

# San Diego Law Review

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Volume 51  
Issue 1 2014

Article 3


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3-1-2014

## False Speech: Quagmire?

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### Recommended Citation

Christopher P. Guzelian, *False Speech: Quagmire?*, 51 SAN DIEGO L. REV. 19 (2014).  
Available at: <https://digital.sandiego.edu/sdlr/vol51/iss1/3>

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## False Speech: Quagmire?

CHRISTOPHER P. GUZELIAN\*

*Recently decided cases in several Federal Courts of Appeals and the United States Supreme Court show that First Amendment false speech case law is contradictory and unpredictable. This Article gives examples and concludes that legal liability for false speech will continue to be arbitrary and even susceptible to intentionally unjust decisionmaking if judges and juries individually and collectively disregard or downplay the necessity of an honest search for truth under the guise of tolerance and evenhandedness. If Americans wish to avoid an anything-goes “quagmire” about truth, they must—despite inevitable resistance in a civilization increasingly rife with skeptics—undergo transformations of their thinking habits to genuinely seek and successfully identify truth with charitable application in law. In addition, a certain kind of optimism is necessary to render consistent, predictable, and correct conclusions in false speech cases. This Article’s implications may also extend beyond false speech to other areas of constitutional and common law.*

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I. INTRODUCTION

“What can I say without getting punished?”

“Will you punish me if I tell this untruth?”

These are questions that every self-preserving kindergartner weighs when vexing parents. And they are questions that every American concerned about the free ability to speak in countless situations must consider. Yet, just beneath the surface of recent so-called false speech cases that have worked their way through the courts are unsettled questions about how American courts in the twenty-first century view the relationship between truth and the Constitution.<sup>1</sup>

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1. A recent series of federal circuit cases and a 2012 Supreme Court case—*United States v. Alvarez*—have touched upon the thorny issue of false speech. *See* 132 S. Ct. 2537, 2542 (2012). At the center of these cases is a law passed by Congress in 2005—the so-called Stolen Valor Act, or SVA—which authorized federal criminal prosecutions of those who had allegedly falsely represented that they had won a military medal. *See id.* at 2543. If convicted, the defendant received up to a year in federal prison plus a fine. *Id.* (quoting 18 U.S.C. § 704(c) (2006)).

The courts dealing with these various prosecutions focused largely on two questions: (1) whether false speech is *generally* unprotected under the First Amendment, as opposed to a lack of constitutional protection only for select traditional categories of false speech, namely, fraud, defamation, perjury, and false commercial speech, and (2) depending on the answer to question number one, whether the SVA is too vaguely written or overbroad. *See id.* at 2547. This Article is not intended to address either of these issues. They may be important in their own right, but this Article considers them tangential.

These open questions rest upon the bedrock issue of truth telling, which is at the core of much jurisprudence. The stated goal of the Federal Rules of Evidence is reaching the truth.<sup>2</sup> Judges often concur with this mission statement.<sup>3</sup> Thus, if we examine false speech law, we might gain some insights into the structure of law itself. And what we end up seeing is that Americans are mired in a great quagmire about how to handle questions of truth in First Amendment matters. Even a cursory inspection of First Amendment case law reveals widespread, sometimes inexplicable, inconsistencies in false speech verdicts. This Article's first four substantive Parts—Parts II through V—nonexhaustively survey four common categories of such dispute or inconsistency that arise.

In Part II, I demonstrate one unresolved disagreement among courts: deciding which *question of fact*—“proposition”—underlies any particular allegation of false speech.

In Part III, I show that there is much dispute—both academically and in the courts—over the *truth* about any particular proposition: whether a correct answer exists, whether it can be known, whether we know it, and how we know it.

In Part IV, readers will observe that there are disputes about whether truth *changes*.

Part V reveals that there is vast dispute about how to *delimit* which *sanctions* are appropriate for a given speech.

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2. FED. R. EVID. 102 (“These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence *to the end that the truth may be ascertained* and proceedings justly determined.” (emphasis added)).

3. For instance, one federal judge in Kansas recently wrote,

The precepts of fair trial and judicial objectivity do not require a judge to be inert. The trial judge is properly governed by the interest of justice and truth, and is not compelled to act as if he were merely presiding at a sporting match. He is not a ‘mere moderator.’ As Justice Frankfurter put it, ‘(f)ederal judges are not referees at prize-fights but functionaries of justice.’ *Johnson v. United States*, 333 U.S. 46, 54, 68 S. Ct. 391, 395, 92 L.Ed. 468 (1948) (dissenting in part). A federal trial judge has inherent authority not only to comment on the evidence adduced by counsel, but also—in appropriate instances—to call or recall and question witnesses. He may do this when he believes the additional testimony will be helpful to the jurors in ascertaining the truth and discharging their fact-finding function.

*United States v. Lee*, 972 F. Supp. 1330, 1345 n.5 (D. Kan. 1997) (quoting *United States v. Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974)). Not always, however. *See infra* Part III.A.

In the concluding Part VI, I will try to persuade readers that courts are having a particularly hard time with false speech cases because many judges' preferred mode of rendering false speech verdicts rests either explicitly or implicitly upon philosophical skepticism about some facet of truth. Judges—particularly those who proudly and loudly advocate a laissez-faire, libertarian First Amendment philosophy—may not even recognize that their default mode of First Amendment judgment could, in fact, be a form of skepticism that can be catastrophic to notions of truth-seeking.

Part VI further asserts that there is a growing foundational skepticism that, if sustained, could be deadly to false speech jurisprudence: a doubt whether the Constitution itself is a legal instrument capable of settling disputes. If the doubt is collectively accepted that it is not so able, then it is possible that all American false speech jurisprudence simply devolves into power-seeking struggles among various factions to assert their “perspectives” of “truth” to the legal detriment of others' perspectives.

Readers may depart with an unsettling—possibly correct—impression that these difficulties about truth's proper role in law extend beyond First Amendment false speech cases alone. Based on legal confusion and judicial unscrupulousness or ineptitude, the possibility of political capture of court proceedings, competing views about truth and its relation to law, and courts' widely divergent views about legal arbiters' proper authority and role, the repercussions for courts' credibility and for public order are significant.<sup>4</sup> This Article calls attention to the problem. It concludes that individual and collective renewal of an optimistic kind of attitude could enable a humble search for truth that might offer an exit from the legal quagmire.

## II. “ASSOCIATION”: LINKING PROPOSITIONS AND SPEECH

A first question for a judge in a false speech case is this: which questions of fact—*propositions*—are properly *associated* with allegedly false speech? Association is a highly important first step in the determination of false speech in legal contexts. Let us take a hypothetical example. Say a speaker exclaims,

“Cheese shouldn't do that!”

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4. Supreme Court popularity has recently hit a record low in modern times. *Pew: American Approval of Supreme Court Hits All-Time Low*, CBS LOCAL (Mar. 25, 2013, 1:37 PM), <http://washington.cbslocal.com/2013/03/25/pew-american-approval-of-supreme-court-hits-all-time-low/>.

An investigation of the speech's historical setting is required to grasp the proper association. Assume the speaker at the time of the speech was in a laboratory full of rats and cheese in cages. This fact might suggest that an associated proposition is

(A) "The cheese in the rat cage is causing the *white* rats to salivate,"

or

(B) "The cheese in the rat cage is causing the *black* rats to salivate."

More context is required to determine whether one, both, or neither of these propositions is associated with the speech.<sup>5</sup> If the evidence shows there were no black rats in the laboratory at the time of the speech, it is then perhaps less credible for a litigant to claim that proposition B is the correct proposition to associate with the litigated speech.

Despite this evidence, a litigant might still try to contend that proposition B is a suitably associable proposition. For instance, the litigant might introduce evidence that the conversation with the speaker shortly before her exclamation "Cheese shouldn't do that!" was about black rats in a different laboratory and the conversation was not in reference to the white ones that happened to be in the laboratory at the time. If this were the case, perhaps proposition B could still be an associable proposition, although it is now more ambiguous which proposition to legally associate, given the white rats close by.<sup>6</sup>

It is not correct that only one proposition is ever properly associated with a particular instance of speech. The speech "Cheese shouldn't do that!" in the context in which it was said could be associated with a near

5. See SUSAN TIEFENBRUN, *DECODING INTERNATIONAL LAW: SEMIOTICS AND THE HUMANITIES* 32 (2010) ("To arrive at a more certain and uniform interpretation [of a given instance of speech], connotational factors should be taken into consideration: the historical period in which the utterance is made, the special meaning the term might have had at the time it was first made, the intention of the speaker as evidenced by other related documents, and the linguistic context of the utterance itself."). Context can also matter intensively in deciding whether a proposition is true. See *infra* Part III.A.

6. There may be some entrepreneurial, dubiously ethical litigation "bias" lurking in false speech cases. If there are monetary damages at the end of the rainbow for proving a "falsity" embedded within a litigated speech, the potential for financial reward incentivizes lawyers to "see what sticks" by identifying propositions known in advance to be false and litigating claimed "associations" between those false propositions and a near limitless supply of speakers and speeches that can be cherry-picked. Witness the explosive growth of the products' safety warnings legal industry over the past decades.

infinite variety of propositions or combinations of propositions. Some of these propositions might strike us as almost comical, yet to another evaluator examining the speech's context—the speaker, the audience, a focus group, or the presiding jurist in a false speech case—they could appear sincerely plausible:

“The cheese in the rat cage has become moldy after eleven days”—  
proposition about observed physical data.

“The third rat, while salivating, did a full backflip with a handstand because it smelled the noxious vapors the cheese put off”—scientific causal proposition.

“The King of the Gods, Zeus, would never permit cheese to be placed in the same cage as rats. That cheese can't really be in that cage”—mixed metaphysical causal proposition and observed physical data proposition.

“It is unethical to keep unmonitored cheese in the same cage as laboratory rats because it causes them to breed more heartily, thus heightening the risk of plague outbreak”—mixed moral and scientific causal proposition.

One's speech, as we see, can generate nearly as many possible propositions as one's imaginative scope about reality permits. It is not just in the realm of hypotheticals that association difficulties arise. In First Amendment litigation, identification of a speech as true or false frequently turns on decisions about which proposition is legally proper to associate with the speech and whether that proposition, in turn, is true or false:

- If a striking union pickets a hospital with signs that say, “This hospital is full of rats!,” is the proper proposition (1) “The hospital is a contractor that does not pay all of its employees prevailing wages or provide health and pension benefits to all of its employees” or (2) “The hospital has small furry rodents running rampant through it?”<sup>7</sup>
- Which proposition does use of the term *black propaganda* in a Filipino ethnic community equate to: “racist propaganda,”

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7. See *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 137 F.3d 1090, 1091 (9th Cir. 1998).

“disseminating false information about someone,” or something else?<sup>8</sup>

- Is the brand name “Havana Club” of a rum distilled in Puerto Rico equivalent to the proposition “This rum was produced in Cuba”?<sup>9</sup>
- If someone is called a “fascist” and “radical right-winger,” what definition of those terms should be used to evaluate the plaintiff’s claim of defamatory falsity?<sup>10</sup>
- Is it a false product portrayal—amounting to the proposition “This is exactly what your product will look like and how it will function”—if a mock-up of a shaving cream product is used in a television ad to portray comparative foaminess over other products if it would be otherwise impossible to show the actual benefits in the normal time allotted in a television ad?<sup>11</sup>
- Does a television ad claiming “Listerine is as effective as floss at fighting plaque and gingivitis. Clinical studies prove it” amount to the proposition that one need not floss if regularly using mouthwash?<sup>12</sup>

Association is a practice that directly implicates whether a speech is true or false for legal purposes. Say three propositions—A, B, and C, where both A and B are true, but C is false—are plausibly associable with a given speech. The jurist who associates C with that speech and rejects associations with A or B is labeling the speech false. But a jurist who rejects C, accepting either A or B, is decreeing the speech to be true.

This Article need not belabor the subject of association—roughly equal to “semiotics”<sup>13</sup>—here, as much has been written elsewhere about it.<sup>14</sup> My

8. See *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 187–88 (2d Cir. 2000) (internal quotation marks omitted).

9. See *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.*, 653 F.3d 241, 248–49 (3d Cir. 2011).

10. See *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976) (finding that there is “tremendous imprecision of the meaning and usage of these terms in the realm of political debate”).

11. See *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 526–28 (5th Cir. 1963).

12. See *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp. 2d 226, 231, 249–50 (S.D.N.Y. 2005) (internal quotation marks omitted).

13. See UMBERTO ECO, *A THEORY OF SEMIOTICS* 7 (1976); CHARLES SANDERS PEIRCE, *A Survey of Pragmaticism*, in 5 *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* ¶ 464, at 317, ¶ 488, at 335 (Charles Hartshorne & Paul Weiss eds., 1974).

14. See, e.g., ECO, *supra* note 13, at 30.



point is rather to say that courts do not give much formal thought to association. When they do think about it, their approaches are incredibly haphazard. Reported cases reveal that courts regularly use at least seven different and commonly incompatible methods to make legally binding associations between speeches and propositions, termed *methods of association*:

- (1) experiential association;
- (2) actual false perception;
- (3) similarly situated reasonable audience false perception;
- (4) quantified false perception;
- (5) literal truth;
- (6) subjective intent; and
- (7) legislature or agency definition.

Case law does little to articulate why and when one of these methods is to be favored over another.<sup>15</sup> Each is discussed below in turn.

### 1. *Experiential Association*

Judges sometimes associate propositions with speeches simply without reference to any guiding principle or rule.<sup>16</sup> Even Supreme Court Justices are not immune from such practices, such as when having awarded damages

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15. There are exceptions, certainly. *Cf.* *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 177–78 (2d Cir. 2000). The Second Circuit stated, [F]ederal courts follow [standards] in determining [the meaning of] a statement or publication [alleged to be] defamatory. [C]ourts “must give the disputed language a fair reading in the context of the *publication as a whole*.” Challenged statements are not to be read in isolation, but must be perused as the average reader would against the “whole apparent scope and intent” of the writing.

Second, courts are not to “‘strain’ to interpret such writings ‘in their mildest and most inoffensive sense to hold them nonlibelous.’”

Finally, “the words are to be construed not with the close precision expected from lawyers and judges but as they would be read and understood *by the public to which they are addressed*.” It is the meaning reasonably attributable to the intended reader that controls. This determination can be particularly difficult where the readership in question constitutes a distinct ethnic community of which the judge is unfamiliar. In such instances, expert evidence or surveys can be useful, though none was supplied by the parties here.

*Id.* (citations omitted) (quoting *Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825, 829 (N.Y. 1995); *November v. Time Inc.*, 194 N.E.2d 126, 128 (N.Y. 1963)).

16. *See, e.g.*, *Lambert v. Calprotrack, Inc.*, No. 95 C 4076, 1996 WL 224515, at \*3 (N.D. Ill. May 1, 1996) (“Plaintiffs assert, ‘the prominent positioning of these individuals in a sales memorandum alongside a discussion of the Hamilton Well certainly suggests a power to control all aspects of the Hamilton Well, including sales of its interests.’ I doubt the value of this argument based on semiotic theory.”).

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for emotional distress in asbestos exposure cases.<sup>17</sup> In one Connecticut state court case involving a criminal citation for an obscene gesture, a minor riding on a school bus displayed his middle finger at a passing state trooper.<sup>18</sup> The minor challenged the citation on the grounds that his action was not obscenity under First Amendment precedent.<sup>19</sup> The judge agreed, holding that the youth's finger display did not have erotic meaning in context.<sup>20</sup> Yet the judge did not identify the method by which he had put his finger on this interpretation.<sup>21</sup>

## 2. Actual False Perception

The Supreme Court has stated a clear test of falsity in defamation law: a speech that “would have a different effect on the mind of the reader from that which the pleaded truth would have produced.”<sup>22</sup> This same definition has been invoked in cases involving commercial disparagement,<sup>23</sup> fraud,<sup>24</sup> intentional interference with business relationships,<sup>25</sup> false

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17. *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 155–56 (2003) (“Asbestosis [which indicates a nine to ten percent lifetime risk of contracting mesothelioma] is ‘a chronic, painful and concrete reminder that a plaintiff has been *injuriously* exposed to a substantial amount of asbestos, a reminder which may both qualitatively and quantitatively intensify his fear.” (quoting *Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 529 (Fla. Dist. Ct. App. 1985))); *see also* *Sinn v. Burd*, 404 A.2d 672, 683 (Pa. 1979) (limiting recovery for emotional distress to circumstances “where a reasonable person ‘normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances’ of the event” (quoting *Leong v. Takasaki*, 520 P.2d 758, 764 (Haw. 1974))).

18. *State v. Anonymous*, 377 A.2d 1342, 1343 (Conn. Super. Ct. 1977).

19. *See id.*

20. *Id.*

21. *See id.*

22. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (quoting ROBERT D. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 138 (1980)) (internal quotation marks omitted); *see also* *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (acknowledging that literally true, but misleading, defamatory statements are not First Amendment protected speech any more than are literally false and misleading defamatory statements of fact). Justice Byron White, sitting by designation on the Eighth Circuit, explained the validity of this “actual perception” test of falsity in defamation-by-implication cases in more detailed terms. *See* *Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 387 (8th Cir. 1996) (applying Minnesota law).

23. *See* *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 849 (9th Cir. 2001) (quoting *Masson*, 501 U.S. at 517); *Biospherics, Inc. v. Forbes, Inc.*, 989 F. Supp. 748, 752 (D. Md. 1997) (quoting *Masson*, 501 U.S. at 517).

24. *See* *Premier Elec. Constr. Co. v. Morse/Diesel, Inc.*, 628 N.E.2d 1090, 1099 (Ill. 1993) (“[A] common law fraud claim requires . . . that the misrepresentations must reach the plaintiff who must reasonably rely on them.”).

advertising,<sup>26</sup> and estate fraud.<sup>27</sup> In other words, the inquiry is whether the *actual* audience *perceived* a given speech to be associated with a specific false proposition.<sup>28</sup>

The fact that different audiences may differently perceive the same speech explains the result in a curious Pennsylvania Supreme Court case, in which the court upheld a jury's ruling that the same articles were true when printed in the *Philadelphia Inquirer* but false when reprinted in a tabloid.<sup>29</sup> This case demonstrates that the actual perception test of falsity makes the question of a speech's truth or falsity highly sensitive to the context of the speech.

However, the exact same courts sometimes *reject* an actual perception test of falsity. In an obstruction of justice case brought under 18 U.S.C. § 1001, the Supreme Court held,

It could be argued, perhaps, that a *disbelieved* falsehood does not pervert an investigation. But making the existence of this crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange; such a defense to the analogous crime of perjury is certainly unheard of.

“Grand jurors are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer.”<sup>30</sup>

Notable First Amendment treatise writers also sometimes call for limitations on judges' use of an actual perception test of falsity to identify implicated propositions, fearing that it is more malleable and subject to judges' personal proclivities and thus could result in more unlimited

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25. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 30 F. Supp. 2d 1182, 1193 (D. Ariz. 1998) (quoting *Masson*, 501 U.S. at 517).

26. See *Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144, 153 (2d Cir. 2007); *Rezec v. Sony Pictures Entm't Co.*, 10 Cal. Rptr. 3d 333, 343 (Cal. App. 2004); SACK, *supra* note 22, at 138.

27. *In re Hollis' Estate*, 12 N.W.2d 576, 581 (Iowa 1944) (“In general, fraud deceives the testator's mind . . .”).

28. 1 ROBERT D. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS* § 2.4.5, at 2–34 (4th ed. 2010) (“A publisher is, in general, liable for the implications of what he or she has said or written, not merely the specific, literal statements made.”). Elsewhere, I have referred to propositions that are associated with a sufficiently common audience perception of a speech as propositions that are “implicated” by that speech. See Christopher P. Guzelian, *Scientific Speech*, 93 IOWA L. REV. 881, 898–905 (2008).

29. *McDermott v. Biddle*, 674 A.2d 665, 665–66, 669 (Pa. 1996).

30. *Brogan v. United States*, 522 U.S. 398, 402 & n.1 (1998) (quoting *United States v. Abrams*, 568 F.2d 411, 421 (5th Cir. 1978)).

liability than could be achieved through an alternative test—such as a “literal” test of falsity.<sup>31</sup>

### 3. *Similarly Situated Reasonable Audience False Perception*

Sometimes courts are not interested in the actual audience’s perception of which proposition is at issue—indeed they expressly discount that perception—but instead focus upon whether a *similarly situated reasonable* audience would associate a false proposition with a statement.<sup>32</sup> The test of how reasonable audiences respond is quite commonplace in First Amendment—and other—jurisprudence, ranging from Free Exercise Clause jurisprudence<sup>33</sup> to cryptic student speech<sup>34</sup> to tort cases involving awards of fear damages based on the reasonability of audience perception.<sup>35</sup>

31. See 1 SACK, *supra* note 28, § 2.4.5, at 2–35 (decrying overuse of actual perception test in defamation cases). See *infra* pp. 31–33 for a discussion of the literal test of falsity.

32. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring).

33. Free Exercise Clause cases are the First Amendment category in which the Court has expressly articulated an “objective” test of perception. See *Wallace*, 472 U.S. at 76, 83 (stating the “objective observer” test). The objective observer supposedly has limited local knowledge of the scene in which the event occurred and is acquainted with the “text, legislative history, and implementation of the statute,” along with general principles of free exercise jurisprudence. *Id.* at 76; see also *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308 (endorsing O’Connor’s objective observer test).

34. *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (“Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.”).

35. See *Williamson v. Waldman*, 696 A.2d 14, 21 (N.J. 1997). The Court in *Williamson* noted,

[I]n determining legal responsibility for emotional injury attributable to the fear of contracting AIDS. . . . [P]ersistence of ignorance about AIDS . . . dominates the reasoning of . . . many courts . . . . Therefore, as a matter of sound public policy, the standard of proximate cause should require as an element of the test of causation a level of knowledge of the etiology and risks of AIDS that can serve to overcome and effectively discourage the kind of ignorance that nourishes the hysteria and irrational fear of contracting AIDS, which, in turn, perpetuate the prejudice and discrimination that surround the AIDS epidemic. . . . [T]he reasonableness standard should be enhanced by the imputation to a victim of emotional distress based on the fear of contracting AIDS of that level of knowledge of the disease that is then-current, accurate, and generally available to the public.

*Id.*; accord *Pichowicz v. Hoyt*, No. Civ. 92–388–M, 2000 WL 1480445, at \*4 (D.N.H. Feb. 11, 2000) (rejecting fear of cancer claim because plaintiffs did not prove by a

Take a recent Fourth Amendment example. A state trooper stops a driver and says, “If the dog doesn’t indicate anything, then we’ll get you going,” immediately after which the trooper asked what the driver would “think about it if I had a dog come and go around the vehicle?” The Eighth Circuit panel focused not on whether the actual driver believed those statements to associate with the proposition “You are free to leave if you wish,” but rather whether a similarly situated reasonable driver could have understood from the trooper’s statement and question that the driver was free to leave.<sup>36</sup>

Or take another case when a federal district court prohibited expert semiotic testimony that would have purported a fish symbol on a city seal not to necessarily be indicative of Christianity.<sup>37</sup> The court reasoned that “the proper inquiry [is] how the average reasonable observer interprets the symbolic fish on the city seal of Republic.”<sup>38</sup> Oddly, the court then proceeded to lay heavy emphasis on evidence that actual residents, not the average reasonable resident, believed the symbol to be Christian in meaning. Thus, although the court *articulated* a similarly situated reasonable observer test, it appears to have *used* an actual perception test.<sup>39</sup>

#### 4. *Quantified False Perception*

One might surmise that an actual perception or similarly situated reasonable observer test would mean that courts commonly use some objective metric to establish what propositions audiences believed as a result of a speech. However, this is not the case. As Georgetown Professor Rebecca Tushnet notes, “[T]he Supreme Court routinely fails to engage in any serious analysis of an audience’s perceptions, relying instead on often unarticulated guesses about what the audience would understand.”<sup>40</sup>

Some courts—particularly in commercial speech or Sherman Act antitrust cases involving false speech—seek to overcome this “thumb in the air” approach to gauging audience perceptions of propositions by

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preponderance of the evidence that low level contaminants in their well caused neurotoxic effects, meaning their fears were “unreasonable”).

36. See *United States v. Grant*, 696 F.3d 780, 784 (8th Cir. 2012) (“The test for whether a person has been ‘seized’ within the meaning of the Fourth Amendment is an ‘objective standard’ that looks to whether a reasonable person would have believed that he was not free to leave.” (citing *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988))).

37. *Webb v. City of Republic, Mo.*, 55 F. Supp. 2d 994, 998 (W.D. Mo. 1999).

38. *Id.*

39. *Id.* at 999 (“Based on . . . especially the statements by the citizens of Republic itself, the Court finds that no genuine issue of material fact remains in dispute on whether the fish symbol on Republic’s city seal is a religious symbol.”).

40. Rebecca Tushnet, *It Depends on What the Meaning of “False” Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 *LOY. L.A. L. REV.* 227, 256 (2007).

requiring rigorous, well-designed market surveys of similarly situated audiences—or even of the same audience under resampled conditions. If some minimum percentage of the audience or readership—fifteen to twenty percent—does not acquire a false perception of a specifically tested proposition because of the speech presented to it, the speech is considered true.<sup>41</sup>

Yet despite these courts' insistence that falsity is objectively measured through well-crafted consumer surveys, some judges disfavor survey usage—even in commercial speech cases—to quantify linguistic perceptions of propositions.<sup>42</sup> Indeed, Federal Seventh Circuit Judge Richard Posner has referred to word surveys as products of the “black arts,” believing them to be highly manipulable.<sup>43</sup>

### 5. *Literal Truth*

Both legislatures and courts sometimes invoke a *literal* test of falsity rather than an actual perception test, similarly situated reasonable perception test, or quantified perception test.<sup>44</sup> Courts and laws adopting this stance have, for example,

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41. See *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226, 249 (S.D.N.Y. 2005) (noting that courts depend on quantified perception (citing *Johnson & Johnson-Merck Consumer Pharm. Co. v. Rhone-Poulenc Rorer Pharm., Inc.*, 19 F.3d 125, 134 n.14 (3d Cir. 1994); *Johnson & Johnson \* Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992))); cf. *Heary Bros. Lightning Prot. Co. v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1048 (D. Ariz. 2003) (“Different courts have taken different positions on whether speech that is . . . false or misleading may constitute ‘improper’ or unreasonable conduct that can form the basis of antitrust liability.”), *aff’d in part, rev’d in part*, 262 F. App’x 815 (9th Cir. 2008).

42. See, e.g., *In re Kraft*, 114 F.T.C. 40, 136, 138 (1991) (invoking “reasonable consumer” test in commercial speech case but declining to adopt quantified perception approach), *enforced*, *Kraft, Inc. v. F.T.C.*, 970 F.2d 311 (7th Cir. 1992); *Res. Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 140 (2d Cir. 1991) (rejecting market survey approach as unreliable and holding that “expenditure by a competitor of substantial funds in an effort to deceive consumers . . . justifies the existence of a presumption that consumers are, in fact, being deceived” (quoting *U-Haul Int’l, Inc. v. Jartran Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986)) (internal quotation marks omitted)).

43. *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd.*, 34 F.3d 410, 416 (7th Cir. 1994).

44. See, e.g., *Kasky v. Nike, Inc.*, 45 P.3d 243, 268 (Cal. 2002) (Brown, J., dissenting). Justice Brown wrote,

[Consider statutes that] “prohibit not only advertising which is false, but also advertising which, although true, is either actually misleading or *which has a*

- permitted damages for false statements during a political candidacy only for literal falsehoods;<sup>45</sup>
- enjoined “facially false” hair product advertisements “without regard to consumer reaction”;<sup>46</sup> and
- sanctioned the marking of products with false patent numbers only for literally falsely printed patent numbers.<sup>47</sup>

Even for literal speech, there can be disagreement about what proposition is at issue. Two people hearing the same speaker might derive different meanings from the same words based on, say, perceived intonation. There is, after all, a marked difference in which proposition should be associated with each of two spoken variants of two near identical literal expressions:

- (A) “The panda comes in the room and eats shoots and leaves.”
- (B) “The panda comes in the room and eats, shoots, and leaves.”

If the speech were in written form, the court might take care and distinguish the two. If the speech were in audible form, a party may not have such luck in convincing a court that the relevant proposition was A, not B—or vice versa—despite identical wording of the oral speech.<sup>48</sup>

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*capacity, likelihood or tendency to deceive or confuse the public.”* This broad definition of actionable speech puts a corporation “at the mercy of the varied understanding of [its] hearers and consequently of whatever inference may be drawn as to [its] intent and meaning.” Because the corporation could never be sure whether its [literally] truthful statements may deceive or confuse the public and would likely incur significant burden and expense in litigating the issue, “[m]uch valuable information which a corporation might be able to provide would remain unpublished. . . .” As the United States Supreme Court has consistently held, such a result violates the First Amendment.

*Id.* at 272 (citations and internal quotation marks omitted) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 n.21 (1978); *Thomas v. Collins*, 323 U.S. 516, 535 (1945); *Kasky*, 45 P.3d at 250 (majority opinion)). Elsewhere I have suggested that a literalist approach of falsity is not preferable in false speech litigation. See Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 683–95 (2010).

45. See *In re Chmura*, 626 N.W.2d 876, 887 (Mich. 2001).

46. *Vidal Sassoon, Inc. v. Bristol-Meyers Co.*, 661 F.2d 272, 277 (2d Cir. 1981).

47. 35 U.S.C. § 292 (2006).

48. This is not silly wordplay; the debate about which is the correct proposition to associate with the Second Amendment turns in part on placement of a single comma in some variants of the original document, even though the comma is lacking in others. Compare U.S. CONST. amend. II, with *A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875*, AM. MEMORY FROM THE LIBR. OF CONGRESS 1, 21 (2013), <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=144>.

Even if there is perfect agreement about the literal speech, there can still be dissent about what the appropriately associated *proposition* is. Consider a speaker who says,

“Barney is gay!”

If the speaker is referencing a 1960s Flintstones character, he might be expressing the character’s joy and happiness. A different speaker might instead be asserting Barney’s homosexuality. If Barney filed a defamation lawsuit against the speaker or those who publicized the statement, a literalist approach without intensive contextual inquiry could not aid the decision of which proposition to associate.

### 6. *Subjective Intent*

Sometimes courts gauge falsity by the speaker’s *subjective intent* to render a false message:

- “[T]he Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood”;<sup>49</sup>
- “[A]ctual deception [is not] necessary to establish mail fraud if the defendant had the conscious intent to defraud”;<sup>50</sup>
- “[F]alsely,’ [as used] in a criminal statute, suggests something more than a mere untruth and includes . . . [the] ‘intent to defraud’”;<sup>51</sup>
- “In jurisprudence, . . . the word ‘false’ implies something more than mere untruth: it imports knowledge and a specific intent to deceive”;<sup>52</sup>
- To make “false statements” in an application for a driver’s license requires guilty knowledge as an essential element of the offense;<sup>53</sup> and

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49. United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (plurality opinion).

50. United States v. Svete, 556 F.3d 1157, 1166 (11th Cir. 2009).

51. United States v. Achtner, 144 F.2d 49, 52 (2d Cir. 1944) (quoting Dombroski v. Metro. Life Ins. Co., 19 A.2d 678, 680 (N.J. 1941); United States v. Otey, 31 F. 68, 70 (C.C.D. Or. 1887)).

52. State v. Tedesco, 397 A.2d 1352, 1358 (Conn. 1978).

53. Commonwealth v. Kraatz, 310 N.E.2d 368, 372 (Mass. App. Ct. 1974).



- *Falsely* means willfully untrue, showing consciousness of guilt.<sup>54</sup>

Courts that have invoked the subjective intent test of falsity occasionally go so far as to claim the test is the default test of falsity.<sup>55</sup>

### 7. Legislative or Agency Definition

Finally, truthfulness may be judged by whether a speech conforms to a statutory or regulatory *definition*. For instance, the Dolphin Protection Consumer Information Act indicates the phrase “dolphin safe tuna” is a false label “if the product contains tuna harvested . . . on the high seas by a vessel engaged in driftnet fishing” or tuna harvested “outside the eastern tropical Pacific Ocean by a vessel using purse seine nets” that are not dolphin safe.<sup>56</sup> Yet the Act offers a speaker no opportunity to rely upon audience perception in arguing the truthfulness of the speech; falsity is determined by whether the speech meets the statutory definition. Whether that statutory definition represents common or actual public perception of the phrase “dolphin safe tuna” and is therefore an “efficient” definition typically remains an untested premise.<sup>57</sup>

Many similar statutory or regulatory definitional truths exist: “safe and effective” pharmaceuticals,<sup>58</sup> “organic” food,<sup>59</sup> appropriate labeling of specific products as “sports bags,” “toys,” “baseball equipment,” “backpacks,”<sup>60</sup> “pro forma” financial disclosures under the Sarbanes-Oxley Act,<sup>61</sup> and a myriad of other definitions.

It is also unclear whether courts should give deference to legislative or regulatory stipulations about false speech. The Fifth Circuit struck down Louisiana’s “Cajun” statute, which defined all fish sold in Louisiana

54. See *City of Boston v. Santosuosso*, 30 N.E.2d 278, 304–05 (Mass. 1940).

55. *State v. Monastero*, 424 N.W.2d 837, 848 (Neb. 1988) (“Courts have generally determined that the word *false* or *falsely* means ‘intentionally untrue’ or deceitful, implying an intention to perpetrate a fraud.”).

56. 16 U.S.C. § 1385 (2012).

57. Cf. *Tushnet*, *supra* note 40, at 248–49.

58. *Ass’n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin.*, 226 F. Supp. 2d 204, 206 (D.C. Cir. 2002) (citing 21 U.S.C. § 355(a) (2000)).

59. 7 C.F.R. §§ 205.200–299 (2013) (detailing extensive USDA requirements for the production and processing of food sold as “organic”).

60. *Processed Plastic Co. v. United States*, 29 Ct. Int’l Trade 1129 *passim* (2005); *Minnetonka Brands v. United States*, 24 Ct. Int’l Trade 645 *passim* (2000); *New York Merch. Co. v. United States*, 294 F. Supp. 971, 976 (Cust. Ct. 1969).

61. 15 U.S.C. § 7261(b) (2012) (authorizing regulatory framework for pro forma financial disclosures that depart from generally accepted accounting principles); see also Henry T. C. Hu, *Too Complex To Depict? Innovation, “Pure Information,” and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601, 1610, 1619 n.51 (2012) (citing 15 U.S.C. § 7261 as a crucial component of the Sarbanes-Oxley Act).

under the marking “Cajun” to be catfish of Louisiana origin.<sup>62</sup> Consequently, a company using the marking for fish imported from China that were a different species than domestic catfish was free to continue its use of the term *Cajun*.<sup>63</sup> The Fifth Circuit reasoned that because the importer was largely selling to wholesalers and clearly labeled the product’s country of origin, there was little risk of *actual* deception—an actual perception test of falsity—and thus, Louisiana’s law was invalid as applied to the importer.<sup>64</sup>

By inexplicable contrast, a California appeals court deferred to a restrictive California statute that required any product sold in California and labeled “Made in the USA” not only to be manufactured in the United States but to have its component parts manufactured in the United States.<sup>65</sup>

Thus, even when legislatures ostensibly decree what proposition should be associated with a specific “term of art” speech, some courts apparently do not feel compelled to limit or conform their false speech inquiries to that proposition, but others do.

A. *Case Study of the “Association” Problem:  
The Stolen Valor Act*

*United States v. Strandlof* was a Tenth Circuit case among several recently before the courts centering on the Stolen Valor Act (SVA).<sup>66</sup> The SVA criminally penalized anyone who “falsely represent[ed]” to have been awarded military honors.<sup>67</sup> Rick Strandlof was a Colorado man who had never served in the military, yet claimed significant military honors as a Marine in Iraq, resulting in a leadership role in several volunteer veterans’ fundraising organizations and meetings with numerous state and federal politicians.<sup>68</sup> In a sister case in the Ninth Circuit, *United*

62. *Piazza’s Seafood World, LLC v. Odom*, 448 F.3d 744, 746, 753 (5th Cir. 2006).

63. *See id.* at 745–46, 753.

64. *Id.* at 753.

65. *Benson v. Kwikset Corp.*, 62 Cal. Rptr. 3d 284, 293, 295–95 (Cal. App. 2007).

66. 667 F.3d 1146, 1151 (10th Cir. 2012), *abrogated by* *United States v. Alvarez*, 132 S. Ct. 2537 (2012), and *vacated*, 684 F.3d 962 (10th Cir. 2012).

67. 18 U.S.C. § 704(b) (2012).

68. *Strandlof*, 667 F.3d at 1151–52; *see also Fake Military Veteran Hid Under ‘Ocean of Lies,’* CNN, <http://www.cnn.com/2009/CRIME/06/11/veteran.imposter/> (last updated June 12, 2009, 1:05 PM) (“He canvassed Colorado appearing at the sides of politicians.”). Strandlof also claimed he never accepted compensation for his activities.

*States v. Alvarez*, the defendant Xavier Alvarez claimed as part of an election victory speech for a position on a municipal water board that he had won the Congressional Medal of Honor, when he had not.<sup>69</sup>

Within the text of the SVA, there is no mention of how to determine whether a given speech about military honors is false.<sup>70</sup> By the SVA's omission of an explicit definition, we can surmise that Congress ruled out a statutory definition approach to defining *falsity*. The SVA's silence presumably means it is up to a court to decide. An experiential approach would lead to conclusions about truth or falsity as varied as are judges' personal judgments. If a judge instead chooses a subjective intent test of falsity, Strandlof and Alvarez were guilty—most likely. If a judge chooses a literal falsity approach, Strandlof and Alvarez were likewise guilty, as they did not win military honors.<sup>71</sup>

However, the prosecutor in *Strandlof* did not allege that Strandlof's audience was ultimately fooled by his representations—an actual perception approach—nor did he allege that a reasonable audience or quantified percentage of a reasonable or the actual audience was or would have been fooled by his misrepresentations—similarly situated reasonable audience perception—or by quantified false perception approaches.<sup>72</sup> Indeed, Alvarez in particular did not fool his audience by his misrepresentations of winning the Congressional Medal of Honor.<sup>73</sup> It appears they in fact reported him to the FBI for his misrepresentations.<sup>74</sup> Thus, application of an actual perception test would resoundingly determine that Alvarez did *not* speak falsely.

We see that depending on which method of association a court selects, a different conclusion—whether the speech is true or false, or even whether an inquiry into falsity is philosophically justifiable or possible—can be reached.<sup>75</sup> It may be that different speech contexts require different methods. But without clear First Amendment explanation of when and why one specific criterion for association is selected over another, the choice is arbitrary, and it is impossible to predict whether one's speech is true or false, and in turn, protected or potentially unprotected.

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See Dan Frosch & James Dao, *A Military Deception, Made Easier by a Reluctance To Ask Questions*, N.Y. TIMES, June 8, 2009, at A10.

69. 617 F.3d 1198, 1200 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2357 (2012) (plurality opinion).

70. See 18 U.S.C. § 704 (2012).

71. See *Strandlof*, 667 F.3d at 1151; *Alvarez*, 617 F.3d at 1200.

72. See *Strandlof*, 667 F.3d at 1151–52 (noting that local veterans suspected Strandlof and subsequently reported him to the FBI).

73. *Alvarez*, 617 F.3d at 1201.

74. *Id.*

75. See *infra* Part III.

## III. PROPOSITIONS: THE TRUTH OR LIE BEHIND THE SPEECH

Let us now turn to a short discourse on truth. Wishing to avoid simply restating a philosophy treatise,<sup>76</sup> this Article offers only a few prefatory comments about propositions and then turns to some practical evidence about related courtroom controversies.

We saw previously that the court must first associate a proposition with an allegedly offending instance of false speech. A secondary typical inquiry by courts, once they have so associated a proposition, is *to determine whether the proposition is true or false*.<sup>77</sup>

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76. Here is an important up-front confession: I am mostly self-educated in philosophy, deferring gladly and respectfully to my academic colleagues who are vastly superior in breadth and depth of study. See Mark Oppenheimer, *The Philosopher Kingmaker*, BOSTON GLOBE (Apr. 20, 2008), [http://www.boston.com/bostonglobe/ideas/articles/2008/04/20/the\\_philosopher\\_kingmaker/?page=full](http://www.boston.com/bostonglobe/ideas/articles/2008/04/20/the_philosopher_kingmaker/?page=full) (summarizing lively academic disputes about philosophy and its relation to jurisprudence). Initially, I drafted for this Article a summarizing, illustrative survey of philosophical controversies related to the topic of truth. I decided to redact this material given space limitations and desire for readability.

Had I included a more robust philosophical summary herein, my aim would have been only to muster evidence that there is extensive disagreement among academics as to whether and how to determine the truth of any given proposition. Some eminent legal philosophers claim—perhaps rightly so—that if I were to set cautious pen to paper about these disputes, the very fact that I am doing so—and the content that I would select, perhaps errantly, to support my contentions—might truthfully say more about my temperament than about deriving answers about propositions’ truthfulness. See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, 100 GEO. L.J. 865, 883–84 (2012).

77. See *infra* note 83. Doug Groothuis provides a summarization of this classical understanding of true belief and speech. He writes,

Our beliefs and statements concern propositions about reality. We either assent to them, deny them or suspend judgment about them. Reality or actuality concerns objects or states of affairs, either real or imaginary. D. Elton Trueblood gives a helpful breakdown:

*Minds* may be knowing or ignorant.

*Propositions* may be true or false.

*Objects* may be real or imaginary.

For example, unicorns are imaginary *objects*; therefore, the *proposition* “Unicorns do not exist” is true, and when my *mind* assents to this proposition, I know it to be true.

DOUGLAS GROOTHUIS, TRUTH DECAY: DEFENDING CHRISTIANITY AGAINST THE CHALLENGES OF POSTMODERNISM 89 (2000) (footnote omitted) (quoting DAVID ELTON TRUEBLOOD, GENERAL PHILOSOPHY 47 (Baker Book House 1976) (1963)). Under this classical definition of *true speech*, false speech would be its negation: speech that reflects as correct—or incorrect—a correspondingly false—or true—proposition about a real or imaginary object.

Even here I must pause and acknowledge that my bias and temperament shines radiantly through by restricting a philosophical discussion about truth to propositions. Propositional truth is the classical conception of truth, but over time, a “truth divide” has grown and commonness of assent to this traditional approach to truth has waned.<sup>78</sup> For instance, some thinkers have come to the strong skeptical or agnostic conclusion that there is or may be no reality or truth beyond human power struggles or language games.<sup>79</sup> Others claim—either explicitly or implicitly—that truth is relative and subjective and that there may not be a singular reality and truth—that the class of real objects and phenomena may vary with the observer<sup>80</sup> or that no generalizable truths exist because truth is a contextually specific and highly complex social and power construct based on ethnicity, race, religion, gender, class, et cetera that results in multiple coexistent truths.<sup>81</sup>

Acknowledging these and other alternatives, but in defense of classicism, most judges still write as if they adhere to classicism, believing there is a single objective reality, typically reducible to articulable and answerable propositional form.<sup>82</sup> Propositions under the classical view have a unique *truth-value*.<sup>83</sup> they can be (1) *true*—a fact or a certainty; (2) *false*—an impossibility or a falsehood; or (3) *uncertain*—an uncertainty.<sup>84</sup> Even

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78. See GROOTHUIS, *supra* note 77, at 11.

79. See FRIEDRICH NIETZSCHE, *On Truth and Lie in an Extra-Moral Sense*, in THE PORTABLE NIETZSCHE 42, 46–47 (Walter Kaufmann ed. & trans., 1954).

80. See, e.g., NELSON GOODMAN, WAYS OF WORLDMAKING 3–4 (1978) (taking an agnostic “irrealist” stance as to the existence of a reality independent of the observer); 1 RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS 1, 12–13, 17 (1991) (arguing that objective perceptions of reality are unnecessary).

81. See, e.g., Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 792–93 (1982).

82. For instance, see Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CALIF. L. REV. 1743, 1750–51 (2000), for a discussion of judicial classicism in contract law.

83. There is a class of propositions, known as “liar paradoxes,” for which it is not clear whether there *is* a truth-value. See R. M. SAINSBURY, PARADOXES 128–29 (3d ed. 2009) (describing and analyzing the liar paradox exemplified by statements such as “What I am now saying is false”). For instance, “This sentence is false,” if true, is false. See *id.* If false, it is true. See *id.* Liar paradoxes are not propositions relevant in courts, to my knowledge. Also some have tried to show that there are mathematical “supervaluations” of truth-values that appear neither true nor false, but it has been cautioned not always to equate such mathematical niceties with actual truth. See Nuel Belnap, *Truth Values, Neither-True-Nor-False, and Supervaluations*, 91 STUDIA LOGICA 305, 333 (2009).

84. See GOTTLÖB FREGE, *Über Sinn und Bedeutung*, 100 ZEITSCHRIFT FÜR PHILOSOPHIE UND PHILOSOPHISCHE KRITIK 25 (1892), in THE FREGE READER 151, 157–58 (Michael Beaney ed., 1997). From the standpoint of an omniscient being, a truth-value may never be deemed uncertain, but from a human or limited being’s perspective, we often must entertain the possibility of the category, which deviates from Frege’s original conception of bivalent truth-values, as true or false. The concept in mathematics of many valued

among classical proponents, however, some contend that truth-values are not binary—true or false—but that there are *degrees* of truth and falsity. For example, truth-values could be “extremely true,” “substantially true,” or “somewhat false.”<sup>85</sup>

Classically, one can also distinguish three categories of philosophically and legally relevant propositions:

- (1) *data propositions*—*sensory claims*, whether directly or indirectly sensed through the five senses or augmentations thereof, for example, “We ‘saw’ a bottom quark using the electron microscope,” or *testimonial claims* based on sensory claims, for example, “The eyewitness told me he saw the man draw a gun and shoot the victim in the chest”;<sup>86</sup>
- (2) *causation propositions*—*relational claims* of cause and result, for example, “Smoking causes lung cancer,” scientific; or “Increases in a product’s supply, all else being equal, decreases its price,” social-scientific; or “Workers of the world unite, for a worker’s paradise will be brought about by the continued oppression by capitalists,” historical;<sup>87</sup> and

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logic was pioneered by Łukasiewicz, JAN ŁUKASIEWICZ, *SELECTED WORKS* 153 (L. Borkowski ed., 1970), and expanded upon by Gödel, 1 KURT GÖDEL, *Zum Intuitionistischen Aussagenkalkül*, in KURT GÖDEL COLLECTED WORKS 222, 222–25 (Solomon Feferman ed., 1986).

85. See L. A. Zadeh, *Fuzzy Logic and Approximate Reasoning*, 30 *SYNTHESE* 407, 407–10, 415 (1975); accord *Bustos v. A&E Television Networks*, 646 F.3d 762, 762 (10th Cir. 2011) (finding that a defamatory proposition “may not be *precisely* true, [but] it is *substantially* true. And that is enough to call an end to this litigation as a matter of law”).

86. See Guzelian, *supra* note 28, at 885.

87. See *id.*; accord Christopher Robertson, *When Truth Cannot Be Presumed: The Regulation of Drug Promotion Under an Expanding First Amendment*, 94 *B.U. L. REV.* 545, 546 (2014) (opining that courts should defer to Food and Drug Administration clinical trial standards in determining questions of causation for pharmaceutical marketing). There are extensive controversies as to whether history is open to causal analysis. See, e.g., LUDWIG VON MISES, *MARXISM UNMASKED: FROM DELUSION TO DESTRUCTION* (2006) (discussing the merits of socialism and capitalism). Mises wrote,

Hegel was the man who destroyed German thinking and German philosophy for more than a century, at least. He found a warning in Immanuel Kant . . . who said the philosophy of history can only be written by a man who has the courage to pretend that he sees the world with the eyes of God. Hegel believed he had the “eyes of God,” that he knew the end of history, that he knew the plans of God.

*Id.* at 8–9. Similarly, Popper stated,

- (3) *viewpoints*—propositions that may not necessarily have truth-values associated with them, for example, aesthetic propositions such as “Blue is the most beautiful color.”<sup>88</sup>

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[S]elective approaches fulfil[i] functions in the study of history which are in some ways analogous to those of theories in science. It is therefore understandable that they have often been taken for theories. And indeed, those rare ideas inherent in these approaches which can be formulated in the form of *testable hypotheses*, whether singular or universal, may well be treated as scientific hypotheses. But as a rule, these historical ‘approaches’ or ‘points of view’ *cannot be tested*. They cannot be refuted, and apparent confirmations are therefore of no value, even if they are as numerous as the stars in the sky. We shall call such a selective point of view or focus of historical interest, if it cannot be formulated as a testable hypothesis, a *historical interpretation*.

Historicism mistakes these interpretations for theories. This is one of its cardinal errors.

KARL R. POPPER, *THE POVERTY OF HISTORICISM* 151 (Harper & Row 1964) (1957).

88. Even for matters of aesthetics, widely considered to be a matter of taste, some insist that there are truths to discover or ignore. Consider architect Frank Lloyd Wright’s thoughts about beauty:

Nature . . . alone can save us from the hopeless confusion of ideas that has resulted in the view that beauty is a matter of caprice, that it is merely a freak of imagination—to one man divine, to another hideous, to another meaningless. We are familiar with the assertion, that, should a man put eleven stovepipe hats on top of the cornice of his building and find them beautiful, why then they are beautiful. Yes, perhaps to him; but the only possible conclusion is, that, like the eleven hats on the cornice, he is not beautiful, because beauty to him is utter violation of all the harmonies of any sequence or consequence of his own nature. To find inorganic things of no truth of relation beautiful is but to demonstrate the lack of beauty in oneself and one’s unfitness for any office in administering the beautiful and to provide another example of the stultification that comes from the confusion of the curious with the beautiful.

Education seems to leave modern man less able than the savage to draw the line between these qualities.

Frank Lloyd Wright, *Ausgeführte Bauten und Entwürfe von Frank Lloyd Wright* (1910), reprinted in 1 FRANK LLOYD WRIGHT COLLECTED WRITINGS 101, 105 (Bruce Brooks Pfeiffer ed., 1992).

This dispute also occurs sometimes for *moral* propositions. See, e.g., ALFRED JULES AYER, *LANGUAGE, TRUTH, AND LOGIC* (Dover Publ’ns 1952) (1946) (conceptualizing different truth-values); R. M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* (1981) (discussing the properties of moral language); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944) (characterizing the meaning of moral terms). For instance, if one says, “Murder is a wrong,” a data proposition, or “Murder is a wrong that must be punishable by death,” a moral causal proposition, these are sometimes said to be viewpoints—value judgments not associated with a truth-value. Courts certainly do not recognize them as such, as all U.S. courts agree that murder is wrong. Also, the question of whether objective moral truths can exist independently of a *mind* or an *evaluator* of them is contended. See generally WILLIAM LANE CRAIG & WALTER SINNOTT-ARMSTRONG, *GOD? A DEBATE BETWEEN A CHRISTIAN AND AN ATHEIST* (2004) (debating the existence of “God”). In describing the Court’s disdain for viewpoint discrimination, Justice Brennan once stated, “Viewpoint discrimination is censorship in its purest form and government regulation

Clearly, for potentially legally relevant propositions drawn from topics ranging from religion, science, social sciences, history, and mathematics to the arts, et cetera, true answers to data propositions—whether an eyewitness really remembered the scene correctly—and causation propositions—whether a pharmaceutical caused liver toxicity—are indispensable in resolving false speech cases. Equally wise judicial restraint knows *not* to seek or demand answers for viewpoints for which there is no known or knowable truth. Yet for many legally relevant propositions, there is widespread disagreement whether to assign a truth-value, and if so, which.

We could put the issue another way: any reliable judicial classification of a historical instance of speech as “false speech” presupposes the court as having competently considered and answered for the associated proposition, or propositions, relevant questions of (1) *ontology*, whether the phenomenon described by the proposition exists and is knowable, (2) *epistemology*, whether the proposition’s truth-value is known, and (3) *methodology*, how that truth-value is known. For instance, in deciding whether a scientific speech is false—“The extensive worldwide release of chlorofluorocarbons causes a hole in the ozone layer”—one cannot reliably reach a conclusion without a court’s analysis of an associated proposition, which in this instance, might be the same statement as the speech itself and its truth-value, known to be true, false, or uncertain by a reliable method.<sup>89</sup>

Finally and importantly, a great number of disagreements about the truth-values of propositions occur—as evidenced in philosophical controversies treatises<sup>90</sup>—because some evaluators adopt either broadly or narrowly (1) blind faith in the validity of a certain truth-value, true, false, or uncertain, for instance, there are a variety of seemingly irreconcilable divides between various naturalist and religious adherents based on certain propositions’ truthiness,<sup>91</sup> or (2) some form of philosophical or methodological skepticism.<sup>92</sup>

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that discriminates among viewpoints threatens the continued vitality of ‘free speech.’” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

89. See Guzelian, *supra* note 28, at 885.

90. See *infra* notes 91–92.

91. Compare RICHARD DAWKINS, *THE GOD DELUSION* 227 (2006) (arguing that God does not exist and is not needed to ensure humans act in morally acceptable ways), and SAM HARRIS, *LETTER TO A CHRISTIAN NATION* 89–90 (2006) (arguing that Christians fail to embrace reality), with FRANCIS S. COLLINS, *THE LANGUAGE OF GOD: A SCIENTIST*



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PRESENTS EVIDENCE FOR BELIEF 5–6 (2006) (arguing that a scientist may believe in both God and science), C. S. LEWIS, *MIRACLES: A PRELIMINARY STUDY* 67–73 (HarperCollins 2001) (1947) (accepting God’s existence and exploring the nature of miracles), and 1 AUGUSTINE, *THE LITERAL MEANING OF GENESIS*, in 42 *ANCIENT CHRISTIAN WRITERS* 1, 7 (Johannes Quasten et al. eds., John Hammond Taylor trans., 1982) (examining God’s creation of men and their souls). Some differentiate scientific and social scientific knowledge from all other forms of “knowledge”—such as philosophy, morality, religion, politics, or ethics—because knowledge of the latter cannot be proven by empirical methods or logic and is therefore largely subjective. See, e.g., David Barnhizer, *Roe v. Wade and the Conflict Between Legal, Political and Religious Truth* (Cleveland-Marshall Coll. of Law, Working Paper No. 05-104, 2006), available at <http://ssrn.com/abstract=684161> (acknowledging different forms of truth). Others disagree with this assessment. See, e.g., MICHAEL HUEMER, *ETHICAL INTUITIONISM* 99, 103, 123 (2005) (contending that there is objective, knowable moral truth). These authors appeal to various human “intuitions” to demonstrate that objective truth and knowledge exist in nonscientific fields of inquiry. See *id.* The Catholic Church investigates and decides the veracity of reported miracles as part of a saint’s beatification, yet Kierkegaard and Hume contended that even if such events exist, there is no reliable method for knowing them to be true. See DAVID HUME, *AN INQUIRY CONCERNING HUMAN UNDERSTANDING* 173 (Charles W. Hendel ed., Bobbs-Merrill Co. 1982) (1748) (“If we take in our hand any volume—of divinity or school metaphysics, for instance—let us ask, *Does it contain any abstract reasoning concerning quantity or number?* No. *Does it contain any experimental reasoning concerning matter of fact and existence?* No. Commit it then to the flames, for it can contain nothing but sophistry and illusion.”); Jyrki Kivelä, *Kierkegaard on Miracles: Introductory Observations*, 43 *SØREN KIERKEGAARD NEWSL.* (Howard & Edna Hong Kierkegaard Library), Feb. 2002, at 11, 13 (citing 3 *SØREN KIERKEGAARD’S JOURNALS AND PAPERS* 198 (Howard V. Hong & Edna H. Hong eds. & trans., 1975)). But see LEWIS, *supra* note 91, at 3–5 (arguing that miracles can be true).

92. Consider as example the methodological skeptics. There are various schools of skeptics who contend that many empirical propositions are unknowable—and thus unknown—precisely because no consistent empirical method exists by which to extract or create knowledge. See Gary Lawson, *Efficiency and Individualism*, 42 *DUKE L.J.* 53, 70 n.55 (1992) (noting the skepticism of Austrian economists regarding empirical work in economics); Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 *NOTRE DAME L. REV.* 449, 470–72 (2006) (discussing judges’ skepticism about empirical methodologies in regards to studies about jury instructions). Witness Nietzsche, who claimed that scientific claims are but metaphors hardened into truths, FRIEDRICH NIETZSCHE, *On Truth and Lies in a Nonmoral Sense*, in *PHILOSOPHY AND TRUTH: SELECTIONS FROM NIETZSCHE’S NOTEBOOKS OF THE EARLY 1870’S*, at 79, 79–97 (Daniel Breazeale ed. & trans., 1979), or Feyerabend, who believed that there is no philosophical method for differentiating scientific and mythological propositions, PAUL FEYERABEND, *AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE* 296 (1975); cf. MICHAEL HUEMER, *SKEPTICISM AND THE VEIL OF PERCEPTION* (2001) (providing a readable overview of skepticism and a direct realist’s rebuttal to it). Still others—Rorty and Kuhn—have posited that what is known does not necessarily, or even often, correspond with what is true—if there even is a truth. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 170–71 (3d ed. 1996); Richard Rorty, Univ. of Va., *From Logic to Language to Play* (Nov. 10–15, 1985), in 59 *PROC. & ADDRESSES AM. PHIL. ASS’N* 747, 753 (1986).

*A. Courtroom Controversies About Propositions*

(1) Deciding what truth is, (2) whether truth is knowable, (3) whether it is known, and (4) how to reliably know the truth may at a glance seem more appropriate inquiries for philosophers than judges. But law cannot escape these pressing questions of how to resolve philosophical questions of truth if it aspires to “seek truth” in First Amendment false speech cases.<sup>93</sup> Most imaginable philosophical controversies about truth do arise in real court cases.

Take, for example, *contextualism*—the concept that both the meaning of a proposition and the truth-values associated with the proposition’s meaning are context dependent. Courts frequently have to wade through contextualism issues. Think simply of all the Supreme Court’s constitutional interpretation every term.<sup>94</sup> Or, if a person can be punished only for making “true threats,” must the court take into account evidence of prior racial hostility by the speaker to show that a lengthy rant about racial superiority, including a mention of imminent attacks against minority targets, was, in fact, equivalent to a direct, intentional threat?<sup>95</sup> Or consider a case in which a legislature has created the following proposition: a “security” is any “certificate or instrument” permitting title or interest in others’ assets, including “any investment contract.”<sup>96</sup> Did the legislature intend an oral investment contract to be a “security?”<sup>97</sup> Or if a state’s law mandates its state courts to “recognize” other states’ laws as a matter of comity, does the word *recognize* mean that the court can *assume* the other state has such laws and thus apply them, or must the court first inquire about the existence and substance of those laws for

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93. See *supra* note 1.

94. See *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 395 (1997) (Breyer, J., concurring in part and dissenting in part) (“Words take on meaning from context.”); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38, 49, 65, 95, 115 (1997) (offering Justice Scalia’s originalist theory of statutory and constitutional interpretation, along with commentaries by Gordon Wood, Laurence Tribe, Mary Ann Glendon, and Ronald Dworkin on alternative methods of interpretation).

95. See *United States v. Viehhaus*, 168 F.3d 392, 398 (10th Cir. 1999).

96. See *Gutmann v. Feldman*, 97 Ohio St. 3d 473, 2002-Ohio-6721, 780 N.E.2d 562, at ¶ 11 (quoting OHIO REV. CODE ANN. § 1707.01(B) (West 2002)) (internal quotation marks omitted).

97. See *id.* ¶ 2.

a particular state before “recognizing” them?<sup>98</sup> Or let us say a scientist-CEO in a public press release to investment analysts touts his company’s drug undergoing government regulatory approval as showing statistically significant success in treating the lung disease of a particular patient subset. The press release omits mention that aggregate treatment data were statistically insignificant taken across *all* study populations, suggesting the drug’s general invalidity. Furthermore, the particular “responsive” subgroup highlighted in the press release was identified by *retrospective* analysis—a scientifically irregular or even unacceptable practice, commonly understood as such by fellow scientists, in which a subgroup showing positive response to the drug is identified only *after* the study is complete. If the press release does not identify that the subgroup was retrospectively identified, is the scientist-CEO’s press release contextually tantamount to criminal fraud?<sup>99</sup>

Beyond contextual problems, there surface any number of varieties of skepticism—and rebuttals thereto—in false speech and other court cases. Cases are rare in which judges, pragmatic as they usually are, express *radical skepticism* about truth’s very existence. Even so, some chagrined jurists apparently have their semiprivate doubts.<sup>100</sup> Other judges, however, are clearly on record as believers that truth does exist and is a guiding principle of society and law, even if truth is not always knowable or known.<sup>101</sup> For moral questions in particular, even Supreme Court Justices

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98. See *Beard v. Viene*, 826 P.2d 990, 993 (Okla. 1992).

99. See David Brown, *The Press-Release Conviction of a Biotech CEO and Its Impact on Scientific Research*, WASH. POST (Sept. 23, 2013), [http://www.washingtonpost.com/national/health-science/the-press-release-crime-of-a-biotech-ceo-and-its-impact-on-scientific-research/2013/09/23/9b4a1a32-007a-11e3-9a3e-916de805f65d\\_story.html](http://www.washingtonpost.com/national/health-science/the-press-release-crime-of-a-biotech-ceo-and-its-impact-on-scientific-research/2013/09/23/9b4a1a32-007a-11e3-9a3e-916de805f65d_story.html); see also *Neeley v. Wolters Kluwer Health, Inc.*, No. 4:11-CV-325 JAR (E.D. Mo. July 29, 2013) (holding that publisher of drug risk manual can be liable to patients for publication of false information).

100. See *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1225 (Fed. Cir. 1995) (“[W]hat is ‘truth’ today is often shown to be error tomorrow. The fact finder may or may not arrive at [truth], but that problem is inherent in any judicial undertaking because an undisputed knowledge of fact is largely unobtainable.”); *Stidham v. City of Whitefish*, 746 P.2d 591, 598 (Mont. 1987) (Fillner, J., dissenting) (“I am convinced that the majority’s opinion is motivated by a search for truth, but what is truth? I rather believe that a lawsuit is a search for justice under the law.”); see also *infra* pp. 30–31 (quoting Judge Sack).

101. See, e.g., *Traxler v. Ford Motor Co.*, 576 N.W.2d 398 (Mich. Ct. App. 1998) (Gibbs, J., concurring in part and dissenting in part). Judge Gibbs writes,

Lawsuits are not activities to generate fees, games to be won, or theater to entertain. Lawsuits are searches for the truth of who did what and who is to be accountable for the consequences. Given the complexities of human affairs, the truth cannot always be found, but the fair search for it is why courts, lawyers and lawsuits exist. When it is found, the truth must be revered, and one answer to the question, “What is truth?” must always be, “What is expected,” which means that when it is known, the truth must always be spoken.

have significantly differed as to basic questions of truth's existence, such as whether there is "natural" law.<sup>102</sup>

Besides radical skepticism, courts also divide over *ontology*—whether a particular proposition's truth-value is or ever will be *knowable*.<sup>103</sup> That some legally relevant truth-values remain permanently unknowable should seem obvious. For instance, courts acknowledge that how a jury reached its verdict is, for legal purposes, a permanently unknowable, impenetrable "black box,"<sup>104</sup> and they sensibly recognize that the death of a lone eyewitness likely precludes future hope of resolving key questions of fact.<sup>105</sup> Courts also recognize that the answers to some particular propositions are presently unknowable for lack of a technical method necessary for acquiring that knowledge. For instance, what lies subsurface before mining operations begin?<sup>106</sup>

Even upon rendering judgment, however, a court sometimes openly confesses its belief that legally material propositions were unknowable and that it has resorted to guesswork to resolve the controversy.<sup>107</sup> Others facing the same perceived dilemma take the opposite approach.

*Id.* at 405 n.1; *see also* *People ex rel. Mirsberger v. Miller*, 46 N.Y.S.2d 206, 209 (Mag. Ct. 1943) ("Since men must live in a regulated society, certain truths are accepted as norms of conduct, but, essentially, we seek to approximate absolute truth. The absolute truth is almost like the infinite. Since man cannot live without ideals, a well informed mind and a sensitive soul recoils from the cynicism of sophists like Gorgias and Protagoras, who held that there was no such thing as truth.").

102. *Compare* *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky . . ."), *and* FRANCIS BIDDLE, JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT: THE OLIVER WENDELL HOLMES DEVISE LECTURES, 1960, at 49 (1961) ("[M]en make their own laws; . . . these laws do not flow from some mysterious omnipresence in the sky, and . . . judges are not independent mouthpieces of the infinite . . ."), *with* CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 231 (2007) ("Why shouldn't a federal judge be interested in what the Founders thought about natural law . . .?").

103. *See* II THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 803 (Christopher Berry Gray ed., 1999).

104. *See, e.g.,* *Place v. Abbott Labs.*, 215 F.3d 803, 808–09 (7th Cir. 2000); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 648–49 (2d Cir. 1946).

105. *See* *Squilache v. Tidewater Coal & Coke Co.*, 62 S.E. 446, 450–51 (W. Va. 1908); *cf.* *Farmer v. Hartford Accident & Indem. Co.*, 368 So. 2d 487, 491 (La. Ct. App. 1979) (deducing questions of fact from circumstantial evidence).

106. *See* *United Contractors v. United States*, 368 F.2d 585, 599 (Ct. Cl. 1966). Of course, this does not preclude the possibility that, with future technical advances—such as ground tunneling radar—this question could remain *permanently* unknowable.

107. *John J. Wells, Inc. v. Comm'r*, 47 T.C.M. (CCH) 1114, 1116 (1984) (admitting court's uncertainty whether party was blackmailed, despite ruling in case).

They refuse to decide the issue and merely allow a party's inability to meet its burden of proof to carry the case. Witness as an example a federal court's rejection of a libel claim by refusing to determine whether President Kennedy was shot from the grassy knoll<sup>108</sup> or Justice Stephen Breyer's recently voiced concern about legal proclamations of truth or falsity for entire categories of speech such as "philosophy, religion, history, the social sciences, the arts, and the like."<sup>109</sup>

For still other jurists who must render a specific decision about the answer to a proposition that they consider unknowable, avoidance tactics are preferred. These can include, but are not limited to, professing agnosticism about the proposition's truth-value,<sup>110</sup> requiring that the proposition's truth-value be "proven," "provable," or "useful" rather than "knowable"—although the philosophical concepts are not necessarily the same<sup>111</sup>—or abdicating, over vigorous dissent, a judge's role to frame

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108. See *Groden v. Random House, Inc.*, 94 Civ. 1074 (JSM), 1994 WL 455555, at \*6 (S.D.N.Y. Aug. 23, 1994) (rejecting false advertising claim because the Kennedy assassination theory of a "grassy knoll shooter" is an improvable historical proposition, and thus the proposition must be left open to public interpretation under the First Amendment), *aff'd*, 61 F.3d 1045 (2d Cir. 1995).

109. *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring). An interesting question arises when Justice Breyer says, "the like." Whose list of "the like" should apply? Is he excluding from sanction speech associated propositions *he personally* considers unanswerable? That a majority of the public believes so? For which there is contest in court? Breyer offers no clues.

110. See generally PAUL HORWITZ, *THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION* (2011) (discussing agnosticism among legal professionals in regards to religion); cf. Lincoln Davis Wilson, Comment, *Judgmental Neutrality: When the Supreme Court Inevitably Implies that Your Religion Is Just Plain Wrong*, 38 SETON HALL L. REV. 715, 747–48 (2008) (contending that the Supreme Court *implicitly* hinders the free exercise of religions purporting to be universally true and that the Court's self-professed "agnosticism" principle with respect to religious truth should be explicitly abandoned).

111. See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (requiring statement to be a *provably* false factual assertion for defamation claim to succeed); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 104 (1902) (holding that federal civil mail fraud statute does not apply to "mere matters of opinion upon subjects which are not capable of proof as to their falsity"). Regarding the general practice of substituting "usefulness" as a proxy for "truth," others have long cautioned against unintended consequences upon understandings of truth. Bertrand Russell wrote,

[One's belief that belief in God is *useful* to oneself] simply omits as unimportant the question whether God really is in His heaven; if He is a useful hypothesis, that is enough. God the Architect of the Cosmos is forgotten; all that is remembered is belief in God, and its effects upon the creatures inhabiting our petty planet. No wonder the Pope condemned the pragmatic defense of religion.

BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 818 (1972).

jury instructions about murky facts, claiming the role is best left to a prosecutor's charging discretion and a jury's decision.<sup>112</sup>

Another tactic when courts sense that they may have to make a decision about a possibly unknowable proposition's truth-value is to evaluate the speaker's *sincerity*, which is decidedly not the same thing. A "sincerity" test, announced in the free exercise of religion context in *United States v. Ballard* in 1944,<sup>113</sup> is commonly invoked for questions of religious fact.<sup>114</sup> However, some courts have occasionally expressed willingness to investigate the veracity of supernatural claims.<sup>115</sup> Note that a sincerity

112. See *Warren v. State*, 835 P.2d 304, 310 (Wyo. 1992) ("The facts that justify the jury's verdict as to Warren arise out of a brawling fight or melee that lasted only a few minutes. It would be difficult, if not impossible, to sort out and compartmentalize, defendant by defendant and case by case, the events that occurred that night. The State is entitled to have leeway in presenting the factual picture to the jury."); *id.* at 313 (Urbigkit, C.J., dissenting) ("The jury was, unfortunately, not guided [by the judge] for its function of adjudicatory fact finding."). But see *Traxler v. Multnomah Cnty.*, 596 F.3d 1007, 1012 (9th Cir. 2010) ("Deciding what amount would compensate for the inability to get a job back is not a form of linear fact-finding appropriately left to the jury. Just as reinstatement invokes equitable factors, so does front pay as a proxy. Judicial discretion is at the heart of the decision.").

113. See 322 U.S. 78, 84 (1944).

114. See *id.* at 94 (Jackson, J., dissenting). The *Ballard* Court justified its switch to a sincerity test by highlighting the potential difficulty citizens could face if the government were given unlimited authority over deciding questions of truth:

Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

*Id.* at 87 (majority opinion).

115. See, e.g., *People ex rel. Mirsberger v. Miller*, 46 N.Y.S.2d 206, 208–11 (Mag. Ct. 1943) (openly entertaining evidence relevant to determining the validity of Spiritualism's practice of communicating with the dead); see also Chief Justice Stone's dissenting remarks in *Ballard*:

I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences. To go no further, if it were shown that a defendant in this case had asserted as a part of the alleged fraudulent scheme, that he had physically shaken hands with St. Germain in San Francisco on a day named, or that, as the indictment here alleges, by the exertion of his spiritual power he "had in fact cured hundreds of persons afflicted with diseases and ailments," I should not doubt that it would be open to the Government to submit to the jury proof that he had never been in San Francisco and that no such cures had ever been effected.

test is a generally handy means for courts to avoid taking a position on the falsity of any similarly intricate or simply politically uncomfortable truth proposition.<sup>116</sup> In some false speech cases, sincerity has begun to be acknowledged as a factor in the liability calculus.<sup>117</sup>

Some judges doubt that the adversarial court process can elicit *knowledge* about a proposition's truth, even if that truth is in some manner knowable. Such judges are *epistemological* skeptics.<sup>118</sup> Consider the words of a Second Circuit judge—and leading defamation treatise author—who expresses explicit epistemological skepticism about courtroom adversarial testimony as a method for the identification of historical facts:

Search for “historical fact” often stumbles in trying to reach “the truth.” While somewhere in the ether there may indeed be truth—“what actually happened”—it cannot in many instances be known with certainty. The limitations of human perception, human memory, and human communication can make certainty as to truth impossible, even with the best intentions. And the best intentions are not always present. . . . [A]t the end of a trial in which facts are contested, irrespective of what the trier of fact concludes, each side’s “truth” is likely to be diametrically opposite from what the other side is equally sure is true. Trials rarely change that conviction. Nor should they.

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322 U.S. at 89 (Stone, C.J., dissenting).

116. Philosopher Harry Frankfurt suggests that the constant bombardment of Americans with various postmodern philosophies has caused “truth fatigue” among the citizenry. He concludes that the disturbing, untoward result of this occurrence is that many citizens have become self-focused on their sincerity in representing personally held convictions, rather than on objective inquiry into the truth of those convictions:

The contemporary proliferation of bullshit [stems from] various forms of skepticism which deny that we can have any reliable access to an objective reality, and which therefore reject the possibility of knowing how things truly are. These “antirealist” doctrines undermine confidence in the value of disinterested efforts to determine what is true and what is false, and even in the intelligibility of the notion of objective inquiry. One response to this loss of confidence has been a retreat from the discipline required by dedication to the ideal of *correctness* to a quite different sort of discipline, which is imposed by pursuit of an alternative ideal of *sincerity*. Rather than seeking primarily to arrive at accurate representations of a common world, the individual turns toward trying to provide honest representations of himself. Convinced that reality has no inherent nature, which he might hope to identify as the truth about things, he devotes himself to being true to his own nature.

HARRY G. FRANKFURT, ON BULLSHIT 64–65 (2005).

In light of Frankfurt’s comments that the citizenry has become comfortable with the culture substitution of the pursuit of sincerity instead of truth, one wonders to how many other areas of growing metaphysical or epistemological controversy—besides religion—such a sincerity test could someday extend.

117. See, e.g., *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14 (1st Cir. 2010) (“[S]incere belief may be an element in the individual liability calculus [for false speech] . . .”).

118. See Michael J. Perry, *Moral Knowledge, Moral Reasoning, Moral Relativism: A “Naturalist” Perspective*, 20 GA. L. REV. 995, 1025–26 n.72 (1986) (“[E]pistemological skepticism holds that there can be no knowledge of any kind.”).

The purpose of litigation is to settle disputes, not to establish truth.<sup>119</sup>

This doubt about the existence and objectivity of “the historical method” in determining “historical facts” also occasionally surfaces in actual cases in which courts must evaluate historical legal practices to inform present-day court practice.<sup>120</sup> Other judges, however, stake their very careers on the purported objectivity of such originalist historical inquiry.<sup>121</sup>

Similarly, some courts exhibit blatant skepticism about science as a methodology for establishing facts,<sup>122</sup> sometimes even concluding that

119. SACK, *supra* note 28, § 3.12, at 3–30; *see also* *Stidham v. City of Whitefish*, 746 P.2d 591, 598 (Mont. 1987) (Fillner, J., dissenting) (espousing same conception of truth as Judge Sack); *Home v. Edwards*, 3 S.E.2d 1, 4 (N.C. 1939) (imitating Judge Sack’s conception of truth). Sophistry is nothing new in law; Bertrand Russell once penned,

In general, there were a large number of judges to hear each case. The plaintiff and defendant, or prosecutor and accused, appeared in person, not through professional lawyers. Naturally, success or failure depended largely on oratorical skill in appealing to popular prejudices. Although a man had to deliver his own speech, he could hire an expert to write the speech for him, or, as many preferred, he could pay for instruction in the arts required for success in the law courts. These arts the Sophists were supposed to teach.

RUSSELL, *supra* note 111, at 74–75. *Contra* *Triplett v. State*, 132 So. 448, 450 (Miss. 1931) (“Different testimony containing the truth of gold and mixed with the dross of error and falsehood is carried into the crucible of the common sense minds of twelve men selected for their intelligence, sound judgment, and fair character, and these minds constituting the crucible of reason often separate the refined gold from the dross.”); John E. Rotelle, *Introduction to THE TRINITY (DE TRINITATE)* 18, 18–19 (John E. Rotelle ed., New City Press 1991) (introducing a theory of knowledge based on analogy to other minds).

120. *See* *United States v. Khan*, 325 F. Supp. 2d 218, 226 (E.D.N.Y. 2004). The court stated,

In his magisterial volume, *Felony and Misdemeanor*, Julius Goebel, Jr., has noted the fundamental mendacity of the historical process applied to many forensic issues determining present rights. He wrote:

Our profession for some seven centuries has made a cult of its historical method. In America, at least, this ritual has become a matter of mechanical gesture, bereft of all piety, pervaded with pettifoggery. For here this method to which jurists point with pride has been used for but mean tasks. It is the small and immediate issues of instant litigation which drive the practitioner to the past in a myopic search for ruling cases and precedents.

*Id.* (quoting JULIUS GOEBEL, JR., *FELONY AND MISDEMEANOR: A STUDY IN THE HISTORY OF CRIMINAL LAW*, at xxxiii (1976)).

121. *See, e.g.*, SCALIA, *supra* note 94, at 38 (setting out a theory of historical interpretation).

122. *Blum v. Merrell Dow Pharm., Inc.*, 33 Phila. 193, 251 (Pa. Com. Pl. 1996) (“The prevalent presumption was that scientific truth or consensus were always ‘out



there are no scientific “facts.”<sup>123</sup> Other courts appear more willing to take some scientific causal propositions as settled fact.<sup>124</sup> Still other courts accept the possibility that multiple competing scientific methodologies may produce admissible expert testimony.<sup>125</sup>

Similar debates about the propriety of methodological reliability in acquiring factual knowledge surface in the social sciences. Without explanation, courts sometimes state their preference for what they believe to be a correct general economics methodology, for example, quantitative, positivist predictions over explicitly recognized alternatives, such as logico-deductive theorems.<sup>126</sup> Some welcome the use of econometric models in court, such as for marginal price sensitivity in antitrust analysis.<sup>127</sup> Others strongly caution against use of regression methods because they believe such inferential methods cannot generally demonstrate

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there’ for the law to find and that any failure to accomplish this goal was due to imperfections in the law’s machinery. Social studies of science pose a fundamental challenge to this relatively comfortable assessment. The difficulty of locating facts, truth or consensus now seems to be embedded in the way science works. The problem of fact finding originates within science itself . . . .” (quoting Sheila Jasanoff, *What Judges Should Know About the Sociology of Science*, 77 JUDICATURE 77, 81 (1993) (internal quotation marks omitted)).

123. See, e.g., *In re Gadolinium-Based Contrast Agents*, No. 1:08 GD 500000, 2010 WL 1796334, at \*4 (N.D. Ohio May 4, 2010) (“It is unreasonable to require the subject of scientific testimony to be ‘known’ to a certainty, since science is an evolving process, and there are no certainties in science.” (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993)). See generally Terence M. Davidson & Christopher P. Guzelian, *Evidence-Based Medicine (EBM): The (Only) Means for Distinguishing Knowledge of Medical Causation from Expert Opinion in the Courtroom*, 47 TORT TRIAL & INS. PRAC. L.J. 741 *passim* (2012) (cataloguing instances of judicial skepticism about science).

124. See, e.g., *State v. Childress*, 274 P.2d 333, 336 (Ariz. 1954) (“Medical science has established the fact that there is a rational and logical relationship between the percentage by weight of alcohol contained in the blood flowing through a person’s body and that person’s state or condition of being under the influence of alcohol. Sobriety of an individual decreases as the percentage of alcohol in his blood increases.”).

125. See, e.g., *In re TMI Litig.*, 193 F.3d 613, 665 (3d Cir. 1999) (“The test of admissibility is not whether a particular scientific opinion has the best foundation, or even whether the opinion is supported by the best methodology or unassailable research. Rather, the test is whether the ‘particular opinion is based on valid reasoning and reliable methodology.’” (quoting *Kannankeril v. Terminix Int’l Inc.*, 128 F.3d 802, 806 (3d Cir. 1997))), *amended* 199 F.3d 158 (3d Cir. 2000).

126. See, e.g., *W. Res., Inc. v. Surface Transp. Bd.*, 109 F.3d 782, 790–91 (D.C. Cir. 1997); cf. LUDWIG VON MISES, *EPISTEMOLOGICAL PROBLEMS OF ECONOMICS* (George Reisman trans., Ludwig von Mises Inst. 3d ed. 2003) (1933) (describing impropriety of using inferential data estimation to predict social scientific causal conclusions).

127. See, e.g., *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 944 (6th Cir. 2005).

causation.<sup>128</sup> Some embrace courtroom admittance of mutually exclusive regression methodologies as each being plausibly reliable in estimating a specific social behavioral pattern, such as voter tendencies.<sup>129</sup>

These few examples are but drops in the truth controversy bucket. There is incalculably vast divergence in how courts decide the truth of incalculably many propositions.

#### IV. CONTINUITY OF TRUTH

A further question essential to determining the litigated falsity of a particular speech arises: is that speech's falsity *continuous*? Continuity—the correct identification of a thing or person's immutable essence—is a challenging philosophical matter.<sup>130</sup> We might restate the continuity issue in terms relevant to false speech: Does the truth-value of any given proposition change over time? Can we know it has changed? Do we know it? By what method would we know?

Some propositions' discernible truths clearly do change over time, as any momentary truth-value is but a momentary description of an ever-changing reality. Truth-values for scientific propositions can be mutable. For instance, the proposition "The universe is expanding at a decelerating rate" was true seven billion years ago, but today, that proposition is false.<sup>131</sup> There appears to be no constant rate of expansion of the universe; it is now an accelerating expansion.<sup>132</sup> Dow Corning Corporation suffered bankruptcy because at the time of class action litigation in the 1980s and 1990s, it appeared from the available science that the company's silicone breast implants caused adverse diseases such as lupus and arthritis, but

128. See, e.g., *DeRolph v. State*, 712 N.E.2d 125, 184–90 (Ohio Ct. Com. Pl. 1999) (rejecting expert's attempt to use inferential regression methods to estimate relationships between proficiency test scoring and projected school budgets as inappropriate "junk science").

129. See, e.g., *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1001–04 (D.S.D. 2004) (endorsing reliability of various regression analyses for analyzing voter tendencies).

130. See generally DAVID HUME, *A TREATISE OF HUMAN NATURE* (David Fate Norton et al. eds., Oxford Univ. Press 2000) (1740) (exploring philosophical concepts of continuity).

131. See Jonathan Amos, *Quasars Illustrate Dark Energy's Roller Coaster Ride*, BBC NEWS, <http://www.bbc.co.uk/news/science-environment-20303592> (last updated Nov. 13, 2012, 3:29 PM).

132. See *id.*

later independent scientific panels concluded—too late for Dow Corning financially—that there was insufficient evidence for such claims.<sup>133</sup>

But what about for other kinds of propositions besides scientific ones? Do moral or legal propositions' truth-values change? Jewish law, for instance, has long grappled with questions about the stasis of a legal inheritance right.<sup>134</sup> Are such moral-legal truths timeless and independent of culture,<sup>135</sup> a claim with which some vehemently disagree?<sup>136</sup>

Even assuming that it were known that the truth-value of a particular proposition had changed, it would still be potentially important to know whether that proposition was false at the time the offending speech was made, yet true by the time of sanction, or vice versa.<sup>137</sup> For this question of continuity, there is also legal disharmony.

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133. See *Chronology of Silicone Breast Implants*, FRONTLINE PBS, <http://www.pbs.org/wgbh/pages/frontline/implants/cron.html> (last visited May 21, 2014). I have on well-trusted authority that one lead plaintiffs' counsel in the Dow cases claimed tongue-in-cheek to my source, "We were wrong on the science in the breast implant cases . . . but we're not giving the money back."

134. Take Jewish inheritance and property law, as discussed in the rabbinical text, the Gemara:

If a son sold property of his father during his father's lifetime and then died, [the son's] son may recover the property from the purchasers. And it is this that is difficult among the laws of jurisprudence for the purchasers ought to be able to say to him, "Your father sold and you are recovering?" But what is the difficulty? Perhaps the grandson might say, "I come with the rights of the father of my father as it is written, 'In place of your fathers shall be your sons whom you shall make princes in all the land'" (Psalms 45:17).

J. David Bleich, *The Problem of Identity in Rashi, Rambam, and the Tosafists*, TRADITION, Summer 2008, at 24, 28 (quoting THE GEMARA, *Bava Batra* 159a). What is the essence of an inheritance right? Should the actions of the son change the right of the grandson? As David Bleich comments,

It is virtually axiomatic that a person cannot transfer or devise property interests that are not vested in him. If so, the son could not possibly bequest to the grandson property that he has already alienated. Yet the Gemara declares that the grandson's claim to recover the alienated property presents no doctrinal difficulty because property passes directly from the grandfather to the grandson by operation of the law of inheritance thereby obviating any property interest that might have been asserted in the name of the son.

*Id.* at 29 (footnote omitted).

135. "For truly I tell you, until heaven and earth pass away, not one letter, not one stroke of a letter, will pass from the law until all is accomplished." *Matthew* 5:18.

136. See Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 AM. ANTHROPOLOGIST 56, 61 (1988) (asserting that "there are or there can be no value judgments that are true, that is, objectively justifiable, independent of specific cultures" (quoting Paul F. Schmidt, *Some Criticisms of Cultural Relativism*, 52 J. PHIL. 780, 782 (1955)) (internal quotation marks omitted)).

137. See *Oakley, Inc. v. McWilliams*, 879 F. Supp. 2d 1087, 1090–91 (C.D. Cal. 2012).

Courts differ, for instance, whether to award prior restraints against defamatory speech that is currently false but might in the future become true.<sup>138</sup> Or consider a First Circuit decision overruling a lower federal district court that permitted a religious nonprofit corporation to avoid SEC reporting regulations.<sup>139</sup> The corporation contended that a religious entity may report aspirational revenues as current assets.<sup>140</sup> Accused of fraudulent accounting, the corporation explained that its prospectus's intended audience was religious.<sup>141</sup> Thus, the corporation reasoned, the audience had or should have had a different understanding than a secular audience about what financially *will* become true—and thus *is* presently true—as a result of prayer.<sup>142</sup> The court did not accept this rationale, proclaiming that the prospectus was merely aspirational, not true, and the revenues had not yet come to pass at the time the prospectus was distributed.<sup>143</sup>

Ultimately, questions of continuity can be made as difficult to resolve, if not more so, than questions about the momentary truth of a proposition.

#### V. DELIMITERS: DEFINING SANCTIONS FOR FALSE SPEECH

A major source of disagreements surfacing in false speech cases is the question of *sanction*: How do we decide whether to punish a particular speech agreed and known to be false?

Every speech is a unique historical event. No two speeches are the same; there are contextual differences in the audience, or audiences, the speaker, or speakers, the speech content, the length, the delivery of the speech—tonal quality, volume, stage props, graphics, et cetera—the audience's perception, or perceptions, of the speech, the audience's reliance upon the speech, rebuttal, or rebuttals, of the speech, recorded repetition of the speech, the place, or places, the time, the moment in history, et cetera *ad infinitum*.

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138. Compare *id.* (rejecting on balance the concept of prior restraint on defamatory speech, in part for fear that it may muzzle false propositions that at a later point become true), with *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339, 353 (Cal. 2007) (permitting narrowly tailored prior restraint on defamation, in which a defendant may seek to have the restraint modified if an adjudged false speech later becomes true).

139. See *SEC v. World Radio Mission, Inc.*, 544 F.2d 535, 537, 543 (1st Cir. 1976).

140. See *id.* at 540.

141. *Id.* at 538.

142. See *id.* at 538–40.

143. *Id.* at 540–43.

Consequently, one might be tempted to say that proper determination of whether to sanction a particular false speech would have to take into account the universal context, all of the innumerable historical elements of that speech, and each element's legal relevance. Such a holistic approach would imply that there could be no interspeech comparisons in rendering judgment, nor would there be any such thing as precedent—judges would be perfectly free to decide each case as it came up. Each confronted speech would have to be scrutinized and judged on its own atomistic, individual merits.

Some judges think law should be holistic.<sup>144</sup> Without weighing in on either the possibility or propriety of this contention, we can observe that American judges do not generally act like holists. If we look at how law is practiced, courts articulate “categories” of supposedly similar speeches.<sup>145</sup> Certain categories of like speech content are not generally sanctioned—political speech—although others are—obscenity, incitement to violence, threats, fighting words, et cetera.<sup>146</sup> Courts then classify individual historical instances of speech as members or nonmembers of these various categories

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144. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 170 (1950).

145. “Categories” are also called “ideal types” by Max Weber and Ludwig von Mises. See LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* 59–60 (Fox & Wilkes 4th rev. ed. 1996) (1949); MAX WEBER, “Objectivity” in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49, 89–90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949). Categories, or ideal types, are used all the time and not just in the context of First Amendment cases or law. See, e.g., MISES, *supra*, at 60. An example might be the sociologist’s category “dictator,” in which we might place “Hitler,” “Stalin,” “Idi Amin,” “Pol Pot,” and such, although others, in the Middle East for example, might place most American presidents but leave out the Ayatollah Khomeini.

146. See, e.g., *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (“[T]he First Amendment requires us to err on the side of protecting political speech rather than suppressing it.”); Robert Barnes, *Supreme Court Suspicious of Ohio Law that Criminalizes False Speech About Candidates*, WASH. POST (Apr. 22, 2014) (noting that Supreme Court Justices expressed concerns about an Ohio statute that makes it a crime to “post, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard for whether it was false or not, if the statement is designed to promote the election, nomination, or defeat of the candidate”) (internal quotation marks omitted), [http://www.washingtonpost.com/politics/supreme-court-suspicious-of-ohio-law-that-criminalizes-false-speech-about-candidates/2014/04/22/bced8fb4-ca5c-11e3-93eb-6c0037d\\_de2ad\\_story.html](http://www.washingtonpost.com/politics/supreme-court-suspicious-of-ohio-law-that-criminalizes-false-speech-about-candidates/2014/04/22/bced8fb4-ca5c-11e3-93eb-6c0037d_de2ad_story.html); *cf.* *Virginia v. Black*, 538 U.S. 343, 359 (2003) (finding that words that incite violence lack constitutional protection); *Cohen v. California*, 403 U.S. 15, 20 (1971) (finding that fighting words do not merit constitutional protection); *Watts v. United States*, 394 U.S. 705, 708 (1969) (finding that constitutional protection does not extend to threats); *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding obscenity not constitutionally protected).

by selective reference to what they consider to be the relevant—but inescapably incomplete—historical facts.<sup>147</sup>

Observe that a category of speech content is merely a word or phrase: “obscenity,” “incitement” and “true threats.” But these words are legally potent. If one’s speech is incitement, it can be punished if the sanctioning law survives rational basis review.<sup>148</sup> So too if the speech is defamation or obscenity.<sup>149</sup> If the particular instance of speech is instead identified as commercial speech, political speech, artistic speech, or parody, it is generally more immune from sanction.<sup>150</sup>

A burning question then is this: is “false speech” a category of sanctionable, unprotected speech according to the First Amendment? Some judges and philosophers consider false speech under nearly any conditions to be immoral and appropriately subject to possible sanction—presumably at a legislature’s discretion.<sup>151</sup> Others, such as Ninth Circuit Chief Judge Alex Kozinski, adopt a far more tolerant approach, suggesting

147. *Cf.* *United States v. Alvarez*, 132 S. Ct. 2537, 2555 (2012) (Breyer, J., concurring) (“[F]ew statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter. Instead, in virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.”).

148. *But see* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–84 (1992) (noting that under some circumstances, unprotected categories of speech content are subject to heightened scrutiny).

149. *See id.*

150. *See, e.g., Fed. Election Comm’n*, 551 U.S. at 457 (finding political speech constitutionally protected); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988) (finding that First Amendment did not extend to parody in certain circumstances); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64–65 (1983) (noting that commercial speech possesses constitutional protection); *Miller v. California*, 413 U.S. 15, 34 (1973) (noting that artistic speech has constitutional protection).

151. *See, e.g., Alvarez*, 132 S. Ct. at 2557 (Alito, J., dissenting) (“[T]he right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest.”); *United States v. Alvarez*, 617 F.3d 1198, 1228 (9th Cir. 2010) (Bybee, J., dissenting) (“[T]he spheres of protection carved out in *New York Times*, *Hustler*, and like cases represent limited *exceptions* to the general rule that false statements of fact are *not protected* by the First Amendment . . . . If a false statement of fact does not fall within one of these exceptions, it falls within the general historically unprotected category of [false] speech . . . .” (citation omitted)), *aff’d*, 132 S. Ct. 2537; SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE*, at xxxiii–xxxiv (1999) (contending that in only rare circumstances is deceit morally justified).

that the commonness of lying in most citizens' daily lives necessitates a constitutional safe harbor for most false speech.<sup>152</sup> Thus, just as we have seen vastly different human perspectives on truth and identification of false speech, so too are there wide differences in opinion whether false speech is immoral, the extent to which that morality should be reflected in secular legal sanctions, and speaking specifically about the American experience, the extent to which moral considerations should influence First Amendment jurisprudence.<sup>153</sup>

Recently false speech cases have wound their way through the highest levels of American federal courts in federal circuit cases *United States v. Alvarez*<sup>154</sup> and *United States v. Strandlof*<sup>155</sup> and the 2012 Supreme Court case *United States v. Alvarez*.<sup>156</sup> Splits between the federal circuit decisions demonstrated that it was unclear whether false speech is a sanctionable speech category, or whether only traditionally sanctionable subcategories of false speech—fraud, defamation, perjury, and false commercial speech—

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152. Kozinski writes with characteristic comedy,

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy (“No, I don’t live around here”); to avoid hurt feelings (“Friday is my study night”); to make others feel better (“Gee you’ve gotten skinny”); to avoid recriminations (“I only lost \$10 at poker”); to prevent grief (“The doc says you’re getting better”); to maintain domestic tranquility (“She’s just a friend”); to avoid social stigma (“I just haven’t met the right woman”); for career advancement (“I’m sooo lucky to have a smart boss like you”); to avoid being lonely (“I love opera”); to eliminate a rival (“He has a boyfriend”); to achieve an objective (“But I love you *so* much”); to defeat an objective (“I’m allergic to latex”); to make an exit (“It’s not you, it’s me”); to delay the inevitable (“The check is in the mail”); to communicate displeasure (“There’s nothing wrong”); to get someone off your back (“I’ll call you about lunch”); to escape a nudnik (“My mother’s on the other line”); to namedrop (“We go way back”); to set up a surprise party (“I need help moving the piano”); to buy time (“I’m on my way”); to keep up appearances (“We’re not talking divorce”); to avoid taking out the trash (“My back hurts”); to duck an obligation (“I’ve got a headache”); to maintain a public image (“I go to church every Sunday”); to make a point (“Ich bin ein Berliner”); to save face (“I had too much to drink”); to humor (“Correct as usual, King Friday”); to avoid embarrassment (“That wasn’t me”); to curry favor (“I’ve read all your books”); to get a clerkship (“You’re the greatest living jurist”); to save a dollar (“I gave at the office”); or to maintain innocence (“There are eight tiny reindeer on the rooftop”).

*United States v. Alvarez*, 638 F.3d 666, 674–75 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc).

153. Compare Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. 55, 62 (1982) (rejecting sanctions of false speech even for defamation), with Jonathan Garret Erwin, Note, *Can Deterrence Play a Positive Role in Defamation Law?*, 19 REV. LITIG. 675, 684 (2000) (noting plaintiffs may recover for defamation claims).

154. 617 F.3d at 1198.

155. 667 F.3d 1146 (10th Cir. 2012), *abrogated by Alvarez*, 132 S. Ct. at 2537, and *vacated*, 684 F.3d 962 (10th Cir. 2012).

156. 132 S. Ct. at 2535.

are sanctionable. A plurality of the Justices in *United States v. Alvarez* appeared to indicate, without entirely excluding the possibility of future exceptions, that false speech is not a sanctionable category of speech just by virtue of a speech's falsity and that only traditionally unprotected subcategories are.<sup>157</sup> The question of sanctions for false speech therefore might appear to the Supreme Court Justices' trained eyes and ears to be resolved, albeit—and importantly—without binding effect. Unfortunately, it is not.

Let us first be clear what one problem is that the Court did not even try to resolve in *Alvarez*. It is one thing to make an abstract proclamation that only “traditionally punishable false speech” will be left unprotected.<sup>158</sup> It is something far more daunting to faithfully apply that legal rule to render consistent and predictable verdicts when exonerating or punishing specific speeches. Sociologists Max Weber and Ludwig von Mises famously suggested that classifying a historical instance of speech by category is the work of a skilled historian using historical judgment.<sup>159</sup> Per Mises, however, there will therefore be unavoidable discrepancy between historians in their judgment whether to classify a particular speech as sanctioned or protected because historians value the comparative relevance of various historical facts differently.<sup>160</sup> For instance, one court might

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157. See *id.* at 2545 (“[T]he Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment.”).

158. Bear in mind that this proposition continues to be disputed among judges, even at the Supreme Court in *Alvarez*. See *id.* at 2544; *id.* at 2551, 2553–54 (Breyer, J., concurring); *id.* at 2562 (Alito, J., dissenting).

159. Mises called such judgment “understanding” or “*Verstehen*.” See MISES, *supra* note 145, at 50–51.

160. Mises cites four possible causes of inconsistencies in historical conclusions. See *id.* at 52–58. He also cites a few other trivial sources of inconsistency not worth reproducing here. To paraphrase him,

1. “[T]he intentional distortion of facts by propagandists and apologists parading as historians.” *Id.* at 52 (emphasis added). Obviously such individuals would be inappropriate judges.
2. *Differing access to or researching of historical facts or source material.* *Id.* at 55. Mises implies that such discrepancies can be rectified by extensive research and sharing of all available information related to the historical occurrence between historians. See *id.* at 52, 55, 57–58. He stresses that this sort of disagreement has to do only with differences in the amount and quality of data considered. See *id.* The adversarial courtroom process, coupled with the rules of evidence, are theoretically equipped to ensure that such access to historical information is thorough and shared.



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3. *Differential quality or approaches in the historian's application of nonhistorical branches of science or investigation.* See *id.* at 52–53. Mises concludes,

Only those who believe that facts write their own story into the *tabula rasa* of the human mind blame the historians for such differences of opinion. *They fail to realize that history can never be studied without presuppositions, and that dissension with regard to the presuppositions, i.e., the whole content of the nonhistorical branches of knowledge, must determine the establishment of historical facts.*

*These presuppositions also determine the historian's decision concerning the choice of facts to be mentioned and those to be omitted as irrelevant.* In searching for the causes of a cow's not giving milk a modern veterinarian will disregard entirely all reports concerning a witch's evil eye; his view would have been different three hundred years ago. In the same way the historian selects from the indefinite multitude of events that preceded the fact he is dealing with those which could have contributed to its emergence—or have delayed it—and neglects those which, according to his grasp of the nonhistorical [branches of knowledge], could not have influenced it.

*Changes in the teachings of the nonhistorical [branches of knowledge] consequently must involve a rewriting of history.*

*Id.* at 53 (emphasis added).

4. *Even if the other above factors can be harmonized between historians, there is an unavoidably subjective and personal element of understanding.* See *id.* at 57–58. Mises writes,

[T]here necessarily enters into *understanding* an element of subjectivity. . . . Two historians . . . . [M]ay fully agree in establishing that the factors *a*, *b*, and *c* worked together in producing the effect *P*; nonetheless they can widely disagree with regard to the relevance of the respective contributions of *a*, *b*, and *c* to the final outcome. . . . Of course, these are not judgments of value, they do not express preferences of the historian. They are judgments of relevance. Historians may disagree for various reasons. They may hold different views with regard to the teachings of the nonhistorical sciences; they may base their reasoning on a more or less complete familiarity with the records; they may differ in the understanding of the motives and aims of the acting men and of the means applied by them. All these differences are open to a settlement by “objective” reasoning; it is possible to reach a universal agreement with regard to them. But as far as historians disagree with regard to judgments of relevance it is impossible to find a solution which all sane men must accept.

*Id.* (emphasis added) (footnote omitted). Mises's extensive, searching evaluation concludes that (1) reliable historical “categorizations” of events are possible to form and (2) reliable classification of individual historical events, including instances of speech, as belonging—or not belonging—to a given category is possible through *understanding*, but (3) there will always remain an irremovable element of subjectivity in any historical investigation and ontological categorization, *not based on personal values or ethics* but on disagreements in *understanding* as to various facts' comparative relevancy to the historical issue at hand. See *id.*

decide that a false article printed in a tabloid damaged someone's reputation—injury being a necessary aspect or delimiter of defamation—whereas the same article printed in a newspaper did not; another court might find the reverse.<sup>161</sup> The difference in judgment could stem from differing emphases on historical facts. Perhaps one court found it more revealing what subsequent letters to the editor in the newspaper stated about the allegedly defamed party. Perhaps another chose instead to give more weight to blogger comments in the local region by self-identifying newspaper and tabloid readers.

Then there is an additional problem of *taxonomy* for sanctions. The fact that there is such disparity amongst judges in identifying examples of sanctionable false speech—or traditionally punishable false speech, as the *Alvarez* plurality preferred—is not a comforting result, particularly in law where language has consequences. Indeed, as Ludwig Wittgenstein once penned,

If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments. This seems to abolish logic, but does not do so. It is one thing to describe methods of measurement, and another to obtain and state results of measurement. But what we call “measuring” is partly determined by a certain constancy in results of measurement.<sup>162</sup>

Following Wittgenstein's call for consistency in judgment, and Weber's and Mises's recognition that historical judgment is in part unavoidably subjective,<sup>163</sup> the obvious first step in improving uniformity in judgment about when to sanction false speech is to *name* those subattributes of false speech—gleaned from the infinite context of each particular allegedly false speech case—that are legally meaningful to, and appropriate for, making the speech sanctionable.<sup>164</sup> I call such legally relevant labels

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Mises states that it is improper for a historian, at the historical stage of inquiry, to normatively justify or condemn historical speeches or ontological historical categories. *See id.* at 52. For instance, one may personally hate nonmaterial lies, but that personally held moral worldview should not affect one's classification of a given instance of allegedly false speech as constitutionally protected or unprotected if materiality is, in fact, a delimiter of sanctionable false speech.

161. *See* *McDermott v. Biddle*, 674 A.2d 665, 666–67 (Pa. 1996).

162. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 75 (G. E. M. Anscombe trans., 3d ed. 2001).

163. *See supra* text accompanying notes 145, 160.

164. Ludwig von Mises urges this solution when he writes,

“delimiters.” Delimiters offer current litigants and future speakers a refined description of whether their allegedly false speech is sanctionable. Without clear delimiters, we revert to a holistic each-case-judged-on-its-unique-merits approach that will present a sizeable challenge to any speaker in predicting potential sanctions prior to speaking.<sup>165</sup>

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The aspect from which history arranges and assorts the infinite multiplicity of events is their meaning. . . . [A historical category] cannot be defined; it must be characterized by an enumeration of those features whose presence by and large decides whether in a concrete instance we are or are not faced with a specimen belonging to the [historical category] in question. It is peculiar to the [historical category] that not all its characteristics need to be present in any one example. Whether or not the absence of some characteristics prevents the inclusion of a concrete specimen in the [historical category] in question, depends on a relevance judgment by understanding. . . .

. . . .  
No historical problem can be treated without the aid of [historical categories]. Even when the historian deals with an individual person or with a single event, he cannot avoid referring to [historical categorization]. If he speaks of Napoleon, he must refer to such [historical categories] as commander, dictator, revolutionary leader; and if he deals with the French Revolution he must refer to [historical categories] such as revolution, disintegration of an established regime, anarchy. . . .

. . . .  
Whether the use of a definite [historical category] is to be recommended or not depends entirely on the mode of understanding. [Consider two historical categories]: Left-Wing Parties (Progressives) and Right-Wing Parties (Fascists). The former includes the Western democracies, some Latin American dictatorships, and Russian Bolshevism; the latter Italian Fascism and German Nazism. This typification is the outcome of a definite mode of understanding. Another mode would contrast Democracy and Dictatorship. Then Russian Bolshevism, Italian Fascism, and German Nazism belong to the [historical category] of dictatorial government, and the Western systems to the [historical category] of democratic government.

. . . .  
[The historical category] is always the representation of complex phenomena of reality . . . .

MISES, *supra* note 145, at 59–62.

Max Weber and Ludwig von Mises called historical categories “ideal types,” but the concept is the same. *See id.*

165. It is sometimes said that courts must maintain a “flexible” approach to First Amendment cases and avoid delimiters because the First Amendment accommodates different values. *See* Book Note, *Romancing the First Amendment*, 104 HARV. L. REV. 955, 956 (1991) (reviewing STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990)) (“[T]he first amendment cannot be reduced to a single principle because ‘first amendment values conflict in complicated ways with numerous other values in complicated contexts.’ . . . [F]irst amendment methodology should permit openness and diversity and thus promote a Romantic emphasis on passion, iconoclasm, and flexibility. . . . [C]ase-by-case balancing ‘emphasizes that first amendment decisions are not mere analytic puzzles.’” (footnotes omitted) (citations omitted) (quoting SHIFFRIN, *supra*, at 124, 148)).

This Article has already extensively discussed one delimiter: falsity.<sup>166</sup> A speech must obviously be false to be sanctionable false speech. We have already seen many snares in judging falsity consistently and accurately.<sup>167</sup> And only time will tell whether the *Alvarez* plurality's determination that the additional delimiter, "traditional falsehoods"—fraud, defamation, perjury, false advertising—is required for sanction ends up as binding precedent.<sup>168</sup> But there are many other delimiters besides falsity and tradition that courts occasionally or often consider necessary to sanction an instance of false speech: "intentionality," "materiality," "injuriousness," et cetera.<sup>169</sup>

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This thinking concludes that there cannot be just one way to fulfill a delimiter, even for contextually similar speeches. See Book Note, *supra*, at 956. If true, this renders a delimiting approach to First Amendment controversies useless. It is unclear what the substitute would be. It should also not escape us that malintentioned arbiters could use this view as a cover for unacceptably subjective, ad hoc decisions about a particular false speech's constitutionality. By this reasoning, judges could demand a negligence *mens rea* for some instances of false speech, but in other cases, even if the arbiter agrees that the speeches are contextually similar, the arbiter may prefer—inexplicably—to require actual malice *mens rea*.

166. See *supra* text accompanying notes 44–54.

167. See *supra* text accompanying notes 44–54.

168. If it does, assuredly the challenge in every false speech case will become to identify better the extremely fuzzy boundaries of what is, and what is not, "traditional" false speech. See Guzelian, *supra* note 44, at 678–79 (describing that even for the supposedly robustly defined category of defamation, it is highly unclear what constitutes, and what does not constitute, defamation).

169. Researching false speech cases provides a number of factors that courts sometimes—but emphatically not always—believe to be necessary considerations in deciding whether to sanction a false speech:

1. Must falsity be *provable* for this false speech to be unprotected? See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) ("[R]equiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so.").
2. What *mental state, mens rea*, is necessary or sufficient with respect to falsity for this false speech to be unprotected? See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring) ("[T]he Court emphasizes *mens rea* requirements that provide 'breathing room' for more valuable speech by reducing an honest speaker's fear that he may accidentally incur liability speaking.").
3. Must this false speech be *materially* false to be unprotected? See, e.g., *id.* at 2554; *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012) (requiring government to prove a statement is "material to a matter within the jurisdiction of [an] agency" to obtain a conviction for a false statement (citing *United States v. Sarihifard*, 155 F.3d 301, 306 (4th Cir. 1998))).

Problematically, however, judges are inconsistent and contradictory in determining *which* additional delimiters besides mere falsity are generally necessary for sanction of a particular false speech.<sup>170</sup> The fact that only a plurality of Justices in *Alvarez* could muster support for a blanket delimiter of traditional falsehoods is evidence of this general difficulty to form consensus.<sup>171</sup> Moreover, similar difficulties to those we saw for

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4. Must this false speech cause *injurious reliance* to be unprotected? *See, e.g., United States v. Kepler*, 879 F. Supp. 2d 1006, 1009 n.1 (S.D. Iowa 2011) (noting that proof of detrimental reliance or actual harm to the plaintiff is an essential element of a false speech claim).
  5. What *kinds of injuries* caused by this false speech are legally recognizable? *See, e.g., Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring).
  6. Is there a legally valid *justification or excuse* for this false speech that exempts it from otherwise clear sanction? *See United States v. Alvarez*, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc).
  7. Is this false speech of a type that simply cannot be punished under any circumstances? *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447, 449 (1969) (per curiam) (striking down statute that criminally punished advocacy of violence).
  8. Would a prior restraint on this false speech ever be allowed? *See, e.g., Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180–81 (1968) (“[N]oncriminal process of prior restraints upon expression ‘avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.’” (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965))).
  9. Is the sanction being sought for this false speech constitutional? *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (“[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.” (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991))).
  10. Who decides these standards: an agency, legislature, judge, jury, more than one of these, or none of these? *See, e.g., Miller v. United States*, 413 U.S. 15, 25 (1973) (noting that the states regulate obscene materials, not the courts; however, courts may suggest what the legislature could define as obscene).
  11. Who carries the burden of proof in arguing these standards: the plaintiff, prosecutor, or defendant? *See, e.g., Hepps*, 475 U.S. at 777 (holding that private-figure plaintiff bore burden of demonstrating speech was false before plaintiff could recover damages under defamation claim).

There may be other general standards that courts have considered that are inadvertently omitted from this list. Note also that these standards are *interdependent*; it is not sufficient to simply consider *one* of them—such as number 11, the burden of proof—without *also* considering the others for a given instance of false speech. *See id.* at 777–78 (noting that shifting burden of proving falsity would protect false, unprovable statements).

170. *See, e.g., Alvarez*, 132 S. Ct. at 2544 (plurality opinion); *id.* at 2551, 2553–54 (Breyer, J., concurring); *id.* at 2562 (Alito, J., dissenting).

171. *See supra* note 170.

falsity arise for other delimiters used to establish contours of false speech sanctions. Courts suffer to evaluate whether a particular delimiter that they deem necessary for sanction is fulfilled by a particular false speech. Let us turn to a case study of but one possible delimiter—materiality—to evidence this.

A. *Case Study of Materiality as a Delimiter for Sanction: The SVA*

“[A] more finely tailored statute . . . . [Than the SVA] might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material . . . .”<sup>172</sup>

—Justice Stephen Breyer

The original SVA declared as criminal false representations about receiving military honors.<sup>173</sup> Nowhere did it discuss whether the false representation must be *material*.<sup>174</sup> For that matter, the SVA was facially silent about *any* requirements for sanction other than statutorily undefined falsity and the topic of the speech—receipt of military honors.<sup>175</sup> The enactment of this minimalist criminal statute lacking explicit delimiters against a blurry backdrop of conflicting judicial beliefs about truth versus falsity, and as we shall now see, materiality versus immateriality, seemed to suggest it was the accused’s luck of the judicial draw whether speech—potentially even true speech—about a legislatively prioritized topic could be punished by jail time. The Ninth Circuit *Alvarez* majority sensed this problem with the SVA when it spoke about the need to consider the “context” of a lie before penalizing it, yet it did not elaborate further.<sup>176</sup>

Let us assume, as Justice Breyer did, that given poor congressional draftsmanship, judges should ride to the statutory rescue by “reading in” a materiality requirement for the SVA.<sup>177</sup> I shall now present evidence of the historical absence of principled, consistent judicial application of

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172. *Alvarez*, 132 S. Ct. at 2537 (Breyer, J., concurring) (emphasis added).

173. 18 U.S.C. § 704(b) (2006).

174. *See id.*

175. *See id.*

176. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012) (plurality opinion). So did Justice Breyer in his *Alvarez* concurrence. 132 S. Ct. at 2555 (Breyer, J., concurring).

177. *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring).

the materiality delimiter in false speech cases, even for contextually similar speeches. I will not prove it in this Article for sake of brevity, but my intuition is that the same kinds of difficulties exist for most, if not all, of the general or specific delimiters that are commonly required or proposed as applicable First Amendment preconditions to sanctioning false speech.<sup>178</sup>

With few exceptions, there is no readily apparent way to determine why some false speech must be materially false to be punished under the First Amendment, while other false speech need not be. Nor is there a “one size fits all” definition of *materiality*. Nor is there any apparent way to anticipate which definition a court will apply if it deems that a materiality delimiter is merited for a given instance of false speech.

The Supreme Court for some statutory penalizations of false speech has defined *materiality* to mean “‘ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of’ the decisionmaking body to which it was addressed.”<sup>179</sup> Courts have applied this definition

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178. For some false speech, in addition to *general* delimiters relevant to sanction such as those given *supra* note 169, courts sometimes create special *subcategory-specific* or *speech-specific* delimiters. For example, courts have fashioned constitutionally mandatory delimiters specific to defamation, such as

- (1) Was the speech about a public or a private figure?
- (2) Was the speech about a matter of public concern?
- (3) Was the speaker a member of the media?
- (4) Is the speaker seeking actual or punitive damages?

*See, e.g.*, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Gertz v. Roberts Welch, Inc.*, 418 U.S. 323, 396 (1974) (White, J., dissenting).

The risk of allowing the invocation of unique delimiters for certain kinds of false speech in addition to general delimiters is that it could offer a ruse for judges to create arbitrary delimiters with the excuse that a certain speech’s unique context requires them. *See Gertz*, 418 U.S. at 396. Justice White objected to perceived ad hoc lawmaking by the Supreme Court in the establishment of constitutional defamation delimiters:

With a flourish of the pen, the Court . . . discards the prevailing rule in libel and slander actions that punitive damages may be awarded on the classic grounds of common-law malice, that is, “‘actual malice’ in the sense of ill will or fraud or reckless indifference to consequences.” In its stead, the Court requires defamation plaintiffs to show intentional falsehood or reckless disregard for the truth or falsity of the publication. . . .

. . . .  
For almost 200 years, punitive damages and the First Amendment have peacefully coexisted. There has been no demonstration that state libel laws as they relate to punitive damages necessitate the majority’s extreme response. I fear that those who read the Court’s decision will find its words inaudible, for the Court speaks “only with a voice of power, not of reason.”

*Gertz*, 418 U.S. at 395–96, 398 (citations omitted) (quoting *Mapp v. Ohio*, 367 U.S. 643, 686 (1961) (Harlan, J., dissenting); CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* § 118, at 431 (1935)).

179. *Kungys v. United States*, 485 U.S. 759, 770 (1988) (quoting *Weinstock v. United States*, 231 F.2d 699, 701 (D.C. Cir. 1956)).

in perjury proceedings,<sup>180</sup> False Claims Act violations,<sup>181</sup> 18 U.S.C. § 1001 violations—false statements about any matter within the jurisdiction of the federal government,<sup>182</sup> et cetera.

In other instances, such as for federal mail fraud,<sup>183</sup> bank fraud,<sup>184</sup> and wire fraud,<sup>185</sup> the Supreme Court has invoked a different definition of *materiality*: that stated in the Second Restatement of Torts.<sup>186</sup> For other statutes that restrict materially false speech, the Supreme Court has not yet opined what definition of *materiality* should apply. For example, the Supreme Court has declined to state whether the definition of *material* used in denaturalization proceedings<sup>187</sup> also applies to false statements made in the context of visa procurements.<sup>188</sup>

Supreme Court decisions sometimes distinguish *materiality*—defined as the possibility that the false speech could cause injury—from *reliance*—whether the false speech did have an injurious effect.<sup>189</sup> Yet remedies professor Emily Sherwin contends that in the context of fraud, *materiality* means something quite different. She states, “[T]he most straightforward reading of the materiality requirement is that some fraudulent misrepresentations, even if deliberate, believed, believable, and acted on in fact, should not have legal consequences. *In other words, materiality*

180. See, e.g., *United States v. Hasan*, 609 F.3d 1121, 1137 (10th Cir. 2010).

181. See 31 U.S.C. § 3729(b)(4) (2012) (“[T]he term ‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”).

182. See, e.g., *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010).

183. 18 U.S.C. § 1341 (2012).

184. *Id.* § 1344.

185. *Id.* § 1343.

186. See, e.g., *Neder v. United States*, 527 U.S. 1, 22 n.5 (1999) (noting that the Restatement (Second) of Torts defines *materiality* as “(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question,” or “(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it” (quoting RESTATEMENT (SECOND) OF TORTS § 538 (1977) (internal quotation marks omitted))).

187. See 8 U.S.C. § 1451(a) (2012).

188. See *id.* § 1182; see also *Monter v. Gonzales*, 430 F.3d 546, 555 n.12 (2d Cir. 2005) (describing this ambiguity).

189. See, e.g., *United States v. Wells*, 519 U.S. 482, 501 (1997) (Stevens, J., dissenting) (referencing above definition).



*is a de minimus limitation, marking off a zone in which proven fraud is tolerated by law.*<sup>190</sup>

In some contexts, such as Rule 10(b)(5) securities fraud, the Supreme Court and other courts appear to adhere more closely to Sherwin's definition of *materiality* than its typical definition that distinguishes materiality and reliance.<sup>191</sup> Yet other courts have expressly rejected Sherwin's "de minimus" definition of *materiality*, at least for a perjury inquiry. For instance, the Federal Ninth Circuit has stated that a material perjury need only be "relevant to *any subsidiary* issue under consideration," and "[t]he government need not prove that the perjured testimony actually influenced the relevant decision-making body."<sup>192</sup> Another federal court, in a willful bank misapplication case, invoked an "intent to mislead" materiality test and explicitly rejected a reliance test of materiality.<sup>193</sup>

Many federal statutes punishing false speech expressly include a requirement of materiality.<sup>194</sup> Many others, however, do not.<sup>195</sup> Only in 1997 did the Supreme Court first attempt to impose some order on this statutory chaos by creating a bright line rule: Congressional criminal statutes penalizing "misrepresentations" or "false representations" henceforth would be interpreted to include a materiality delimiter, even if the statute did not explicitly require such. In contrast, statutes that restricted the use of "false statements" would be interpreted not to include a materiality delimiter unless the statute expressly provided one.<sup>196</sup>

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190. Emily Sherwin, *Nonmaterial Misrepresentation: Damages, Rescission, and the Possibility of Efficient Fraud*, 36 LOY. L.A. L. REV. 1017, 1021 (2003) (emphasis added).

191. See *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) ("[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having *significantly* altered the 'total mix' of information made available." (emphasis added) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) (internal quotation marks omitted)); *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 166 (2d Cir. 1980) (defining *materiality*, in the securities fraud context, as "reasonably certain to have a *substantial* effect on the market price of the security" (emphasis added) (quoting *SEC v. Bausch & Lomb Inc.*, 565 F.2d 8, 15 (1977)) (internal quotation marks omitted)).

192. *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003) (emphasis added) (quoting *United States v. Lococo*, 450 F.2d 1196, 1199 (9th Cir. 1971)) (internal quotation marks omitted).

193. See *United States v. Kernodle*, 367 F. Supp. 844, 852 (M.D.N.C. 1973).

194. For instance, see 18 U.S.C. § 1001(a) (2012); 8 U.S.C. § 1451(a) (2012); 18 U.S.C. § 1623(a) (2012).

195. See 18 U.S.C. § 704(b) (2012) (lacking materiality requirement).

196. See *United States v. Wells*, 519 U.S. 482, 491 (1997).

Justice Stevens—and at the circuit level, Judge Alex Kozinski—vehemently dissented in *United States v. Wells*, arguing that there was no distinction at common law between false statements, false representations, or misrepresentations and that the Court was creating an arbitrary, artificial, implicit standard.<sup>197</sup> Even assuming there were differing common law origins of false statements and misrepresentations, we should constitutionally wonder why Congress can require some false speech to be materially false to be sanctioned, although it can—ostensibly as a matter of political will—decline to require other sanctioned false speech to be the same.

In other words, the implication of *Wells* is that, much like a legislatively defined falsehood,<sup>198</sup> the political process—not the First Amendment—will dictate whether a speaker’s false speech has to be materially false to be punished. Moreover, *Wells* and its progeny offer no insight into how courts will interpret statutes that penalize false speech that is statutorily described with words other than *false statements* or *misrepresentations*—such as *false marking*,<sup>199</sup> *false data or information*,<sup>200</sup> or *false reports or information*.<sup>201</sup>

State courts have done little better in adequately defining what is meant by *materiality* or explaining to which forms of false speech such a requirement should apply.<sup>202</sup> California offers yet another definition of *materiality*: “whether the statement or testimony ‘might have been used to affect the proceeding in or for which it was made.’”<sup>203</sup> Texas common law fraud demands a subjective inquiry into materiality—whether the speaker believed the speaker’s false speech to be material.<sup>204</sup> In Kansas, the inquiry is an objective one—whether a reasonable person could believe the false speech to be material.<sup>205</sup> In common law tort, if damages are

197. See *id.* at 504 (Stevens, J., dissenting) (“*Kungys v. United States*, 485 U.S. 759[, 769] (1988) . . . made it perfectly clear that ‘false statements’ share a common-law ancestry with ‘misrepresentations.’”).

198. See *supra* p. 16 (discussing legislatively defined falsity).

199. 35 U.S.C. § 292 (2006).

200. 42 U.S.C. § 17302 (2006).

201. 12 U.S.C. § 164 (2012).

202. See, e.g., *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009); *Koch v. Koch Indus.*, 203 F.3d 1202, 1230–33 (10th Cir. 2000); *People v. Kobrin*, 903 P.2d 1027, 1028 (Cal. 1995).

203. *Kobrin*, 903 P.2d at 1028 (quoting CAL. PENAL CODE § 123 (West 1995)).

204. *Koch*, 203 F.3d at 1232.

205. See *Philip Morris*, 566 F.3d at 1122 (requiring reasonable person test of materially false speech for mail or wire fraud).

sought for false speech, there is an implied requirement of materiality.<sup>206</sup> However, if rescission is the remedy sought, there is no requirement that the false speech be material.<sup>207</sup>

Finally, some false speech that federally requires materiality to be punished does not traditionally require materiality at the state level, or vice versa.<sup>208</sup>

Consider again the recent SVA controversy. The SVA penalized anyone who “falsely represent[ed] himself or herself” regarding award of military honors.<sup>209</sup> Per *Wells*, the term *false representation* is a magic buzzword meaning that the Court must interpret—and Congress ostensibly intended—a federal criminal statute to have a materiality requirement.<sup>210</sup> Yet *Alvarez* in the Ninth Circuit did not give weight to the issue of materiality.<sup>211</sup> Even if it had—or if the Supreme Court other than Justice Breyer had chosen to do so, which it did not—ahead would lie great legal perils in dealing with a materiality standard for the SVA.

Let us assume, for instance, another court chose to apply its fraud standard of materiality to a statute such as the SVA. If Strandlof spoke in Houston, a Texas state court would have to inquire whether Strandlof *himself* believed his false statements were material. If instead Strandlof spoke in Lawrence, a Kansas state court would inquire whether a *reasonable person* could believe the false speech to be material. The difference is inexplicable.

Even if one could settle upon a constitutionally acceptable objective or subjective test of materiality for Strandlof’s speech, choosing the—unsettled—definition of *materiality* would present difficulties. Under the de minimus definition of *materiality*, the government arguably would

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206. See *Ryan v. Wersi Elec. GmbH & Co.*, 59 F.3d 52, 53 (7th Cir. 1995); *Top of Iowa Co-op. v. Schewe*, 149 F. Supp. 2d 709, 724 (N.D. Iowa 2001), *aff’d*, 324 F.3d 627 (8th Cir. 2003).

207. See Sherwin, *supra* note 190, *passim*.

208. Compare 18 U.S.C. § 1621 (2012) (requiring materiality in the context of telling falsehoods under oath in judicial proceedings), with *Bell v. Waterfront Comm’n of N.Y. Harbor*, 228 N.E.2d 758, 761–62 (N.Y. 1967) (“[D]eliberately telling a falsehood under oath or practicing deceit in dealing with a government agency is a sufficient predicate for criminal prosecution, adverse regulatory action or administrative discipline even if the misrepresentation was not ‘material’ . . .”).

209. 18 U.S.C. § 704(b) (2012).

210. See *United States v. Wells*, 519 U.S. 482, 494 (1997). Note that under the logic of existing precedent, which tolerates differing state and federal materiality requirements, were a state to pass an identical version of the SVA, it might not be required to adhere to the *Wells* test of materiality. See *supra* note 208.

211. By *Wells*’s logic, dissenting Judge Bybee ostensibly *had* to show *Alvarez*’s false speech to be material to convict him. He declined to do so. See *United States v. Alvarez*, 617 F.3d 1198, 1230 & n.7 (9th Cir. 2010) (Bybee, J., dissenting), *aff’d*, 132 S. Ct. 2537 (2012) (plurality opinion).

fail to carry its burden in demonstrating that Strandlof's misrepresentations caused significant, legally cognizable harm to others—no money was lost or stolen, no personal reputations were alleged to be damaged, and if anything, veterans in Colorado were given more attention, meaning that military “honor” was arguably improved through Strandlof's efforts. If, instead, the *Kungys v. United States*<sup>212</sup> definition of *materiality* applies—that Strandlof's speech influenced another's decisionmaking—the government would presumably fare better.

In conclusion, although Justice Breyer mused in *Alvarez* that a narrowed version of the SVA delimited by a materiality requirement should be preferred, closer legal analysis of materiality as a candidate for a delimiter of false speech sanction makes it clear that it would be unlikely to succeed in providing prospective speakers with a clearer picture of First Amendment protections.

### *B. Concluding Comments on Sanctions*

For purposes of this Article, an examination of other potential false speech delimiters is unnecessary. It suffices to say that careful examination would likely demonstrate that widespread disagreement—similar to that seen for falsity and materiality—exists in their application, too. The confusion surrounding First Amendment delimiters for false speech sanction is therefore not limited to falsity and materiality or to the burden of proof standard that the Ninth Circuit in *Alvarez* keyed upon. Rather, judicial irresolution of these three delimiters is merely exemplary of a far greater First Amendment quagmire.

Because delimiters for sanctionable false speech are being ignored or applied in arbitrary, ad hoc, and conflicting ways, we can predict two problematic consequences. First, many particular instances of speech—even speech that could be plausibly gauged as truthful—have the potential to be punished. Second and worse, because courts' disagreements about delimiters make them incapable of restraining sanction of false speech, legislatures and prosecutors—anticipating a probability of successful prosecution—might be tempted to enact and enforce *near perfectly standardless* laws penalizing “false”—whatever that means—speech concerning any topic of particular legislative interest. The SVA, which employed no delimiters other than falsity, is case-in-point, as the

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212. 485 U.S. 759 (1988).

plurality and concurrence of Justices in *Alvarez* sensed.<sup>213</sup> The upshot is that a would-be speaker cannot effectively predict whether the speaker's proposed speech is constitutionally protected.<sup>214</sup> Much speech is chilled, notwithstanding judges' proud but wrong beliefs that they have vigilantly mounted defenses of the First Amendment.

## VI. EPILOGUE: WE THE PEOPLE'S ROAD TO FIRST AMENDMENT SERFDOM

This Article began by presenting conflicts and difficulties in correctly associating allegedly false speeches with questions of fact—propositions. As for propositions and their respective truth-values, in postmodern America, there are vicious clashes about truth—what structure it takes, whether it can be coherently articulated, whether truth-values exist, whether there can be multiple coexisting truth-values for the same proposition, whether truth-values are knowable, whether they are known, whether there is a correct method for knowing them, and whether there are multiple competing methods that can all be, if not harmonized, simultaneously tolerated. Moreover, there is debate about whether truth changes, one implication being that a speech arguably false at the time it is made could become true before trial, or vice versa. Finally, this Article also sought to show that the same patterns of disagreement probably arise not just with respect to falsity but with respect to all delimiters that inform us about the possibility of punishment for a false speech.

Jurists have their work cut out for them. Differing inclinations for how to resolve each of these and other potential conceptual points of departure prompt unique, often mutually exclusive, resolutions for any particular false speech allegation. All of these considerations bring us to the final two-part question:

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213. For instance, the Ninth Circuit *Alvarez* majority identified an implicit scienter requirement of actual malice in the SVA. *See id.* at 1209 (majority opinion). The dissent, however, chose not to do so. *See id.* at 1233 n.12 (Bybee, J., dissenting). As if the standardless anarchy of false speech law were not already taxing enough on would-be speakers, Supreme Court precedent indicates that speakers whose statements are judged false cannot plead ignorance of federal laws or jurisdiction as a defense. *See, e.g.,* *United States v. Yermian*, 468 U.S. 63, 74–75 (1984). The currently standardless, yet enforceable state of false speech law is reminiscent of the plight of imperial Rome's subjects, bound by edicts placed on high posts that no one could read.

214. Predictable law is vital in preserving the Rule of Law and the constitutionally enshrined freedom of speech. *See generally* F. A. HAYEK, *The Road to Serfdom*, in 2 THE COLLECTED WORKS OF F. A. HAYEK 112 (Bruce Caldwell ed., Definitive ed. 2007) (describing the importance of predictable law standards); Guzelian, *supra* note 44 (elaborating on the importance of predictable standards in law).

*Who is the rightful arbiter of false speech cases, and what is the arbiter's proper role in adjudicating false speech cases?*

These questions cannot be avoided in addressing false speech. The arbiter's worldview, and the arbiter's tolerance of a worldview besides the arbiter's own, will dictate the outcome of false speech cases.

*A. We the People: Machiavellian or Skeptical Lords  
and Pitiful Vassals*

Congress, state legislatures, and municipal councils enact Stolen Valor Acts and other false speech laws. Presidents, governors, and mayors enforce them. But in America at the end of the day, courts get the final call. *Marbury v. Madison* ensured this.<sup>215</sup> One could argue that judges are not the proper articulators of constitutional law because *Marbury* was wrongly decided. Some at the fringe do this.<sup>216</sup> But even if occasionally begrudged, judges are the *de facto* arbiters of false speech law.

This, however, does not settle the matter. From where does American judges' empowerment to articulate standards for false speech law come? "Why," says the puzzled constitutional law scholar, "from the U.S. Constitution, of course!" Indeed. Sanctioning false speech is a constitutional issue.<sup>217</sup> Federal judges have authority to hear cases arising under the First Amendment.<sup>218</sup> State judges are bound to comply with the First Amendment in deciding state cases.<sup>219</sup> The Constitution establishes a procedure for the President by and with the advice and consent of the Senate to select individuals as federal judges;<sup>220</sup> state constitutions establish procedures for selecting individuals as state judges, but those procedures must themselves comply with the Constitution.<sup>221</sup>

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215. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178–80 (1803).

216. See Matt DeLong, *Gingrich: Send U.S. Marshals To Compel 'Radical' Judges To Explain Rulings*, WASH. POST (Dec. 19, 2011, 1:55 PM), [http://www.washingtonpost.com/blogs/post-politics/post/gingrich-send-us-marshals-to-arrest-uncooperative-judges/2011/12/18/gIQAIYUg2O\\_blog.html](http://www.washingtonpost.com/blogs/post-politics/post/gingrich-send-us-marshals-to-arrest-uncooperative-judges/2011/12/18/gIQAIYUg2O_blog.html).

217. See U.S. CONST. amend. I. Lawful power to enact Amendment I is also given in the Constitution. U.S. CONST. art. V.

218. See *id.* art. III, § 2, cl. 1.

219. See *id.* art. VI, cl. 2.

220. See *id.* art. II, § 2, cl. 2.

221. See *id.* art. VI, cl. 2.

The late, great Yale law professor Arthur Leff suggested that the Constitution has effectively served as a sort of *Codex-god*—a ruler whose authority *is* just because the ruler exists.<sup>222</sup> “We the People” created a disembodied Codex-god during 1788–1789 and ever since have assented to the Codex’s subsequent and ongoing control over their affairs.<sup>223</sup> Leff ascribed the Constitution’s centuries of success to two things: (1) an overwhelming number of American individuals have continuously identified themselves as members of “We the People,” who created the document and continue to honor it, and (2) the Constitution established responsibilities, procedures of governance, and individual rights to simultaneously establish individual and collective freedoms and just rule.<sup>224</sup>

But Leff offered two wicked curveballs on the heels of his praise of the Constitution. First he posed the question whether “We the People” will continue to be satisfied with their created god.<sup>225</sup> Second and relatedly, Leff pointed out that the Constitution is not and could never be a complete moral code.<sup>226</sup>

Grave implications follow. If the Constitution is the creation of men, then it is at some level “arbitrary” in its selection or enumeration of rights, procedures, and responsibilities. The Codex-god’s decrees could have been otherwise. Just as Henry Ford did not have to create cars based upon petroleum combustion, so too did a founding Constitution not require a three-branch system of federal government.<sup>227</sup> True, the Codex-god offers a mechanism to later generations of “We the People” to deal with future dissatisfaction about its decrees—the people may amend it. But what happens when some members of “We the People” start to feel like they no longer want to tinker at the margins with the Constitution’s sentiments but rather want a total makeover?

The point perhaps becomes more clear through a technological analogy: What if instead of living in the landscape inspired by Henry Ford’s twentieth century internal combustion engine substantial numbers of “We the People” begin to want hydrogen-powered floating automated

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222. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1247 (“As long as the Constitution is accepted, or at least not overthrown, it successfully functions as a God would in a valid ethical system: *its* restrictions and accommodations govern. They could be other than they are, but they are what they are, and that is that.”).

223. See generally PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* (2011) (discussing how “We the People” decided to establish the United States Constitution).

224. See Leff, *supra* note 222, at 1245–49.

225. See *id.* at 1245–46.

226. See *id.* at 1245.

227. See RAY BATCHELOR, *HENRY FORD: MASS PRODUCTION, MODERNISM AND DESIGN* 18 (1994) (describing Henry Ford’s invention of the car).

vehicle fleets with vast reduction in urban sprawl and pollution? What if others want to stay true to Henry Ford's original vision, complete with leaded gasoline? What if still others—Ford-hating Luddites—want everyone just to walk? In such circumstances, loyalty to the original bulwarks of the Codex-god's ideals crumbles, as various factions amongst "We the People" compete to replace the smoldering ashes of a once accepted codex with their particular view of law.<sup>228</sup> Similarly, Leff muses, where the Constitution is textually silent about a right or responsibility, "interpretations" of the Codex-god's decrees abound.<sup>229</sup>

This appears to be happening in America. There is increasing divergence in understandings and beliefs about the Constitution and its applications. Some want an apparently preservative originalist interpretation—fidelity to what they perceive the original "We the People" and the Founding Fathers intended<sup>230</sup>—although some contend this practice is in actuality post-hoc, ends-directed revisionism.<sup>231</sup> Others want a pragmatic living interpretation not necessarily bound to traditional or historical meaning;<sup>232</sup>

228. Antonin Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703, 708 (1985) ("A guarantee may appear in the words of the Constitution, but when the society ceases to possess an abiding belief in it, it has no living effect.").

229. See Leff, *supra* note 222, at 1247.

230. See, e.g., SCALIA, *supra* note 94, at 38; Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 622 (1999); Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2210 (2006) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851–52 (1989); see also William H. Rehnquist, In Memoriam, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401, 407 (2006) (criticizing the concept of a "living constitution" unrooted in tradition and historical meaning).

231. See, e.g., SUNSTEIN, *supra* note 230, at 6–9 (contending that "originalist" conservative judges are actually as activist and ends-directed as liberal judges).

232. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 234, 253 (1995) ("[T]he decision to read the Constitution narrowly, and thereby to 'restrain' judicial interpretation, is not a decision that can be read directly from the text. The Constitution does not say, 'Read me broadly,' or, 'Read me narrowly.' . . . The originalist faces backwards but steals frequent sideways glances at consequences. The pragmatist places the consequences of his decisions in the foreground. The pragmatist judge does not deny that his role in interpreting the Constitution is interpretive. He is not a lawless judge. He does not, in order to do short-sighted justice between the parties, violate the Constitution and his oath, for he is mindful of the systemic consequences of judicial lawlessness."); see also Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 912 (1993) (arguing that although history is not irrelevant, constitutional protections should sometimes be extended).



others endorse “perfectionism”;<sup>233</sup> others support majoritarian interpretation;<sup>234</sup> still others advocate a two-step translation process from originalist textual meaning to modern contextual meaning;<sup>235</sup> and some, apparently fed up with monikers in the recent interpretation wars, have staked out a new moniker and interpretist philosophy: *new textualism*.<sup>236</sup>

In the multiple approaches to “hearing” the god, we discover the trouble. Leff observes that where “We the People” generally stop having *faith*, the Codex-god reigns well, or where the Codex-god cannot or does not speak, a power vacuum forms and causes a rush among various bands of individual citizens who constitute “We the People” to assert competing normative beliefs, each contending that the Codex-god supports its view to the exclusion of others included in “We the People.”<sup>237</sup> When the god is mute or dead, vassals fight each other to become lords, each claiming they can hear the true god or replace the fallen god better than can others.<sup>238</sup>

As expectations of the Constitution’s authority crumble, a vicious power struggle ensues, says Leff.<sup>239</sup> If corrupt portions of “We the People” work their way into administrative power of the Constitution, even greater social degradation is possible, as citizens attempt to grab as much control as possible of the deposed Codex-god’s kingdom:

All I can say is this: [absent a Codex-god,] it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel. . . . As things now stand, everything is up for grabs.

Nevertheless:  
Napalming babies is bad.  
Starving the poor is wicked.

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233. See, e.g., SUNSTEIN, *supra* note 230, at 245 (describing perfectionists).

234. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006) (arguing that courts should specifically follow written texts and defer to legislative interpretations when texts are unclear).

235. See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165, 1211–12 (1993).

236. See, e.g., James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 *VA. L. REV.* 1523, 1524–25 (2011) (asserting that all philosophies of interpretation—whether conservative or progressive—ultimately revert to textual inquiry).

237. See Leff, *supra* note 222, at 1247–48; cf. FRÉDÉRIC BASTIAT, *THE LAW* 51 (Ludwig von Mises Inst. 2007) (1850) (“[Law] will be—as it now is—the battlefield for everybody’s dreams and everybody’s covetousness.”).

238. See BASTIAT, *supra* note 237, at 6 (arguing that due to special interest monopolization of legal authority and sanction, law “destroys for [the special interest’s] own profit, and in different degrees amongst the rest of the community, personal independence by slavery, liberty by oppression, and property by plunder”).

239. See Leff, *supra* note 222, at 1248.

Buying and selling each other is depraved.  
 Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol  
 Pot—and General Custer too—have earned salvation.  
 Those who acquiesced deserve to be damned.  
 There is in the world such a thing as evil.  
 [All together now:] Sez who?  
 God help us.<sup>240</sup>

Leff's lament may seem exaggerated and some such as Dworkin disagreed that it is inevitable,<sup>241</sup> but there are increasingly louder echoes of it.<sup>242</sup> It is reflected in the legal realist movement that has gripped many in American jurisprudence since the early 1900s when John Chipman Gray confidently proclaimed, "To quote again from Bishop Hoadly . . . 'Nay, whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is *He* who is truly the Law Giver to all intents and purposes, and not the Person who first who wrote and spoke them.'"<sup>243</sup> Francis Biddle wrote that Justice Holmes believed that "men

240. *Id.* at 1249.

241. *See, e.g.*, RONALD DWORIN, *LAW'S EMPIRE* (1986). Dworkin contended there are right answers in nearly all cases without necessary resort to shared metaethical standards. *See* RONALD DWORIN, *A MATTER OF PRINCIPLE* 144 (1985); Ronald Dworkin, *On Gaps in the Law*, in *CONTROVERSIES ABOUT LAW'S ONTOLOGY* 84, 84–90 (Paul Amselek & Neil MacCormick eds., 1991). However, Dworkin faced challenges from legal realists, critical legal studies theorists, and others who contend that law is indeterminate. *See* Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *PHIL. & PUB. AFF.* 205, 235 (1986). Furthermore, a problem with Dworkin is that he was ontologically agnostic with respect to the existence of legal morality, contending only that morality can be *known*—as distinguished from natural law. But to say moral law can be known without first addressing its existence is to put the cart before the horse.

242. *See* Leiter, *supra* note 76, at 876 ("[T]here is no way for Dworkin's interpretive theory of law to accommodate what at times appears to be naked political partisanship."). *See generally* KAREN L. CARR, *THE BANALIZATION OF NIHILISM: TWENTIETH-CENTURY RESPONSES TO MEANINGLESSNESS* (1992) (arguing that the commonplace of nihilistic beliefs has led to a social environment where ideas can be imposed forcibly with little resistance and raw power alone determines moral and intellectual hierarchies); LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011) (describing the unethical money politics of Congress); PETER SCHWEIZER, *THROW THEM ALL OUT* (2011) (analyzing the systematic corruption of politicians).

243. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 120 (1909). Interestingly, Gray only selectively quoted Bishop Hoadly, who in his work importantly continued,

I say, if They have this power lodged with them, then the *Kingdom*, in which they rule, is not the Kingdom of *Christ*, but of *Themselves*; *He* doth not rule in it, but *They*: And, whether They happen to agree with him, or to differ from Him, as long as they are the *Law-givers*, and *Judges*, without any Interposition

make their own laws . . . these laws do not flow from some mysterious omnipresence in the sky, and . . . judges are not independent mouthpieces of the infinite.”<sup>244</sup> Justice Holmes himself wrote, “The common law is not a brooding omnipresence in the sky. . . .”<sup>245</sup>

If Leff is right, there are unsettling consequences for false speech law under the First Amendment. Will social questions such as “What is truth?” be resolved by Lords of the Flies—whichever power-hungry legal “godlets” have politically clawed their way into control of the courts?<sup>246</sup>

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from *Christ*, either to guide or correct their *Decisions*, *They are Kings* of this *Kingdom*, and not *Christ Jesus*.

BENJAMIN HOADLY, *THE NATURE OF THE KINGDOM, OR CHURCH, OF CHRIST: A SERMON PREACH'D BEFORE THE KING* 15 (3d ed. 1717).

244. FRANCIS BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT* 49 (1961).

245. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

246. Some openly wonder whether procedural processes enshrined in the federal and state constitutions are adequate for picking jurists of the highest intellectual and moral character for the job. See, e.g., Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 *HOFSTRA L. REV.* 377, 458–62 (1996). Indeed, notable individuals now advocate the elimination of direct election state judge appointments to avoid judicial corruption and taint. See, e.g., John Schwartz, *Effort Begun To Abolish the Election of Judges*, *N.Y. TIMES*, Dec. 24, 2009, at A12 (detailing efforts by former Supreme Court Justice Sandra Day O'Connor and others to eliminate political elections of state judges). The federal process for judgeship selection may be no better. At least one U.S. Supreme Court Justice, in moments of revelatory candor, has formally acknowledged that federal judges and even Supreme Court members may be in the positions that they are not by their jurisprudential skill and moral superiority but because of their adeptness at forming political connections. *Rutan v. Republican Party*, 497 U.S. 62, 92–93 (1990) (Scalia, J., dissenting). Justice Scalia stated,

Today the [Supreme] Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an ‘appropriate requirement.’ . . . It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. . . . Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation.

*Id.* (citations omitted).

Some jurists contend that a solution to this problem of corrupted jurists is that where the Constitution is silent, legislatures not judges must speak. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 *SAN DIEGO L. REV.* 823, 828 (1986) (declaring that there is a “principle of acceptance of democratic choice where the Constitution is silent”). However, this does not solve the problem. First, one may ask on what authority this principle should be accepted. Second, deference to legislatures merely allows for a *different* corrupting or corrupted subset of “We the People” than judges to make legal decisions. See James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in *PUBLIC CHOICE AND CONSTITUTIONAL*

Will other judges who aspire to act nobly in such a treacherous environment—and have survived a politicized appointments process—defer out of a personal desire for judicial “tolerance” to the increasingly strident demands of skeptics who calculatingly litigate against truth in First Amendment cases?

When the Constitution is in effect deposed, might citizens vie for preferred forums with sympathetic Lords, whose philosophies and interpretations of law most favor the outcome they seek? Partly driven by power-lusting Machiavellians, partly by noble judges’ admirable but misguided reluctance to make definitive, binding holdings about truth in false speech cases, might America be inching gradually toward a nihilist’s legal paradise where the courts either expressly or unwittingly hold that nothing is true, that basically all false speech—save that that is offensive or inconvenient to the presiding jurist—is tolerated?

### *B. Keep the Faith: A Hopeful Conclusion*

This Article has pointed to some of possible scores of junctures where judges and juries may differ whether a speech is false and punishable. How different judges view reality, truth, speech, the Constitution, and the relationship between all of these can lead to profoundly different outcomes in false speech First Amendment decisions. For some of these differences, reasonable minds may plausibly differ. But for others, as we have noted, discrepancies in rulings appear mutually exclusive, unpredictable, or unjust. Is there a root of all of these points of departure, particularly the “improper” ones? Is perhaps, just perhaps, the problem not the *administration* of law under the Constitution but the *authority* behind the incorporation of the Constitution?

That is, if the answer to the stuffy question “From whence comes American judges’ empowerment to articulate standards for false speech law?” is “The Constitution,” the next question becomes, “From whence comes the Constitution’s legitimacy to articulate standards for false speech law?,” which is answered, “From the authority of ‘We the People,’ as stated in the Constitution’s Preamble.”

The conversation usually ends there with a knowing nod. But we might ask still one more question: “And from whence comes ‘We the

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ECONOMICS 3, 19 (James D. Gwartney & Richard E. Wagner eds., 1988) (contending that majoritarian democracies are subject to economic capture by special interest groups).

People’s’ authority to incorporate a Constitution?” Might perhaps the source of the maddening multitude of rulings that jurists render in false speech law ultimately lie with the Constitution’s recognition of “We the People” as the Constitution’s source of incorporation and inspiration?

However romantic the lore Americans collectively share of its creation, the Constitution, reduced to base historical facts, appears to have been created by a group of self-selecting, landed, highly gentrified freemen without divine right—and decidedly not by women or minorities.<sup>247</sup> Legal theorists have long mentioned troubling implications of selectively man-made law. As Frédéric Bastiat recognized in 1850 and Arthur Leff compellingly restated three decades ago, law that is created by any specific select group of people incrementally regresses to a structure of rules—and attendant sanctions—that support, rather than punish, power-grabbing denizens asserting their own wills upon the rest of the unwilling—and often unlucky and unhappy—citizenry.<sup>248</sup> Bastiat famously claimed

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247. Historian Gary North claims that divine right was specifically omitted from the Constitution and was a radical, unprecedented break with previous American and European tradition. See GARY NORTH, CONSPIRACY IN PHILADELPHIA: ORIGINS OF THE UNITED STATES CONSTITUTION, at xi (2004); see also CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES *passim* (1913) (criticizing the gentrified creation of the Constitution). North offers an entire volume supporting his reasoning, and I shall not repeat it here, nor attempt or wish to defend his reasoning. Yet no less a man in stature than Chief Justice Warren Burger acknowledged in personal correspondence to North that the single most important operative part of the Constitution conceptually is the expression “We the People.” See NORTH, *supra*, at 97; see also Louis Michael Seidman, Op-Ed., *Let’s Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19 (“Constitutional disobedience may seem radical, but it is as old as the Republic. In fact, the Constitution itself was born of constitutional disobedience. When George Washington and the other framers went to Philadelphia in 1787, they were instructed to suggest amendments to the Articles of Confederation, which would have had to be ratified by the legislatures of all 13 states. Instead, in violation of their mandate, they abandoned the Articles, wrote a new Constitution and provided that it would take effect after ratification by only nine states, and by conventions in those states rather than the state legislatures.”).

248. Bastiat writes,

[T]he proper purpose of law is to use the power of its collective force to stop this fatal tendency to plunder instead of to work. All the measures of the law should protect property and punish plunder.

But, generally, the law is made by one man or one class of men. And since law cannot operate without the sanction and support of a dominating force, this force must be entrusted to those who make the laws.

This fact, combined with the fatal tendency that exists in the heart of man to satisfy his wants with the least possible effort, explains the almost universal perversion of the law. Thus it is easy to understand how law, instead of checking injustice, becomes the invincible weapon of injustice. It is easy to understand why the law is used by the legislator to destroy in varying degrees among the rest of the people, their personal independence by slavery, their liberty by oppression, and their property by plunder. This is done for the benefit of the person who makes the law, and in proportion to the power that he holds. . . .

about such law, “*The law perverted!* . . . It is impossible to introduce into society a greater change and a greater evil than this: the conversion of the law into an instrument of plunder.”<sup>249</sup>

For our purposes, the relevant corollary to Bastiat’s and Leff’s writings is that in a nation where a self-selecting group of elite men are the creators of law, not its humble and delegated administrators, their views alone are also the measure of truths relevant to legal decisionmaking. This Article’s primary thrust was to demonstrate that jurists’ personal conceptions of how to reflect the Founders’ First Amendment truths differ profoundly. We are then left, regrettably, with the false speech quagmire described in this Article.

I close by emphasizing that I am not claiming that forced or coerced legal adoption of alternative legal codices, biblical or natural law, et cetera, to solve the false speech quagmire is likely to succeed where “We the People” fall short. Instead, if “We the People” are beginning to diverge widely in their expectations about the First Amendment and what it offers, “We the People” will fall ever increasingly into the morass we have. I trust I will not be viewed by my admired colleague Mike Seidman of Georgetown as disrespectful when I gently chide his recent pessimism in a *New York Times* editorial *Let’s Give Up on the Constitution* where he states, “[P]erhaps the dream of a country ruled by ‘We the people’ is impossibly utopian. If so, we have to give up on the claim that we are a self-governing people who can settle our disagreements through mature and tolerant debate.”<sup>250</sup>

I must dissent to Seidman’s dissent. Thriving existence can be found only through a certain kind of optimistic *faith*. The Justinian Code guided Rome successfully for a millennium because the citizenry had faith and hope. If “We the People” take the light yoke upon ourselves to continue to have an optimistic faith living in a land of sweet liberty, from sea to shining sea, perhaps that is what we can indeed continue to realize.

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Men naturally rebel against the injustice of which they are victims. Thus, when plunder is organized by law for the profit of those who make the law, all the plundered classes try somehow to enter—by peaceful or revolutionary means—into the making of laws. According to their degree of enlightenment, these plundered classes may propose one of two entirely different purposes when they attempt to attain political power: Either they may wish to stop lawful plunder, or they may wish to share in it.

FREDERIC BASTIAT, *THE LAW* 6–7 (Dean Russell trans., 2d ed. 1998) (1850).

249. BASTIAT, *supra* note 248, at 1, 8.

250. See Seidman, *supra* note 247, at A19.

Let us be clear on the process: individually and collectively, Americans must first *reacquire* faith to overcome the skepticism and nihilism evidenced in this Article.<sup>251</sup> Then, *through* that faith, we can gain the necessary optimistic *expectations* about law by which we may become communally and gradually enabled to undo the false speech quagmire. Downturned despair must be snuffed out in this free nation. If some or many of “We the People” aspire to peer habitually into the darkness of untruth and truthiness, as this Article has done in a quasi-parody—if we are faithful skeptics, if we side with nihilism—that is what we will indeed continue to receive. If we unify in a faithful, honest, hopeful, and humble search for truth with charitable application, doubtlessly we will, despite differences, accomplish what we set out to. We might fittingly adapt as an epigraph a President’s encouraging words at a time surely more troubling than now:

We know how to save the Union. The world knows we do know how to save it. We—even we here—hold the power and bear the responsibility. . . . We shall nobly save or meanly lose the last, best hope of earth. . . . The way is plain, peaceful, generous, just—a way which, if followed, the world will forever applaud, and God must forever bless.<sup>252</sup>

Give up on truth? No. It falls to those of “We the People” who are our current or potential judges and juries to find or rediscover their own heroic faith before they take on the next false speech case, or perhaps other questions of law, for that matter.

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251. See *Philippians* 4:8 (“[W]hatever is true, whatever is honorable, whatever is just, whatever is pure, whatever is pleasing, whatever is commendable, if there is any excellence and if there is anything worthy of praise, think about these things.”); see also *1 Corinthians* 15:1–3 (“I would remind you . . . of the good news that I proclaimed to you, which you in turn received, in which also you stand, through which also you are being saved . . . . For I handed on to you as of first importance what I in turn had received: that Christ died for our sins . . . and that he was buried, and that he was raised on the third day . . .”).

252. ABRAHAM LINCOLN, *Annual Message to Congress* (Dec. 1, 1862), in 2 ABRAHAM LINCOLN COMPLETE WORKS 261, 277 (John George Nicolay & John Hay eds., The Century Co. 1907).