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IMPLICATIONS OF LIBEL DOCTRINE FOR NONDEFAMATORY FALSEHOODS UNDER THE FIRST AMENDMENT

NAT STERN

I. INTRODUCTION

Factually false statements pervade everyday life. Though allocation between honest error and conscious deception is impossible, social science supports Mark Twain’s assertion that “lying is universal.”1 Law, however, attaches sanctions to only a fraction of the universe of consciously false expression. Calculated falsehoods long forbidden include perjury, false advertising, misrepresentation of material facts to the government,2 misrepresentation of material facts in connection with the sale or purchase of securities,3 and defamation. Of these and other legal prohibitions, it is this last category of libel that may be said to dominate constitutional jurisprudence on the power to punish factually

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1. John W. and Ashley E. Frost Professor of Law, Florida State University College of Law. Amanda Gibson and Haley VanErem provided valuable research assistance.


false assertions. Conversely, courts have not forged a comprehensive First Amendment framework to govern falsehoods outside of defamation.

The Supreme Court's defamation doctrine thus provides the principal guide to government's ability to bar other types of false expression. Though criticized as lacking coherence, the Court's treatment of libel law reveals a number of distinct premises and principles. Part II of this article discusses these themes and their relation to First Amendment doctrine in other areas. Part III-A argues that those themes do not support the proposition that the First Amendment categorically relegates deliberate factual falsehood to the status of unprotected speech. With this conclusion as predicate, Part III-B addresses the validity of a currently contested law: viz., the ban imposed by the federal Stolen Valor Act on falsely stating receipt of certain military honors. This Part ultimately endorses the recent ruling of the

4. See 1 Rodney A. Smolla, Law of Defamation §1.5, at 1-11 (2d ed. 2011) (“Despite the imposition of new first amendment barriers to recovery, the American law of defamation has exploded in the last decade... These changes... indicate that the law of defamation is and probably will remain an area of substantial litigation activity.”).

5. See Josh M. Parker, Comment, The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False Factual Speech Restrictions Outside of the Defamation Context, 78 U. Chi. L. Rev. 1503, 1525 (2011), (“[N]either the Supreme Court nor lower courts have endorsed any systematic approach for evaluating the constitutionality of false-speech restrictions outside of the defamation context.”); Eugene Volokh, Comment, Amicus Curiae Brief: Boundaries of the First Amendment's "False Statements of Fact" Exception, 6 Stan. J. C.R. & C.L. 343, 348 (2010) (“[T]he Court has never articulated a clear rule for which knowingly false statements of fact are constitutionally protected and which are not.”). The issue of whether deliberately false statements are categorically denied constitutional protection is discussed at infra Part III-A.


Ninth Circuit Court of Appeals in *United States v. Alvarez*\(^8\) that the Act in its current form violates the First Amendment.

**II. RECURRING MOTIFS IN THE CONSTITUTIONAL LAW OF DEFAMATION**

The Court’s libel doctrine, as critics charge, may well not represent a tight theoretical structure.\(^9\) The regime’s lack of a single unifying principle, however, perhaps owes as much to the complex balance to be struck in this field as to any shortcomings in the Court’s handiwork. Abandoning nearly a half-century ago its view that defamatory speech enjoys no First Amendment protection,\(^10\) the Court has sought to reconcile First Amendment values with the state interest in redressing “invasion of . . . reputation and good name.”\(^11\) This enterprise has been shaped by a series of tenets, assumptions, and strategies. Separately and collectively, these foundations of the constitutional law of libel shed light on the reach of government’s power to prohibit factually false speech in a variety of forms.

**A. Supplying Deficiencies in the Marketplace of Speech**

Allowing damages for libel can be understood as recognition that a central rationale for free expression does not apply to such speech. The Court and commentators alike have long enshrined Holmes’s position that truth is better pursued through the joust of free expression than by government edict:

\(^8\) 617 F.3d 1198 (9th Cir. 2010), *reh’g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted* ___ U.S. ___, 132 S. Ct. 457 (Oct. 17, 2011).

\(^9\) See supra note 5.

\(^10\) *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). *N.Y. Times* is discussed at *infra* notes 33–41 and accompanying text. For an expression of the Court’s previous position, see *Beauharnais v. Illinois*, 343 U.S. 250, 256–57 (1952) (stating in dictum that libelous statements “are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

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

Neither Holmes's reasoning nor the nature of libel, however, favors responding to defamatory falsehoods solely through the "competition of the market." By its own terms, that competition is a battle of beliefs. As the Court famously stated in *Gertz v. Robert Welch, Inc.*:

12. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See Texas v. Johnson, 491 U.S. 397, 419 (1989) ("[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.") (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963) (stating as one of major justifications of free expression that it is "the best process for advancing knowledge and discovering truth"); see also United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection"). But see Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 909 (2010) ("Once we fathom the full scope of factors other than the truth of a proposition that might determine which propositions individuals or groups will accept and which they will reject . . . we can see that placing faith in the superiority of truth over all of these other attributes of a proposition in explaining acceptance and rejection requires a substantial degree of faith in pervasive human rationality and an almost willful disregard of the masses of scientific and marketing research to the contrary.").


14. Holmes was explicit on this point later in his Abrams dissent. See id. at 631 ("Of course I am speaking only of expressions of opinion and exhortations . . . .").

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. This passage has raised questions concerning both the distinction between fact and opinion and the constitutional status of factually false speech as a class. At a minimum, however, defendants seeking shelter for defamatory falsehoods find scant support in Holmes’s notion of competing ideas or its philosophical antecedents.

More pointedly, reliance on the metaphorical marketplace for “correction” of libel clashes with realities of stain to reputation. An untrue accusation often has an inherent competitive advantage over the response it evokes among the audience at which both statements are aimed. As the Gertz Court observed, “an opportunity for rebuttal seldom suffices to undo [the] harm of defamatory falsehood;” thus, libel law derives from “our experience that the truth rarely catches up with a lie.”

16. Id. at 339–40.
17. See infra notes 119–26 and accompanying text.
18. See infra Part III-A.
Because of the relative inability of private figures to refute charges through access to media, the Gertz Court established a lower evidentiary barrier for private figures bringing libel suits.22

In addition, the Court’s approval of restrictions on certain other kinds of speech can also be understood in terms of this logic of “market failure.”23 An obvious example is the authority both to forbid and to require commercial speech to assure that information provided consumers is not false or misleading.24 Similarly, states may prohibit charitable fundraisers to make false or misleading representations rather than expect donors to discover how their contributions were actually used.25 Nor is the power to remedy imperfections in the marketplace of speech confined to instances of untruthful communication. In holding that states may forbid incitement likely to produce imminent lawlessness,26 the Court tacitly acknowledged that ordinary debate is

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22. See Gertz, 418 U.S. at 344. Gertz held that states could permit plaintiffs designated as private individuals to recover damages upon a showing of negligence. Id. at 347. The far more demanding standard of actual malice imposed on public officials and public figures—i.e., demonstrating knowledge of falsity or reckless disregard of truth or falsity—is discussed infra notes 39–45 and accompanying text.


unavailable to avert the threatened harm in such circumstances.\textsuperscript{27} Even the Court’s sanction of wholesale bans on public exhibition of obscene material draws on this type of rationale. In \textit{Paris Adult Theatre I v. Slaton},\textsuperscript{28} the Court sustained the state’s judgment that such display “has a tendency to injure the community as a whole,”\textsuperscript{29} polluting public life in a way that cannot be cleansed by the presence of more wholesome expression.\textsuperscript{30}

\section*{B. Protecting Unworthy Speech for Higher Ends}

The Court’s condemnation of defamatory falsehood as devoid of value has not placed libel wholly beyond the bounds of constitutional protection. Instead, the Court has recognized that holding speakers strictly accountable for the truth of their statements would deter much valuable expression. Accordingly, the Court has granted some “strategic protection”\textsuperscript{31} to defamatory falsehood in order to protect “speech that matters.”\textsuperscript{32} That rationale and its implementation lay at the heart of the Court’s landmark decision in \textit{New York Times Co. v. Sullivan}.\textsuperscript{33} The alleged libel in that case involved criticism of public officials.\textsuperscript{34} Solicitude for such speech, the Court made clear, forms a crucial part of “the central meaning of the First Amendment.”\textsuperscript{35} Adoption of the First Amendment represented “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and
Because “erroneous statement is inevitable in free debate,” declared the Court, it “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” Thus, critics of government who sincerely believe their factual assertions must not be deterred by the specter of costly litigation that may culminate in an adverse verdict by a jury perhaps influenced by distaste for the critic’s views.

To prevent such “‘self-censorship,’” the Court ruled that a public official seeking to recover damages for a defamatory falsehood must show “actual malice”: i.e., that the defendant either knew that the statement was false or acted with reckless disregard of whether it was false. The Court bolstered the potency of this protection by requiring


38. See id. at 279 (noting the danger of jury bias, “Under such a rule [limiting defense to demonstration of truth], would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which ‘steer far wider of the unlawful zone.’ The rule thus dampens the vigor and limits the variety of public debate.” (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958))); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 863–64 (2d ed. 1988) (also noting danger of jury bias).


40. Id. at 279–80 (quoting Smith v. California, 361 U.S. 147, 153–54 (1959)).
officials to establish actual malice with "convincing clarity" rather than by a preponderance of the evidence.41 Later decisions further confirmed the formidable nature of this standard. For example, the Court announced that neither proof of the defendant's hostility toward the plaintiff 42 nor demonstration that a prudent person would have conducted additional investigation43 amounts to actual malice. As procedural safeguards, the Court ruled that failure of a plaintiff's opposing affidavit to support a reasonable inference of actual malice by clear and convincing evidence entitles the defendant to summary judgment,44 and that determinations of actual malice at trial are subject to independent appellate review.45

Outside the realm of comments on public officials, the Court has calibrated its "strategic protection" according to a balance of First Amendment values and plaintiffs' status. In Curtis Publishing Co. v. Butts,46 a fragmented Court effectively applied the actual malice standard to speech about plaintiffs designated as public figures.47 In his crucial concurring opinion, Chief Justice Warren explained that such individuals exert an impact on society comparable to that of many officeholders.48 On the other hand, the Court in Gertz found that the state has a heightened interest in enabling private figures to recover damages for harm to their reputation from defamatory falsehood.49 In addition to their greater vulnerability to injury,50 private individuals have not thrust

41. Id. at 285–86.
46. 388 U.S. 130 (1967).
47. Id. at 164–65 (Warren, C.J., concurring in the result) (stating his adherence to the actual malice standard in the case of "public figures"). For an explanation of how the confluence of various opinions in the case produced this outcome, see Harry Kalven, Jr., The Reasonable Man and the First Amendment: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267, 275–78 (1967).
48. See Butts, 388 U.S. at 163–64 (Warren, C.J., concurring) ("[M]any [individuals] who do not hold public office . . . are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.").
50. See supra note 22 and accompanying text.
themselves into the cauldron of public attention and controversy. Accordingly, the Court did not insist that private figures surmount the formidable barrier of the actual malice rule. Instead, states could permit private persons to recover actual damages upon a showing of negligence. Gertz did require proof of actual malice to obtain presumed or punitive damages; in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., however, the Court confined this requirement to suits in which the defamatory expression involves a matter of public concern.

Despite the modification in Gertz and Dun & Bradstreet of the robust protection for libel granted in earlier cases, the constitutional law of defamation remains notable for the considerable shelter accorded speech that “in and of itself carries no First Amendment credentials.” The idea that otherwise unprotected or “socially worthless” speech warrants protection to avoid a “chilling effect” on more worthy expression reverberates well beyond the treatment of defamation. The most conspicuous example of this philosophy is the Court’s overbreadth doctrine, under which a statute is struck down if “a substantial number” of its applications are unconstitutional, “judged in relation to the statute’s plainly legitimate sweep.” Thus, a defendant whose own speech is presumed to be unprotected may nonetheless escape penalty because the law in question trenches on an intolerable amount of protected

51. Gertz, 418 U.S. at 344–45. By contrast, public figures have “invite[d] attention and comment,” id. at 345, either by achieving “pervasive fame or notoriety,” id. at 351, or “thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” Id. at 345.
52. Id. at 346–47.
53. Id. at 347.
54. Id. at 349.
56. See id. at 761 (plurality opinion).
expression. As in *New York Times*, the Court has insisted on carefully drawn regulation of speech because “First Amendment freedoms need breathing space to survive.”

Defamation doctrine’s motif of providing a buffer to “speech that matters” can also be perceived in a different context. The Court has consistently guarded speech of public import even in the face of Justices’ apparent belief that the content in question has scant value. Thus, in *Hustler Magazine, Inc. v. Falwell*, the Court overturned a verdict for intentional infliction of emotional distress based on a scurrilous but obviously parodic portrayal of the plaintiff. The Court did not disguise its low regard for the mock advertisement, describing it as a “distant cousin” to classic political cartoons and “a rather poor relation at that,” accordingly, its removal from public discourse would likely engender “little or no harm.” Nevertheless, again echoing *New York Times*, the Court ruled that “adequate breathing space to the freedoms protected by the First Amendment” required that public figures like the plaintiff show actual malice to recover damages even under this non-reputational tort claim. As the Court later explained, citizens “must tolerate insulting, and even outrageous, speech” in order to preserve this breathing space. More recently, the Court applied *Falwell*’s animating philosophy in *Snyder v. Phelps*. There, the Court reversed a damages award for intentional infliction of mental distress against individuals who displayed picket signs near a soldier’s funeral service expressing the view that God kills American soldiers as punishment for the nation’s toleration of sin.

61. Gooding v. Wilson, 405 U.S. 518, 520–23 (1972) (defendant’s conviction under overbroad statute invalid even if his speech is presumed to constitute fighting words).
62. Id. at 522 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
64. The parody advertisement consisted of an interview in which the plaintiff “states that his ‘first time’ was during a drunken incestuous rendezvous with his mother in an outhouse.” Id. at 48.
65. Id. at 55.
66. Id.
67. Id. at 56.
70. The Court also invalidated the plaintiff’s claim of intrusion upon seclusion. *Id.* at ___, 131 S. Ct. at 1219–20.
As in *Falwell*, the Court in *Snyder* left little doubt of its assessment of the picketers' commentary; the picketing, the Court observed, "is certainly hurtful and its contribution to public discourse may be negligible." The First Amendment, however, embodies a commitment "to protect even hurtful speech on public issues to ensure that we do not stifle public debate." Finally, defamation's model of safeguarding the core of speech by shielding some of its periphery suggests immunity for another type of factual falsehood. Frederick Schauer has discussed the phenomenon of widely shared but "plainly, demonstrably, and factually false" beliefs: e.g., that President Obama was born in Kenya, or that the Holocaust did not occur. Even if government has broad power to proscribe factually false statements generally, it presumably could not bar assertion of such patent untruths. As Mark Tushnet has observed, claims of this nature are "ideologically inflected," they are bound up with a larger worldview of a political character. A power to suppress this type of speech, therefore, might allow government to thwart protected expression associated with the false statements. As in *New York Times*,

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71. *Id.* at __, 131 S. Ct. at 1220.

72. *Id.* at __, 131 S. Ct. at 1220. In contrast, the Court's acceptance of wide latitude to forbid false and misleading commercial speech is rooted partly in the belief that the incentive for advertising creates "little likelihood of its being chilled by proper regulation and forgone entirely." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

73. *Schauer*, *supra* note 12, at 897–98.

74. This Article disputes the existence of such sweeping authority. See infra Part III-A.


77. *Id.* at 19.

78. See *id.* at 18; compare *id.*, with *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular
preserving unimpeded debate on public issues entails protection of factually false speech that sometimes accompanies it. 79

C. Determining Harm

As Gertz observed, libel laws seek “the compensation of individuals for the harm inflicted on them by defamatory falsehood.” 80 These laws therefore find their justification in the state’s “legitimate interest in redressing wrongful injury.” 81 The standard for establishing “comprehensive reputational injury,” 82 however, is not uniform across plaintiffs and subject matters. As noted earlier, private figures who do not show actual malice may still recover actual damages, and may obtain presumed and punitive damages if the defamatory expression involved a matter of private concern. 83 This sliding scale of evidentiary burden thus represents an effort to tailor required demonstrations of injury to distinctive permutations of interests and values. In each instance, though, recovery is ultimately bottomed on the finding that the defamatory falsehood has been "injurious" 84 to the plaintiff. The Court’s assessment of injury in libel cases extends in significant ways to the approach toward harm from falsity in other areas as well. 85

Admittedly, plaintiffs who must show actual injury do not face a formidable constitutional hurdle. Instead, the Court has adopted a generous notion of such injury commensurate with the principle underlying libel law: viz., vindication of the “‘essential dignity and worth of every human being.’” 86 Accordingly, plaintiffs may be compensated words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.”). 79. See N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). 80. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). 81. Id. at 342. 82. Id. at 347 n.10. 83. See supra notes 49–56 and accompanying text. 84. Gertz, 418 U.S. at 347. 85. The question of whether a demonstration of harm is constitutionally required for the prohibition of nondefamatory falsehoods is discussed supra notes 9–79 and accompanying text. 86. Gertz, 418 U.S. at 342 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).
not only for monetary losses, but also for “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.” The mild constraint that juries must rely on “competent evidence” under “appropriate instructions” is largely diluted by the discretion to quantify these intangible injuries. Nevertheless, the Court has not discarded the principle that harm must be demonstrated where constitutional standards preclude presumed damages.

Underscoring the indispensable element of targeted injury, the Court has rejected claims altogether in cases of failure to show that the disputed statement plausibly amounted to an attack on the plaintiff. In both New York Times and Rosenblatt v. Baer, for example, the inability to link criticism of a governmental body to an individual charge against the plaintiff official rendered the suit untenable. As separate grounds in New York Times, the Court found that criticism of the “police” in Montgomery, Alabama, did not attribute specific misconduct to City Commissioner Sullivan. Similarly, in Rosenblatt, the Court ruled that an article critical of a county commission’s actions did not constitute a charge “of and concerning” the plaintiff, a former commissioner. These holdings bear overtones of the common law’s group defamation rule, which bars recovery to a member of a defamed group unless the libelous statement is reasonably understood to refer specifically to that individual. In both instances, a member of an entity tarred with a

87. Id. at 350.
88. Id.
89. See id. ("[T]here need be no evidence which assigns an actual dollar value to the injury.").
93. See Diaz v. NBC Universal, Inc., 337 F. App’x. 94, 96 (2d Cir. 2009) ("[A] plaintiff’s claim is insufficient if the allegedly defamatory statement referenced the plaintiff solely as a member of a group, unless the plaintiff can show that the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the plaintiff.” (citations omitted)); Beznos v. Nelson, 155 N.W.2d 241, 243 (Mich. Ct. App. 1967) ("[I]f defamatory words are used broadly in respect to a class or group, there is no cause of action unless the words can be made to apply to a single member of that group or to every member of the group.” (citations omitted)); RESTATEMENT (SECOND) OF TORTS § 564A (1977).
collective brush cannot claim constitutionally cognizable harm absent evidence that the plaintiff has been singled out for taint.94

The centrality of harm to libel may also have influenced the disfavor into which the claim of false light invasion of privacy has fallen. The tort consists of public disclosure of false and “highly offensive” facts about the plaintiff;95 thus, unlike defamation, false light does not necessarily entail damage to reputation. Over four decades ago, the Court dealt a devastating blow to false light claims grounded in “reports of matters of public interest” by requiring proof of actual malice.96 Since then, the concept of false light has fared poorly among both courts and commentators, with judicial abolition97 or denial of recognition98 matched by scholarly condemnation.99 The faltering status of false light claims appears to reflect a widespread view that false statements about persons are not actionable absent a demonstration or likelihood of harm.

94. Even where an inaccurate libelous statement is aimed specifically at the plaintiff, two doctrines employing similar logic require the suit’s dismissal for absence of harmful impact. Under the substantial truth doctrine, the claim is rejected because the defendant’s statement “although not literally true in every detail, is substantially true in its implication[s].” Wynberg v. Nat'l Enquirer, Inc., 564 F. Supp. 924, 927 (C.D. Cal. 1982); see Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984), vacated on other grounds, 477 U.S. 242 (1986) (stating that hypothetical suit over report that plaintiff committed thirty-five burglaries when he had committed thirty-four would likely fail). The incremental harm doctrine deems nonactionable a defamatory statement contained in expression whose protected portions harm the defendant’s reputation far more than the asserted libel; see Simmons Ford, Inc. v. Consumers Union of the U.S., Inc., 516 F. Supp. 742, 750 (S.D.N.Y. 1981).

95. RESTATEMENT, supra note 93, at § 652B.


By contrast, the power to curb false speech with obvious links to
definite harms arouses little dispute. Even as the Court lifted the First
Amendment stature of commercial speech,\textsuperscript{100} it invoked \textit{Gertz} to endorse
broad power to regulate false and misleading advertising.\textsuperscript{101} Later
promulgating a formal test for commercial speech regulation, the Court
affirmed the state's authority to "ban forms of communication more
likely to deceive the public than to inform it."\textsuperscript{102} As suggested earlier, the
injury to consumers and others from deceptive speech about goods and
services is intuitively apparent.\textsuperscript{103} Even here, however, the Court will not
lightly infer damage from factually truthful commercial speech that the
state contends is potentially deceptive. Rather, the government must
"demonstrate that the harms it recites are real and that its restriction will
in fact alleviate them to a material degree."\textsuperscript{104}

This approach to falsity's causal link with likely harm is broadly
congruent with the regulatory frameworks for securities transactions and
for fraud. For example, in the securities context, Rule 10b-5 of the
Securities Exchange Act forbids buyers and sellers of securities, inter
alia, from making untrue statements of material facts or from omitting
such facts in connection with these transactions.\textsuperscript{105} At the same time,
misrepresentation does not automatically trigger a successful claim;
plaintiffs must show that their loss resulted from detrimental reliance on
the misleading statement.\textsuperscript{106} In a sense, the concept of fraud on the

\textsuperscript{100} See \textit{Va. State Bd. of Pharm. v. Va. Citizens Consumer Council}, 425 U.S. 748, 763 (1976) ("[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

\textsuperscript{101} See \textit{id.} at 771–72.


\textsuperscript{103} See \textit{supra} note 23–24 and accompanying text.

\textsuperscript{104} \textit{Edenfield v. Fane}, 507 U.S. 761, 770–71 (1993) (rejecting state's argument that solicitation by accountants of potential clients might lead to fraud, among other things, because the argument was unsubstantiated by the record).


\textsuperscript{106} \textit{Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.}, 552 U.S. 148, 157 (2008); \textit{Dura Pharm., Inc. v. Broudo}, 544 U.S. 336, 341–42 (2005); \textit{see also}
market represents an effort to navigate the complex relationship between falsity and harm in this context. Under this principle, plaintiffs may recover damages based on the impact of a misrepresentation on a stock’s market price rather than on the buyer’s or seller’s direct reliance on that statement. As to First Amendment constraints on actions for fraud generally, the Court has starkly refused to regard falsity without more as sufficient grounds for liability. “[I]n a properly tailored fraud action . . . [false] statement alone does not subject a [defendant] to fraud liability.” In the same vein, probabilistic assessments of harm do not suffice to ensnare even a calculating perpetrator of fraud. Rather, the complainant must demonstrate that the intended fraud was successfully consummated.

Even prohibition of perjury, arguably a pure instance of deeming falsity per se as actionable, is ultimately rooted in notions of indisputable harm. As a recent book on the subject concluded, “[p]erjury clearly poses a threat to the judicial system and the administration of justice,” transcending its effect on the case in which it is committed. This manifest and fundamental injury no doubt accounts for the severity with which the Court has allowed perjury to be treated. Thus, criminal defendants’ right to testify does not shield them from penalty for perjury, including enhancement of their sentence at a trial that led to

Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 734–35 (1975) (“[A] putative plaintiff, who neither purchases nor sells securities but sues instead for intangible economic injury such as loss of a noncontractual opportunity to buy or sell, is more likely to be seeking a largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff’s subjective hypothesis.”) (denying cause of action to sue under SEC Rule 10b-5 where party claiming damages has not bought or sold shares).


109. See id.

110. JAMES B. STEWART, TANGLED WEBS 433 (2011).

111. See id. at 441 (“Lying under oath that goes unproven and unpunished breeds a cynicism that undermines the foundations of any society that aspires to fair play and the rule of law. It undermines civilization itself.”).

their conviction.\textsuperscript{113} Witnesses falsely testifying at a grand jury proceeding are likewise subject to prosecution.\textsuperscript{114}

\textbf{D. Acknowledging Epistemic Doubt in the Face of Official Truth}

Defamatory falsehoods may not be susceptible to remedy through the marketplace of ideas;\textsuperscript{115} the experience of libel law, however, counsels against facile surrender of First Amendment safeguards to allegations of factually false assertions. As Vincent Blasi has noted, Holmes’s analysis drew as much from scientific methodology and its fallibilist tenets as from economic analogy.\textsuperscript{116} Scientific skepticism toward claims of final truth accords with the democratic premise that government may not prescribe unassailable orthodoxies.\textsuperscript{117} This epistemic humility points to the need to base libel damages on substantial confidence that the defendant’s statement definitely conveyed to third parties a provably false derogatory assertion about the plaintiff.

The main arena in which this philosophy has been implemented is litigation over the so-called fact-opinion distinction. Legions of lower courts after \textit{Gertz}, relying on that decision’s famous dicta,\textsuperscript{118} distinguished between protected expressions of opinion and actionable

\begin{enumerate}
\item[115.] \textit{See supra} Part II.A.
\item[116.] \textit{See} Vincent Blasi, \textit{Holmes and the Marketplace of Ideas}, 2004 \textit{Sup. Ct. Rev.} 1, 19–21 (2004); \textit{see also} PATRICIA GOSLING \& BART NOORDAM, \textit{Mastering Your PhD: Survival and Success in the Doctoral Years and Beyond} (2006), \textit{available at} \url{http://www.springerlink.com/content/gm3kl2855023rl3g/} ("There is no place for dogma in science. The scientist is free, and must be free to ask any question, to doubt any assertion, to seek for any evidence, to correct any errors." (quoting J. Robert Oppenheimer)).
\item[117.] \textit{See} W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith within."); \textit{see also} Gey, \textit{supra} note 58, at 20 ("[W]hile the democratic government continues to describe itself as such, everything is always open to question; nothing is sacrosanct.").
\item[118.] \textit{See supra} notes 15–16 and accompanying text.
\end{enumerate}
In Milkovich v. Lorain Journal Co., however, the Court rejected a categorical dichotomy between reachable fact and privileged opinion. Blanket immunity for "opinion," the Court noted, would protect speech taking the nominal form of opinion but implying assertions of fact. Moreover, established First Amendment principles already safeguarded libel defendants from improper suppression of their views. Speakers could not be punished for statements "that cannot 'reasonably [be] interpreted as stating actual facts'" about the plaintiff.

The Milkovich Court highlighted as well its decision in Philadelphia Newspapers, Inc. v. Hepps, which embodied the proposition that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."

The Milkovich Court's dismissal of the fact-opinion shibboleth should not obscure its insistence that actionable libel contain a core of provable falsity. Indeed, the overall continuity of the post-Milkovich landscape with the fact-opinion regime suggests a consensus that the Court did not appreciably lower the constitutional burden on plaintiffs.


121. Id. at 18, 21.

122. Id. at 18.

123. Id. at 19.

124. Id. at 20 (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988)).


127. See Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724, 727 (1st Cir. 1992) ("[W]hile eschewing the fact/opinion terminology, Milkovich did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion."). A sampling of decisions from before and after Milkovich supports the First Circuit's observation. Throughout both periods, courts have sought to discern whether a statement implies a defamatory fact by ascertaining the statement's impression on the hypothetical average reasonable reader or listener. See, e.g., Bustos v. A & E Television Networks, 646 F.3d 762, 765 (10th Cir. 2011); Damon v. Moore, 520 F.3d 98, 103–04 (1st Cir. 2008); Knievel v. ESPN, 393 F.3d 1068, 1080 (9th Cir. 2005); Moss v. Camp Pemigewasset, Inc., 312 F.3d 503, 510 (1st Cir. 2002); Wells v. Liddy, 186 F.3d 505, 529 (4th Cir. 1999); Potomac Valve &
As an epistemic matter, then, libel plaintiffs must provide strong assurance that the disputed statement can be plausibly construed as communicating a defamatory assertion that is verifiably false. Given the subjective perception of meaning, courts should hesitate to ascribe objective content to ambiguous expression. In this regard, the high threshold for finding provably false speech has long led the Court to resist libel claims rooted in overly literal bases for liability. Thus, suits over charges that a plaintiff in one case had engaged in "blackmail" and another was a "traitor" were rejected because these terms could not reasonably be understood as accusations of criminal behavior. Instead, viewed in the context of a heated dispute each amounted to "rhetorical hyperbole." In other aspects of libel, too, the Court's recognition of semantic uncertainty has produced a tempered approach to the question of factual falsity. This functional perspective, for example, has informed the Court's treatment of altered quotations. Even deliberate misattribution of certain language to a plaintiff does not inevitably rise to the level of actionable libel. Rather, the Court held in Masson v. New Yorker Magazine, Inc. that a defendant can be held liable for such revision only if the alteration materially changed the meaning conveyed by the


128. See generally Thomas, supra note 119, at 339–84 (advancing a "pragmatics paradigm" for examining the role of meaning in defamation law).


131. Id. at 285–86; Greenbelt, 398 U.S. at 14.

plaintiff's original statement. There, the Court carefully screened from the article at issue those passages in which reasonable jurors could conclude that the discrepancies between Masson's reported and actual words would harm his reputation. Thus, much as impermissible overbreadth must be both "real" and "substantial," so must actionable defamatory falsehood as well.

Outside of libel, commercial speech offers a comparable illustration of how epistemic considerations inform the bounds of regulatory power. On the one hand, the state's ample authority to curb false, deceptive, and misleading speech stems from confidence in three forms of knowledge. First, prototypical advertising of the terms on which goods or services are offered—e.g., the prices of prescription drugs at issue in the seminal case of Virginia State Board of Pharmacy v. Virginia. Citizens Consumer Council, Inc.—normally arouses little doubt about the factual content of the message being conveyed. In addition, the relative objectivity of such information makes it subject to official review without fear of partisan overreaching by the state. Finally, advertisers can typically assess the reliability of their claims: "The truth of commercial speech . . . may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else."

At the same time, regulatory prerogative is more tenuous when the capacity for objective disproof is absent. Much contemporary commercial expression consists of corporate image advertising, "which describes the corporation itself, its activities or its views, but does not

133. Id. at 517.
134. See id. at 522–25.
136. See supra notes 25–27 and accompanying text.
138. Id. at 771–72 n.25; see also Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 564 n.6 (1980) ("[C]ommercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages . . . ").
explicitly describe any products or services sold by the corporation.\textsuperscript{139} As with slogans broadly proclaiming the superiority of a product or service,\textsuperscript{140} the subjectivity of corporate image advertising appears to preclude its prohibition.\textsuperscript{141} Similarly, where advertising is factually accurate and not demonstrably misleading, the Court has been loath to permit its suppression on the ground that foolish consumers might adversely rely on false inferences. Thus, the Court has repeatedly struck down bans on truthful lawyer advertising based on fears that potential clients would fail to grasp the nature or quality of services being offered. Rejecting this rationale, the Court has struck down prohibitions on advertising about the price of routine legal services,\textsuperscript{142} advertising areas of practice except in officially prescribed verbiage,\textsuperscript{143} and including illustrations in an advertisement.\textsuperscript{144}

\textit{E. Declining to Waive Core First Amendment Tenets}

Defamatory falsehoods, though devoid of worth, do not fall wholly outside the orbit of First Amendment protection. Selective shelter of some libelous speech allows valuable expression to flourish.\textsuperscript{145} Protection of libel, however, is not only instrumental. The Court has also stated that sanctions for libelous falsehood do not warrant wholesale suspension of fundamental free speech principles. This stance, intimated in the \textit{New York Times} declaration that “libel can claim no talismanic
immunity from constitutional limitations," was emphatically affirmed in a case that did not involve libel at all.

The idea that defamation lies beyond the reach of the First Amendment can be traced to dicta in the Court's 1942 decision in *Chaplinsky v. New Hampshire*. There, the Court upheld Chaplinsky's conviction for having uttered "fighting words." In explaining the state's power to punish such speech, the Court famously recited categories of expression "the prevention and punishment of which has never been thought to raise any Constitutional problem." The roster included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

A half-century later, the Court took occasion in *R.A.V. v. City of St. Paul* to refine the ostensible sweep of these passages. R.A.V. had been convicted for burning a cross on the yard of an African-American family under an ordinance banning the display of a burning cross or other symbol that would foreseeably "'arouse[] anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender.'" A narrowing construction by the Minnesota Supreme Court limited the ordinance's reach to expression that could be considered "fighting words" under *Chaplinsky*. On appeal, the United States Supreme Court acknowledged that *Chaplinsky's* language licensed restrictions on the content of speech in the case of fighting words and other classes of expression enumerated in that opinion. The Court further recognized that declarations since *Chaplinsky* appeared to place these areas entirely beyond the bounds of the Free Speech Clause. Nevertheless, the Court

147. 315 U.S. 568 (1942).
148. Id. at 572–74. The Court described this type of speech as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 572.
149. Id. at 571–72.
150. Id. at 572 (emphasis added).
152. Id. at 379–80.
153. Id. at 381.
154. See id. at 382–83 (citing *Chaplinsky*, 315 U.S. at 572).
155. See id. at 383 ("We have sometimes said that these categories of expression are 'not within the area of constitutionally protected speech,'" (quoting
rejected as overly literal an interpretation that government may wholly ignore central First Amendment mandates when forbidding these kinds of speech.\textsuperscript{156} In particular, the Court repudiated any suggestion that these realms of expression could be made “vehicles for content discrimination unrelated to their distinctively proscribable content.”\textsuperscript{157}

To the Court, St. Paul’s ordinance constituted such a vehicle both formally and functionally. On its face, the ban selectively targeted only those fighting words pertaining “to one of the specified disfavored topics.”\textsuperscript{158} Even within an otherwise unprotected class of speech, however, the state may not single out for “special prohibitions . . . speakers who express views on disfavored subjects.”\textsuperscript{159} Moreover, the Court asserted, the ban in practice effected viewpoint discrimination as well.\textsuperscript{160} Since the prohibited words were far more likely to be employed by advocates of intolerance than by their opponents,\textsuperscript{161} the ordinance was fraught with danger that the city sought “to handicap the expression of particular ideas.”\textsuperscript{162}

Nor did the Court leave doubt that the analysis fatal to St. Paul’s ordinance would govern prohibitions of libel as well. In support of its reasoning, the Court invoked a distinction between the permissible proscription of libel and the invalid “content discrimination of proscribing only libel critical of the government”\textsuperscript{163} However little regard the First Amendment may have for a category of speech, it still does not condone “censorship of ideas” imposed through content discrimination

\textsuperscript{156} Roth v. United States, 354 U.S. 476, 483 (1957)) . . . or that the ‘protection of the First Amendment does not extend’ to them (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984)) (additional citations omitted)).

\textsuperscript{157} Id. at 384 (“Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government ‘may regulate [them] freely.’” (quoting id. at 400 (White, J., concurring))).

\textsuperscript{158} Id. at 383–84.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} See id. at 391–92.

\textsuperscript{162} Id. at 393–94.

\textsuperscript{163} Id. at 384.
within that category. Thus, defamation—like fighting words and other "low-value" speech—is not excluded from the solicitude of the First Amendment's most jealously guarded values.

III. THE STATUS OF NONDEFAMATORY FALSE FACTUAL ASSERTIONS: THE STOLEN VALOR ACT AS LITMUS TEST

The themes that emerge from Supreme Court libel decisions, including incorporation by reference in R.A.V., are instructive on authority to restrain other factually false expression. Unlike some commentators, however, the Court has not explicitly articulated a systematic approach to novel prohibitions of false speech. At a basic doctrinal level, the presumption about such bans hinges on a proper reading of Chaplinsky's classic list of subordinate classes of speech. If the inclusion of libel is read as a proxy for the entire category of false expression, then factually false statements generally should be deemed "no essential part of any exposition of ideas, and . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Conversely, application of expressio unius would mean that Chaplinsky's specification left open for consideration protection of other kinds of false expression.

This Part argues that the intersection of themes governing the Court's treatment of defamation is too complex and nuanced to infer the

164. Id. at 393; see id. at 392 ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.").


166. See, e.g., Parker, supra note 5, at 24–37 (proposing four-factor test to determine whether restriction of false factual speech violates First Amendment); Spottswood, supra note 24 (proposing broad protection for factually false but sincerely believed speech while limiting protection of insincere false speech to extent needed to avoid deterring sincere speech, based largely on the two categories' respective positive and negative contributions to the stock of knowledge).

167. See Tushnet, supra note 75, at 15 ("[W]hat we are dealing with here is a standard 'level of generality' problem.").

susceptibility of all false statements to regulatory discretion. Reliance on Court pronouncements of the unworthiness of factually false speech removes this language from the broader context of the Court’s jurisprudence. The Court has not endorsed the proposition that false statements of fact are so categorically beyond the pale of constitutional cognizance that the state may punish any of them on the showing of merest rationality. On the contrary, recent Court decisions have registered a deep reluctance to expand the set of proscribable genres of speech beyond those already established. The indiscriminate inclusion of all false factual assertions would have ramifications at odds with premises underlying the Court’s defamation doctrine and the First Amendment principles upon which it rests. Thus, the speech suppressed by the Stolen Valor Act cannot be simply presumed to be “of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.” Rather, the government must demonstrate that the damage produced by such speech is sufficiently substantial to overcome First Amendment barriers to censorship. To date, no showing of intrinsic harm to justify a blanket ban has been presented.

A. The Fallacy of Wholesale Exclusion of False Speech from First Amendment Visibility

It is easy enough to string together quotations to seemingly show that the Court has thoroughly banished false statements from the realm of

169. The rational relationship or rational basis standard is notoriously easy for the government to meet. See F.C.C. v. Beach Commc’ns, Inc., 508 U.S. 307, 314–15 (1993) ("On rational-basis review . . . those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it.”) (citation and internal quotation marks omitted); Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955); Ronald J. Krotoszynski, Jr., If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith, 102 Nw. U. L. Rev. 1189, 1197 (2008) (“Traditional rational basis review only asks whether any theoretical, or hypothesized, rational relationship exists to a legitimate governmental interest; the challenger must essentially prove a negative by eliminating any real or imagined basis for the enactment.”).

170. Chaplinsky, 315 U.S. at 572.
protected expression. The Court’s opinion in R.A.V., however, cautions against hyper-literal and de-contextualized constructions of such isolated passages. Ironically, the notion that these passages reflect a default presumption that false speech is categorically unprotected is belied by Gertz itself. Even as the Court decreed that “there is no constitutional value in false statements of fact,” its holding conferred considerable protection on this speech. To infer that this analysis manifests an intention to regard all factually false speech as an undifferentiated, unprotected whole represents a simplistic and unwarranted leap in logic.

Designation of all factually false speech as an unprotected category clashes with the more cautious, multifaceted philosophy displayed in the Court’s libel jurisprudence. To hold that false statements are uniformly unprotected by the First Amendment “except in a limited set of contexts where such protection is necessary ‘to protect speech that matters’” assumes one’s conclusion and exalts one element of the Court’s analysis to the exclusion of others. Wholesale relegation of factually false expression to the status of unprotected category would stem from the premise that “it may be appropriately generalized that


172. See supra notes 154–57 and accompanying text.


174. See supra notes 52–54 and accompanying text; see also Alvarez, 617 F.3d at 1203 ("Gertz’s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition.").

175. Alvarez, 617 F.3d at 1219 (Bybee, J., dissenting) (quoting Gertz, 418 U.S. at 341).

176. See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413, 477 (1996) ("[N]ear absolute protection [is] given to false but nondefamatory statements of fact outside the commercial realm . . .; even a concern with chilling true speech would not explain such sweeping protection of speech that deserves understanding.").
within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. Such a generalization hardly seems warranted across the entire landscape of even deliberately false speech. It is not self-evident, for example, that a misrepresentation of identity in the course of investigative reporting is of such intrinsic “evil” that no “case-by-case adjudication” is needed before it is subject to sanction.

Perhaps strategic considerations afford some latitude for this type of deception, but this rationale does not address a multitude of other false statements that produce no appreciable harm. Given the serious and obvious injury that justifies damages for libel, the idea of false expression as punishable apart from demonstrable harm is unpersuasive. In his concurring opinion in Alvarez, Chief Judge Alex Kozinski offered a catalogue of “white lies, exaggerations and deceptions” presumably subject to penalty under a theory that factual falsity is categorically proscribable. That these untruths are typically self-serving does not mean that they are unprotected. State power to stamp out these everyday departures from the truth would not only be Orwellian; it would reverse the usual assumptions of the First Amendment. It is government’s


178. See Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 522 (4th Cir. 1999) (refusing to permit Food Lion to recover damages on showing of less than actual malice where reporters used false resumes to gain access to Food Lion supermarkets). The use of “testers” posing as interested home buyers to discover whether certain brokers engage in racial discrimination raises similar issues. See, e.g., Northside Realty Assocs., Inc. v. Chapman, 411 F. Supp. 1195, 1196–97 (N.D. Ga. 1976).

179. See supra Part II.B.

180. See supra notes 19–21 and accompanying text.


182. See, e.g., id. at 674 (“I go to church every Sunday” (internal quotations omitted)).

183. Nor do Chief Judge Kozinski’s categories encompass all the presumably protected false speech that might be susceptible to punishment under a blanket power to ban falsehoods. For example, detrimental reliance on incorrect, objectively unsubstantiated, but sincerely believed predictions might be subject to sanction. See, e.g., ‘Rapture’: Believers Perplexed after Prediction Fails, BBC News (May 22,
burden to justify restrictions of expression. Absent express recognition from the Court, sweeping authority to ban false statements of any stripe should not be presumed. Of course, even the quotidian examples cited by Chief Judge Kozinski might not escape sanction in circumstances where they foreseeably caused a harm that the state has a right to prevent, such as inducing adverse financial reliance. To regard falsity in of itself as such a harm, however, exceeds the scope of power that has thus far been acknowledged by the Court.

Nor does obscenity’s status as an unprotected category of speech refute the idea that harm is a requisite element of such categories. While the Court’s definition of obscenity does not specify harm, the rationale for its suppression does. The Court has accepted a legislative determination that a connection exists between the availability of obscene material and antisocial behavior. More broadly, the Court acknowledged the harmful effect on “the tone of the society” that the dissemination of obscenity was thought to produce. Of course, it could be argued that dishonesty in the aggregate exerts a similarly corrosive effect on society. To justify blanket authority to ban false statements in all forms, however, this rationale would have to rely on the same lenient

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185. See infra note 275 and accompanying text.
186. See United States v. Alvarez, 617 F.3d 1198, 1228 (9th Cir. 2010) (Bybee, J., dissenting), cert. granted, ___ U.S. ___, 132 S. Ct. 457 (2011) (describing the Court’s obscenity jurisprudence as an “embarrassment” to the concept of harm requirement).
187. See Miller v. California, 413 U.S. 15, 24 (1973) (“[W]e now confine the permissible scope of [obscenity] regulation to works . . . which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.”).
189. Id. at 59 (quoting Alexander Bickel, Dissenting and Concurring Opinions, 22 Pub. Int. 25, 25 (1971)).
190. See SISSELLA BOK, LYING: MORAL CHOICES IN PUBLIC AND PRIVATE LIFE 63 (Vintage Books 1979) (discussing “cumulative harm” of individual deceptive practices).
scrutiny that the Court invoked in Paris Adult Theatre I v. Slaton.\textsuperscript{191} There, the Court permitted the state to prohibit obscenity on the basis of "unprovable assumptions"\textsuperscript{192} about its effects. Unlike factual falsehood in general, however, obscenity had already long been established as one of the traditionally proscribable classes of speech.\textsuperscript{193} Moreover, even within that tradition, obscenity occupies a distinctive niche in First Amendment jurisprudence subjecting it to extraordinary control.\textsuperscript{194} Absent an unequivocal signal from the Court, it should not be assumed that false expression categorically belongs on the list, much less that government can ban any portion of it on the lightest of premises.

Such a signal has not been forthcoming. On the contrary, the Court in recent terms has refused to expand the categories of unprotected speech, or otherwise to sanction suppression of speech simply for lacking value. Most pointedly, the Court in United States v. Stevens,\textsuperscript{195} emphatically rejected an invitation to recognize a new class of excluded expression. At issue was a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty as described in the legislation.\textsuperscript{196} According to the government, such depictions represented a logical addition to Chaplinsky's list of "'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'"\textsuperscript{197} The Court, however, took a more stringent view of the criteria for inclusion on the list. It observed that these "'historic and traditional categories long familiar to the bar'" included obscenity, defamation,

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\textsuperscript{191.} 413 U.S. 49 (1973).

\textsuperscript{192.} \textit{Id.} at 61.

\textsuperscript{193.} See Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); see also Roth v. United States, 354 U.S. 476, 485 (1957) ("[O]bscenity is not within the area of constitutionally protected speech or press").


\textsuperscript{195.} 559 U.S. \textsuperscript{,}, 130 S. Ct. 1577 (2010).


\textsuperscript{197.} Stevens, 559 U.S. at \textsuperscript{,}, 130 S. Ct. at 1584–85 (quoting \textit{Chaplinsky}, 315 U.S. at 571–72).
fraud, incitement, and speech integral to criminal conduct. The Court acknowledged that this roster was not exhaustive, noting its 1982 decision in New York v. Ferber designating child pornography as such a category. Ferber, however, represented a “special case” in which production of the forbidden material was inextricably intertwined with the abuse of children. Neither that decision nor others identifying unprotected classes of speech had “establish[ed] a freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”

Accordingly, the Stevens Court would not conduct “a simple cost-benefit analysis” to determine categories of speech entitled to no First Amendment protection. Rather, the Court would be guided by the bedrock judgment embodied in the First Amendment that the benefits of free speech exceed its costs. That judgment precludes denial of protection to certain speech simply because that speech “is not worth it.” Thus, the features that characterized previously recognized proscribable classes of expression did not “permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary . . . .” Refusing therefore to perform “an ad hoc calculus of costs and benefits,” the Court instead struck down the challenged law on the ground that depictions of animal cruelty did not qualify as a “historically unprotected” category of speech.

198. Id. at __, 130 S. Ct. at 1584 (citation omitted).
200. Stevens, 559 U.S. at __, 130 S. Ct. at 1585–86; Id. at __, 130 S. Ct. at 1586 (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”).
201. Id. at 1586 (citation omitted).
202. Id.; see also FCC v. Pacifica Found., 438 U.S. 726, 761 (1978) (Powell, J., concurring in judgment) (“I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most ‘valueable’ and hence deserving of the most protection, and which is less ‘valueable’ and hence deserving of less protection.”).
203. Stevens, 559 U.S. at __, 130 S. Ct. at 1586.
204. Id. at __, 130 S. Ct. at 1585.
205. Id. at __, 130 S. Ct. at 1585.
206. Id. at __, 130 S. Ct. at 1586.
207. Id. at __, 130 S. Ct. at 1586.
Any doubt that the Court would rigorously enforce this strict definition of unprotected speech was dispelled last term in *Brown v. Entertainment Merchants' Association*.208 There, the Court invalidated a California law forbidding the sale to minors of "violent video games."209 In a virtual replay of the *Stevens* opinion, the Court affirmed that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."210 Only "persuasive evidence that a novel restriction . . . is part of a long . . . tradition of proscription" could overcome the First Amendment's overwhelming presumption against prohibitions directed at the content of speech.211 Against a long tradition of children's literature presenting vivid depictions of violence, such evidence to support California's ban was sorely lacking.212 The state therefore could not deny violent video games to minors simply because the social costs of this type of speech were thought to outweigh its value.213 As with other content-based restrictions, the Court subjected the law to strict scrutiny.214 Almost inevitably,215 the statute failed to meet this demanding standard.216

Also last term, the Court issued a decision philosophically if not doctrinally aligned with *Stevens* and *Brown*. In *Snyder v. Phelps*,217 the Court overturned an award of damages against a church and its members for picketing at the funeral of a military service member. A number of the signs asserted a link between the death of American soldiers and the nation's tolerance of homosexuality.218 Unlike *Stevens* and *Brown*, the outcome in *Snyder* hinged largely on the expression's classification as

209. *Id.* at ___, 131 S. Ct. at 2732.
210. *Id.* at ___, 131 S. Ct. at 2734.
211. *Id.* at ___, 131 S. Ct. at 2734.
212. *See id.* at ___, 131 S. Ct. at 2736.
213. *Id.* at ___, 131 S. Ct. at 2734.
214. *Id.* at ___, 131 S. Ct. at 2738.
215. *See id.* at ___, 131 S. Ct. at 2738 ("It is rare that a regulation restricting speech because of its content will ever be permissible." (quoting United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 818 (2000))).
216. *See id.* at ___, 131 S. Ct. at 2738–42.
218. *See id.* at ___, 131 S. Ct. at 1216–17.
commentary on a matter of public concern. As in those two cases, however, the Court underscored that speech could not be suppressed based on an assessment of its low worth, even as the Court appeared to intimate endorsement of that assessment.

That much false speech is doubtless of little worth, then, does not mean that all of it is proscribable. Stevens's enumeration of classes of speech “fully outside the protection of the First Amendment” specified libel and fraud, but not the entire category of false factual expression of which they form so small a part. Stevens emphasized, and Brown echoed, the Court's reluctance to augment the established list of unprotected categories. Extrapolation from the list's particular classes of falsehoods to false speech generally would represent a major expansion at odds with the Court's cautious approach. It is more consistent with the Court's philosophy to assume that prohibitions of false factual statements other than the specified subsets are subject to ordinary First Amendment principles.

Finally, the Court's concern with troubling implications of power claimed by the government in Stevens applies with far greater

219. See id. at ___, 131 S. Ct. at 1216 (“The ‘content’ of Westboro’s signs plainly relates to broad issues of interest to society at large”); id. at ___, 131 S. Ct. at 1219 (“Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment.”).

220. See id. at ___, 131 S. Ct. at 1219 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

221. See id. at ___, 131 S. Ct. at 1218 (“The applicable legal term—‘emotional distress’—fails to capture fully the anguish Westboro’s choice added to Mr. Snyder’s already incalculable grief”); id. at ___, 131 S. Ct. at 1220 (“Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible.”).


223. See id. at ___, 130 S. Ct. at 1584.


225. See United States v. Alvarez, 638 F.3d 666, 670 (9th Cir. 2011) (“The Court’s standard list of categorically exempt speech has never used the phrase ‘false statements of fact.’ Instead, the Court has limited itself to using the words defamation (or libel) and fraud.”).
magnitude here. To regard depictions of illegally wounding or killing animals as falling into a “‘First Amendment Free Zone’” would sustain authority of “alarmingly breadth.” Depictions of illegal instances of hunting and fishing or the “humane slaughter of a stolen cow,” for example, could be made the objects of criminal prohibition. These finite examples of government overreach, however, pale in comparison with the range of innocuous untruths that the state could forbid if factual falsehood were deemed a “‘First Amendment Free Zone.’” Of course, the government would presumably reserve such power to pursue more “serious” deception. The Stevens Court, however, dismissed such a justification: “We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.” Moreover, the very notion of responsibility of this kind is constitutionally problematic. Overturning a conviction for use of a vulgarity in public, the Court in Cohen v. California pointed to the lack of a “readily ascertainable general principle” by which it could identify especially “distasteful” words as constitutional pariahs. Leaving determination of punishable falsehoods wholly to government discretion would remove the judicial touchstone of principled distinctions altogether.

B. The Stolen Valor Act: A Case Study of Repellant but Protected Lies

The Stolen Valor Act (SVA) appears likely to become the vehicle through which the Court resolves the First Amendment status of nondefamatory (and non-fraudulent) falsehoods. The Act’s key language provides:

Whoever falsely represents himself or herself . . . to have been awarded any decoration or medal authorized by Congress for the Armed Forces of

227. Id. at ___, 130 S. Ct. at 1588.
228. Id. at ___, 130 S. Ct. at 1588.
229. Id. at ___, 130 S.Ct. at 1585 (quoting Jews for Jesus, 482 U.S. at 574).
230. See id. at ___, 130 S. Ct. at 1577.
231. Id. at ___, 130 S. Ct. at 1591.
233. See id. at 25.
the United States [or] any of the service medals or badges awarded to the members of such forces . . . shall be fined under this title, imprisoned not more than six months, or both. 234

The SVA has received mixed treatment among both courts235 and commentators.236 The most extensive analysis and spirited debate


236. Compare, e.g., Parker, supra note 5, at 21–37 (asserting the constitutionality of SVA under the author’s proposed test); and Tushnet, supra note 75, at 24 (stating the view that SVA is constitutional); and Volokh, supra note 5, at 350 (arguing that the SVA is “probably” constitutional if limited to knowingly false claims), with Jeffery C. Barnum, Comment, False Valor: Amending the Stolen Valor Act to Conform with the First Amendment’s Fraudulent Speech Exception, 86 WASH. L. REV 841 (2011) (arguing that SVA in current form violates First Amendment but can be amended to qualify as constitutional anti-fraud measure); Stephanie L. Gal, Note, Resolving the Conflict Between the Stolen Valor Act of 2005 and the First Amendment, 77 BROOK. L. REV. 223 (2011) (stating the same); and David S. Han, Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech, 87 N.Y.U. L. REV., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1945248 (arguing that SVA impermissibly infringes self-definition interest protected by First Amendment); and Beth F. Lloyd-Jones, Note, The Stolen Valor Conundrum: How to Honor the Military While Protecting Free Speech, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 153 (2012) (finding SVA to violate the First Amendment); and Kathryn Smith, Hey! That’s My Valor: The Stolen Valor Act and Government Regulation of Speech Under the First Amendment, B.C. L. REV., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1927590 (contending that SVA amounts to unconstitutional restriction of free speech); and Christina E. Wells, Lies, Honor, & the Government’s Good Name: Seditious Libel & the Stolen Valor Act, 59 UCLA L. REV. DISCOURSE 136 (2012) (arguing that SVA is unconstitutional for substantially the same reasons that the First Amendment forbids
judicially took place in *Alvarez*, whose various opinions focused largely on the threshold question of whether false statements of fact comprise an unprotected category of speech.\(^{237}\) Having concluded that they do not, the Ninth Circuit panel applied strict scrutiny to the SVA, leading almost inevitably\(^ {238}\) to the Act’s invalidation.\(^ {239}\) As discussed in Part III-A above, this Article agrees that the Court has not treated the entire class of false factual expression as beyond the bounds of constitutional protection. This section seeks to show that the SVA illustrates why, absent congruence with the principles discussed in Part II, even bans on lies\(^ {240}\) that warrant society’s disapproval violate the First Amendment.

*Alvarez* supplies an emblematic test case for the SVA, including a strikingly unsympathetic defendant. A director of a local water board, Alvarez introduced himself at a meeting as “a retired marine of 25 years.”\(^ {241}\) Thus began a “series of bizarre lies” about Alvarez’s nonexistent military service that included a claim that he was awarded a Congressional Medal of Honor.\(^ {242}\) With no real question of his violation of the SVA, Alvarez pled guilty while reserving his right to appeal the Act’s constitutionality.\(^ {243}\)

Alvarez’s false claim, however repugnant, underscores the case for not broadly extending power to punish libel to other forms of factually false assertions. Unlike the injury inherent in published

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239. See *Alvarez*, 617 F.3d at 1215–17.

240. See Robbins, 259 F. Supp. 2d at 819 (citation omitted) (interpreting SVA to include scienter requirement).

241. *Alvarez*, 617 F.3d at 1200.

242. *Id.* at 1200–01.

243. *Id.* at 1201.
defamatory falsehoods, a spurious assertion of military glory does not inevitably produce a particularized substantial harm. Nor did such a premise form the basis for the SVA. Instead, Congress determined that “[f]raudulent claims surrounding the receipt of . . . [military] decorations and medals awarded by the President or the Armed Forces of the United States damage the reputation and meaning of such decorations and medals.” Likewise, the government successfully argued before the Tenth Circuit that “Congress could reasonably conclude, as a matter of simple common sense, that prohibiting false representations of having earned military awards would serve to safeguard the integrity of the awards.” One need not dispute either of these propositions to find them insufficient bases for suppression of speech. For the egregiously undeserving Alvarez to be associated with the Congressional Medal of Honor may in a sense dilute the meaning and integrity of that award. This effect, however, is too diffuse and ephemeral to support criminal sanctions under the First Amendment. Atmospheric injury may suffice for restrictions of the unique and unprotected category of obscenity, but under normal principles of free speech abstract detraction from the truth does not. Absent persuasive evidence of a more concrete harm—e.g., adverse impact on military personnel—false claims to these awards should not be subject to censorship.

244. See supra notes 20–22 and accompanying text.
247. See supra notes 28–30 and 189–94 and accompanying text.
248. The court in United States v. Strandlof, 746 F. Supp. 2d 1183 (D. Colo. 2010), rev’d, No. 10-1358, 2012 WL 247995 (10th Cir. Jan. 27, 2012), rejected the government’s argument that false claims to military honors could cause soldiers to “lose incentive to risk their lives to earn such awards.” Id. at 1190 (citation omitted).

This wholly unsubstantiated assertion is . . . unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor. . . . I find it incredible to suggest that, in the heat of battle, our servicemen and women stop to consider whether they will be awarded a medal before deciding how to respond to an emerging crisis.

Id. at 1190–91.
Moreover, it does not disparage the government's interest in honoring recipients of these awards to require pursuit of this aim to comply with the First Amendment. On the contrary, the Court has held that even the ultimate symbol of the nation, the American flag, may not be employed in a manner that infringes on freedom of speech. In *West Virginia State Board of Education v. Barnette*, the Court sustained the right to refrain from participating in a ceremony requiring students to salute the American flag and recite the Pledge of Allegiance. In the precedent overruled by *Barnette*, the Court had reasoned that since "[n]ational unity is the basis of national security," officials were entitled "to select appropriate means for its attainment." In *Barnette*, however, the Court found no "grave and immediate danger" to national unity as embodied by the flag to justify this invasion of "individual freedom of mind in preference to officially disciplined uniformity." Similarly, the Court ruled in *Texas v. Johnson* that the state could not invoke its interest in "preserving the [American] flag as a symbol of nationhood and national unity" to convict Johnson for violating a law prohibiting "[d]esecration" of a flag in a manner likely to "seriously offend" observers. Johnson had set fire to the flag as part of a political demonstration. Since Johnson's violation of the law "thus depended on the likely communicative impact of his expressive conduct," the Court subjected his conviction to strict scrutiny. As in *Barnette*, the Court found that the state had breached the fundamental constitutional command that public authorities may not "'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"

249. 319 U.S. 624 (1943).
252. *Id.* at 639.
254. *Id.* at 410.
255. *Id.* at 400 n.1 (citing TEX. PENAL CODE ANN. § 42.09(b) (Vernon West 1989)).
256. *Id.* at 399.
257. *Id.* at 411–12.
258. *Id.* at 415 (quoting *Barnette*, 319 U.S. at 642).
To be sure, it is difficult to conceive of Alvarez’s patent lie as touching the rights of belief and conscience involved in \emph{Johnson} and \emph{Barnette}. At a deeper level, however, the targeted suppression of such claims implicates the ideas of epistemic skepticism and marketplace dynamics reflected in those cases and in the Court’s libel jurisprudence. The \emph{Milkovich} Court’s rejection of a stark line between fact and opinion arose from concern that substantively libelous statements might otherwise find refuge in the disingenuous form of opinions.\footnote{259} In another sense, though, the danger can run in the opposite direction. To shelter ideas while leaving factual expression to plenary government control ignores an abiding First Amendment theme: wariness of government’s capacity and motives when acting as arbiter of truth. The same First Amendment that constrains government from enforcing favored ideas should not be construed to grant \textit{carte blanche} to privilege favored facts. While Alvarez’s claim could be readily disproved,\footnote{260} no similarly objective gauge exists for distinguishing protected from proscribable falsehoods in the absence of a requirement of harm. It may be intuitively appealing to assume constitutional protection of falsehoods that are interwoven into ideologies\footnote{261} or intellectual inquiry,\footnote{262} but a principled standard for identifying these is elusive. Conversely, falsehoods like Alvarez’s claim may seem hardly worth protecting, but the purpose of the First Amendment is to “protect unpopular individuals from retaliation,”\footnote{263} and the Court has repeatedly warned that ostensibly small inroads on First Amendment safeguards pave the way for far larger ones.\footnote{264} A uniform requirement that appreciable harm be demonstrated to

\begin{footnotes}
\item 259. See supra notes 120–24 and accompanying text.
\item 260. See Tushnet, supra note 75, at 24 (asserting as major reason for validity of laws like SVA “the ease with which the falsity of some factual statements can be determined”).
\item 261. See supra notes 69–72 and accompanying text.
\item 262. See Volokh, supra note 5, at 352 (“[A] per se rule of constitutional protection might well apply to false statements about historical figures, historical events, war news, or scientific theories.”).
\item 264. See, e.g., Cohen v. California, 403 U.S. 15, 25 (1971) (“We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege . . . fundamental societal values are truly implicated.”) (finding violation of free speech); Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963) (“[I]t is no defense to urge that the religious practices here
strip falsehoods of protection avoids basing freedom of speech on official bias or judicial preference.\(^{265}\)

Vigilance against such bias, it will be recalled, was the impetus for the Court’s decision to strike down the hate speech ordinance in \textit{R.A.V.}\(^{266}\). In barring discriminatory bans on speech, the Court sounded a prominent theme in First Amendment jurisprudence.\(^{267}\) On its face, the SVA does not discriminate against a particular viewpoint.\(^{268}\) The \textit{R.A.V.} Court, however, was concerned with more than overt efforts to suppress a specific message. Like St. Paul’s ordinance, the SVA singles out for “special prohibition[]” expression on “disfavored subjects.”\(^{269}\) Moreover, \textit{R.A.V.} recognized that a law’s viewpoint discrimination can lurk in its “practical operation”\(^{270}\) as well as its formal restriction. Here, the SVA enforces through selective sanction the view that military heroism and its attendant glory merit elevation over acclaim attained through other achievements.\(^{271}\) This perspective is likely shared by a large portion of

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may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . .”) (finding violation of Establishment Clause); see also United States v. Playboy Entm’t Group, Inc., 529 U.S. 803, 826 (2000) (“We cannot be influenced . . . . by the perception that the regulation in question is not a major one because the speech is not very important.”) (invalidating regulation of cable operators’ transmissions).

265. See United States v. Strandlof, No. 10–1358, 2012 WL 247995, at *24 (10th Cir. Jan. 27, 2012) (Holmes, J., dissenting) (“If there is a common feature that binds together the types of false statements enumerated in the Supreme Court’s past lists, it is something more than mere falsehood.”) (arguing for invalidation of SVA).

266. See \textit{supra} notes 151–65 and accompanying text.

267. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) (“[A]s a general matter, ‘the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’” (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972))).

268. See United States v. Robbins, 759 F. Supp. 2d 815, 820 (W.D. Va. 2011) (“[T]he speakers targeted by the law do not advocate any particular political or cultural viewpoint or question prevailing dogma or beliefs about any historical or scientific issue.”).


270. \textit{Id.}

the public. Comparable support, however, probably exists for the belief that bigotry should yield to tolerance; still, the \textit{R.A.V.} Court struck down an ordinance implementing that view on the ground that "majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."\textsuperscript{272} Certainly in this case, appreciation of exceptional courage by recipients of military honors does not require the coercive force of law.\textsuperscript{273}

While the SVA’s discrimination may be more oblique than that of St. Paul’s ordinance, this consideration is offset by two factors. First, the ordinance fell even though its prohibitions applied to a proscribable category of speech; the antidiscrimination principle should obtain even more rigorously when, as assumed here, a restriction does not affect a traditionally unprotected category. Secondly, though the SVA is directed at certain factual falsehoods about individual military performance rather than commentary on military policy, the two topics cannot always be so neatly cabined.\textsuperscript{274} The \textit{Cohen} Court refused to "indulge the facile assumption that one can forbid particular words without also running a

\textsuperscript{272} \textit{R.A.V.}, 505 U.S. at 392.

\textsuperscript{273} See \textit{W. Va. State Bd. of Educ. v. Barnette}, 319 U.S. 624, 641 (1943) ("To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.").

substantial risk of suppressing ideas in the process.\textsuperscript{275} Here, that risk is not so remote as to qualify the SVA for \textit{R.A.V.}'s exception for content discrimination whose nature "is such that there is no realistic possibility that official suppression of ideas is afoot."\textsuperscript{276}

These principles apply with special force where the causal theory of harm is attenuated and market deficiencies are not present to prevent correction of falsehood through additional speech. When false representation of military honors specifically and traceably secures improper benefits, its perpetrator can no doubt be penalized.\textsuperscript{277} A concrete adverse effect, however, is not categorically inherent in lies about military credentials, as Alvarez's hollow boast attests. Established First Amendment doctrine shields even the expression of ideas of proven toxicity in the faith that their threat can be countered by additional speech.\textsuperscript{278} It is consistent with this philosophy to trust the market, not official sanctions, to confront falsehoods whose principal impact is their moral offense. Lies like Alvarez's may well earn near-universal condemnation. Still, once admitted, the power to restrain individual liberty based on moral disapproval is not confined to this degree of consensus.\textsuperscript{279} However disturbing Alvarez's speech, it did not warrant

\textsuperscript{275} Cohen v. California, 403 U.S. 15, 26 (1971).
\textsuperscript{276} \textit{R.A.V.}, 505 U.S. at 390.
\textsuperscript{277} \textit{See} Brody v. Barasch, 582 A.2d 132, 133–34 (Vt. 1990) (affirming decision to deny plaintiff license to practice psychology on basis of mischaracterizations on plaintiff's resume).
\textsuperscript{278} \textit{See} American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 327–28 (7th Cir. 1985) (“Under the First Amendment the government must leave to the people the evaluation of ideas. . . . A belief may be pernicious — the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions.”).
\textsuperscript{279} Upholding a conviction for homosexual sodomy in \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986), the Court found as adequate rationale for the law at issue “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” \textit{Id.} at 196. Overruling \textit{Bowers} in \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), the Court disavowed the proposition that “the majority may use the power of the State to enforce [its views on homosexual conduct] on the whole society through operation of the criminal law.” \textit{Id.} at 571. A similar difficulty attends the rationale that Alvarez misappropriated a species of government property. \textit{See} Parker, supra note 5, at 24. \textit{Johnson}, too, could be seen as having misappropriated a revered national symbol, \textit{see} Texas v. Johnson, 491 U.S. at 397, 422 (1989) (Rehnquist, C.J., dissenting), but not in a manner that materially undermined the operations of government.
abandonment of the constitutional premise that further speech remains the first resort for addressing noxious expression. Indeed, the exposure of Alvarez's mendacity vindicates reliance on counterspeech as the First Amendment's usual corrective mechanism.\(^{280}\)

Like the statute struck down in *Brown*, the SVA is at once too narrow and too broad.\(^{281}\) It singles out a particular type of false self-laudation for unconditional proscription, and reaches fictitious claims that generate no material or irreparable harm. Disallowing punishment of a braggart like Alvarez does not foreclose power to impose sanctions where such lies induce tangible reliance and improper gain.\(^{282}\) Laws prohibiting fraud represent an obvious instrument for pursuing many such instances.\(^{283}\) *R.A.V.* and *Johnson* offer precedent; in neither case did the invalidity of the state's legal theory signify that the defendant's conduct was intrinsically immune from punishment under a properly crafted law.\(^{284}\) Similarly, here, those who seek redress against concrete

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280. See United States v. Alvarez, 617 F.3d 1198, 1216 (9th Cir. 2010) ("Alvarez's lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace.").

281. See *Brown v. Entm't Merchs. Ass'n*, ___ U.S. ___, 131 S. Ct. 2729, 2742 (2011) ("As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime.").

282. See Tushnet, *supra* note 75, at 3 n.9 ("[M]any false claims about having received military honors appear to be made in connection with efforts to obtain material benefit.").

283. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) ("The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.").

284. See *R.A.V.* v. City of St. Paul, 505 U.S. 377, 380 n.1 (1992) (stating that R.A.V.'s conduct might have violated Minnesota statutes forbidding terroristic threats, arson, or criminal damage to property); *Johnson*, 491 U.S. at 412 n.8 ("[N]othing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted only for flag desecration—not for trespass, disorderly conduct, or arson."); see also *Virginia v. Black*, 538 U.S. 343, 365–67 (2003) (plurality opinion of O'Connor, J.) (invalidating conviction of defendant for cross burning with intent to intimidate on ground that jury instructions conveyed improper burden of proof).
CONCLUSION

The constitutional law of libel has been the main forum for weighing the status of factual falsehoods under the First Amendment. Perhaps most strikingly, the Court has carefully circumscribed the state’s ability to penalize even a class of speech so devoid of value and capable of harm. From these decisions themes have emerged that illuminate the conditions under which government can proscribe other kinds of factually false expression. The current controversy over the Stolen Valor Act offers an instructive case of the bounds of that power. Though surely few would approve of false claims of military honors, the Court has not granted government plenary authority to forbid even morally repugnant lies simply because they are untrue. However noble the statute’s goals, it must comply with the guarantees of the Free Speech Clause. Requiring bans on falsehood to be neutrally aimed at demonstrable harms while preserving breathing space for valuable speech is not an onerous demand under the First Amendment.

285. The Court appears not to have even ruled out the possibility of a statute aimed at extraction of benefits through this specific misrepresentation. See United States v. Stevens, 559 U.S. ___, ___, 130 S. Ct. 1577, 1592 (2010) (“We... do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional.”). It is conceivable that the government could show that lying about military honors is an especially potent falsehood for misleading employers and other dispensers of benefits, and thus warrants special deterrence.

286. See Johnson, 491 U.S. at 418 (“It is not the State's ends, but its means, to which we object.”).