also catalogued scores of “flip-flops” from Trump.⁴ In general, from 2016 into 2017, journalistic political fact-checking has surged in frequency and scope.⁵ Newspapers and magazines regularly run articles, columns, and features on Trump’s record-breaking lying.⁶

Though the frequency and blatancy with which Trump lies is exceptional, he is not the only elected political leader active today whose mendacity has been documented. Catalogues exist for Speaker of the House Paul Ryan, Vice President Mike Pence, Senate Majority Leader Mitch McConnell, Senate Minority Leader Chuck Schumer, and Senate Minority Leader Nancy Pelosi.⁷ Trump cabinet members and White House spokespeople have also come under scrutiny for their untruthfulness.⁸

2. Glen Kessler, Meg Kelly & Nicole Lewis, *President Trump Has Made 1,628 False or Misleading Claims Over 298 Days*, WASH. POST (Nov. 14, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/11/14/president-trump-has-made-1628-false-or-misleading-claims-over-298-days/?utm_term=.a34199e1d252.

3. *Id.*

4. *Id.*

5. Alexios Mantzarlis, *How Has Political Fact-Checking Changed After Trump’s First 100 Days? Not Much.*, POYNTER (May 1, 2017), <https://www.poynter.org/news/how-has-political-fact-checking-changed-after-trumps-first-100-days-not-much>.

6. Glenn Kessler & Meg Kelly, *President Trump Has Made More Than 2,000 False or Misleading Claims over 355 Days*, WASH. POST (Jan. 10, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/01/10/president-trump-has-made-more-than-2000-false-or-misleading-claims-over-355-days/?utm_term=.8f8332107d16; David Leonhardt, Ian Prasad Philbrick & Stuart A. Thompson, *Trump’s Lies vs. Obama’s*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html> (comparing Trump and Obama as to “demonstrably and substantially false statements” without counting repeated mentions of same lie, and showing that, in the first ten months of his presidency, Trump told six times the number of lies Obama told during his entire two terms of office); see also Bella DePaulo, *I Study Liars. I’ve Never Seen One Like President Trump*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/outlook/i-study-liars-ive-never-seen-one-like-president-trump/2017/12/07/4e529efe-da3f-11e7-a841-2066faf731ef_story.html?utm_term=.b6bf3f09119f; Lauren Duca, *Gaslighting 2: Revenge of the Reality-Based Community*, TEEN VOGUE (Nov. 9, 2017, 10:31 AM EST), <https://www.teenvogue.com/story/gaslighting-2-revenge-of-the-reality-based-community>; Sean Illing, *“The Fish Rots from the Head”: A Historian on the Unique Corruption of Trump’s White House*, VOX, <https://www.vox.com/2017/11/16/16643614/trump-administration-corruption-russia-investigation> (last updated Mar. 1, 2018, 9:53 AM EST).

7. Venues covering these politicians include POLITIFACT, www.politifact.com; SNOPEs, <https://snopes.com>; and FACTCHECK, <https://www.factcheck.org>.

8. Dan Alexander, *The Case of Wilbur Ross’ Phantom \$2 Billion*, FORBES (Nov. 7, 2017, 6:00 AM), <https://www.forbes.com/sites/danalexander/2017/11/07/the-case-of-wilbur-ross-phantom-2-billion/>; Igor Bobic, *The First 100 Lies: The Trump Team’s Flurry of Falsehoods*, HUFFINGTON POST (Feb. 26, 2017, 9:44 AM EST), https://www.huffingtonpost.com/entry/donald-trump-administration-lies-100_us_58ac7a0fe4b02a1e7dac3ca6; Chris Cillizza, *Donald Trump Just Keeps Lying*, CNN (Aug. 3, 2017, 7:41 AM EST), <http://www.cnn.com/2017/08/03/politics/donald-trump-mexico-boy-scouts-lies/index.html>; Leigh Cuen & Politifact, *4 Times Trump and His Cabinet Have Lied About Immigration*,

Clearly, not all mendacity is of equal concern. Some mendacity is not even troubling at all. Small white lies told to protect another's feelings about a trivial matter are at one end of the scale, while serial deception to defraud investors out of their life savings or to sustain two families, each kept secret from the other, are at another. Similarly, political hype or bluster may not be troublesome, whereas lying about criminal activity or scientific fact seems clearly so. Most political mendacity falls into a middle ground. Understanding when and how middle-ground mendacity is dangerously harmful is crucial. Decrying all mendacity is overkill, yet narrowing the field is difficult. Press tallies and online databases vary in what they count as lies. Entries run the gamut of fibs to whoppers, fudges to half-truths or falsehoods. Yet even calibrated catalogues of mendacious statements from politicians do not identify when and how mendacity from politicians should alarm us. Fact-checkers spot mendacity and sometimes put it on a scale of deceptiveness, but this is not the same as identifying harmful mendacity.

With mendacity in politics receiving so much attention, it is important to figure out which mendacity is dangerous and why. Lawyers, I will demonstrate, have a particular expertise in parsing mendacity. They can and should put that expertise to use in identifying the political mendacity that is particularly problematic for the health of representative democracy.

II. THE LAW'S APPROACH TO MENDACITY: A CASE STUDY

When non-lawyers think of the law's concern with dishonesty, they naturally think of perjury or lying under oath in a formal legal proceeding, such as a trial or congressional hearing. But the law of perjury is not the locus of the most robust and nuanced legal doctrines and codes that deal with mendacity. Mendacity in marketplaces receives far more legal scrutiny than lying under oath, for example. Many different areas of law address truthfulness and dishonesty in marketplaces: the common law of tort and contract; state

TEEN VOGUE (Aug. 16, 2017, 8:00 AM EST), <https://www.teenvogue.com/story/trump-lies-immigration>; Pema Levy & Dan Friedman, *3 Times Jeff Sessions Made False Statements to Congress Under Oath*, MOTHER JONES (Nov. 8, 2017, 6:00 AM), <http://www.motherjones.com/politics/2017/11/3-times-jeff-sessions-made-false-statements-to-congress-under-oath/>; Chris Strohm & Billy House, *Sessions Says He Forgot About Russia Meeting But Didn't Lie*, BLOOMBERG (Nov. 14, 2017, 10:32 AM EST), <https://www.bloomberg.com/news/articles/2017-11-14/sessions-says-he-s-never-lied-about-russia-trump-connections>; Eric Uman-sky & Marcelo Rochabrun, *5 Trump Cabinet Members Who've Made False Statements to Congress*, PROPUBLICA (Mar. 2, 2017, 6:36 PM EST), <https://www.propublica.org/article/five-trump-cabinet-members-made-false-statements-to-congress> (noting lies during the confirmation hearings of Scott Pruitt, Betsy DeVos, Steve Mnuchin, Tom Price, and Jeff Sessions).

statutory codifications applicable specifically to merchants; federal laws dealing with the sales of securities; and state consumer protection laws, to name but some. Only a small proportion of doctrine in each of these areas relates to straight up lying or knowing expression of falsehood with an intent to deceive. Instead, much doctrine focuses on misleading or deceptive practices, not isolated statements whose description depends on knowledge of the intent of the speaker. Other doctrine attempts to limit deception by requiring precision in communication and content. And much that might be considered mendacious is not prohibited by law, even in settings where the law bans some mendacity: not all mendacity harmfully compromises markets, and the law does not attend to mendacity for its own sake. Only certain kinds of mendacity in specific contexts has the capacity to corrode a market's operations. Law attempts to pinpoint these instances so as to regulate them. I definitely do not and would not recommend the promulgation of new law for regulating political mendacity; however, examining what the law pinpoints as problematic mendacity in the context of markets illuminates both the sort of mendacity problematic in politics and why lawyers with even modest training or education about market-threatening mendacity are likely to be good at spotting the kinds of mendacity that threaten American representative democracy.

It is useful to consider why the law regulating mendacity in markets is so extensive. What is it about markets that provokes mendacity? Why has American law ended up replete with doctrines to redress the problem?

Adam Smith may well have been right that as social creatures, people are literally born with a disposition "to truck, barter, and exchange,"⁹ but that disposition alone does not give rise to a functioning market. Ongoing commercial activity requires that buyers and sellers trust one another in the transactional setting or else they will not be willing to engage there. On a very small scale, in hyper-local markets, people can draw on their common sense to evaluate each other's truthfulness in transactions, although even in comparatively small settings, participants quickly augment common sense with other means of verification—such as with public scales, for example.¹⁰

9. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 15 (Edwin Cannan ed., Methuen & Co. 1904) (1776).

10. Public scales, meant to ensure honesty in transactions, have a long history in North America. See, e.g., PROCEEDINGS OF THE COMMON COUNCIL OF THE CITY OF BUFFALO. FROM

In markets where transactions are generally arms-length and in-person evaluation of a buyer's or seller's truthfulness is generally impossible, mendacity occurs more often. It emerges because people are both social and self-interested. Self-interest drives us to make ourselves better off; sociability inclines us to trust one another. When an activity can serve self-interest by capitalizing on others' credulousness, conditions are ripe for mendacity. In these contexts, mendacity is a kind of predation and exploitation: it harms or wrongfully uses others to further the interests or goals of the mendacious one. This predatory or exploitative conduct can be objected to on deontological or aretaic grounds. A deontologist may urge that respect for human dignity makes exploitation, via mendacity or any other mechanism, wrong. A virtue theorist may argue that mendaciousness is inconsistent with epistemic excellence. But legal intervention in mendacity in markets is probably provoked by a more consequentialist consideration: American law favors the existence of markets, and markets cannot expand and operate efficiently if they are riddled with mendacity.

American law particularly promotes the existence and large scope of markets for mass-produced consumer goods—goods manufactured by large scale producers and sold to many individuals throughout a state, region, or even the entire country. The volume of goods made and sold, the distance between manufacturer and end consumer, the string of middlemen typically involved in distribution, and the very flourishing of markets for consumer goods make them simultaneously ripe for mendacity on the part of sellers (manufacturers, wholesalers, and retailers) but vulnerable to too much mendacity. Sellers know there are numerous consumers, each of whom makes many purchases. They also know that consumers have scarce time and opportunity for face-to-face, common-sense evaluations of sellers' truthfulness or even to gather secondhand reputational information about sellers' truthfulness. This creates the opportunity for seller mendacity at the expense of consumers. But of course, the more sellers who act mendaciously toward consumers, the less willing or eager people will be to purchase mass-produced goods. Shrinking demand tends to diminish supply. Eventually, pervasive mendacity can undermine a market's very

JANUARY 1, 1885, TO DECEMBER 31, 1885, 1337 (1886) (discussing the establishment of a public scale on city property by the Merchants Exchange, defining "public scale," and noting such scales' prevalence in "eastern cities"); MINUTES OF THE COMMON COUNCIL OF THE CITY OF PHILADELPHIA. 1704 TO 1776. 786-87 (1847) (resolving to immediately construct "public Scales for weighing of Hay" at the "Meal Market" so that "Country people" would be protected from "Hucksters of Meal").

existence. Sellers face a collective action problem: the collective level of truthfulness required is high, but the individual seller incentive to be mendacious is also high. Consumers face a trust problem: unless mendacity among sellers is overall relatively low, they have no reason to trust—or risk purchasing from—any given seller.

It is important to note that the problem here is with the quality of information about goods and especially about the terms on which they are being sold. If the problem were only about the quality of the goods themselves, personal experience with the goods would give consumers reason, or not, to continue to buy from particular sellers. For potential purchasers, the difficulty is knowing whether sellers are giving them accurate information about quality, content, and terms of sale with regard to any specific future transaction. Even explicit warranties and guarantees cannot resolve the problem of possible mendacity. These instruments themselves can be vehicles of mendacity, and individual sellers have the same incentives to use them mendaciously as they have to be mendacious about goods themselves, even if all sellers would be better off if none were mendacious about either.

Laws and regulations governing false and misleading advertising take direct aim at the problem of reducing mendacity in the market for consumer goods. By focusing on advertising, these laws take advantage of a necessary activity for sellers in a crowded, robust market: informing potential customers, who have other opportunities, of the existence and merit of the option provided by a particular seller. Sellers advertise to gain attention for their products and sales venues and to inform potential buyers about the comparative advantages of both. Consumer protection law related to false and misleading advertising capitalizes on sellers' felt need to advertise in the first place.

In the United States, much consumer protection law is state law. To show how a state curtails false or misleading advertising, I consider a small portion of California law: California's regulation of advertising of home furnishings. In addition to its statutory law pursuant to false or misleading advertising, California has an administrative code of regulations to address the phenomenon. Within that code, there is an entire division that sets up the Bureau of Electronic and Appliance Repair, Home Furnishings and Thermal Insulation (Bureau of Home Furnishings),¹¹ created by the authority of the Home Furnishings Act.¹² Among its other activities, the Bureau

11. CAL. CODE REGS. tit. 4 § 1101 (2018).

12. CAL. BUS. & PROF. CODE § 19034 (2018).

of Home Furnishings enforces an article of the California administrative code that pertains to false and misleading advertising,¹³ and it is this article's sections that convey the highly contextualized and particularized approach California takes in this area.

The regulations start with a definition of falsity or misleadingness.

In determining whether advertising is false or misleading it shall be considered in its entirety and as it would be read by the persons to whom it is designed to appeal. It shall be considered to be misleading if it tends to deceive the public or impose upon credulous or ignorant persons.¹⁴

Several features of this definition are particularly salient. First, the regulation does not belabor distinctions between falsity, misleadingness, and deception. Second, it requires no information about the intent of the advertiser, instead approaching the question of an advertisement's meaning entirely from the perspective of the targeted audience. Third, it evaluates deceptiveness from the vantage point of both the general public and a slice of it: those who are "credulous" or ignorant.

The article then turns to very specific practices, noted and dealt with in precise yet colloquial terms. For example, consider this section on "Bait and Switch Advertising":

The term "Bait and Switch Advertising" means an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. The purpose thereof is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. Bait and switch advertising of any article subject to the provisions of the Home Furnishings Act shall be deemed to be false and misleading. Practices which shall be considered as evidence of unlawful bait and switch advertising include but are not limited to the following:

- (a) Refusal to show the product advertised;
- (b) Disparagement in any respect of the advertised product or the terms of sale;

13. *Id.* § 19150. These regulations are promulgated pursuant to section 17500.

14. CAL. CODE REGS. tit. 4 § 1300.1 (2018).

- (c) Failure to have available at all outlets listed in the advertisement sufficient quantities of the product to meet reasonable anticipated demands;
- (d) Refusal to take orders for the advertised merchandise for delivery within a reasonable period;
- (e) Showing or demonstrating a defective product unusable or impractical for the purposes implied in the advertisement;
- (f) Accepting a deposit for the product and then switching the purchaser to a higher priced item;
- (g) Failure to make deliveries within a reasonable time or to make a refund.¹⁵

This section does include a reference to the seller's intentions. It does not, however, rely on these as evidence of an "alluring but insincere offer" meant to entice customers, but to get them to buy something different. A concrete set of practices, listed in clauses (a)-(g), shows how bait and switch is done. These practices, not the inner mental states of the seller, evidence bait and switch.

The article also has a section dedicated to ads about factory outlets. That section insists that when an ad refers to a "factory outlet" or a "factory store":

such terms shall not be used in any advertisement, sign, or by any other device or printed material unless the establishment is owned in its entirety by the factory and the factory is responsible for its operation, function, and pay of the employees and unless a minimum of 51 percent in dollar volume of the articles of furniture and bedding sold or offered for sale are manufactured by the factory.¹⁶

This might seem oddly tautological if one did not know that, in contemporary America, manufacturers commonly operate stores in exurban malls devoted exclusively to so-called factory outlets—attracting people to these inconvenient (for the shopper) but low-rent (for the manufacturer) locations by suggesting that deals are to be had by cutting out the usual middlemen. Indeed, the article goes on to provisions regulating use of terms like "Factory Direct," "Factory to You," "Manufacturer to You," [and] "Direct to You," requiring

15. *Id.* § 1304.1.

16. *Id.* § 1309.

that these must refer to transactions where the factory bills the consumer, and the consumer's payment directly goes to the factory.¹⁷ These regulations tackle advertising that raises the bait and switch specter in a very specific manner. The "factory outlet" and "factory direct" regulations guard against a highly contextual practice that could easily "deceive the public or impose upon credulous or ignorant persons" by taking advantage of contemporary American consumer assumptions about wholesale and retail selling of consumer goods—assumptions that may be largely tacit or implicit, not entirely conscious to consumers themselves.

There are additional regulations directed against advertising goods as "Custom Made" (an article must be made to specifications for a particular customer and noting an article does not count "merely because the customer has a choice of coverings")¹⁸ and prohibiting advertising a sale as "Going Out of Business" unless the business is indeed winding down (merchandise must already be on premises or previously ordered and "mere change of business location, business name, or type of business entity" does not count).¹⁹

All in all, California's statutes and regulations regarding false advertising of home furnishings display a remarkable degree of particularity and reach. This combination is the hallmark of a method that identifies problematic mendacity so as to prevent it. By incorporating context, the regulations pinpoint how mendacity is practiced. Then, the practices themselves can be banned or used to identify prohibited communications. Neither the statutes nor the regulations focus on the intentional states of sellers. Enforcement does not require a determination of whether a seller is straight up lying, carelessly misinforming, or somewhere in between these poles. Instead, the focus is on practices that indicate the promulgation of inaccurate information, particularly inaccurate information likely to exploit buyers in order to benefit, at least in the short term, those who purvey it. Applying the regulations requires detection of practices such as bait and switch, improper references to factory sales or outlets, and so forth. This, in turn, calls for competence in knowing how to identify and discover evidence of these practices. This sort of competence is developed holistically. It calls for familiarity with the market for consumer goods as it operates in California; a sense of the perspective of the general public and the susceptibilities of credulous or ignorant members of it; knowledge of the numerous channels for advertising; awareness of the ways both lawful

17. *Id.* § 1309.2.

18. *Id.* § 1310.

19. *Id.* § 1312.

and unlawful ads communicate and lawful and unlawful sellers operate; detailed knowledge of the purpose, history, and content of relevant statutes and regulations; and a grasp of how administrative boards and courts apply them. But it does not necessitate contentious claims about the mental states of those who are in violation.

III. PARALLELS BETWEEN AMERICAN REPRESENTATIVE DEMOCRACY AND MODERN MARKETS

The general populace parallels consumers, and elected officials and candidates for elected office parallel purveyors of consumer goods. As in the market for consumer goods, politicians and voters have limited opportunity for the sort of repeated face-to-face personal interaction in which people can best deploy commonsense methods for evaluating truthfulness. Because of the size of the population, the distances between capitals and home districts and states, and the fact that voters have many concerns other than politics, politicians—like sellers—can use mendacity to persuade voters to support them or at least refuse support to their rivals. This is true not just in regard to elections, but with regard to policies pursued and decisions taken by elected officials. Mendacity about these can provoke public support or opposition. Whether seeking office or already in it, politicians can have various motives to be mendacious in their communications to the general public—ranging from raw desire for power, to a need to curry favor with certain special interest groups, to a dedication to implementing an overall agenda.

Consumer goods markets and democratic politics both are mechanisms for aligning social results with individual choices—for mediating what is on the market at what price; who occupies elected office; and what laws and policies government pursues. You need not glorify the role of individual choice in life, nor think that either politics or markets work perfectly, to appreciate the value of mechanisms that protect individuals whose choices would unlikely be respected or vindicated by alternative methods, whether for production and distribution of goods or for who serves in government and what government does. But for this sort of thing to work even roughly, the mechanism that aligns individual choices with social results must reflect minimally *meaningful* choices made by the relevant individuals. Individual choices based on inaccurate information are not meaningful indicators of what the choosers favor, want, need, or care about. When a politician supplies inaccurate

information to the public to further a politician's own objectives, he manipulates and exploits those whose choices he is supposed to represent. If the mendacity of politicians becomes pervasive, democratic government loses the very basis for representation: the separateness of the public interest from the politician's own goals. Mendaciousness makes it possible for politicians to coopt representative democracy for purposes other than popular self-governance.

Potential voters who come to believe that voting itself has become a mechanism for oppression are unlikely to flock to the polls. This is another way mendacity from politicians threatens large-scale representative democracy, which is premised on the existence of a connection, forged by the ballot, between the general populace and those who serve in governmental office. If large numbers of people refrain from voting, no such connection is possible.

So, contemporary American representative democracy in some ways resembles modern markets for consumer goods and is thus similarly susceptible to erosion via mendacity. But as with untruthfulness in markets, not all untruthfulness in politics is equally pernicious. In both settings, hype, for example, can attract attention without hoodwinking. When politicians exaggerate or oversimplify, their mendacity is not necessarily harmful. American representative democracy is safe from some measure of hyperbole or bromide. How can the public know when mendacity menaces? Here is where lawyers can be useful. Lawyers can deploy their expertise in parsing unproblematic mendacity from pernicious mendacity. They can examine politicians and identify patterns and practices of mendacity that strike at the essential components of representative democracy.

IV. LAWYERS SHOULD AID THE PUBLIC IN IDENTIFYING AND CONDEMNING PERNICIOUS MENDACITY

In the United States, the legal profession stands in a special relationship to representative democracy, popular sovereignty, and the rule of law—and thus the profession has responsibilities to protect these from pernicious mendacity in politics. The slogan “no one is above the law” is a motto for democracies founded on popular sovereignty. If politics in a representative democracy is to function properly, laws must be creditable as laws in the interest of the populace. They cannot be vehicles for personal gain or raw power. When politicians are systematically mendacious, the laws they

make and the policies they propose are suspect. They put the rule of law in doubt.

All members of a representative democracy founded in popular democracy have an interest in and arguably some obligation to maintain the health of democratic institutions and political discourse. But lawyers have a custodial role to play, by virtue of their expertise and by the way they themselves particularly benefit from a system of governance premised on rule of law.²⁰

Part of why the legal profession is so prominent in American culture, and why it provides a living and social standing for so many who enter it, is precisely because the country is one of laws, not people. It takes a lot of law to substitute for personal decree and whim or extralegal social control. That law has to be written, argued for, explained, used, modified, adapted, improved. This is all work done by lawyers, who make their livings this way. In a country less law-governed, lawyers' work would be less valuable and less valued. Lawyers have a concrete, material interest in preserving the rule of law. As particular financial beneficiaries of this system of governance, lawyers owe it to their fellow citizens to protect the rule of law and thereby preserve representative democracy.

Lawyers' educations give them a particular ability to anticipate when and how mendacity can undo a practice that serves a desirable social purpose. Lawyers are schooled in how mendacity can endanger the quality and even the existence of socially beneficial institutions. Their awareness of this kind of threat and their skills in dealing with it make them similar to doctors in emergency health situations. Confronted with an emergency, even a specialist who does not ordinarily deal with the particular medical problem presented should provide assistance. If the emergency is epidemic, not only individual physicians should help—so should hospitals and medical professional organizations. Similarly, law firms, legal organizations, and lawyers' professional organizations may have obligations to address pernicious political mendacity, particularly if it is pervasive.

V. CONCLUSION

I started by noting Donald Trump's extreme mendacity compared to other politicians'. Trump currently serves in the Executive Office

20. This line of argument will be familiar to scholars and practitioners of tort law. In that context, it is used to justify the imposition of legal duties of care, whereas here, I am arguing that lawyers have an ethical duty to protect against pervasive mendacity in American politics.

of President of the United States. For many Americans, he is the politician they most often see and hear, via his own rallies, Twitter, and press reports. In all these venues, Trump repeatedly speaks mendaciously. While particular instances are more or less egregious departures from truthfulness, it is the fact that Trump has incorporated mendacity into his political brand, as it were, that makes his mendacity so dangerous. By repeatedly and constantly dissembling, lying, telling half-truths, and denying facts, Trump epitomizes the mendacious politician. As President, he is the most salient example of a politician many people have. If the most salient politician is also an exemplar of mendacity, people may well conclude he is typical, that all politicians are similarly mendacious. This can erode people's willingness to participate in representative democracy, as I explained above. If Trump's baked-in mendacity becomes a trend among politicians, representativeness itself becomes impossible: a populace whose votes have been mendaciously manipulated by the beneficiary of those votes has not in any way expressed its own authentic will. Nobody elected on such a basis can be seen as representing an aggregation of the populace's choices, since the members of the populace did not, in fact, make a real choice. Rather, they went through the motions of voting but did so on the basis of mendacity that voided the significance of the votes they cast.

Pernicious mendacity in politics is not limited to Donald Trump. Lawyers should be examining mendacity from other politicians to decide whether it is harmful to the rule of law and representative democracy. Sometimes, it will make more sense to analyze political speech not through an analogy to false and misleading advertising, but through other legal frameworks that preserve practices vulnerable to mendacity. For example, lawyers who specialize in contracts law, particularly contracts between merchants, will be aware of how the Uniform Commercial Code (U.C.C.) addresses the problem of truthfulness in warranties. On one hand, the U.C.C. does not want to write merchants' contracts for them. Merchants are presumed to be sophisticated at contracting and are therefore best left to formulate the terms of their own agreements. On the other hand, even sophisticated transactors face versions of the collective action problem generated by the combination of self-interest and credulity that arises in social activities. The U.C.C. drills down on a particular locus in bargains between merchants, a locus where the temptation to mendacity is high as is the overall benefit of blocking it: affirmations of fact merchants make about the goods they are pur-

veying, otherwise known as express warranties. An express warranty is an extra commitment from buyer to seller that a good will live up to agreed-upon specifications. One can see how this would add value to a contract and how easily a purchaser could be exploited via a mendacious express warranty.

The U.C.C. handles the problem by distinguishing promises about goods into two categories, implied and express. Implied warranties go without saying, so to speak.²¹ These are representations about goods every buyer and seller can assume the seller is making and are restricted to guarantees of merchantability²² and fitness.²³ The exact scope and content of these warranties is defined by trade practices. By giving them default status, the U.C.C. underwrites implicit representations about the quality of goods being sold.

Beyond merchantability and fitness, any other guarantees about goods must be explicit and are themselves part of what the U.C.C. takes the parties to be bargaining over.²⁴ In calling for terms to be expressed, the U.C.C. does not confine merchants to linguistic agreements. The U.C.C. specifically recognizes that sellers of goods may affirm facts about goods via exhibition of samples or use of technical specifications or blueprints, for example. Nor does the U.C.C. suggest that affirmations of fact are to be ascertained by an inquiry into the intentional state of a seller who conveys. What matters is whether a description of a good or the exhibition of a sample was a basis for the agreement to purchase the goods. If so, that description is itself part of the “fabric of the agreement.” As such, it can be the subject of claims for breach of contract. Of course, whether a description, linguistic or otherwise, actually constitutes an affirmation of fact that is essential to the entire bargain can be, factually, quite a complicated matter. My point is not that the U.C.C. provisions on express warranties make all cases easy. Rather, my point is that these U.C.C. provisions approach the entire issue of accuracy of information in a very particular context—the mercantile one, where all parties are assumed and expected to

21. “‘Implied’ warranties rest so clearly on a common factual situation or set of conditions that no particular language or action is necessary to evidence them and they will arise in such a situation unless unmistakably negated.” U.C.C. § 2-313 cmt. 1 (AM LAW INST. & NAT’L CONF. OF COMM’RS ON UNIF. STATE LAWS 2018).

22. Under the U.C.C.’s definition of “merchantability,” goods must be at least of average quality, properly packaged and labeled, and fit for the ordinary purposes they are intended to serve. *Id.* § 2-315.

23. Fitness refers to a seller’s knowledge that a buyer is going to use goods for a particular purpose, and that the buyer is relying on the seller’s expertise in order to select suitable goods. *Id.*

24. *See id.* § 2-313 cmt. 1 (Specific affirmations of act must be expressed because these go to the “essence of the bargain” that is the very product of the parties’ “dickering.”).

be sophisticated about the nature and purpose of their communications.

There are political settings that are more like the one regulated by the U.C.C. than the one regulated by California's law and regulation on false and misleading advertising. Examples might include when officials make representations on background checks for security clearances or when nominees for high office address questions at confirmation hearings. These are more special purpose and ritualized areas of communication, and like bargains between merchants, it may make sense to hold people accountable for both implied and express affirmations they make.

Lawyers from all sorts of specialties have experience and knowledge related to the sort of mendacity that can wreck socially beneficial practices and institutions. They can and should use their professional education and skills to inform their fellow citizens of pernicious mendacity in politics.²⁵ I am not maintaining that courts or legislatures should regulate mendacity in political speech, not arguing for the creation of a body of law on the topic. Rather, I urge that lawyers and the institutions associated with the profession have civic work to do.

25. Some lawyers are already showing the way. Walter Shaub, former director of the United States Office of Government Ethics, joined Campaign Legal Center as Senior Director, Ethics in July 2017. Shaub regularly uses Twitter to unpack lying on federal forms, such as the one used to apply for national security clearances. *See, e.g.*, Walter Shaub (@waltshaub), TWITTER (Dec. 11, 2017, 8:19 AM), <https://mobile.twitter.com/waltshaub/status/940254666113404929> ("New! Below is the email from the FBI regarding Session's claim that he was told not to disclose foreign contacts. This email does not corroborate the DOJ's explanation, which was that he got advice from FBI 'In filling out the SF-86 form.>"). Renato Mariotti, now in private practice and running for Attorney General of Illinois, also uses Twitter to examine lies related to the ongoing FBI investigation into Russian influence on the 2016 U.S. presidential elections. *See, e.g.*, Renato Mariotti (@renato_mariotti), TWITTER (Nov. 1, 2017, 6:41 PM), https://mobile.twitter.com/renato_mariotti/status/925900578672332800 ("THREAD: Is the President of the United States under investigation?"). Stephen J. Harper, a lawyer who has authored several books and serves as an adjunct professor at Northwestern University Law Center, dissects lies from Trump, Pence, Jared Kushner, and others as part of an interactive timeline related to the various investigations into connections between the Trump administration and Russia. *Interactive Timeline: Everything We Know About Russia and President Trump*, MOYERS & CO., <http://billmoyers.com/story/trump-russia-timeline/> (last updated Feb. 27, 2018).

