

# 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.”<sup>1</sup> 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.

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Minneapolis, New Orleans, Omaha, Pittsburgh, Richmond, Salt Lake City, and St. Louis each planned their response to the alien attack.<sup>8</sup> In Tulsa, two heart attacks were reported due to excitement caused by the broadcast.<sup>9</sup> “Mass hysteria mounted so high in some cases that people told the police and newspapers they ‘saw’ the invasion.”<sup>10</sup> 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.”<sup>11</sup> 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.<sup>12</sup>

*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.<sup>13</sup> 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.<sup>14</sup> For his Halloween Eve selection, Welles selected a pulpy thriller published forty years earlier.<sup>15</sup> 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

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.<sup>16</sup>

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.<sup>21</sup> 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."<sup>22</sup> *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."<sup>23</sup> 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

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

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 *Mars*,” the *Times* stated, “was scheduled for January release but has been moved up.”<sup>29</sup> 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,<sup>30</sup> which ultimately granted the then-twenty-six-year-old artist the keys to the kingdom with a *carte blanche* limitless budget.<sup>31</sup> 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 new t ]

III. MASTERS OF SPIN



‘education,’ really, is in the point of view,” he wrote in *Crystallizing Public Opinion* (1923).<sup>40</sup>



representatives of the newly established U.S.S.R.<sup>56</sup>





in the library of Nazi Propaganda Minister Josef Goebbels.<sup>84</sup> “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.<sup>85</sup> “This shocked me, but I knew any human activity can be used for social purposes or misused for antisocial ones.”<sup>86</sup>

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).<sup>87</sup> 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.”<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

Hippler began his career in the Nazi newsreel division in 1935.<sup>91</sup> Although too young to participate in World War I,<sup>92</sup> 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.”<sup>93</sup> Hippler reached the German masses with incendiary

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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).<sup>94</sup>

While commanding the top spot in the Nazi film industry as the highest-ranking motion picture executive, Hippler continued to direct films.

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actually a collection center for deportation to the death camps of Eastern Europe.<sup>105</sup>

In 1944, Geron was told that “if he made a film about Theresienstadt, his life would be spared.”<sup>106</sup> Under the worst circumstances the frustrated filmmaker was given a chance to resume his career as a director. He felt





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.<sup>125</sup> While *Fahrenheit 9/11* presented dark theories as hidden insight and potential explanations for events that shocked most Americans, at the

journalist Sharon Waxman in the *New York Times*.<sup>132</sup> “[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.<sup>133</sup>



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.<sup>148</sup> In her review for the *New York Times*, Manohla Dargis observed: "If you didn't know where the new film 'Celsius' was coming from you certainly get the picture who8 g

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

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* (2



Zell Miller: “The terrorist threat is real. It’s everyday, it’s real.”<sup>165</sup> Dick Morris: “Somebody has to explain that nobody took it [the terrorist threat] seriously before George Bush on 9/11.”<sup>166</sup> 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.”<sup>167</sup> 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 (2004): Steve Bannon.

role was insignificant, the botched mission affected his worldview as an example of “failed military and presidential leadership.”<sup>169</sup> Five years later, in 1985, Bannon joined Goldman Sachs as an associate and soon became involved with Hollywood from an investment angle.<sup>170</sup> 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.<sup>171</sup> 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.<sup>172</sup>











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.”<sup>210</sup> 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.”<sup>211</sup> Ultimately, these choices “are not for the Government to make.”<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> 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

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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>





decorated military officer.<sup>223</sup> 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.<sup>224</sup> 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*.<sup>225</sup> 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.<sup>226</sup> In fact, “the freedom to express thoughts . . . was limited to *honest* statements—not efforts to deceive others,” wrote Campbell concerning a 1788 Pennsylvania case.<sup>227</sup> 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.”<sup>228</sup> 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.<sup>229</sup> 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

A century ago the seeds of disinformation were planted.<sup>231</sup> 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.<sup>232</sup> 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





Film	Director	Distributor	Notable Personnel
<i>Corruption</i> (2012)	Bannon	Pictures	
<i>Behold a Pale Horse:</i>  <i>Last Chance</i> (2012)	Chuck Untersee	Heartland Pictures	Featuring Charlie Daniels
<i>Torchbearer</i> (2016)	Steve Bannon	ARC Entertainment/Citizens United Productions	

*Mainstream:  
How  
Hollywood  
Movies and  
the New York  
Media Are  
Promoting the*