University of Dayton Law Review

Volume 44 | Number 2 Article 5

3-1-2019

Fake News, Deliberate Lies, and the First Amendment

Donald L. Beschle
John Marshall Law School

Follow this and additional works at: https://ecommons.udayton.edu/udlr

 Part of the Law Commons

Recommended Citation

Beschle, Donald L. (2019) "Fake News, Deliberate Lies, and the First Amendment," *University of Dayton Law Review*: Vol. 44: No. 2, Article 5.
Available at: https://ecommons.udayton.edu/udlr/vol44/iss2/5

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact mschlangen1@udayton.edu, ecommons@udayton.edu.

FAKE NEWS, DELIBERATE LIES, AND THE FIRST AMENDMENT

Donald L. Beschle[*]

I. INTRODUCTION: FAKE NEWS, REAL CONSEQUENCES

During the 2016 presidential campaign, a story emerged on the internet, and went viral, claiming that Hillary Clinton's campaign was engaged in operating a human trafficking ring out of Comet Ping Pong, a pizza restaurant in the District of Columbia.[1] Despite the absurdity of the claim, thousands (if not millions) were apparently eager to believe the story.

Many believers went further: As Pizzagate spread, Comet Ping Pong received hundreds of threats from the theory's believers.[2] The restaurant's owner, James Alefantis, told *The New York Times*: "'From this insane, fabricated conspiracy theory, we've come under constant assault, . . . I've

* Professor of Law, The John Marshall Law School. B.A., Fordham University; J.D., New York University School of Law; LL.M., Temple University School of Law.

[1] *See* Cecelia Kanz, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), https://www.nytimes.com/2016/11/21/technology/fact-check-this-pizzeria-is-not-a-child-trafficking-site.html. *See also* Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html.

[2] Kanz, *supra* note 1; Fisher et al., *supra* note 1.

Published by eCommons, 2018

done nothing for days but try to clean this up and protect my staff and friends from being terrorized."[3]

Neighboring businesses, performers who had performed at the restaurant, and others even marginally connected with Comet Ping Pong received harassment and death threats.[4] On December 4, 2016, a North Carolina man who had, in his own words, relied on the story and appointed himself as an investigator, travelled to D.C. and fired three shots at the restaurant, hitting a door, walls, and a desk.[5] Fortunately, no one was hit.[6]

On December 14, 2012, a mentally troubled twenty-year-old named Adam Lanza killed his mother, and then took weapons to Sandy Hook Elementary School in Newtown, Connecticut, where he shot and killed twenty students and six adults, before killing himself as first responders closed in.[7] The shooting, at the time the worst mass shooting at the elementary or high school level, and one of the worst of any kind in U.S. history, set off a national debate on gun control.[8] Supporters of further restrictions on gun ownership were met by defenders of gun rights, most of whom argued that further restrictions would be ineffective or counterproductive.[9] But one particularly bizarre reaction to the massacre, promoted by internet blogger Alex Jones and others, was that there was, in fact, no shooting at all.[10] Jones claimed that the entire shooting was staged, with child actors as the "victims," to further the cause of gun control.[11]

Once again, the absurd claim was nevertheless accepted by many, some of whom began to harass the families of the victims, denouncing them for their role in perpetuating this "hoax."[12] Needless to say, the families, if not the entire Newtown community, were shocked and deeply offended, if not frightened, by the harassment.

In 2011, Wisconsin held recall elections for a number of state senate seats.[13] Americans for Prosperity, a conservative group, sent out a mailing

---

[3] Kanz, *supra* note 1.

[4] *See* Fisher et al., *supra* note 1.

[5] *Id.*

[6] *See* Matthew Haag & Maya Salam, *Gunman in 'Pizzagate' Shooting Is Sentenced to 4 Years in Prison*, N.Y. TIMES (June 22, 2017), https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html.

[7] *See Sandy Hook Elementary School shooting*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Newtown-shootings-of-2012 (last visited Dec. 21, 2018).

[8] *Id.*

[9] *See id.*

[10] *See generally* Elizabeth Williamson, *Alex Jones, Pursued Over Infowars, Falsehoods, Faces Legal Crossroads*, N.Y. TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/alex-jones-defamation-suit-sandy-hook.html.

[11] *Id.*

[12] *Id.*

[13] Monica Davey, *Republicans Hold On to Wisconsin Senate After Recall Vote*, (Aug. 9, 2011) https://www.nytimes.com/2011/08/10/us/politics/10wisconsin.html?mtrref=www.google.com&gwh=1BA4772F267AFEF00F8AA856370A6598&gwt=pay.

targeted to likely Democratic voters, incorrectly stating the deadline date for absentee voting.[14] Voters who relied on the information would have sent in their votes too late to be counted.[15] This is just an example of different election-oriented "dirty tricks" used over the years to suppress voters through the use of misinformation about voting procedures. Different stories, different media, but all examples of "fake news" causing real harm: people have been harassed, even shot at, and have been deprived of their right to vote. Other examples would be easy to list.

Some definitions are in order. Opinions that you disagree with do not make them fake news. Nor is an account that stresses certain facts and downplays others, with nothing more, fake news. For our purposes, fake news is something made up, something that is, in common understanding, a deliberate lie. The parameters of a deliberate lie will be addressed below. For now, it is enough to remember that we are dealing with a narrow category of speech.

The First Amendment protects speech from subsequent punishment to an extent that many other nations regard as remarkable, including nations that we would regard as democracies that are generally protective of human rights.[16] It is common to hear that for purposes of the Amendment, there is no such thing as a false idea. But how far does this extend? Are there false facts, for purposes of the First Amendment? Are deliberate lies shielded from punishment? If so, under what circumstances? Or should we disregard the question of deliberate falsehood and limit punishment, either criminal or civil, to instances that satisfy the high standard set down in *Brandenburg v. Ohio*[17] for punishment for speech: a test that focuses only on the specific intent of the speaker to bring about a likely and temporally close outcome?[18] To begin, we return to the reasons for protecting speech, and the likely assumptions of the framers of the Amendment.

---

[14] *See* Greg Sargent, *Americans for Prosperity Sent Misleading Absentee Ballots Far More Widely Than Previously Known*, WASH. POST (Aug. 5, 2011), https://www.washingtonpost.com/blogs/plum-line/post/americans-for-prosperity-sent-misleading-absentee-ballot-far-more-widely-than-previously-known/2011/03/03/gIQAxhcywI_blog.html?noredirect=on&utm_term=.08cbc1059864.

[15] *Id.*

[16] Most Western democracies employ some degree of balancing individual rights and pressing social interests, while the United States' approach to free speech contains no text-based mechanism for balancing. *See generally* AHARON BARAK, PROPORTIONALITY CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 133 (2012).

[17] 395 U.S. 444 (1969).

[18] Under *Brandenburg*, only advocacy "directed to inciting or producing imminent lawless action and [] likely to . . . produce such action" may be punished. *Id.* at 447.

Published by eCommons, 2018

II. GOALS OF FREE SPEECH

Unless a constitutional provision is precise, for example, those setting a minimum age for federal office,[19] it will need to be interpreted. And to interpret the scope of any open-ended provision, one must work from a view of what goals it was meant to achieve. Over the years, commentators have generally fallen into three camps.

A. Democratic Decision-making

It seems clear that whatever else they may have envisioned, the framers of the First Amendment thought that free speech was necessary to a democratic republic.[20] All would agree that criticism of government, free discussion of political issues and candidates, is at the core of the Amendment. But does the scope of protection extend only to political (and religious, in light of the free exercise clause) opinion?

B. Achieving Progress in Science, Art, and Other Socially Important Fields.

While early cases exploring the boundaries of free speech did focus on political or religiously motivated speech,[21] by the mid-twentieth century, it was widely, if not universally, accepted that a wide range of scientific, literary, historical, and other speech not falling within a narrow concept of political, was also protected.[22] Still, this "categorical" approach left some categories, such as defamation, obscenity,[23] "fighting words,"[24] and advertising[25] outside the scope of the amendment. A category, then, had to earn its way into full protection.

C. Self-Fulfillment

Starting in the 1960s, First Amendment law, both in the courts and in scholarly commentary, began to undergo a significant shift.[26] Instead of asking categories of speech to justify protection by demonstrating their social value, courts and commentators began to support the proposition that the fact that a speaker felt the need to express an idea in order to satisfy his or her

---

[19] U.S. CONST. art. I, § 2, cl. 2 (minimum age of twenty-five for members of the House of Representatives); *id.* art. I, § 3, cl. 3 (minimum age of thirty for members of the Senate); *id.* art. II, § 1 (minimum age of thirty-five for the office of the President).

[20] *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (Harper & Bros. ed.,1948).

[21] *See, e.g.*, Abrams v. United States, 250 U.S. 616, 619–22 (1919); Debs v. United States 249 U.S. 211, 212–15 (1919); Schenck v. United States, 249 U.S. 47, 50–51 (1919).

[22] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (state may not prohibit the teaching of evolutionary theory); Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 686–90 (1959) (states may not censor films that are not obscene).

[23] *See* Miller v. California, 413 U.S. 15, 36 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).

[24] Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

[25] *See generally* Valentine v. Chrestensen, 316 U.S. 52 (1942).

[26] *See, e.g.*, Martin v. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (First Amendment pursues individual self-realization).

https://ecommons.udayton.edu/udlr/vol44/iss2/5

individual needs, or, as Professor Thomas Emerson famously put it, to achieve self-fulfillment was sufficient to trigger the First Amendment.[27] The burden in any case, involving any type of speech, was not to justify its protection by establishing the social value of the category (if not the specific exercise) of speech.[28] Instead, all speech would become presumptively protected, and it would then fall to the government to justify the absence of protection by demonstrating significant, tangible harm as a consequence of the speech.[29] While some version of the self-fulfillment model has become dominant, the categorical approach has not disappeared. Some categories, such as commercial speech,[30] are entitled to something less than full First Amendment protection, and while the definition of obscenity has significantly changed in recent decades,[31] obscenity is still regarded as an unprotected category.[32] In deciding whether, and to what extent, deliberate lies should be protected from punishment under the First Amendment, these theories about the amendment's purpose should be kept in mind.

III. THE FRAMERS' VIEWS

Just what did the authors of the First Amendment mean when they prohibited Congress from "abridging the freedom of speech?"[33] Almost certainly, they meant something less than a current scope of the clause, but scholars disagree on exactly what they had in mind. Much of this disagreement focuses on the distinction between two ways in which government may limit speech.

One view put forward by Professor Leonard Levy more than fifty years ago, maintained that the only type of abridgment meant to be prohibited was one on prior restraints – that is, censorship of material before it could be published.[34] Under this view, the amendment said nothing about punishing speech after its publication for the harm it caused.[35] He relied on Blackstone's Commentaries, an influential treatise of the time:

> [W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law. … the *liberty of the press*, properly understood, is by no

---

[27] Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963), *available at* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3769&context=fss_papers.

[28] *See* Redish, *supra* note 26, at 593-94.

[29] *See id.* at 901-02.

[30] *See* 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996); Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm., 447 U.S. 557 (1980).

[31] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973), paragraph one of the syllabus.

[32] *Id.* at 36 ("In sum, we [] reaffirm the [] holding that obscene material is not protected by the First Amendment").

[33] U.S. CONST. amend. I.

[34] *See generally* LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (Harper & Row ed.,1960). Levy published a revised edition in 1985.

[35] *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 173–206 (1985).

Published by eCommons, 2018

> means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[36]

Often scholars disagree with Professor Levy,[37] but their disagreements focus on one particular grounds for subsequent punishment. These scholars maintain that the framers meant to abolish the law of seditious libel, that is, criticism of government that threatened its stability.[38] Levy's critics focus on the framers' belief that robust criticism of government was necessary in a democratic republic, and the obvious detrimental effect the threat of subsequent punishment would have on such criticism.[39]

An intermediate position can also be found in early American discussion of free speech and seditious libel. Traditionally, just as truth was not a defense in cases of libel or slander of an individual,[40] so it was not a defense in a case of seditious libel, when the only issue was the tendency to bring government into disrepute.[41] Some maintain that the First Amendment would allow for prosecution of seditious libel, but with the caveat that truth was a defense.[42]

Whatever the resolution is of the debate over the framers' intent, it is accepted by nearly all that today's First Amendment limits subsequent punishment as well as prior restriction. But a quick glance at this history does shed some light on a couple of things that might help our inquiry today. First, early debate over the First Amendment focused on its protection of what everyone would regard as political speech, that is, criticism of government and discussion of government policies.[43] Second, we can see here that even within this narrow set of protected types of speech, some distinction was made

---

[36] 2 WILLIAM BLACKSTONE, COMMENTARIES *151–152.

[37] *See generally* David A. Anderson, *The Origins of the Press Clause* 30 U.C.L.A. L. REV. 485 (1986); Vincent Blasi, *The Checking Value in the First Amendment Theory*, 1977 A.B.A. RES. J. 521 (1977).

[38] *See* Blasi, *supra* note 37, at 528–38.

[39] *See generally* Harold L. Nelson, *Seditious Libel in colonial America*, 3 AM. J. LEGAL HIST. 160 (1959).

[40] *Id.*

[41] *Id.*

[42] While this principle is not inconsistent with the *Zenger* case, which established the principle that truth is a defense to seditious libel, Professor Harold Nelson found that the *Zenger* case essentially ended the use of seditious libel "as a serious threat to printers in the American colonies[.]" *Id.* at 170.

[43] *See generally* Gerald Gunther, *Learned Hand and the Origin of Modern First Amendment Doctrine Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

https://ecommons.udayton.edu/udlr/vol44/iss2/5

not only with respect to the harm caused by speech, but also whether it was truthful.

IV. SOME PHILOSOPHICAL VIEWS

Speech has a range of possible values, making it appropriate for special protection. But does that apply to all types of speech, and specifically, to false speech? Poet John Milton's Areopogetica is often seen as the first great defense of free speech in Anglo-American history.[44] Yet, after his praise of unregulated speech and publication, he clarifies that by no means is he endorsing dangerous types of speech. Catholic doctrine, Milton says, should not be tolerated, nor should "that [] which is impious or evil absolutely either against faith or manners no law can possibly permit, that intends not to unlaw itself."[45] Milton was concerned with falsity not merely because it is false, but that it may threaten the social and political order.[46] But what about falsity that does not rise to that level, that does not constitute, in seventeenth or eighteenth-century terms "seditious libel?"

John Stuart Mill's On Liberty[47] is often seen as the most powerful argument for allowing freedom to speak untruths. But Mill does so, not in praise of falsity, or even in a post-modern deep skepticism of whether truth exists, but rather in an effort to actually promote truth. What we think true, even if shared by most people, even most experts, may not be true. Society must protect "false" opinion to put commonly-accepted truths to the test, and the debate will bring us closer to the truth.[48]

Evidence of Mill can be heard in Justice Holmes' dissent in *Abrams v. United States*,[49] when he explains his conclusion that advocacy well short of an immediate call to anti-government violence should be protected:

> [W]hen 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

---

[44] *See generally* John Milton, *Areopagitica: With a Commentary By Sir Richard C. Jebb and with Supplementary Material* (Cambridge at the Univ. Press 1918), *available at* https://oll.libertyfund.org/titles/milton-areopagitica-1644-jebb-ed.

[45] *Id.* at 60.

[46] STANLEY E. FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING TOO 102–03 (1994).

[47] JOHN STUART MILL, ON LIBERTY, 19-67 (Liberal Arts Press, Inc. 1956) (1859).

[48] *Id.*

[49] 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

Published by eCommons, 2018

> out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[50]

The "market" of ideas concept has come to dominate much of the First Amendment doctrine.[51] But, of course, it has been criticized from different directions.[52] If one is a complete skeptic about truth, it inadequately protects speech as it justifies protection in the interests of a truth that does not exist. From the perspective of one who believes in the concept of truth, the problem is quite different. The notion that debate will allow truth to prevail is empirically questionable.[53] Has not falsity often prevailed? The response might be that falsity prevails only for a while, that truth ultimately wins. Even if this is so, it is reminiscent of the response of John Maynard Keynes to conservative economists who opposed government intervention to counteract economic depressions on the grounds that, in the long run, markets would resolve themselves. Keynes' response, famously, was that "*[i]n the long run* we are all dead."[54] In other words, how much social disruption and pain must we endure before the market works its magic? The same might be asked of the market of ideas.

Of course, from Milton to Mill to Holmes, free speech defenders are dealing with opinion and ideas, whether in the political, religious, or other arenas in which disagreement or matters of truth or falsity are expected to be controversial, and even when stated as factual, are recognized as matters of opinion or faith. Examples invariably involve speakers who sincerely believe their assertions. Does any of this call for constitutional protection for statements that the speaker knows to be false?

V. PUNISHING DELIBERATE LIES?

When we think of the wide berth that the First Amendment gives to speech that an objective observer would have no difficulty in labelling as false, it is easy to overlook the obvious examples where the law is willing to punish speech that is not merely false, but deliberately false. The most obvious example is fraud. The essence of both civil and criminal liability for fraud is a deliberate misstatement that induces another to suffer a loss.[55] One can imagine less common contexts where a deliberate lie will surely lead to civil or criminal liability with no serious concern that the First Amendment is violated. Imagine a malicious bystander telling a blind man at a busy

---

[50] *Id.* at 630.

[51] *See, e.g.*, R.H. Coase, *The Market for goods and the Market for Ideas*, 64 AM. E.C. REV. 384 (1974).

[52] *Compare, e.g.*, Redish, *supra* note 26, with Blasi, *supra* note 37 (the primary goal of the Amendment was to check government).

[53] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 19–29 (1982). Schauer criticizes the "Survival theory of truth." *Id.* at 20.

[54] JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 80 (1923) (emphasis in original).

[55] "*Fraud* is deliberately deceiving someone with the intent of causing damage." *Fraud*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/fraud (last visited Dec. 3, 2018).

https://ecommons.udayton.edu/udlr/vol44/iss2/5

intersection that he has the crossing light and should walk into oncoming traffic. The First Amendment would hardly be taken seriously as prohibiting civil and criminal liability of the lies.

These examples are so clear that they are unlikely to ever be considered in any study of First Amendment doctrine. But a standard overview of speech clause jurisprudence reveals additional contexts where deliberate lies will be unprotected. For more than a century, defamation was considered entirely unprotected by the First Amendment.[56] Truth or falsity of the statement was the core question; it was unimportant whether falsity was deliberate.[57] But a series of Supreme Court decisions in the 1960s and 1970s extended First Amendment protection to defamatory statements.[58] In *New York Times v. Sullivan*, the Court extended constitutional protection to statements about public officials.[59] Subsequent cases extended protection to a broader category of "public figures,"[60] and finally, a more limited degree of protection was extended to statements about citizens who did not qualify as public figures.[61]

While the cases extended First Amendment protection to a wide range of false defamatory statements, making the tort much more difficult to prove, it should not be overlooked that even the *Sullivan v. New York Times* standard permits a judgment against a speaker who acts with reckless disregard for the truth.[62]

A similar pattern emerges when we turn our attention to First Amendment protection for advertising, or as it is more precisely labelled in the cases, "commercial speech." For decades, the Supreme Court considered commercial advertising to be beyond the protection of the First Amendment.[63] In all likelihood, the Court saw such advertising to be simply one aspect of carrying on economic activity: more action than speech.[64] But in a series of cases beginning in the 1970s, the Court brought commercial speech within First Amendment protection.[65] Since the 1980 Supreme Court decision in *Central Hudson*,[66] which set out the appropriate First Amendment test for

---

[56] "There are certain well-defined and narrowly limited classes of speech, . . . which never have been thought to raise any Constitutional problem[s]. These include . . . the libelous[.]" Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[57] *See id. at 574.*

[58] *See* New York Times v. Sullivan, 376 U.S. 254 (1967); *see also* Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967); *see also* Gertz v. Robert Welch, 418 U.S. 323 (1974).

[59] *N.Y. Times*, 376 U.S at 283–84.

[60] *Curtis Pub. Co.*, 388 U.S. at 154–55 (reasoning that a college football coach was a public figure).

[61] *See Gertz*, 418 U.S. at 350 (holding that even a private plaintiff must prove at least negligence as to the truth of the statement on the part of the defendant).

[62] *N.Y. Times*, 376 U.S. at 279–80.

[63] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[64] *See id.*

[65] *See* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm., 447 U.S. 557 (1980); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[66] *See generally Central Hudson*, 447 U.S. 557.

Published by eCommons, 2018

commercial speech, justices have disagreed on whether advertising regulation should be subject to a strict or an intermediate level of review.[67] But a core requirement of *Central Hudson* remains unchallenged. In order to qualify for First Amendment protection, the speech must not be false or misleading. As with defamation, deliberate falsehood is unprotected.[68]

At first glance, the 2012 Supreme Court decision in *United States v. Alvarez*[69] seems to refute the notice that deliberate lies fall outside of First Amendment protection. Xavier Alvarez had a long history of lying about his past achievements, claiming falsely, for example that he had married a Mexican movie starlet and once played with the Detroit Red Wings of the National Hockey League.[70] Due to or in spite of his made-up tales, he became a member of the Three Valley Water District Board in Claremont, California.[71] At his first public meeting of the Board, he introduced himself as a retired Marine with twenty-five years of service who had also been awarded the Congressional Medal of Honor.[72] Unlike his earlier claims about his past life, the claim of receiving the Medal of Honor violated federal law, specifically the Stolen Valor Act of 2005.[73] That statute made it a crime to falsely claim to have been awarded military service medals, with a particularly severe penalty for a false claim regarding the Medal of Honor.[74] Alvarez was convicted at trial, but the Ninth Circuit Court of Appeals overturned the conviction on grounds that the statute violated the First Amendment.[75] Before the Supreme Court, the government argued that statutes punishing perjury, making false statements to law enforcement officers, false representation of oneself as a government official, as well as the principle of *Sullivan*, had established that knowingly false statements were a category of unprotected speech.[76]

The Court affirmed the Ninth Circuit by a four-justice plurality opinion, finding that there was no "false speech" category of speech unprotected by the First Amendment.[77] Like other content-sensitive restrictions, then, the statute had to be subject to strict scrutiny, which the

---

[67] *See generally* 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996) (plurality opinion). While the Court was unanimous in invalidating the state regulation, the Justices split sharply over how strictly truthful advertising should be protected. For example, Justice O'Connor's concurrence advocated for a form of intermediate scrutiny, while Justice Thomas' advocated for strict scrutiny. *Compare id.* at 528 (O'Connor, J., concurring), with *id.* at 518 (Thomas, J., concurring).

[68] "For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." *Central Hudson*, 447 U.S. at 593.

[69] *See generally* United States v. Alvarez, 567 U.S. 709 (2012).

[70] *Id.* at 712.

[71] *Id.*

[72] *Id.*

[73] 18 U.S.C. § 704(b)–(c) (2018).

[74] *Alvarez*, 567 U.S. at 715–16.

[75] *Id.* at 714.

[76] *Id.* at 718–20.

[77] *Id.* at 730.

plurality found was a test that the government could not satisfy.[78] The government's examples of punishable speech were distinguished as instances where the prohibition was clearly necessary to protect a concrete government interest.[79]

In contrast, Justice Alito, writing for himself and two other dissenters, found that precedent did, in fact, establish that deliberate lies were unprotected by the First Amendment:

> The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech. By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.[80]

The deciding votes were cast by Justices Breyer and Kagan, who agreed with the plurality that the statute was invalid but did not apply strict scrutiny. Instead, in an opinion by Justice Breyer, the Court's most frequent advocate of invoking a proportionality (or balancing) test in constitutional cases, the concurring justices maintained:

> I agree with the plurality that the Stolen Valor Act of 2005 violates the *First Amendment*. . . . In determining whether a statute violates the *First Amendment*, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications. Sometimes the Court has referred to this approach as "intermediate scrutiny," sometimes as "proportionality" review, sometimes as an examination of "fit," and sometimes it has avoided the

[78] *Id.* at 725–26.
[79] *Id.* at 720–21.
[80] *Id.* at 739 (Alito, J., dissenting).

Published by eCommons, 2018

application of any label at all. Regardless of the label, some such approach is necessary if the *First Amendment* is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as "strict scrutiny" implies) nor near-automatic approval (as is implicit in "rational basis" review). But in this case, . . . "intermediate scrutiny" describes what I think we should do.

False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.

[F]ew statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter. Instead, ... limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. . . . The statute before us lacks any such limiting features. . . . [T]hat breadth means that it creates a significant risk of First Amendment harm.

[But] the statute nonetheless has substantial justification. It seeks to protect the interests of those who have sacrificed their health and life for their country. . . . [T]he statute risks harming protected interests but only in order to achieve a substantial countervailing objective. . . . We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is "yes." . . . [A] more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm. . . . The Government has provided no

https://ecommons.udayton.edu/udlr/vol44/iss2/5

> convincing explanation as to why a more finely tailored statute would not work.[81]

The Breyer-Kagan approach, then requires us to explore two questions. Deliberate lies can be punished if they cause, or substantially risk causing, significant harm. We need to explore each of these questions. What is a deliberate lie? And when do we have a situation that presents a sufficient risk of concrete, specific harm?

VI. PROPORTIONALITY: A BRIEF OUTLINE

Proportionality, as Justice Breyer explains, is a balancing test. It can resemble intermediate scrutiny, but in legal systems such as Canada and European nations, it is a somewhat more detailed inquiry that has elements that are found in both the rational basis test and the strict scrutiny test applied in American courts.[82]

The first step is to identify whether an individual has a plausible claim of right, and whether the government has a substantial interest in the action that touches on the right.[83] Each side will usually be able to satisfy this threshold test.

With the state interest in its regulation established, the next step is to ask whether there is a rational connection between the regulation and the objective.[84] Similar to the rational basis test in American constitutional law, this part of the test will usually be satisfied, and will exclude only actions entirely unrelated to legitimate government goals.

The next step is to ask whether the state action impairs the right as little as possible, or in terms more familiar to American lawyers, whether there is an alternative which would satisfy the state interest while imposing less of a burden on the right.[85] But while this step sounds like the strict scrutiny test, in systems employing proportionality, it will not be interpreted as rigorously. In order for the inquiry to end here, it must be shown that an alternative exists that is obvious and practical, and that will allow the government objective to be satisfied to the full extent that it is satisfied by the challenged practice.[86] At this stage of the analysis, the state need not accept an alternative that would be less effective or more costly. But such matters will be appropriate to consider in the final step of the proportionality analysis.

---

[81] Id. at 730–39 (Breyer, J., concurring).

[82] *See generally* BARAK, *supra* note 16.

[83] *Id.* at 245–302.

[84] *Id.* at 303–16.

[85] *Id.* at 317–39.

[86] A law fails the necessity test only where an available alternative "can fulfill the law's purpose at the same level of intensity and efficiency as the means determined by the limiting law." *Id.* at 323.

Published by eCommons, 2018

The final step of proportionality analysis is to weigh the relationship between the constitutional right and the purpose of the limiting law.[87] This is the step where proportionality truly becomes a balancing test. And, like all balancing tests, it is open to the criticism that it is hopelessly indeterminate, and merely a matter of subjective weighing of value by the decisionmaker. In the arena of religious freedom, do we value non-establishment more or less than free exercise? Aharon Barak, in his survey of proportionality across a number of legal systems, insists that a more precise balancing inquiry can at least minimize the subjectivity problem.[88] Instead of balancing at the level of the right or interest involved in the abstract, the proper question is whether the marginal benefits of the state regulation in question outweigh the marginal infringement on the right.[89] This will, of course, require an assessment of the importance of the right and the countervailing interest at the abstract level, but will not always lead to a conclusion in favor of one or the other.

Proportionality, like intermediate scrutiny, does not lead to highly determinate outcomes. If one favors clear rules that do lead in that direction, any balancing test will be highly suspect. However, over the last four decades, the clarity of strict scrutiny, and low-level rational basis scrutiny, have eroded, and this trend shows little evidence of coming to an end.

VIII. PUNISHING DELIBERATE LIES?: PROBLEMS

While the *Alvarez* plurality suggests that even deliberate falsehoods are entitled to full First Amendment protection, most of the justices disagree. If deliberate falsehoods are entitled to less or no protection, the initial question in any case will be whether the statement is a deliberate lie. When might a statement generally regarded as false not qualify?

A. Opinion

Clearly, simply an expression of opinion will not qualify as a deliberate falsehood. But does that mean that tacking the phrase "I believe" on any factual assertion remove potential liability? The Supreme Court, in the context of libel law, has dealt with this issue. In *Milkovich v. Lorain Journal*,[90] the Court held that "a statement of opinion" that "contain[] a provably false factual connotation" could be subjected to liability.[91]

The "provably false" standard clearly protects all views on issues of political, moral, historical, or scientific matters, regardless of the overwhelming consensus of either experts or the general public on the

[87] *Id.* at 340–70.
[88] *Id.*
[89] *Id.* at 351–52.
[90] 497 U.S. 1 (1990).
[91] *Id.* at 20.

https://ecommons.udayton.edu/udlr/vol44/iss2/5

question. In any of the fields, the importance of allowing continued debate of accepted opinion makes things that are accepted as indisputable fact within a particular discipline still merely an "idea" open to refutation in legal contexts.

The fact/opinion distinction also presents the related problem of hyperbole. Is calling someone "crooked" a factual statement or an opinion? Does it mean guilt of a particular type of crime, or merely a sense of shadiness? Does calling someone a "liar" merely accuse him of falsehood, or is it in context a charge of perjury?

B. Fiction, Satire, Obviously (?) Unbelievable Assertions.

In a literal sense, all fictional writing consists of lies. That is to say, Huck Finn, Sherlock Holmes, and countless other characters, never existed or had the adventures imagined for them by their creators. Of course, much fiction is meant to illustrate moral, historical, and other truths, but through the medium of stories as literally untrue as Xavier Alvarez's tales of his own past. The satirical Onion newspaper has, for decades, been a proud purveyor of fake news, openly presented as such.[92]

In the 1988 decision of *Hustler Magazine v. Falwell*,[93] the Supreme Court considered a claim by nationally-prominent politically-active minister Jerry Falwell against Hustler Magazine for its running a full page advertisement parody that suggested that Falwell had sexual relations with his mother.[94] In holding that Falwell, as a public figure, could not recover either for defamation or intentional infliction of emotional distress, the Court noted that the ad parody was clearly labeled as such, and therefore could not be regarded as a factual assertion that could serve as the basis of a defamation action.[95] It seems clear that by clearly labeling material as fiction, a speaker absolves himself from liability for falsity. Yet, it is hardly uncommon to find instances of readers or listeners who do not get the joke, and who actually believe the report in the Onion or its competitors.

Might the mere outrageousness of the story sufficiently identify it as fictional? During the 1928 presidential campaign, considerable anti-Catholic feeling was triggered by the Democratic nomination of Governor Al Smith, the first Catholic to run for president.[96] Pamphlets were circulated around the country stating that if Smith were to win, the Pope would rule. In fact, the pamphlets asserted that Pius XI had already begun tunneling from the Vatican

[92] For a history of the Onion, *see The Onion*, WIKIPEDIA, http://Wikipedia.org/wiki/the_Onion (last visited Dec. 21, 2018).

[93] 485 U.S. 46 (1988).

[94] *Id.* at 48.

[95] *Id.* at 57.

[96] *See* JOHN O'SULLIVAN, THE PRESIDENT, THE POPE, AND THE PRIME MINISTER: THREE WHO CHANGED THE WORLD 110 (2006); ROBERT SLAYTON, EMPIRE STATESMAN: THE RISE AND REDEMPTION OF AL SMITH 309–13 (2001).

Published by eCommons, 2018

in the direction of Washington.[97] Does the absurdity of the tunnel story itself label it as fiction? (Even if Pius wanted to decamp to Washington, why not just hop on ocean liner?) Is it obviously a hyperbolic claim against a fear of religious influence in American political affairs? Yet, many took the claim literally. If one thinks that this level of gullibility is a thing of an uneducated past, consider Pizzagate.

C. Sincerity

Of course, demonstrating the falsity of a factual assertion still leaves open the question of whether it is a deliberate lie, that is, did the speaker know (or should have known) of its falsity. Does sincere belief in the truth of an objectively obvious falsehood remove the case from one of deliberate lies? In a case from the 1940s, the Supreme Court dealt with the conviction of a preacher for fraudulently inducing donors to contribute to him based on his assertions that he was the incarnation of a saint, and had healing powers that he could use on the donor's behalf.[98] In reviewing the charge given to the jury, the Court drew a distinction between two inquiries.[99] A court cannot, consistent with the First Amendment, pass on the truth or falsity of a religious claim.[100] But a court is free to inquire into the sincerity of the defendant. Fraud, then, would turn on whether the preacher sincerely believed his claims.[101]

Of course, simply prefacing a claim with "I believe," will not necessarily determine the matter. In post-*Sullivan* defamation cases, the standard is one of "knew or reasonably should have known" of falsity.[102] Circumstances will suggest whether the speaker is sincere. For example, there are several Pentecostal religious sects who believe, and preach, that the Bible teaches that if they are living rightly, they can safely handle poisonous snakes.[103] In fact, they are encouraged to do so to demonstrate their faith. When death or near-death occurs, some courts will absolve sect leaders from prosecution based on the leader's sincere religious belief.[104] On the other hand, when evidence established that a sect leader induced his wife to handle

---

[97] *See* SLAYTON, *supra* note 96, at 323.

[98] United States v. Ballard, 322 U.S. 78, 79–80 (1944).

[99] *Id.*

[100] *Id.* at 86–87.

[101] *Id.* at 82.

[102] *See supra* notes 58–62 and accompanying text.

[103] *See* Danny Cevallos, *Snakes and Church vs. State*, CNN (May 28, 2014), http://www.cnn.com/2014/02/26/opinion/cevallos-snake-handling-law/index.html.

[104] *See, e.g.*, Jerry A. Coyne, *Tennessee: Where 'Religious Freedom' Frees Snake Handlers to Abuse Animals*, THE NEW REPUBLIC (Jan. 20, 2014), http://newrepublic.com/article/116223/snake-handling-pastor-acquitted.

https://ecommons.udayton.edu/udlr/vol44/iss2/5

snakes, expecting and intending that she be bitten, he was convicted of attempted murder.[105]

Of course, the "knew or should have known" standard will not be easy to apply. Even in a relatively easy case, such as one asserting facts about oneself, there may be room for argument. Might the claims of a fabulist such as Xavier Alvarez be the consequence of a mental defect, rather than a conscious set of lies? And the "should have known" standard will depend on a range of factors. Is the speaker the origin of the falsehood, or did he simply pass it on? In either case, what degree of care should have been taken? Is sincerity more easily demonstrated by an ordinary citizen forwarding an internet story that seems suspicious than by a journalist or broadcaster sending the same to millions?

The need to demonstrate the existence of a deliberate lie will shield much speech activity from subsequent punishment. But even as to the deliberate lies that remain, a proportionality test requires that a second significant question be addressed. How much (if any) harm has been done (or threatened) by the lies?

D. Sufficient Harm?

The fundamental problem with the Stolen Valor Act was its failure to specify sufficiently significant harm (or, indeed, any particular harm) caused by the deliberate misrepresentation.[106] A proportionality test will require a showing of harm to a significant government interest, sufficient to outweigh the chilling effect on speech. To Justice Alito and his dissenting colleagues in *Alvarez*, the vague idea that a false claim of receiving the Medal of Honor depreciated its value to those who earned it was sufficient, in light of their assignment of zero weight to the value of deliberately false speech.[107]

But if we, along with Justice Breyer,[108] assign even a small amount of value to even deliberate lies, something more significant must be pointed to as outweighing it and justifying its punishment. The mere fact that someone might believe the lie is insufficient. At the other extreme, if one is defrauded in reliance on the lie, defamed or induced to purchase an inferior product, current law clearly holds that the harm is sufficient. Likewise, the harm to the judicial system caused by perjury and to law enforcement by willful lies, present class examples of sufficient harm.

---

[105] *See Snake-Handling Preacher Guilty of Trying to Kill Wife*, ORLANDO SENTINEL (Feb. 13, 1992), http://orlandosentinel.com/1992-02-13/news/9202135015_1_summerford-preacher-snake-handling.

[106] *See supra* notes 74–80 and accompanying text.

[107] *See supra* note 79 and accompanying text.

[108] *See supra* note 80 and accompanying text.

Published by eCommons, 2018

Fake news may induce many to change the opinions about political issues and candidates, and vote accordingly.[109] While hard to measure, the potential effect is surely significant. But in light of the essential core of First Amendment concern, discussion of political matters, inducing this kind of change cannot be sufficient to constitute harm outweighing the free speech right. For good or evil, lies are so ingrained in political argument that intervention would be clearly in conflict with First Amendment values.

Of course, if a statement is intended to, and does, pose an imminent threat to the type of criminal or civil harm that can clearly be punished, it need not even be determined to be a deliberate lie.[110] But, to what extent does the presence of a deliberate lie extend liability to harms not imminent, or harms directly caused by a third party who believes the lie? Even third-party decisions during political campaigns may be unrelated to the expected falsehoods hurled at candidates to influence voters. Instances of "dirty tricks" may seek to deter people from voting by, for example, distributing flyers that falsely "warn" them that if they attempt to vote without a government-issued ID, they will be arrested.[111]

If specific harm is intended and reasonably imminent, the *Brandenburg* standard may be satisfied, and the need for a specific proportionality test for deliberate lies disappears.[112] But what about the situation where one of the two *Bradenburg* elements is absent? A lie may be deliberate, but not specifically intended to lead to concrete harm; a deliberate lie may cause harm days, weeks, or months after the speech, and thousands of miles away from the speaker. Is it enough that the harm be foreseeable, and to what degree?

The First Amendment was created in the early days of newspapers, its growth took place in an era of radio, television, and national newspapers and magazines. When considering such things as the imminence or foreseeability of harm, how significant is the advent of the internet? Just a generation ago, the scope of most individual's power to do harm through speech activity was limited to a local community; now it extends to the world for anyone with access to a computer. Does this justify placing greater

---

[109] *See generally* Joe Uchill, *Russian-type meddling found in 18 nations' elections last year report*, THE HILL (Nov. 14, 2017), https://thehill.com/policy/cybersecurity/360233-russia-type-information-campaigns-meddled-with-18-nations-elections-in.

[110] Thus, a "true threat," as perceived by the target, may not be protected by the First Amendment, regardless of intent to carry out the threat. *See* Elonis v. United States, 135 S. Ct. 2001, 2012 (2015); Virginia v. Black, 538 U.S. 343 (2003), paragraph (b) of the syllabus.

[111] *See generally* Aviva Shen, *5 Voter Misinformation Campaigns to Watch Out For*, THINK PROGRESS (Oct. 24, 2012), https://thinkprogress.org/5-voter-misinformation-campaigns-to-watch-out-for-3c0441 ccc 534/.

[112] Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (holding that speech may be punished only where a specific intent to produce imminent lawless activity is proven).

https://ecommons.udayton.edu/udlr/vol44/iss2/5

reasonability on those who use the internet to do harm, or would that course unduly limit the ability of internet users to do good?

IX. CONCLUSION

Where, then, do we stand after all of this? Do deliberate lies deserve the same full extent of protection given to other forms of speech, or do we need to frame some unique approach to fake news? The first thing to note is that we do need to choose; however, the answer is not inevitable and inherent in the words of the First Amendment.

The extent to which the First Amendment prohibits subsequent punishment of speech was, at best, an open question until the early decades of the twentieth century. When faced with the question of punishment of anti-war speech in the aftermath of World War I,[113] Justice Holmes had no First Amendment body of law to turn to. Instead, he simply borrowed the elements of criminal attempt from common law to frame his clear and present danger test.[114] After twists and turns in the formulation and application of the test, we now have the highly speech-protective *Brandenburg* test: speech can be punished only where it is specifically intended to achieve an illegal activity, and it is highly likely that outcome will occur soon.[115] *Brandenburg* can be applied regardless of whether the speech involved is true, contestable, or even clearly false, and one might conclude that this is sufficient to deal with the fake news/deliberate lie problem. Indeed, the easiest examples of punishable lies, fraud, perjury, and defamation, satisfying the *Sullivan* test, can be explained by applying a specific intent/close proximity to harm test.

Returning to the three fake news examples in the introduction, we can see that the willful distribution of incorrect information on voting rules and procedures might well fall into the *Brandenburg* specific intent/likelihood of harm model, but what about the Pizzagate and Sandy Hook denial cases? Was there specific intent to trigger harassment or death threats, not to mention the actual shooting incident at the pizza shop? Perhaps it is sufficient to limit punishment to those who harass, threaten, or shoot, but should the creators of the lie that triggered them escape liability?

The similarity of this problem to that of "hate speech" is obvious. As late as the 1950s, the Supreme Court upheld in *Beauharnais*,[116] an Illinois

---

[113] *See, e.g.*, Schenck v. United States 249 U.S. 47, 52 (1919); Debs v. United States 249 U.S. 211 (1919). In *Debs*, the Court upheld a conviction, where the defendant had the specific intent to obstruct the military draft, and a "reasonably probable effect" of his speech was found. *Debbs*, 249 U.S. at 216.

[114] *See* Donald L. Beschle, *An Absolutism that Works: The Original "Clear Present Danger Test,"* 8 S. ILL. U. L.J. 127, 131-35 (1983). "At common law, the attempt to commit a crime was itself a crime if the perpetrator not only intended to commit the completed offense, but also performed 'some open deed tending to the execution of his intent.'" United States v. Resendiz-Ponce, 549 U.S. 102, 106 (2007) (quoting 2W. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.2(a), p 205 (2d ed. 2003)).

[115] *Brandenburg*, 395 U.S. at 447–49.

[116] Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

Published by eCommons, 2018

statute that punished libeling a racial or ethnic group by attributing criminal and antisocial beliefs to that group.[117] The statute was meant to avoid racial or ethnic violence.[118] While the case has never explicitly been overruled, most agree that subsequent Supreme Court opinions have rendered it obsolete and limited prosecution to instances of actual threats or incitements to violence.[119] And while that choice now seems firmly entrenched, it was not inevitable. The Court chose to extend the scope of the First Amendment when it could have maintained earlier limitations on the right.[120] Whether in protecting most hate speech, protecting campaign spending in the name of speech, or bringing previously unprotected speech categories into the Amendment, the choices were not inevitable.[121] Instead, the Court, not without dissent, concluded that extending the scope of the First Amendment better achieved the purposes and spirit of the amendment, and was worth whatever social cost it might impose.[122] And now, deliberate lies present a new set of questions.

In the Gospel of John, Pontius Pilate asks Jesus if he claims to be a king.[123] Jesus does not answer directly, but instead states that he came into the world "to testify to the truth."[124] Pilate replies "[W]hat is truth?"[125] For centuries, commentators have debated Pilate's meaning. Was he sincerely seeking an answer? Was he merely being cynical? Was it merely the response of a world-weary, middle-level government functionary? In any event, the question remains, and poses the accompanying question of whether government can provide the answer. If government cannot be trusted to provide final truth, can it at least be trusted to label some assertions as false? And can deliberately false assertions be punished for their consequences to a greater extent than other speech?

The options are represented by the three opinions in *Alvarez*.[126] The plurality, found that there is no categorical exception to First Amendment protection for deliberate lies, applies the default position of full protection.[127] In contrast, Justice Alito and his dissenting colleagues found that deliberate lies, at least of the sort present in *Alvarez*, have no protection.[128] Finally, Justice Breyer, joined by Justice Kagan, fall somewhere in between. Giving deliberate lies some (but perhaps little) value, they apply a proportionality test

---

[117] *Id.* at 251.

[118] *Id.* at 258, 259.

[119] *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir.), *cert denied*, 439 U.S. 918 (1978). The Seventh Circuit invalidated the denial of a parade permit to the American Nazi Party under an ordinance that was similar to the statute upheld in *Beauharnais*. *Collin*, 578 F.2d at 1204.

[120] *See supra* notes 51-62 and accompanying text.

[121] *See supra* notes 111-114 and accompanying text.

[122] *Id.*

[123] *John* 18:33 (Gospel of John).

[124] *John* 18:37 (Gospel of John).

[125] *John* 18:38 (Gospel of John).

[126] *See generally* United States v. Alvarez, 567 U.S. 709 (2012).

[127] United States v. Alvarez, 576 U.S. 709, 729–30 (2012).

[128] *Id.* at 755.

https://ecommons.udayton.edu/udlr/vol44/iss2/5

(or perhaps intermediate scrutiny).[129] Presumably, such a test would allow significant weight to be accorded to lies involved in political campaigns, given the centrality of political debate to First Amendment concerns. Similarly, the harm used would need to be more concrete, perhaps more foreseeable, in cases involving political speech.

As we consider First Amendment issues in the near future, we should also be mindful of the evolution of media. Rules that emerged in an era of print, grew in an era of broadcast television and radio, now shape the world of the internet. On the one hand, the internet gives dangerous people access to an audience that would be inconceivable only a few decades ago. At the same time, it gives their opponents instant opportunity to rebut harmful speech. Is the internet the greatest engine for dissemination of truth ever invented, or is it a tower of Babel that creates confusion and deep skepticism over whether truth is even a meaningful concept? Or perhaps both?

Perhaps Pilate was right to be skeptical, even cynical, about his ability to declare what was true. But does that mean there is no room for government to declare some statements to be untrue, and intentionally so? As we have seen, the law already does so in contexts well-recognized and uncontroversial. Perhaps it is sufficient to rule these as instances of an unspoken application of *Brandenburg*, involving specific intent to achieve a harmful goal. But "fake news," deliberate lies that lead to outcomes that were not clearly intended, poses a different problem. Should it be enough for the originator of the "Pizzagate" story to claim that he never intended his followers to engage in death threats and actual shooting? Should Alex Jones be absolved of any responsibility simply by claiming that he never intended his followers to harass the Sandy Hook mothers? Which answer better achieves what the core goals of the First Amendment are? After *Alvarez*, are these and others at least open questions?

[129] *Id.* at 730–31.

Published by eCommons, 2018