The Resilience of Noxious Doctrine: The 2016 Election, the Marketplace of Ideas, and the Obstinacy of Bias

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THE RESILIENCE OF NOXIOUS DOCTRINE: THE 2016 ELECTION, THE MARKETPLACE OF IDEAS, AND THE OBSTINACY OF BIAS

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The Supreme Court has recognized the central role that free expression plays in our democratic enterprise. In his dissenting opinion in United States v. Abrams, *Justice Holmes offered a theory of how free expression advances our search for truth and our cultivation of an informed electorate. That model—often called the "marketplace of ideas," based upon the metaphor used by Holmes—has proven to be one of the most persistent and influential concepts in First Amendment jurisprudence.*

The marketplace of ideas model essentially holds that free expression serves our democratic goals by allowing differing proposed truths and versions of the facts to compete with each other for acceptance. The theory maintains that the best ideas and the most reliable information will emerge and prevail. The well-informed electorate that results from this process will then make better decisions in our participatory democracy.

During the 2016 presidential election, however, it became apparent that a number of statements made by then-candidate Donald Trump proved difficult to rebut in the public dialogue, even though they were clearly and demonstrably false. Of particular concern, some of those statements fed into biases against and stereotypes of racial, ethnic, and religious minorities and women. This disinformation stubbornly resisted efforts at correction.

This Article discusses the marketplace of ideas model and its underlying assumptions about how human beings process information and make decisions. It then proceeds to explain, through recent social science research, why the dynamic envisioned by the marketplace of ideas theory often fails to provide an effective counter-narrative to statements that reinforce racial, ethnic, religious, and gender biases and stereotypes. The Article concludes with some necessarily preliminary and exploratory thoughts about potential curative measures.[1]

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1.   Niehoff raised related, but different, critiques of the functioning of the marketplace of ideas model during the 2016 election cycle in Len Niehoff, *Bankrupt Marketplace: First Amendment Theory and the 2016 Presidential Election*, J. Media, Info. & Comm. L., Spring 2017, at 1.

INTRODUCTION

In the course of his presidential campaign, Donald Trump made a substantial number of demonstrably false and misleading statements.[2] Of course, he held no monopoly here and political fact checkers also took issue with many statements made by Hillary Clinton.[3] Moreover, some of Trump's falsehoods were relatively benign insofar as they sought to enhance his own standing rather than to degrade that of others. For example, it seems clear that Trump substantially overstated his net worth during the campaign.[4] Furthermore, on numerous occasions Trump denied making statements that reliable evidence showed he had, in fact, made— a not uncommon stratagem among politicians.[5]

But a large number of Trump's false statements were more worrisome because they related to racial, ethnic, religious and other minority groups. For example, Trump falsely claimed the Black youth unemployment rate was at 59 percent at a time when the Bureau of Labor Statistics put it at 27.1 percent.[6] In August of 2016, Trump tweeted that "inner-city crime is reaching record levels."[7] In fact, data from the Federal Bureau of Investigation ("FBI") shows that violent crime is at its lowest rate since

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2.   Glenn Kessler, *Fact Checking in the Aftermath of a Historic Election*, WASH. POST (Nov. 10, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/10/fact-checking-in-the-aftermath-of-an-historic-election.

3.   Lauren Carroll, *Hillary Clinton's Top 10 Most Misleading Claims*, POLITIFACT (Oct. 27, 2016), http://www.politifact.com/truth-o-meter/article/2016/oct/27/hillary-clintons-top-10-most-misleading-claims.

4.   Erin Carlyle, *Trump Exaggerating His Net Worth (By 100%) in Presidential Bid*, FORBES (June 16, 2015, 1:14 PM), https://www.forbes.com/sites/erincarlyle/2015/06/16/trump-exaggerating-his-net-worth-by-100-in-presidential-bid.

5.   Aaron Sharockman, *The Post-Truth Election? Comparing 2016 to Past Elections on the Truth-O-Meter*, POLITIFACT (Aug. 16, 2016), http://www.politifact.com/truth-o-meter/article/2016/aug/16/post-truth-election-comparing-2016-past-elections- (stating that Donald Trump did support the War in Iraq during the 2000s but when asked about it during the campaign, he said he never supported it).

6.   Warren Fiske, *Trump Misleadingly Puts Black Youth Unemployment Rate at 59 Percent*, POLITIFACT (June 20, 2016), http://www.politifact.com/virginia/statements/2016/jun/20/donald-trump/trump-misleadingly-puts-black-youth-unemployment-r.

7.   Louis Jacobson, *Donald Trump is Wrong that 'Inner-City Crime is Reaching Record Levels'*, POLITIFACT (Aug. 30, 2016), http://www.politifact.com/truth-o-meter/statements/2016/aug/30/donald-trump/donald-trump-wrong-inner-city-crime-reaching-recor.

1995,[8] and that it would take many years of "significant increases" to return to the record levels of crime in the early 1990s.[9] Trump falsely tweeted that Blacks killed 81% of White homicide victims in 2015, relying on a non–existent statistic from a non–existent organization.[10] FBI statistics show that in fact only 15% of White homicide victims were killed by Blacks in 2014.[11] In these instances, Trump plainly misstated objective facts that played into extant stereotypes.

Some of Trump's statements about racial, ethnic, and other minorities were more subjective, making them harder to characterize as objectively true or false. Nevertheless, many of those statements are deeply troubling because they either lack any evidentiary foundation or reflect a misunderstanding of underlying realities. For example, Trump opined that there is "no real assimilation" by second and third generation Muslims in the United States.[12] Based on its close study of the issue, however, the Pew Research Center concluded that Muslim Americans (regardless of generation) appear to be highly assimilated in American society.[13] In the same vein, Trump claimed that through our refugee programs we are allowing tens of thousands of terrorists into the country, even though there is no data supporting this conclusion and even though he appears to have conflated terrorists with those who are, in fact, fleeing terrorism.[14]

Political fact-checking organizations and the mainstream media reported extensively on Trump's false statements of fact and unsubstantiated

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8. CRIM. J. INFO. SERVICES DIV., FED. BUREAU OF INVESTIGATIONS, CRIME IN THE UNITED STATES 2014 tbl.1, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1 (the most recent statistics available at the time of publication are for 2014).

9. Jacobson, *supra* note 7.

10. Jon Greenberg, *Trump's Pants on Fire Tweet that Blacks Killed 81% of White Homicide Victims*, POLITIFACT (Nov. 23, 2015, 3:35 PM), http://www.politifact.com/truth-o-meter/statements/2015/nov/23/donald-trump/trump-tweet-blacks-white-homicide-victims.

11. FED. BUREAU OF INVESTIGATIONS, RACE, ETHNICITY, AND SEX OF VICTIM BY RACE, ETHNICITY, AND SEX OF OFFENDER, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicidedata/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2014.xls (last visited Apr. 7, 2017).

12. Louis Jacobson, *Donald Trump Wrong that 'There's No Real Assimilation' by U.S. Muslims*, POLITIFACT (June 18, 2016, 5:00 AM), http://www.politifact.com/nbc/statements/2016/jun/18/donald-trump/donald-trump-wrong-theres-no-real-assimilation-us-.

13. PEW RESEARCH CTR., MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM (2011), http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism ("A majority of Muslim Americans (56%) say that most Muslims who come to the U.S. want to adopt American customs and ways of life."). In fact, Muslim Americans' preferences for self-identification mirror those of Christian Americans. *Id.*

14. Louis Jacobson, *Donald Trump's Pants on Fire Claim that US Is Letting in 'Tens of Thousands' of Terrorists Now*, POLITIFACT (May 25, 2016), http://www.politifact.com/truth-o-meter/statements/2016/may/25/donald-trump/donald-trump-says-us-letting-tens-thousands-terror.

generalizations.[15] And they noted that he made such statements in staggering proportions. For example, by April of 2017, Politifact assessed 20% of Trump's statements as mostly false, 33% as false, and 16% as what it called "pants on fire" false— cumulatively suggesting that the vast majority of the time Trump was making either false or significantly misleading statements to the public.[16]

In a famous dissenting opinion in *United States v. Abrams*,[17] Justice Oliver Wendell Holmes offered a theory of how free expression advances the goals of our democracy. In essence, he argued that free expression allows differing ideas to compete for acceptance. The best ideas and most reliable information will prevail, empowering the electorate to make well-informed decisions. This "marketplace of ideas" model has proven to be one of the most influential concepts in First Amendment jurisprudence.

This model suggested the following outcomes in the 2016 election: (1) the public would consider the facts and views that contradicted Trump's statements; (2) those true facts and more informed views would prevail in the competition; and (3) an informed electorate would decline to vote for a candidate who made so many false, misleading, or baseless statements. Instead, Trump secured a major victory in the Electoral College and, although he did not win the popular vote, more than sixty million people cast their ballots for him.[18] This widely unanticipated result[19] raises many complex questions and invites numerous potential lines of inquiry.

We focus here on the false statements and unsubstantiated generalizations that Trump made about racial, ethnic, and religious minorities and women. We ask: is there something about such statements that makes them especially resistant to the testing and falsification powers of the marketplace of ideas? As we will discuss, the social science research strongly suggests that the answer to this question is "yes."

If that is right (and we have good reasons to believe that it is), then the implications go well beyond the 2016 election—and they are ominous. After all, such a diagnosis suggests that one of our basic theories of how our democracy operates is failing us. And it suggests that this theory is

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15.   *See, e.g.*, Carlyle, *supra* note 4; *see also* Jacobson, *supra* note 7.

16.   *Donald Trump's File*, POLITIFACT, http://www.politifact.com/personalities/donald-trump (last visited Apr. 7, 2017).

17.   Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

18.   James Barrett, *How Many Votes Did Trump and Clinton Get? The Final Vote Count*, DAILY WIRE (Dec. 21, 2016), http://www.dailywire.com/news/11777/how-many-votes-did-trump-and-clinton-get-final-james-barrett (stating that the final vote count for Donald Trump was 62,979,636).

19.   Matt Viser & Annie Linskey, *Trump Defies Predictions and Polls in Unexpected Win*, BOSTON GLOBE (Nov. 8, 2016), https://www.bostonglobe.com/metro/2016/11/08/first-polls-close-ind/PbqkFzfkDo2QPWFCbxTrmI/story.html.

failing us with respect to one of our core democratic values: equality across racial, ethnic, religious, and gender lines.

In Part I of this Article, we offer a more detailed discussion of the marketplace of ideas theory and the behavioral and decision-making assumptions embedded within it. In Part II, we discuss the social science around cognitive bias generally. In Part III, we apply more detailed social science concepts to show why the marketplace of ideas dynamic is unlikely to destabilize and rebut statements that reinforce biases, prejudices, and stereotypes. In this context, we look more closely at a number of statements made by then-candidate Trump in the course of the 2016 election that were false and played on invidious stereotypes but that did not seem to result in any adverse political consequences for him. We conclude with some observations about potential avenues for further thought and inquiry that might help address the problem we describe.

I. The Marketplace of Ideas

Political theorists and legal scholars have often noted the central role that freedom of expression plays in a system of democratic self-governance.[20] They have disagreed about whether fostering public discourse around issues related to political decision-making provides the exclusive (or even the most persuasive) justification for a robust principle of free speech.[21] But the literature reflects a clear—and unsurprising—consensus that (a) the democratic process and its outcomes are substantially enhanced by the participation of informed citizens, and (b) we can cultivate the development of such citizens only by allowing for the free and open exchange of ideas, opinions, and facts.

We find this sentiment articulated in numerous Supreme Court opinions, some of which mobilize the most rhapsodic language the Court knows how to use, including Justice Brandeis's poetic concurring opinion in *Whitney v. California*.[22] In that opinion, Brandeis declared that "[t]hose who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[23] Brandeis believed that:

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20.   *See, e.g.*, James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491 (2011); *see also* Robert Post, *Participatory Democracy and Free Speech*, 97 Va. L. Rev. 477 (2011).

21.   *See, e.g.*, Eugene Volokh, *In Defense of the Marketplace of Ideas / Search for Truth as a Theory of Free Speech Protection*, 97 Va. L. Rev. 595, 595 (2011) ("I agree with Professors Post and Weinstein that a broad vision of democratic self-government is one important justification for free speech, though I wouldn't limit First Amendment protection to speech that is part of 'public discourse.' . . . [W]e should not dismiss the search-for-truth rationale—which is in practice similar to the marketplace-of-ideas rationale."); Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 Va. L. Rev. 531 (2011).

22.   Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

23.   *Id*. at 375.

> [W]ithout free speech and assembly discussion would be futile;
> that with them, discussion affords ordinarily adequate protec-
> tion against the dissemination of noxious doctrine; that the
> greatest menace to freedom is an inert people; that public dis-
> cussion is a political duty; and that this should be a fundamental
> principle of the American government.[24]

In this view, free expression does not just facilitate democracy; it makes democracy possible.

Over time, a dominant conceptual model has emerged to describe how free expression plays this critical role in democracy. This is not to say that there is only one such model— to the contrary, courts and legal scholars have articulated a variety of explanations for why free expression matters and how it helps us achieve our political, social, and individual goals.[25] But the most influential and consistently invoked model for how the First Amendment works in our democratic system comes from the opinion of Justice Holmes in *Abrams v. United States*.[26] As Lee Bollinger has stated, "[W]ithin the legal community today, the *Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech."[27] In the same vein, Ronald K. L. Collins has observed that "[i]n its own secular way, the opinion has become canonical" and "many also view [its central] metaphor as key to any healthy system of freedom of expression."[28] And Thomas Healy has written that "Holmes's dissent—the most important minority opinion in American legal history—gave birth to the modern era of the First Amendment" and that "nearly a century later, his dissent continues to influence our thinking about free speech more than any other single document."[29]

As we will discuss later, the model Holmes offers us in *Abrams* is subject to many important criticisms, though it may remain our best the-

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24.   *Id.*

25.   For example, Cass Sunstein has stressed that free expression creates a "public sphere" that helps protect against the harmful effects of group polarization. *See* Cass R. Sunstein, Republic.com 2.0, at 59–97 (2017). And Vincent Blasi has noted that free expression serves as a critical check on the abuses of political power. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 Am. B. Found. Res. J. 521 (1977). Indeed, Justice Brandeis's concurrence in *Whitney* reflects a number of rationales supporting free expression, including that it promotes personal development and self-fulfillment. *Whitney*, 274 U.S. at 375 ("the final end of the State [is] to make men free to develop their faculties").

26.   250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

27.   Lee C. Bollinger, The Tolerant Society 18 (1986).

28.   Ronald K.L. Collins, *Holmes' Idea Marketplace— Its Origin and Legacy*, First Amendment Center (May 13, 2010), http://www.firstamendmentcenter.org/holmes%E2%80%99-idea-marketplace-%E2%80%93-its-origins-legacy.

29.   Thomas Healy, The Great Dissent 7 (2013). For a recent discussion of Holmes's model and related concepts of free expression, see Cass R. Sunstein, Republic.com 2.0, at 52–57 (2017).

ory of the value of free expression. But let us begin our consideration of the case by focusing on its remarkable facts, which help explain the passion and even outrage that we find in Holmes's dissent.

Abrams arose from the following circumstances: Five people had written, printed, and distributed leaflets around New York City that were supportive of the Russian Revolution.[30] By contemporary standards, the leaflets seem unremarkable and utterly harmless. Although this was the extent of their activity, the five were charged with and convicted of violating the federal Espionage Act.[31] In one of its darker and less competent moments, the Supreme Court upheld the convictions and Justice Holmes dissented.

Holmes begins the centerpiece of his dissent by noting the understandable, perhaps even good, intentions of those who want to censor speech:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.[32]

Holmes thus starts with this valuable insight: the impulse to silence speech with which we disagree is understandable and extends to people with benevolent designs.

Of course, this does not make the impulse any less dangerous. Years later, Justice Brandeis, in his dissenting opinion in *Olmstead v. United States*,[33] a case involving a different kind of constitutional concern, observed that:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[34]

Holmes expressed great respect for Brandeis's dissent,[35] perhaps because he had anticipated one of its central themes in *Abrams*.

In any event, Holmes's dissent in *Abrams* continues on to state his marketplace of ideas theory:

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30.   Abrams v. United States, 250 U.S. 616, 617 (1919)

31.   *Id*. at 617–18.

32.   *Id*. at 630.

33.   Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

34.   *Id*. at 479.

35.   *Id*. at 469.

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[36]

This model offers us an explanation for how free speech works to advance our democratic goals: ideas, opinions, and facts compete for our allegiance in a free market; through this competition we entertain alternative possibilities; as a result of this consideration and analysis we arrive at the truth; and that truth empowers us to participate constructively as informed citizens of our democracy.

This model so influences our thinking that we have come to rely heavily, even if not always consciously, upon the process it describes to correct the false facts and "noxious doctrines" that are circulated in the public sphere. "[T]he fitting remedy for evil counsels is good ones" and the best way to address bad speech is through "more speech,"[37] Justice Brandeis declared in *Whitney*, and the marketplace of ideas model assures us that this has it right. "At the length truth will out," Shakespeare tells us,[38] and we like to think it so.

There are, nevertheless, numerous problems with Holmes's model. Some difficulties derive from his choice of metaphorical language. Granted, a metaphor has certain virtues here: after all, in this passage Holmes seeks to explain the process by which we go about finding the truth amidst competing narratives, a process that does not lend itself to a simple and straightforward indicative description. To the contrary, the search for the truth may often strike us as a complex, if not even mysterious, undertaking, particularly in the context of debates around polity and policy. Holmes hints at some of the ambiguity and uncertainty present when he observes that this is "an experiment, as all life is an experiment."[39]

Still, metaphors have their limitations. The poetic ambiguity that helps give them their rhetorical force carries with it an inherent uncertainty of meaning and application. Language that tries to get at some grand and abstract truth may offer little or no insight into the coarser stuff of existential reality. Metaphors may facilitate understanding—or may frustrate it.

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36.   *Abrams*, 250 U.S. at 630.

37.   *Whitney*, 274 U.S. at 372.

38.   WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 2, sc. 2.

39.   *Abrams*, 250 U.S. at 630.

We see this at work when we look at the assumptions that the marketplace of ideas model entails and ask hard questions about whether they align with the world as we find it. A comprehensive critique of the model lies beyond the scope of this Article.[40] We will here note a few of its most conspicuous and troublesome failings because they may help explain at least some of what may have occurred during the 2016 election.

As an initial matter, this model assumes that competing ideas will at least have a fairly equal opportunity to come into the marketplace and strive for consideration and allegiance. But the marketplace of ideas may be like other markets in the sense that there may be substantial barriers to entry. This may hold particularly true for ideas about racial, ethnic, and religious minorities.

Further, the model assumes that those participating in the market believe that the discovery of the truth qualifies as an important, if not essential, value. But political contests often have a great deal to do with things other than finding the truth: the personalities of the candidates; an undifferentiated impulse toward change; a disproportionate backlash against existing policy; and so on. A vote may reflect a considered decision about where the truth resides, or it may constitute a sort of primal scream.

If the players in the market do care about the truth, then the model assumes that they will act rationally and logically in trying to sort things out. In this sense, the model embodies an Enlightenment-era optimism about how human beings process concepts and information. But we know, of course, that people run ideas and data through many kinds of cognitive filters that have little or nothing to do with reason or logic.

Next, the model assumes that individuals will do the hard work necessary to separate truth from falsehood, and good ideas from inadequately supported ones. The model, consistent with the realities of Holmes's time, rests upon assumptions about how quickly information moves, how much of it we receive at one time, how much time we have to test and analyze it, and how easily we can find the resources necessary to confirm or rebut what we are told. But now, every human being who owns a computer is overwhelmed by informational inputs that come in such numbers and at such a pace that they resist this sort of critical consideration.[41]

Finally, the model assumes that these truth-loving, rational, open-market players will not only discover the truth, but will act in a manner consistent with what they have learned. Under this theory, human beings reason toward the truth not just for its entertainment value or as an intriguing exercise, but because what they learn will affect their behaviors. It obviously does not always play out that way.

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40.   For a brief but expansive critique of the model, see Frederick Schauer, Free Speech: A Philosophical Enquiry (1982) at 25–30.

41.   For example, on average around 6,000 tweets are sent out on Twitter every second, adding up to about 500 million tweets every day. *Twitter Usage Statistics,* Internet Live Stats, http://www.internetlivestats.com/twitter-statistics (last visited Apr. 6, 2017).

The current science around cognitive bias sheds some light on our understanding of how the marketplace of ideas is likely to function in reality. It also helps explain why the model is almost certain to disappoint us, particularly with respect to ideas and purported "facts" that feed our biases and stereotypes. In the next section of our paper, we consider that science in its general terms.

II.   The Science of Cognitive Bias

In 2007, five professors from Yale Law School, the George Washington Law School, the University of Washington, the University of Colorado, and the University of Oregon published a study predicting the polarization of American culture.[42] The rhetoric of the 2016 presidential election and the public's reaction to that rhetoric reflect the accuracy of the study's prediction. In sum, the study found that "[t]here is a culture war in America, but it is about facts, not values."[43]

The study considered how Americans generally care about the same core issues: the economy, national security, and the health and safety of their loved ones and themselves.[44] The researchers found ample evidence, however, that Americans are "sharply divided about what sorts of conditions endanger these interests and what sorts of policies effectively counteract risk."[45] These divisions result in differing views about the best policies around issues like immigration, crime control, and foreign trade.

According to the study, in considering the appropriate policy response, individuals will continue to disagree about the underlying facts, even though those facts are established.[46] Even when faced with facts directly contradictory to one's assertions, people are likely to chose policies that those underlying facts would not support. Individuals often resist solutions that logically follow from the underlying facts if the suggested solutions do not align with their own views and have not yet been implemented.[47] In sum, the researchers concluded that individuals tend to process factual information about risks in a manner that fits their cultural predispositions.[48]

Social science tells us that even when presented with facts that are directly contradictory to our beliefs, we often do not act as rationally as we

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42.   Dan M. Kahan et al., *The Second National Risk and Culture Study: Making Sense of—and Making Progress In—The American Culture War of Fact* (Yale Law School, Public Law Working Paper No. 154, 2007), http://ssrn.com/abstract=1017189.

43.   *Id*. at 16.

44.   *Id*.

45.   *Id*.

46.   *Id*. at 5.

47.   *Id*.

48.   *Id*. at 16.

think we do.[49] A wide and continuous set of environmental and biological factors influence our decisions and lead us to ignore evidence, logic, and the laws of probability.[50] We process information through filters that have nothing to do with the objective truth of any given fact.

All human beings resort to stereotyping and generalizing in their decision-making.[51] In some instances, these behaviors help people make decisions quickly and efficiently and have no significant negative consequences.[52] For example, based on very limited experience, an individual might make an over-generalized and stereotyping judgment about whether the safest and least expensive transportation from an airport to a hotel is a taxicab, an Uber, or a wholly unaffiliated car. That judgment may have no basis in objective statistical realities, but probably no dire adverse consequences will come from its failings.

Unfortunately, in many instances, our generalizations have much more pernicious bases and consequences. We refer here to "widely held but grossly oversimplified images of particular types of people"—images that often drive surprising and harmful decisions.[53] These stereotypes tend to rest on "miscalculations and mistakes" that a simple review of the relevant data and facts would easily correct.[54]

Daniel Kahneman, a psychologist and Nobel Prize winner, has spent his career studying how cognitive biases, such as stereotyping, affect decision-making.[55] Kahneman begins from the premise that stereotyping is a completely natural phenomenon.[56] The human brain frequently makes quick, instinctive, and reflexive decisions, especially in stressful or time-sensitive situations.[57] Kahneman calls this "System 1" thinking, and describes it as "instinctive, emotional, automatic, subconscious," and, most importantly, "frequent[ly]" used. The human brain relies on System 1 thinking throughout the day, from analyzing someone's tone or gestures to slamming instinctively on the brakes of a car.[58]

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49.   DANIEL KAHNEMAN, THINKING, FAST AND SLOW 4 (2013).

50.   *See generally* Jackson Pahlke, Unconscious Ideological Preferences: Imagined or Real? (March 18, 2014) (unpublished B.A. thesis, University of Nebraska-Lincoln) (on file with authors).

51.   *Id.*

52.   KAHNEMAN, *supra* note 49, at 13. *See also id.* at 168–69.

53.   Bridget M. McCormack & Leonard M. Niehoff, *When Stereotypes Attack*, 41 LITIG. 28 (Summer 2015).

54.   *Id.*

55.   Kedar Pavgi, *The FP Top 100 Global Thinkers*, FOREIGN POLICY (Nov. 28, 2011), http://foreignpolicy.com/2011/11/28/the-fp-top-100-global-thinkers-4.

56.   KAHNEMAN, *supra* note 49, at 168–69.

57.   *Id.* at 25.

58.   McCormack & Niehoff, *supra* note 53, at 34.

Kahneman contrasts the autopilot mentality of System 1 thinking with the characteristics of our more analytic System 2 thinking.[59] System 2 thinking is slow, effortful, conscious, and generally based in logic.[60] Kahneman's exhaustive research shows that people use System 2 less frequently than System 1 thinking.[61]

Kahneman explains why we more commonly depend upon System 1 thinking. System 1 thinking uses very little mental energy and permits quicker decision-making.[62] It requires little or no effort and quickly becomes part of an individual's subconscious response to the conditions of life.[63] This helps clarify why we struggle to recognize, resist, and change our generalized and stereotypical thinking, even in the face of evidence that our thinking is false. To make matters worse, the human mind can create stereotypes and cognitive biases for a multitude of often-unexplainable reasons, making it even more difficult to unseat them through rational opposition.

Social science identifies an additional challenge as well. Emotion frequently infuses reasoning that an individual may believe rests on fact and logic. Social scientists describe this as "motivated reasoning."[64] And, as found in a study done by psychologist Arthur Lupia at the University of Michigan, it is not just that emotion infects all of our reasoning, "but our positive or negative feelings about people, things, and ideas arise much more rapidly than our conscious thoughts, in a matter of milliseconds."[65] Scientists maintain that this behavior reflects the traces of our evolutionary history.[66] In our early history we applied fight-or-flight responses against predators and we now apply the same fight-or-flight response by pushing away data that we experience as threatening.[67]

Chris Mooney cites Professor Charles Taber, of Stony Brook University, to explain how such behaviors become stubbornly ingrained:

> Consider a person who has heard about a scientific discovery that deeply challenges her belief in divine creation—a new hominid, say, that confirms our evolutionary origins. What happens next, explains political scientist Charles Taber of Stony Brook University, is a subconscious negative response to the new information—and that response, in turn, guides the type

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59.   Kahneman, *supra* note 49, at 25–30.

60.   *Id*. at 20.

61.   *Id*. at 13, 168–69.

62.   *Id*. at 20.

63.   *Id*.

64.   Chris Mooney, *The Science of Why We Don't Believe Science*, Mother Jones (May/June 2011), http://www.motherjones.com/politics/2011/03/denial-science-chris-mooney.

65.   *Id*.

66.   *See id*.

67.   *See id*.

of memories and associations formed in the conscious mind. "They retrieve thoughts that are consistent with their previous beliefs," says Taber, "and that will lead them to build an argument and challenge what they're hearing."[68]

In other words, when our views are challenged, we construct an "argument" in defense of them that depends not upon facts or data but upon whatever cognitive scraps we can locate that tend to confirm what we hope to be true—and we do not even know we are doing this.

To put the dilemma another way: "when we think [we are] reasoning, we may instead be rationalizing."[69] As Professor Jonathan Haidt at the University of Virginia notes, cognitive biases lead us to believe "we're being scientists, but we're actually being lawyers. Our 'reasoning' is a means to a predetermined end—winning our 'case'—and is shot through with biases."[70] After an individual has an initial belief about an issue, especially one that is tied to strong emotions, the individual will spend a disproportionate amount of thought trying to refute anything contrary to that view.[71] In the same vein, individuals will give greater weight to evidence bolstering what they already believe, the phenomenon known as "confirmation bias."[72]

With time, these biases and illogical connections become a part of System 1 intuitive thinking.[73] An individual's brain makes decisions about a fact before that individual even becomes consciously aware of making that decision.[74] Through his research, John-Dylan Haynes found that a brain scanner could tell approximately seven seconds before a study participant could vocally explain which hand he or she would use to press a button.[75] This sort of lapse between action and understanding only increases with more complex decisions.

Research regarding the cognitive biases in human decision-making has only recently become prevalent in the fields of psychology and political science. In the 1960's and 70's, cognitive scientists initially posited that human judgments were severely limited by "bounded rationality," meaning the constraints of available information, available time, and available

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68.   *Id.*

69.   *Id.*

70.   *Id.*

71.   *See id.*

72.   Scott Plous, The Psychology of Judgment and Decision Making 233 (Christopher Rogers & James R. Belser, eds., 1993).

73.   *Id.*

74.   Brandon Keim, *Brain Scanners Can See Your Decisions Before You Make Them*, Wired (Apr. 13, 2008), https://www.wired.com/2008/04/mind-decision.

75.   *Id.*

cognitive ability.[76] Tversky and Kahneman were the first to argue that people use mental shortcuts to form judgments and make decisions.[77] They also argued that these mental shortcuts, called heuristics, frequently focus on one aspect of a complex problem, while ignoring other important aspects.[78] Tversky and Kahneman argued that while these heuristic rules formed by the brain are often helpful, they also enforce systemic deviations from the rules of logic and probability.[79] These irrational or illogical choices are called cognitive biases, which can take many forms,[80] as we discuss below.[81]

Others have further expanded Kahneman's research to determine how cognitive biases develop, what makes them so persistent, and why such biases are so difficult to change. As a 2005 study by Evans and Curtis-Holmes shows, dual process theory can explain the belief bias effect, referencing the fact that people are only likely to believe facts in line with their prior beliefs.[82] System 1 controls the first response many individuals have to hearing a new set of facts, which places belief-based reasoning above logic-based reasoning.[83]System 1's fast, heuristic processes, such as belief bias, compete with (and often defeat) the slower analytic processes of System 2 that would more frequently lead to correct logical decisions.[84]

These general principles of cognitive bias suggest that our thinking is not driven by the sort of rational and analytic processes that the marketplace of ideas anticipates; our thinking is driven by rapid, unconscious processes that depend heavily on ingrained assumptions that tend to confirm what the individual already believes and finds non-threatening. Building on the general principles described in this part of the Article, Part III considers some of the more specific dynamics that social scientists say are at work in our thought processes and that may make faulty generalizations and invidious stereotypes particularly difficult to disrupt. And we will consider those dynamics in the context of some of the statements made by then-candidate Trump.

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76.   *See, e.g.*, *Herbert Simon*, ECONOMIST (Mar. 29, 2009), http://www.economist.com/node/13350892.

77.   Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1125 (1974). These theories have been criticized for being too focused on how heuristics lead to errors, instead of also focusing on heuristics as rational thought. *Id*.

78.   *Id*. at 1129.

79.   *Id*.

80.   *Id*.

81.   *See infra* Part III.

82.   John St. B. T. Evans & Jodie Curtis Holmes, *Rapid Responding Increases Belief Bias: Evidence for the Dual-Process Theory of Reasoning*, 11 THINKING & REASONING 382 (2005).

83.   *Id*. at 383–84.

84.   *Id*. at 385.

III.   Cognitive Bias and Candidate Trump

At this point, we must shift our thinking from a simple concept of cognitive bias to a more complex collection of concepts of cognitive biases. Cognitive biases can differ in their origins, causes, development, and manifestations. We will discuss some common forms of cognitive bias, relating them to examples from then-candidate Trump's statements as we go.

A.   *Anchoring and Adjustment Bias*

The cognitive bias called "anchoring" refers to the human tendency to rely on the first piece of information we receive about an event or the tendency to focus on only one aspect of an event. The bias means that an individual's ultimate judgment is influenced by the anchor.[85] This tendency results in errors in reasoning and understanding. We process new facts through that initial information and accept them only to the extent that they match what we already "know."[86]

Even when people know the anchor fact is wrong, most find it difficult to adjust away from it.[87] That is why the anchoring bias may also be known as the adjustment bias. In a study by Strack, Fritz, Mussweiler, and Thomas, the researchers gave subjects "anchors" that were clearly untrue.[88] The researchers asked some subjects if Mahatma Gandhi died before or after age 9, and others if Gandhi died before or after age 140. Although the subjects understood that neither of these anchors were even close to correct, the group given age 9 as an anchor stated an average age of Gandhi's death as 50. The group given 140 stated an average age of 67.[89]

Anchoring bias appears to have played a significant role in the 2016 election dialogue. Consider first an example unrelated to the central concerns of this Article: the matter of Trump's wealth and success as a businessman. From the beginning, Trump pointed toward this success as his primary qualification to serve as President, and his supporters consistently pointed to this background as an important factor in their decision-making.[90]

It therefore becomes important that Trump's first financial disclosure statement in 2015 claimed that his net worth was approximately $10 bil-

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85.   Amos Tversky & Daniel Kahneman, *supra* note 77, at 1128.

86.   Zoltán Vass, A Psychological Interpretation of Drawings and Paintings 83 (2012).

87.   Timothy D. Wilson et al., *A New Look at Anchoring Effects*, 125 J. Experimental Psychol. 387, 387 (1996).

88.   Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 J. Personality & Soc. Psychol. 437, 437 (1997).

89.   *Id*. at 442, tbl.5.

90.   *See* Shawn Tully & Roger Parloff, *Business the Trump Way*, Fortune (Apr. 21, 2016), http://fortune.com/donald-trump-businessman.

lion.[91] Both *Forbes* and *Bloomberg* calculated his wealth as substantially less, somewhere between $2.5 and $4 billion.[92] During the campaign, Trump's "success" was widely questioned, often by reference to objective data.[93] For example, some observers noted that if Donald Trump had just invested the amount of money his father initially gave him, he would be vastly wealthier than he is now, showing his business acumen may not be so great.[94] Nevertheless, many individuals believe that Trump is extremely wealthy.[95]

Or consider another example, more central to the thesis of this Article. Early on in his candidacy, Trump put forth a platform banning Muslim travel, a position that no other major politician had discussed, at least in public.[96] By doing so, Trump anchored the following "facts" in the public dialogue: (1) all Muslims pose a threat to non-Muslim Americans; (2) the United States needs a policy to address this imminent threat; and (3) Trump is the only candidate who has developed such a policy. The notion that Trump had a policy to address this important issue became anchored, despite the fact that there is no empirical evidence that the vast majority of Muslims pose any such threat and despite the fluid nature of Trump's policy, which moved from bans to registration to extreme vetting—whatever that means.[97] These issues notwithstanding, Trump set the tone for discussions about immigration and terrorism, using his positing to frame the debate and influencing future decisions by voters regarding the validity of policies that would have initially seemed outrageous and off-limits to many.

The proposed ban on Muslim travel builds on other biases as well. The creation of an in-group and an out-group capitalizes on human fears, a reaction engrained through evolutionary psychology.[98]As we discuss below, stereotypes that build upon each other may prove the hardest to

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91.   James Pethokoukis, *Donald Trump is Hypnotizing the GOP. Literally.*, WEEK (Jan. 22, 2016), http://theweek.com/articles/600497/donald-trump-hypnotizing-gop-literally.

92.   *Id*.

93.   *See, e.g.*, Kurt Eichenwald, *Why Donald Trump Isn't the Successful Businessman He Claims to Be*, INDEPENDENT (Aug. 7, 2016, 10:32 BST), http://www.in dependent.co.uk/news/ world/americas/us-elections/why-donald-trump-isn-t-the-successful-businessman-he-claims-to-be-us-elections-republican-politics-7173666.html.

94.   Claire Groden, *Donald Trump Would Be Richer if He'd Have Invested in Index Funds* (Aug. 20, 2015), http://theweek.com/articles/600497/donald-trump-hypnotizing-gop-literally.

95.   Allan Smith, *Voters Were Polled on How Much They Think Hillary and Trump Are Worth — and the Answers Were All Over the Place*, BUSINESS INSIDER (June 2, 2016, 10:34 AM), http:// www.businessinsider.com/hillary-clinton-donald-trump-worth-poll-2016-6.

96.   Keith Lee, *Negotiate Like Trump: Use This One Technique to Get Massive Results*, ABOVE THE LAW (Dec. 10, 2015), http://abovethelaw.com/2015/12/negotiate-like-trump-use-this-one-technique-to-get-massive-results.

97.   Alana Abramson, *What Trump Has Said About a Muslim Registry*, ABC NEWS (Nov. 18, 2016), http://abcnews.go.com/Politics/trump-muslimregistry/story?id=43639946.

98.   L. Cosmides et al., *Perceptions of Race*, 7 TRENDS COGNITIVE SCI. 173 (2003).

break, as there may be many levels of bias engrained into a System 1 response to information levels that are invisible to the individual making the decision.

Confirmation bias, discussed briefly above, is another common type of anchoring bias.[99] Confirmation bias describes our tendency to value facts and opinions that align with those we have already formed.[100] By only referencing information and viewpoints that affirm previously held beliefs, people confirm their biased views instead of considering conflicting data and ideas.[101] As noted above, not only do people look for others who agree with them, they frequently dismiss or expend extra energy scrutinizing discordant views.[102] The Internet only contributes to this confirmation bias as people become more and more likely to limit the news they read to sources that agree with their own beliefs. The proliferation of 'fake news' on Facebook prior to the 2016 presidential election shows the concern of confirmation bias, and how people are only informed by news sources within their own "bubble."[103]

Trump engaged in many strategies throughout his campaign that facilitated confirmation bias. One such strategy consisted of his villianization of the mainstream media, which had reported numerous negative stories about him.[104] By discounting the media as biased and untrustworthy, Trump discouraged his followers from considering opposing facts and ideas, and encouraged them to listen only to him and to each other.[105] The strategy resulted in a vast, and successful, experiment in the overwhelming power of confirmation bias.

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99.   Plous, *supra* note 72.

100.   *See id.*

101.   *Id.*

102.   *Id.*

103.   Drake Baer, *The 'Filter Bubble' Explains Why Trump Won and You Didn't See it Coming*, N.Y. Mag. (Nov. 9, 2016, 1:04 PM), http://nymag.com/scienceofus/2016/11/how-facebook-and-the-filter-bubble-pushed-trump-to-victory.html.

104.   Kenneth T. Walsh, *The Media War*, U.S. News (Nov. 25, 2016, 6:00AM), http://www.usnews.com/news/the-report/articles/2016-11-25/donald-trump-is-declaring-war-on-the-media.

105.   *See, e.g.*, Charlie Spiering, *Donald Trump: CNN Not 'Fake News' — It's Actually 'Very Fake News,'* Breitbart (Feb. 16, 2017), http://www.breitbart.com/big-journalism/2017/02/16/donald-trump-cnn-not-fake-news-actually-fake-news (quoting Trump as saying, "You just take a look at that show . . . . The panel is almost always exclusive anti-Trump . . . . and the hatred and venom coming from his mouth; the hatred coming from other people on your network." The article then notes: "[Trump] added that CNN was not respected by the American people, especially from his supporters. 'The public gets it, you know. Look, when I go to rallies, they turn around, they start screaming at CNN . . . . They want to throw their placards at CNN."). *See also* Louis Nelson, *Trump Blasts 'Fake News' CNN's Polls*, Politico (Mar. 20, 2017, 9:28 AM), http://www.politico.com/story/2017/03/trump-cnn-fake-news-polls-236250 (pointing out that Trump tweeted that 'fake news' CNN had stopped polling, when it had not).

B.   *Attribute Substitution Bias and the Asch Effect*

Attribute substitution occurs when an individual has to make a judgment about a target attribute (e.g., Donald Trump's ability to be a political leader) and instead substitutes a more easily calculated heuristic attribute, meaning a shortcut attribute (Donald Trump's purported business acumen).[106] This substitution is a System 1 automatic process, which then influences even System 2's reflective decisions about the same subject matter.[107] To put it simply, an individual is often unaware that two unlike attributes have become conflated, even when the two are logically dissimilar.

Anuj Shah and Daniel Oppenheimer, two psychologists studying how the brain reduces effort in decision-making, note that biases like attribute substitution are very common because they help people reduce the time and energy expended in making decisions.[108] This sort of substitution is especially common when considering policies that impact a large group of people. As Kahneman showed through his research in 2002, stereotyping people typically falls into this kind of cognitive bias.[109] Judging someone by the color of their skin is frequently easier (meaning less computationally complex for the brain) than judging that person by her intelligence, morality, work ethic, or some other, more relevant factor.[110] In this way, a stereotype about the relative violence of Whites, Hispanics, and Blacks becomes an easy substitute for actual data.

Cass Sunstein argues that attribute substitution is especially pervasive when people are making decisions about moral, political, or legal matters.[111] When presented with a difficult political issue (e.g., immigration), people find a more familiar problem that they personally experience (e.g., fear of terrorism) and apply that orientation to the harder problem. This dynamic was evident during the 2016 election when Trump capitalized on

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106.   Benjamin R. Newell et al., Straight Choices: The Psychology of Decision Making 71–74 (2007).

107.   *See* Carey K. Morewedge & Daniel Kahneman, *Associative Processes in Intuitive Judgment*, 14 Trends Cognitive Sci. 435, 435–40 (2010).

108.   Daniel M. Oppenheimer & Anuj K. Shah, *Heuristics Made Easy: An Effort Reduction Framework*, 134 Psychol. Bull. Am. Psychol. Ass'n 207 (2008).

109.   *See supra* Part II.

110.   Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* Heuristics and Biases: The Psychology of Intuitive Judgment 42, 49–81 (Thomas Gilovich et al. eds., 2002).

111.   Cass R. Sunstein, *Moral Heuristics*, 28 Behavioral & Brain Sci. 531 (2005).

fears of job loss[112] and terrorism[113] (both known attributes) to advance his political agenda (essentially an unknown attribute with unclear solutions to the issues of job loss and terrorism).

Trump's proposed ban on Muslim immigrants provides an example of attribute substitution. Trump stated, without any citation to actual data, "Countless innocent American lives have been stolen because our politicians have failed in their duty to secure our borders."[114] In this statement and others like it, Trump addresses a complex issue (national security) by appeal to a personal anxiety (fear of loss of life). This process conflates terrorism and immigration.

Sunstein also suggests that heuristic shortcuts about political matters do not occur only through the conflation of two concepts, such as immigration and terrorism.[115] When an individual is asked his own opinion on a difficult political matter, he may substitute the opinion of a trusted political or religious leader as his own.[116] People assume that religious or political leaders will have thought through the problem more than they have, trusting others to make the decision for them.[117]

This deference is common even when a political leader may have few, if any, qualifications to speak on the subject at issue. Daniel Oppenheimer, a psychology professor at the UCLA, has stated that "as voters, we do not reflect on our own core beliefs and then seek [candidates to match those beliefs]."[118] Rather, voters do the opposite: "[as voters, we] decide which candidates we like based on subjective cues, then mold our beliefs to fit [the candidate's beliefs]."[119] According to Oppenheimer:

> Most people have no idea where most candidates stand on most issues, so they just assume that the candidate agrees with

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112.   For example, in Donald Trump's speech, entitled "Declaring America's Economic Independence," he indicates that blue collar workers are losing jobs, particularly due to globalization. *Full Transcript: Donald Trump's Jobs Plan Speech*, POLITICO (June 28, 2016, 1:19 PM EDT), http://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891 ("The legacy of Pennsylvania steelworkers lives in the bridges, railways[,] and skyscrapers that make up our great American landscape. But our workers' loyalty was repaid with betrayal. Our politicians have aggressively pursued a policy of globalization — moving our jobs, our wealth[,] and our factories to Mexico and overseas.").

113.   *See, e.g.*, *Full Text: Donald Trump's Speech on Fighting Terrorism*, POLITICO (Aug. 15, 2016, 3:15 PM), http://www.cbsnews.com/news/where-donald-trump-stands-on-terrorism ("In the 20th Century, the United States defeated Fascism, Nazism, and Communism. Now, a different threat challenges our world: Radical Islamic Terrorism.").

114.   *Donald J. Trump: Address on Immigration*, DONALDJTRUMP.COM (Aug. 31, 2016), https://www.donaldjtrump.com/press-releases/donald-j.-trump-address-on-immigration.

115.   Sunstein, *supra* note 111.

116.   *Id*.

117.   *Id*.

118.   Emma Roller, *What Voters Want*, N.Y. TIMES (Jan. 26, 2016), http://www.nytimes.com/2016/01/26/opinion/campaign-stops/what-voters-want.html.

119.   *Id*.

them . . . . People will actually change their positions to align with the candidates they prefer, and will also assume that candidates agree with them on important issues, even when that isn't true.[120]

Throughout his campaign, Trump asserted that various authority figures, often unnamed, approved of him and disapproved of other candidates. For example, Trump has name-dropped Larry Kudlow[121] and Laurence Tribe.[122] In addition, Trump has often urged people to defer to his own expertise and authority, even though he offered no evidence to support the premise that he had any—consider, for example, his assurance that he knew more about ISIS than "the generals."[123]

On a related note, during the campaign Trump also capitalized on the fact that people look to experts to form their own opinions, something known as the Asch Effect.[124] The Asch Effect finds that high-status individuals have a stronger likelihood of a subject agreeing with an obviously false conclusion, when a high-status individual makes that conclusion, despite the subject normally being able to clearly see the answer as incorrect.[125] This relies in part on the attribute substitution bias and also on individuals feeling strong emotional pressure to conform to authorities, who seem to speak for a majority's position.[126] This is similar to attribution bias because individuals take the decisions of someone they consider an expert and attribute those decisions to their own decision-making.

C. *Availability Bias*

Similar to the attribute substitution discussed in Sub-Part B, the availability heuristic is a mental shortcut that relies on immediate examples that come to a given person's mind when evaluating a specific topic or

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120.   *Id.*

121.   Eric Kanakowi, *CNBC's Awful Trump Interview Highlights its Larry Kudlow Problem*, MEDIA MATTERS (Feb. 9, 2016), https://www.mediamatters.org/blog/2016/02/09/cnbcs-aw ful-trump-interview-highlights-its-larr/208470 (quoting Trump as tweeting: "Highly Respected economist @Larry_Kudlow is a big fan of my tax plan— thank you, Larry").

122.   Ben Jacobs, *Harvard Scholar: Ted Cruz's Citizenship, Eligibility for President 'Unsettled,'* THE GUARDIAN (Jan. 10, 2016), https://www.theguardian.com/us-news/2016/jan/11/lau rence-tribe-ted-cruz-donald-trump-citizen-president.

123.   Chris Cillizza, *The Dangerous Anger of Donald Trump*, WASH. POST (Nov. 13, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/11/13/the-remarkably-unappeal ling-anger-of-donald-trump/?utm_term=.c78f46ed8514.

124.   S.E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 35 (1955). *See also* Henry T. Moore, *The Comparative Influence of Majority and Expert Opinion*, 32 AM. J. PSYCHOLOGY 16 (1921).

125.   *Id.*

126.   Vernon L. Allen & John M. Levine, *Social Support, Dissent and Conformity*, 31 SOCI- OMETRY 138, 138-149 (1968); *see also* Saul McLoud, *Asch Experiment*, SIMPLY PSYCH. (2008), https://www.simplypsychology.org/asch-conformity.html.

decision.[127] People generally recall examples that evoke a strong emotional effect, such as fear, pride, hate, disgust, or sadness. Research shows that people tend to sensationalize the likelihood of unusual events, such as homicide, terrorist attacks, or airline accidents, while ignoring less sensational but more realistic possibilities, such as car accidents and death from common disease.[128] This bias is frequently combined with emotional biases based on evolutionary psychology and the human instinct to avoid fear or disgust.

Trump effectively used the availability bias during his election campaign. During the Republican primary, when terror attacks occurred in Paris and then in San Bernardino, he used them as proof that his warnings about Muslims were justified.[129] Trump's favorable polling rose about 7 points in the aftermath of the attacks, right before he began winning multiple primary contests.[130]

Throughout his campaign, Trump effectively fed fears of "the other." He famously claimed that "[W]hen Mexico sends its people, they're not sending their best. They're bringing drugs; they're bringing crime; they're rapists."[131] Such statements unabashedly tapped into base fears humans hold about their own safety.[132] That the statement has no factual basis did not prevent him from saying it or people believing it.

In the same vein, during the Republican National Convention, Trump mentioned the tragic story of a young woman killed by an illegal immigrant, again feeding on fears of personal safety. Trump omitted a critical fact from the narrative: the act was not a violent crime, but a drunk driving accident.[133] The young woman could just as easily have been killed by a middle–aged White male driving home from the Republican National Convention.

Playing on fear can be very powerful, using System 1 thinking to shut down any System 2 processes.[134] By giving us vivid examples of a situa-

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127.   PLOUS, *supra* note 72, at 121–31.

128.   *Id*.

129.   Molly Ball, *Donald Trump and the Politics of Fear*, ATLANTIC (Sept. 2, 2016), http://www.theatlantic.com/politics/archive/2016/09/donald-trump-and-the-politics-of-fear/498116.

130.   *Id*.

131.   Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?utm_term=.62c440ee6642.

132.   Ball, *supra* note 129.
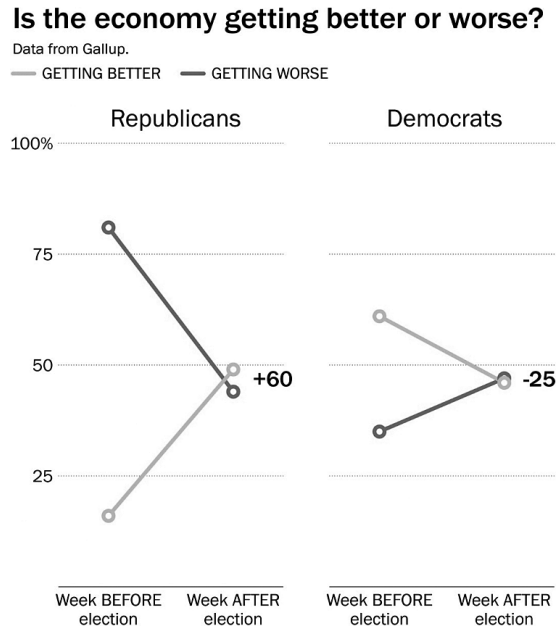
133.   Dylan Matthews, *Donald Trump's Convention Speech Was an Overwhelming Victory for Fear*, VOX (July 22, 2016), http://www.vox.com/2016/7/22/12254826/donald-trump-convention-speech-rnc-fear.

134.   Andrew Winston, *Fear and Hopelessness in Cleveland*, HUFFINGTON POST (July 22, 2016), http://www.huffingtonpost.com/andrew-winston/fear-and-hopelessness-in_b_11134200.html.

tion, even when those examples are rare or were incorrectly described, Trump capitalized on the fears of his audience and played into their natural predisposition to default to System 1 thinking. In such a context, the marketplace of ideas becomes a marketplace of free-floating anxieties.

D.   *Group-Based Biases*

Group-based biases occur when individuals who are part of a group tend to see that group in a more positive manner compared to other groups.[135] Politics, especially American politics with its two-party system, inherently creates group-based biases. Partisan bias affects how an individual views policies, including the state of the economy, for example, even when objective factors would show the view to be incorrect. A Gallup poll in November of 2016 asked people one week before the election and one week after the election the following question: Is the economy getting better or worse? As the following chart[136] shows, in less than fourteen days, people changed their response, even though logically, there was no reason for such a drastic change regarding the *current* state of the economy.[137]

Is the economy getting better or worse?

Data from Gallup.

— GETTING BETTER   — GETTING WORSE

	Republicans		Democrats	
100%				
75				
50		+60		-25
25				
	Week BEFORE election	Week AFTER election	Week BEFORE election	Week AFTER election

135.   Mina Cikara & Jay Van Bevel, *The Neuroscience of Intergroup Relations: An Integrative Review*, PERSP. ON PSYCHOL. SCI., http://www.psych.nyu.edu/vanbavel/lab/documents/Cikara.VanBavel.inpress.PopS.IntergroupNeuroscience.pdf.

136.   Philip Bump, *And Just Like That, Republicans Are Pretty Confident in Where the Economy Is Headed*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/15/and-just-like-that-republicans-are-pretty-confident-in-where-the-economy-is-headed/?utm_term=.6d33aa62ed48.

137.   *Id.*

The response from both Republicans and Democrats suggests that people are making policy judgments based on impressions or predispositions, not on actual or objective information.[138]

Psychologist Gordon Allport captured the fallacy of in-group and out-group biases in his seminal book, The Nature of Prejudice.[139] His research shows that "all groups develop a way of living with characteristic codes and beliefs, standards, and enemies to suit their own adaptive needs—the pressures keep each individual member in line."[140] The formation of an in-group necessarily yields an out-group, people who constitute the 'other' and who can become the enemy of people in the initial in-group. The "in-group is psychologically primary . . . and hostility towards out-groups helps strengthen a sense of belonging."[141] This group-based bias creates partisanship and probably also drives ethnocentric and race-based views that influence political decisions.

During the election, Trump frequently used false dichotomies to capitalize on perceived conflicts between the interests of American citizens and others in the world or even between different races and groups of Americans themselves. For example, speaking about China, Vietnam, and India, Trump declared that "our jobs are being stolen . . . like candy from a baby."[142] He also stated that "Syrians are now being caught at the southern border . . . . We don't know who they are, could be ISIS."[143] And, as noted above, Trump villainized Mexicans as a threat to U.S. interests.[144] Disagreeing with these statements might lead to in-group members labeling dissenters as anti-American, using group-based biases to isolate dissenters.

Domestically, Trump used in-group and out-group biases to create distinctions between Blacks, Whites, Hispanics, Muslims, and more. For example, Trump falsely tweeted that Blacks killed 81% of White homicide victims in 2015, relying on a non-existent statistic from a non-existent organization.[145] The following chart shows exactly how inflated Trump's false statistics were:[146]

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138.   *Id.*

139.   Gordon W. Allport, The Nature of Prejudice (Basic Books 1979).

140.   *Id.*

141.   *Id.*

142.   Sally Kohn, *Nothing Donald Trump Says on Immigration Holds Up*, Time (June 29, 2016), http://time.com/4386240/donald-trump-immigration-arguments.

143.   Stephanie Condon, *Fact Checking 2016 Candidates on Syrian Refugees*, CBS News (Nov. 20, 2015), http://www.cbsnews.com/media/fact-checking-2016-candidates-on-syrian-refugees/4.

144.   Lee, *supra* note 131.

145.   Greenberg, *supra* note 10.

146.   *Id.* (emphasis added to chart).

COMPARING TRUMP'S RACIAL STATISTICS TO ACTUAL STATISTICS

	Trump Number	FBI Number	Error factor
Blacks killed by Whites	2%	8%	4 times
Blacks killed by Blacks	97%	90%	A little off
Whites killed by Whites	16%	82%	5.4 times [*sic*] [147]
Whites killed by Blacks	*81%*	*15%*	*5.4 times*

Individuals often afford purported authority figures, like Trump, much more leeway, giving the authority figure the benefit of the doubt. This authority bias can also exacerbate any existing in-group bias in White voters. And combining biases with emotional triggers, such as economic anxiety and fear for safety, leads to further stereotyping and generalization as System 1 responses begin to overtake System 2 considerations of opposing viewpoints.

E.   *Compounding Biases*

As the prior descriptions demonstrate, one can attribute the pervasive nature of these cognitive biases to the fact that many of these biases bolster each other, making it exponentially more difficult to resist System 1 thinking. Although it may be possible to identify reasons other than cognitive biases to explain Trump's inaccurate statements above, there is one instance where only cognitive biases will explain the public reaction to Trump's comments.

In October 2016, just one month before the 2016 election, the Washington Post obtained a video of Donald Trump having an "extremely lewd conversation about women in 2005."[148] Donald Trump said, "I'm automatically attracted to beautiful [women]—I just start kissing them. It's like a magnet. Just kiss. I don't even wait. And when you're a star they let you do it. You can do anything . . . Grab them by the pussy. You can do anything."[149] Members of Trump's own party called the remarks "totally inappropriate and offensive,"[150] "vile,"[151] and "repugnant and unaccept-

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147. Note that when the authors of this article did the math, the error rate appears to be 5.125, not 5.4 as the source erroneously reported.

148. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9 ce776-8cb4-11e6bf8a3d26847eeed4_story.html?postshare=2491475870527101&tid=ss_tw& utm_term=.ccbabc92b1fd.

149. Ben Mathis-Lilley, *Trump Was Recorded in 2005 Bragging About Grabbing Women "By the Pussy,"* SLATE (Oct. 7, 2016, 4:27 PM), http://www.slate.com/blogs/the_slatest/2016/10/07/donald_trump_2005_tape_i_grab_women_by_the_pussy.html.

150. Fahrenthold, *supra* note 148.

151. *Id*.

able in any circumstance."[152] Following sharp criticism, Trump issued a short statement saying that "this was locker-room banter, a private conversation that took place many years ago. Bill Clinton has said far worse to me on the golf course—not even close . . . . I apologize if anyone was offended."[153] Trump validated his comments by calling them locker-room talk, an attempt to normalize what some said "amounts to [describing] sexual assault."[154] The entire sequence of events, and the results of the succeeding election, demonstrates cognitive biases at work.

Trump's statements in the 2005 video reflect generalizations about women and their roles in our society. He assigns a universal characteristic to all women ("they"). And he then reduces women to sexual objects—indeed, consensual sexual objects—who are attracted to celebrity status and power. These statements play on stereotypes that treat women as a homogenous group and then assign characteristics to them that men wish to project.

But it does not end there. Trump's October 2016 justification for his prior comments relied on cognitive biases. By saying that he was just engaging in "locker-room banter,"[155] Trump stereotyped men. In order to justify his broad generalizations about how women act, Trump made broad generalizations about how men talk about women.[156] Of course, it is important to note that these statements do not just play on stereotypes—they play on *false* stereotypes. Trump offered no evidence in support of his claims that all women are alike, that all are willing to become consensual sexual objects in the presence of a powerful male, or that men commonly talk about their non-consensual sexual advances on unwilling women.

One might expect that Trump's comments would have hurt his chances with religious voters and women voters. To the contrary, Trump did much better than pollsters expected with both of those groups. Instead of voting for Hillary Clinton or even a third party, many voters in both of these groups still cast their lot with Donald Trump as President.[157] Steven Pinker, a Harvard psychologist, argued that Trump's "libertine and irreligious lifestyle," as evidenced by his 2005 comments "should have, but did

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152.   *Id.*

153.   *Id.*

154.   *Id.*

155.   *Id.*

156.   Men say this is not typical locker-room banter. *See, e.g.*, Sally Jenkins, *Donald Trump's Idea of 'Locker Room Talk is as Demeaning to Men as it is to Women*, WASH. POST, Oct. 10, 2016, https://www.washingtonpost.com/sports/redskins/donald-trumps-idea-of-locker-room-talk-is-as-demeaning-to-men-as-it-is-to-women/2016/10/10/7e34718a-8eee-11e6-a6a3-d50061aa9fae_story.html?utm_term=.eee0c376442e.

157.   Maria Konnikova, *The Psychological Research that Helps Explain the Election*, NEW YORKER (Dec. 25, 2015), http://www.newyorker.com/science/maria-konnikova/the-psychological-research-that-helps-explain-the-election.

not, poison him with evangelicals."[158] Exit polls showed that four out of five white evangelicals still voted for Trump.[159] Democrats also expected fewer women to vote for Trump after his crass comments. Polls found that "Trump had nearly equal support among Republican men and women, and numbers showed that the Republican faithful—men and women—were supporting their nominee at rates similar to . . . past presidential elections."[160] Despite Trump's comments, Clinton lost the votes of White women overall.[161]

Trump's 2016 campaign thus did not just rely upon stereotypes that activate System 1 thinking and other compromised analytics. It relied upon the compounding of such stereotypes. This sort of layering did not occur just once. To the contrary, his remarks often triggered multiple stereotypes, as when he portrayed Mexicans as drug-runners *and* rapists *and* other sorts of non-specified criminals.

CONCLUSION
AND PRELIMINARY THOUGHTS
ON WAYS FORWARD

The challenge before us seems clear. We have historically depended on the testing power of the marketplace of ideas to expose factual falsehoods and to resist, in Brandeis's memorable phrase, "noxious doctrine." In reality, however, the assumptions embedded in the model have never aligned particularly well with the realities of human cognition, decision-making, and behavior. The 2016 election brought this misalignment to the forefront, fully demonstrating the difficulties we encounter in unseating ideas that are driven by System 1 thinking, that come to us as anchors, that confirm our biases and stereotypes, and that play upon our fears and anxieties. As one of the authors has declared elsewhere, in 2016 the marketplace of ideas "crashed."[162] How do we pull the market out of its current disarray?

If the challenge seems clear, then the solution does not. After all, the diagnostics applied above strongly suggest that hopeful thinking that the

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158.   *Id.*

159.   Some voters justified their vote for Trump by relying on fallacious thinking as well. Some claimed that because Presidents Kennedy and Johnson were womanizers or immoral, issues of morality should not matter to the presidency. Steve McQuilkin, *White Evangelicals Just Elected a Thrice-Married Blasphemer: What That Means for the Religious Right*, USA Today (Nov. 10, 2016, 4:23 PM), http://www.usatoday.com/story/news/politics/elections/2016/11/10/conser vative-christians-boorish-trump/9357 2474.

160.   Clare Malone, *Clinton Couldn't Win Over White Women*, Five Thirty Eight (Nov. 9, 2016, 7:16 PM), https://fivethirtyeight.com/features/clinton-couldnt-win-over-white-women.

161.   *Id.*

162.   Len Niehoff, *The Marketplace of Ideas Has Crashed*, Detroit News (Dec. 1, 2016), http://www.detroitnews.com/story/opinion/2016/12/01/marketplace-ideas/94692632.

market will revive has little basis in the current science of cognitive bias. We have shown ourselves to be resolutely impervious to new information and passionately dedicated to beliefs in which we have already invested, regardless of whether they have any basis in fact. Facts from one source alone are not likely to mean much to those who have developed a deep instinctive fondness for a position through the quick and easy thinking that characterizes System 1 processes.

Because scholars continue to study the dynamics of the 2016 election, our thinking remains necessarily preliminary, but we see two possible avenues for curative steps. First, we will need to adjust our understanding of the amount of evidence that is required to destabilize people from settled views. The research suggests that this requires substantial amounts of data, as well as some concrete and specific motivation for change.[163] An example of this sort of change is evident in responses to the Birther movement.[164] In the case of President Obama, people who already dislike him may have little motivation to change their beliefs about where he was born.[165] Until there was overwhelming evidence of President Obama's birthplace, namely his actual birth certificate, some people refused to believe what he said.

To put the matter in legal terms, we will need to adjust our thinking from "preponderance of evidence" arguments to "clear and convincing evidence" arguments, if not even arguments "beyond a reasonable doubt." And we will have to explain, with exquisite clarity, the adverse consequences of error. It is possible that rational anxieties (e.g., around the governmental registration of individuals based on their religious beliefs) may be able to overcome irrational ones (e.g., that most members of a religious group represent a threat to personal safety).[166]

We might think of this as constantly striving toward the "tipping point" at which people can be persuaded to change their minds. There are some signs of promise here: for example, research indicates that people confronted about their negative misconceptions about immigration statistics "became more likely to view immigrants favorably and more likely to

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163.   David P. Redlawsk, *A Matter of Motivated 'Reasoning,'* N.Y. TIMES (April 22, 2011), http://www.nytimes.com/roomfordebate/2011/04/21/barack-obama-and-the-psychology-of-the-birther-myth/a-matter-of-motivated-reasoning.

164.   *Id.*

165.   *Id.*

166.   However, these methods may still not work. Research also confirms that non-Hispanic Americans over-estimate the percentage of the population that is foreign-born or that is in the U.S. without authorization. However, in four separate survey experiments, researchers found that providing accurate information does little to affect attitudes toward immigration. This is true even when people's misperceptions are explicitly corrected. These results call into question a potential cognitive mechanism that could underpin inter-group threat theory. Misperceptions of the size of minority groups may be a consequence, rather than cause, of attitudes toward those groups. *See* Daniel J. Hopkins et al., *The Muted Consequences of Correct Information About Immigration* (June 18, 2016), https://ssrn.com/abstract=2798622.

donate money to a pro-immigration charity."[167] Perhaps even "a slight nudge—just providing a little factual information—can affect how some people think," by creating a tipping point at which people bring their views in line with fact and reason.[168]

While this tipping point may prove difficult to find, political scientists Redlawsk and Civettini have conducted multiple studies to show that it does indeed exist.[169] Ironically, it seems that the cure for the anxiety that drives bad decisions may reside in qualitatively different anxiety: the providing of sufficient facts to create within an individual some apprehension about whether they have in fact arrived at the truth.[170] At that point, anxiety may prompt individuals to switch to System 2 processing, carefully "consider[ing] new information and potentially overrid[ing] existing affective expectations."[171] Without a level of data bombardment that breeds its own anxiety, however, it seems unlikely that mere counter-factual argument will destabilize settled misconceptions.

Second, it seems clear that there must also be a change in how issues are framed for people who may not agree with the facts about hot-button issues like immigration, global warming, and race relations. Professor Kahan, who predicted the polarization of American culture, studied how people responded to framing about polarizing issues by sending letters about global warming.[172] He found that conservatives were "much more open to accepting the fact that humans are causing global warming" when "the science had been written into an alternative narrative that appealed to their pro-industry worldview."[173] People were more likely to respond positively when a business or religious leader, speaking in a context different from environmentalists or scientists, provided views on political issues.[174] Kahan and others have suggested that instead of leading with the facts in order to convince reasoners motivated against your beliefs, one should lead with the values— "so as to give the facts a fighting chance."[175]

This point has not only strategic but normative appeal. After all, the message of the social science is that truth is more likely to prevail if presented in a way that stresses the similarity of values, rather than the difference. This Article argues for unifying narratives that invite the audi-

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167.   Jeff Guo, *If Someone Doesn't Like Immigrants, Ask Them This Question*, WASH. POST (Jan. 6, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/01/06/if-someone-doesnt-like-immigrants-ask-them-this-question/?utm_term=.1f29aa6f9a40.

168.   *Id.*

169.   David P. Redlawsk et al., *The Affective Tipping Point: Do Motivated Reasoners Ever "Get It"?*, 31 POL. PSYCHOL. 563, 589 (2010).

170.   *Id.*

171.   *See id.*

172.   Kahan et al., *supra* note 42.

173.   *Id.*

174.   *Id.*

175.   *Id.*

ence in, rather than polarizing narratives that are likely to drive people back into the comfortable places of their accepted truths. In any event, the election of 2016 made this reality abundantly clear: in the marketplace of ideas, we cannot assume that the truth will sell itself or that it will not need our help to close the deal.