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## Developing a Taxonomy of Lies Under the First Amendment

Alan K. Chen

Justin Marceau

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# DEVELOPING A TAXONOMY OF LIES UNDER THE FIRST AMENDMENT©

ALAN K. CHEN\* & JUSTIN MARCEAU\*\*

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\* Professor of Law, University of Denver Sturm College of Law. We would be lying if we said that we are not grateful to the 2017 Ira C. Rothgerber, Jr. Conference on Constitutional Law at the University of Colorado Law School and the Yale Freedom of Expression Scholars Conference 5 for providing us an opportunity to present earlier versions of this article or that we did not benefit from thoughtful comments and suggestions from David Han, Gregory Klass, Christina Koningsor, Helen Norton, Lyrissa Lidsky, Catherine Ross, David Schulz, Alexander Tsesis, and James Weinstein. Thanks for excellent research support from Molly Kokesh, Justin Martin, Kate Sanford, and Jeffrey Wermer. Any errors are ours alone.

\*\* Animal Legal Defense Fund Professor, University of Denver Sturm College of Law.

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## INTRODUCTION

For better or worse, lies are now an important topic in contemporary social, political, and legal discourse. False statements of fact have burst into mainstream consciousness from an emerging variety of sources—fake news outlets (and President Trump’s repeated branding of mainstream media with the “fake news” epithet), the speech of political candidates and issues groups, and statements by undercover journalists and activists to gain access to newsworthy information. Most recently, of course, we have witnessed the public spectacle of the President and the former Director of the Federal Bureau of Investigation accusing each other of lying.<sup>1</sup>

Roughly coinciding with the increased salience of lies was the United States Supreme Court’s 2012 decision in *United States v. Alvarez*,<sup>2</sup> ruling that in many contexts even intentional falsehoods are a form of speech covered by the First Amendment.<sup>3</sup> There, the Court invalidated the Stolen Valor Act, a federal criminal law punishing those who lie about having received military honors.<sup>4</sup> The decision rejected the government’s claim that lies are a form of speech that is categorically outside the scope of the First Amendment’s coverage.

In doing so, the Court appeared to divide lies into two broad categories. In the first category are the array of lies, including those at issue in *Alvarez*, that receive First Amendment coverage. State regulation of such lies is therefore subject to some form of heightened judicial scrutiny. The

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1. Julie Hirschfeld Davis & Glenn Thrush, *Trump Accuses Comey of Lying to the Senate*, N.Y. TIMES (June 10, 2017), <https://www.nytimes.com/2017/06/09/us/politics/trump-comey.html> [https://perma.cc/6TX2-CLEE].

2. 567 U.S. 709 (2012).

3. *Id.* at 722. For a summary of the coverage/protection distinction under First Amendment doctrine, see *infra* note 34.

4. *Alvarez*, 567 U.S. at 722–23.

second category is comprised of lies that traditionally have been considered beyond the scope of the Free Speech Clause. In his plurality opinion, Justice Kennedy noted that lies in this latter category are not covered by the First Amendment because they either cause cognizable harm to a third party or produce a material (and implicitly undeserved) benefit to the liar.<sup>5</sup>

At first blush this dichotomy makes great sense. For example, lies used to unjustly obtain financial or other material benefits for the speaker simply seem unworthy of the Constitution's attention. They promote no core First Amendment values and are indisputably socially harmful. But beyond historically clear examples that meet this standard, such as fraud, it is unclear after *Alvarez* precisely how to determine when a particular category of lie causes sufficient harm to the listener or produces enough benefit to the speaker such that its regulation is not subject to constitutional scrutiny.

*Alvarez* is not that helpful in refining the First Amendment law regarding lies because, upon closer examination, the frailty of the simplistic "harm/benefit" vs. "no harm/no benefit" distinction is readily apparent. Every lie causes some benefit to the speaker or some harm to the listener, and quite often both. The suggestion that Xavier Alvarez's lies about having earned military honors caused absolutely no harm to honorably-decorated veterans or did nothing to boost Alvarez's stature in the community (at least until his lies were exposed) is unrealistic. Likewise, speakers use a wide range of lies in social contexts, either to curry favor with listeners or to increase social capital. Yet, these lies may injure the listener's autonomy. The listener, in reliance on the speaker's lie, may be prompted to take certain action that she would not have otherwise taken. She may, for example, invite someone to a dinner party or to join a particular social club. But if every injury caused or advantage gained, however abstract or minimal, indiscriminately thrusts a lie into the status of non-speech, the constitutional protection of lies is illusory.

In previous work, we argued that the First Amendment limits the power of government to regulate lies, especially lies that promote the democracy and truth-finding functions of free

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5. *Id.*

speech.<sup>6</sup> However, we did not fully address a related but crucial question that emerges from *Alvarez*: under what circumstances are lies subject to valid government regulation because they cause cognizable harm to third parties or yield material gains to the speaker? This Article picks up where the Supreme Court left off and, based on the history and underlying purposes of the First Amendment, proposes a workable framework for evaluating the scope and reach of the First Amendment's protections for lies.

We argue that there is a spectrum of harms caused by and benefits gained from lies, and that the First Amendment's coverage and protection should vary accordingly. On one end of the spectrum are lies such as perjury and fraud, which fall beyond the First Amendment's reach because they are widely and historically understood to cause tangible harm, material gain, or both. In the middle are the wide range of lies—which we call “socially routine lies,” such as the lie in *Alvarez*—which the Court described as “simply intended to puff up oneself.”<sup>7</sup> These lies, while not inherently valuable from a traditional free speech perspective, nonetheless warrant coverage and protection because the harms they cause are typically slight, and the danger that outlawing such misstatements will chill truthful speech is palatable. Finally, at the other end of the spectrum are what we have labeled “high value lies”—false statements of fact that facilitate the purposes of protecting free speech by contributing to the discovery of truthful information that enhances public debate on matters of political salience.<sup>8</sup> This latter category includes what some commentators have referred to as “activist journalism,” deceptions that contribute to undercover work by credentialed, full-time journalists or activists.<sup>9</sup>

We lay out our claims in three steps. Part I provides a detailed overview of the current state of the law after *Alvarez*. It briefly describes the Court's fractured decision and focuses on the agreement by the plurality and concurring opinions that

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6. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435 (2015).

7. *Alvarez*, 567 U.S. at 721.

8. Chen & Marceau, *supra* note 6, at 1472–73.

9. See, e.g., Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: “Fake News,” the First Amendment, and the New Activist Journalism* 10 (Cornell Legal Studies Research Paper No. 17-02, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906444](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906444) [<https://perma.cc/D3HJ-HPLS>].

lies that cause cognizable harm or produce undeserved material benefits are not covered by the First Amendment. This category of lies is narrowly circumscribed, but nonetheless important so as to make clear that not all forms of deception will enjoy constitutional sanction. We go on to discuss where the plurality and concurring opinions part ways over the standard of review. This Part concludes by identifying categories of lies that warrant constitutional coverage and protection, either because their regulation might chill truthful speech, they have intrinsic value in themselves, or they otherwise produce neither third-party harm nor personal gain for the liar.

Part II explains that the *Alvarez* decision's limiting principles for the protection of lies are largely unworkable. Specifically, we argue that the task of identifying harmful as opposed to innocuous lies is chimerical. It is simply not possible to neatly divide lies into categories of harmful or harmless across the vast range of human experience. We note here also that an exclusive focus on harm and benefit might even have the paradoxical consequence of diluting the constitutional protection for high value lies. We conclude this Part with a discussion about how the current *Alvarez* framework is causing at least some confusion among lower courts.

Finally, in Part III we propose a sensible compromise governing the regulation of lies. State restrictions of high value lies that are socially valuable and lies speakers tell during political campaigns warrant the most exacting constitutional scrutiny. Laws that regulate "socially routine lies"—the vast majority of lies that are covered by the First Amendment but do not promote truth or provide similarly concrete public discourse value—will be subject only to intermediate scrutiny. Government restrictions of the "traditional categories" of harm-causing lies that are "long familiar to the bar" will fall outside of First Amendment coverage altogether.<sup>10</sup>

Such a framework ensures that the speech protections for lies are neither illusory nor absolute. Moreover, it provides a model for courts evaluating the reach of the First Amendment as applied to regulation of lies that is not subject to case-by-case litigation with one party always arguing that the lie in

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10. *Alvarez*, 567 U.S. at 717 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

question causes harm. At the same time, our proposed framework would reserve the strongest bite of First Amendment protection only for those lies that serve the underlying purposes of free speech, or otherwise produce social value. Dividing lies into three broad categories defined by categorical balancing promotes doctrinal clarity while forestalling the balkanization of lies into limitless subcategories requiring courts to engage in ad hoc balancing for each different type of lie.<sup>11</sup>

## I. THE FIRST AMENDMENT FRAMEWORK FOR EVALUATING GOVERNMENT REGULATION OF LIES

Lies are ubiquitous. As Chief Judge Kozinski memorably explained, “Saints may always tell the truth, but for mortals living means lying.”<sup>12</sup> Likewise, Justice Breyer remarked on “the pervasiveness of false statements.”<sup>13</sup> Notwithstanding their commonplace usage, lies have not been a centerpiece of First Amendment analysis until recently.

Prior to 2012, the Supreme Court said little about whether the First Amendment limits the state’s ability to regulate lies. Most cases addressing lies involved regulations of speech categories that were widely understood to do little to advance the underlying purposes of free speech because they did nothing to promote democracy or the search for truth.<sup>14</sup> These types of lies were also not a First Amendment concern because they caused tangible social harms to third parties. Among these categories of regulation were laws prohibiting fraud,<sup>15</sup> perjury,<sup>16</sup> impersonation of a government official,<sup>17</sup> defamation

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11. While we regard Justice Breyer’s balancing methodology, as currently elucidated, insufficiently clear to be workable, *Alvarez*, 567 U.S. at 730–38 (Breyer, J., concurring), we find value in his pragmatic approach. This project is less an outright rejection and more a refinement of Justice Breyer’s concurrence and aims to provide sufficient guidance to policymakers, courts, and speakers.

12. *United States v. Alvarez*, 638 F.3d 666, 674 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc); see also Chen & Marceau, *supra* note 6, at 1454–55.

13. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring).

14. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973).

15. We examined each of these categories at greater length in our prior work. Chen & Marceau, *supra* note 6, at 1444–45.

16. *Id.* at 1445.

17. *Id.* at 1446–47.

of a private person,<sup>18</sup> and misleading commercial speech.<sup>19</sup> In the traditional vernacular of free speech doctrine, these categories of speech are not relevant to the First Amendment because they have no value.<sup>20</sup> In these initial decisions considering lies to be categorically excluded from constitutional scrutiny, the Court did not extensively analyze the theoretical reasons for not applying the First Amendment.

To the extent that the Court recognized that the First Amendment applied to government regulation of lies before *Alvarez*, it limited the Amendment's scope to contexts in which constitutional protection of falsehoods was necessary to avoid chilling truthful expression.<sup>21</sup> Thus, for example, in *New York Times v. Sullivan*,<sup>22</sup> the Court imposed a high burden on public-official plaintiffs suing news outlets for defamation because it was concerned that a lower threshold would lead the media to censor themselves; the news media otherwise might be chilled from making unfavorable but truthful statements about public officials.<sup>23</sup> Prior to *Alvarez*, then, any constitutional protection for lies was based not on their intrinsic speech value, but on concerns that regulating them would chill truthful speech.<sup>24</sup>

#### A. *The Alvarez Framework: Lies Are Presumptively Covered by the First Amendment*

In one of the more memorable opening lines of a Supreme Court decision, *United States v. Alvarez* begins with the simple phrase, "Lying was his habit."<sup>25</sup> The plurality opinion goes on to describe Xavier Alvarez's pattern of lying, noting that the

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18. *Id.* at 1449 n.81.

19. *Id.* at 1447.

20. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). In an amicus brief supporting the government's claim that regulation of lies is not subject to First Amendment scrutiny, Professors Volokh and Weinstein enumerate a somewhat longer list of lies subject to government regulation. See Brief for Professors Eugene Volokh & James Weinstein as Amici Curiae Supporting Petitioner at 3–11, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-210), 2011 WL 6179424, at \*3–11 [hereinafter Volokh & Weinstein Amicus Brief].

21. *Chen & Marceau*, *supra* note 6, at 1447–51.

22. 376 U.S. 254, 270–71 (1964) (imposing strict limitations on libel claims brought by public officials).

23. *Chen & Marceau*, *supra* note 6, at 1447–51 (describing cases).

24. *Id.* at 1451.

25. *United States v. Alvarez*, 567 U.S. 709, 713 (2012).



record reflected that he “lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico.”<sup>26</sup> The lie that got Alvarez into *legal* trouble, however, was his false claim that he had been awarded the military’s highest honor, although federal prosecutors took the apparent position that any of his lies could subject him to criminal punishment.<sup>27</sup> In the view of the United States at the time of Alvarez’s appeal, “the general rule is that false statements of fact are not protected by the First Amendment.”<sup>28</sup>

The government’s claim was not entirely without support in the Court’s prior case law. In *Gertz v. Robert Welch, Inc.*, the Court said false statements of fact “belong to that category of utterances which ‘are no essential part of any exposition of ideas, and are 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.’”<sup>29</sup> Even stronger, in *Hustler Magazine, Inc. v. Falwell*, the Court explained that “[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage.”<sup>30</sup> And these sentiments were echoed and amplified in an amicus brief submitted by two respected free speech scholars, who asserted: “[T]he Stolen Valor Act, if read to apply only to knowingly false representations, should be seen as constitutional, on the grounds that the First Amendment generally does not protect

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26. *Id.*

27. Brief for Petitioner at 18–20, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-210), 2011 WL 6019906, at \*18–20. In contrast, mocking the notion that lies are almost “always” unprotected, Chief Judge Kozinski exclaimed that, “‘Always’ is a deliciously dangerous word, often eaten with a side of crow.” *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, C.J., concurring in denial of rehearing en banc).

28. Brief for Petitioner at 10, 19, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-210), 2011 WL 6019906, at \*10, \*19 (arguing that “this Court’s First Amendment decisions have long recognized that false factual statements ‘are not protected by the First Amendment in the same manner as truthful statements.’” (quoting *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982)); see also *Alvarez*, 567 U.S. 709, 750 (2012) (Alito, J., dissenting) (citation omitted) (stating false statements are entitled, at most, only to a limited “measure of strategic protection” that derives from the need to ensure that any false speech restriction does not chill truthful and other fully protected speech).

29. 418 U.S. 323, 340 (1974) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

30. 485 U.S. 46, 52 (1988).

knowingly false statements of fact.”<sup>31</sup>

The most significant feature of the *Alvarez* decision is its clear break from this line of thinking. By a six to three margin, the Court renounced any notion that there is a “general exception to the First Amendment for false statements”<sup>32</sup> and disavowed the suggestion that its prior cases regarded “false statements, as a general rule, [as] beyond constitutional protection.”<sup>33</sup> Instead of a general rule against speech protection for lies, *Alvarez* suggests a presumption that lies *are* covered by the First Amendment.<sup>34</sup> “The probable, and adverse, effect of” limiting lies, even valueless lies about winning military honors, the Court explained, “illustrates, in a *fundamental way*, the reasons for the law’s distrust of content-based speech prohibitions.”<sup>35</sup> After *Alvarez*, even worthless lies that serve no obvious function in the marketplace of ideas and, worse still, might impede the search for truth, are thus deemed fundamental to the First Amendment’s protections.

### B. *Categorical Balancing and No Value Lies*

The category of lies that falls entirely “outside the reach” of

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31. Volokh & Weinstein Amicus Brief, *supra* note 20, at 34. For additional language from prior Supreme Court decisions suggesting that lies are valueless, see Chen & Marceau, *supra* note 6, at 1442–43.

32. *Alvarez*, 567 U.S. at 718. In doing so, the plurality opinion continued the Court’s somewhat controversial insistence that the definition of categories of speech that are not covered by the First Amendment ought to be confined to categories that have historically and traditionally been recognized as having no speech value. See *United States v. Stevens*, 559 U.S. 460, 468 (2010). For a different view, see Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2177–79 (2015) (observing that neither the Supreme Court nor other federal or state courts in the pre-New Deal period recognized categories of low value speech on a routine basis).

33. *Alvarez*, 567 U.S. at 718.

34. Where we refer to the idea that a particular category of speech is “covered” by the First Amendment, we mean that its regulation will be subject to some form of judicial scrutiny under free speech doctrine. Speech that is not covered does not even trigger First Amendment concerns, and therefore may be regulated without meaningful judicial oversight. For categories of speech that are covered by the First Amendment, there are different levels of *protection*, depending on the nature of the speech, the context, and the type of regulation involved. Speech that is not covered by the First Amendment is, ipso facto, not protected. But not all speech that is covered is necessarily protected identically. On the coverage/protection distinction generally, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004).

35. *Alvarez*, 567 U.S. at 722 (emphasis added).

First Amendment protection is discrete and relatively well defined.<sup>36</sup> Such lies may be banned or regulated by the state without triggering any concern under the Speech Clause. The origin of this limitation comes from *Chaplinsky v. New Hampshire*.<sup>37</sup> There, the Court held that regulation of so-called fighting words—words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”<sup>38</sup>—are not of First Amendment concern. In doing so, the Court noted that laws addressing “well-defined and narrowly limited classes of speech” have simply never been thought to raise any constitutional question.<sup>39</sup>

In addition to the implied historical pedigree<sup>40</sup> of these categories of unprotected speech, the Court articulated a functional rationale for their exclusion from the First Amendment. It said that these speech forms “are no essential part of any exposition of ideas” and have “slight social value as a step to truth.”<sup>41</sup> While *Chaplinsky* is widely understood as the “no value” speech case, it stands for more than that. What has been widely ignored by most commentators is *Chaplinsky*’s conclusion that certain forms of speech are excluded from the First Amendment not only because they have little or no value, but also because “*any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*”<sup>42</sup> Thus, a careful reading of *Chaplinsky* reveals that the Court is engaging in a sort of categorical balancing that weighs the speech’s value against its social costs.<sup>43</sup> Unlike the

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36. *Stevens*, 559 U.S. at 469 (defining the class of unprotected speech more generally).

37. 315 U.S. 568 (1942).

38. *Id.* at 572.

39. *Id.* at 571–72.

40. For a discussion of the dispute about whether the categories of speech excluded from First Amendment consideration ought to be defined by historical recognition or by the balancing of policy concerns, see *supra* note 32.

41. *Chaplinsky*, 315 U.S. at 572.

42. *Id.* (emphasis added). *But see* *United States v. Stevens*, 559 U.S. 460, 471 (2010) (“But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.”). *See generally* Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 502 (2009) (explaining the foundation of the “fighting words” doctrine from *Chaplinsky*).

43. For a description of the technique of categorical balancing, as distinguished from ad hoc balancing, see Mark Tushnet, *An Essay on Rights*, 62

case-by-case harm inquiry seemingly invited by *Alvarez*, harm is relevant under *Chaplinsky* too, but at a higher level of abstraction. This is consistent with the Court's more recent elaboration on unprotected speech as "narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."<sup>44</sup>

### C. *Alvarez's Focus on Cognizable Harm and Material Benefit*

As recounted above, the Supreme Court has on numerous occasions made blanket statements suggesting that lies are simply not salient to the First Amendment. Lies have generally been regarded as having little or no value, and therefore not been considered to be of constitutional concern.<sup>45</sup> As we have seen, the Court's decisions in the past were consistent with this assertion, rejecting First Amendment coverage for lies in the contexts of fraud, perjury, impersonation of a federal official, and misleading commercial speech. Moreover, throughout the twentieth century, the Court's decisions on free speech claims about lying were largely ad hoc, with no attempt to elaborate on a larger set of principles. *Alvarez* charts a different course.

#### 1. Lies that Cause Legally Cognizable Harms

Both the plurality and concurring opinions in *Alvarez* articulated some general principles for determining the line between lies that are covered by the First Amendment and those that are not. First, it is clear from both opinions that harm is a relevant limiting principle. In rejecting the government's claim that all lies are no-value speech under the First Amendment, Justice Kennedy's plurality opinion noted that the prior case law was confined to categories of regulation

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TEX. L. REV. 1363, 1372 (1984) (describing categorical balancing as "a comparison of the interests in a broadly defined category of cases"). Moreover, we acknowledge that other scholars have drawn meaningful distinctions among the types of balancing that courts can and do engage in. See, e.g., Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495 (2015) (distinguishing between ad hoc balancing, categorical balancing, and contextual comparison of the value of speech and the countervailing social interest in regulating it).

44. *Stevens*, 559 U.S. at 469 (quoting *Chaplinsky*, 315 U.S. at 571–72).

45. *Chen & Marceau*, *supra* note 6, at 1443.

targeting lies that caused a “legally cognizable harm.”<sup>46</sup> Thus, in cases upholding laws prohibiting fraud, perjury, lying to federal officials, and impersonating a federal officer, the specific harms associated with those lies removed such speech from the Constitution’s scope.<sup>47</sup> Some categories of lies, such as fraudulent misrepresentations, cause material financial harm to specific victims. Other types of lies prohibited by these laws undermine both the truth-finding function and the integrity of government processes in ways that tangibly and fundamentally interfere with those matters.<sup>48</sup>

Justice Breyer’s concurrence also elaborates on harm as a relevant factor. He wrote that lies that cause “specific harm to identifiable victims,” whether the victim be the government, a business, or an individual, fall beyond the reach of the First Amendment.<sup>49</sup> The category of lies that are unprotected, then, must be discrete and identifiable based on “requirements of proof of injury,”<sup>50</sup> or instances where “tangible harm to others

46. *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

47. *Id.* at 720–21.

48. Impersonating a government official is a unique type of lie. Typically, pretending to be someone other than yourself is not a material harm that eliminates First Amendment protection. *See Alvarez*, 567 U.S. at 719–20. But pretending to be a representative of the government is different. Statutes covering such behavior serve the goals of protecting the democracy by “maintain[ing] the general good repute and dignity of . . . government . . . service itself.” *Id.* at 721 (alterations in original) (quoting *United States v. Lepowitch*, 318 U.S. 702, 704 (1943)); *see also* Chen & Marceau, *supra* note 6, at 1446; Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 198.

49. *Alvarez*, 567 U.S. at 734 (Breyer, J., concurring). As Mark Tushnet has written,

Justice Breyer’s overbreadth analysis focuses not only on “specific harm,” mostly to “identifiable victims” but also, with reference to the federal “false statements” statute, “where a lie is likely to work particular and specific harm by interfering with the functioning of a government department.” Perhaps the harm associated with Stolen Valor Act lies is not visited on identifiable individuals, though we can identify the class that is harmed—those who have actually received the medals and now find the recognition the medals represent worth less.

Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 513 (2014) (quoting *Alvarez*, 567 U.S. at 734–35 (Breyer, J., concurring)); *see also* *United States v. Swisher*, 811 F.3d 299, 308 (9th Cir. 2016) (“[L]aws punishing fraud, defamation, or intentional infliction of emotional distress generally ‘requir[e] proof of specific harm to identifiable victims,’ and statutes prohibiting the impersonation of a public official ‘may require a showing that, for example, someone was deceived into following a ‘course [of action] he would not have pursued but for the deceitful conduct.’”) (second and third alteration in original) (quoting *Lepowitch*, 318 U.S. at 704).

50. *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring).

is especially likely to occur.”<sup>51</sup> Justice Breyer explained that such “limitations help to make certain that” the law is not “discouraging or forbidding the telling of [a] lie in contexts where harm is unlikely or the need for the prohibition is small.”<sup>52</sup>

He then noted that the traditional categories of legitimate legal regulation of lies were consistent with this framework, which focuses on specific harms. Laws banning fraud protect victims from losing money, and laws regulating defamation address reputational harms caused by false statements.<sup>53</sup> Laws punishing perjury are typically limited to lies about material facts.<sup>54</sup> Here, Justice Breyer implied that the materiality requirement limits perjury prosecutions to those who lie in ways that are likely to undermine the judicial truth-finding process. Similarly, he observed that laws penalizing false statements made to government officials “are typically limited to circumstances where a lie is likely to work particular and specific harm by interfering with the functioning of a government department.”<sup>55</sup> Finally, laws that prohibit a person from impersonating a government official often require proof that someone was deceived into following a “course [of action] he would not have pursued but for the deceitful conduct.”<sup>56</sup>

Justice Breyer’s concurrence also discussed two other types of laws regulating false factual statements that were not examined by the plurality. First, statutes that prohibit one from making a false claim about terrorist attacks or about other crimes or catastrophes, he noted, “require proof that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm.”<sup>57</sup> Second, Justice Breyer discussed trademark infringement laws, which he regarded as perhaps the most

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51. *Id.* at 734.

52. *Id.* at 736. For an apparently comprehensive list of the federal statutes that impose liability for a misrepresentation, see *United States v. Wells*, 519 U.S. 482, 505–06 nn.9–10 (1997) (Stevens, J., dissenting) (critiquing the majority’s willingness to impose liability for a lie to a federally insured bank for the “purpose of influencing in any way” the action of the bank and compiling a list of roughly a hundred crimes relating to deception).

53. *Alvarez*, 567 U.S. at 734–35 (Breyer, J., concurring).

54. *Id.*

55. *Id.*

56. *Id.* (quoting *United States v. Lepowitch*, 318 U.S. 702, 704 (1943)).

57. *Id.* at 735. (citing 47 C.F.R. § 73.1217 (2011); 18 U.S.C. § 1038(a)(1) (2012)).

analogous regulation to the Stolen Valor Act. Infringement of another's registered trademark causes harm by confusing potential customers about the source of a good or service, "thereby diluting the value of the mark to its owner, to consumers, and to the economy."<sup>58</sup> Moreover, trademark statutes typically focus on "commercial and promotional activities" and also often require the trademark holder to show a likelihood of confusion, which is an indication that "tends to ensure that the feared harm will in fact take place."<sup>59</sup>

Justice Breyer's emphasis on actual harm or likelihood of harm also emerges from his application of intermediate scrutiny to the Stolen Valor Act. His analysis concluded that the law was too broadly drafted. In contrast, he noted,

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.<sup>60</sup>

If any doubt remained about Justice Breyer's view, he erased it with his unequivocal concluding statement about the importance of this limiting principle: "[t]he limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small."<sup>61</sup>

The dissenters, too, acknowledged the relevance of harm in analyzing the constitutionality of government regulation of false factual statements. Justice Alito emphasized that there are instances in which lying about military honors can lead to tangible harms.<sup>62</sup> For example, he pointed out that some individuals who lied about military honors were found to have

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58. *Id.*

59. *Id.*

60. *Id.* at 738. At least one lower court views Breyer's concurrence in precisely this analytical frame. See *United States v. Swisher*, 811 F.3d 299, 308–09 (9th Cir. 2016) (describing Justice Breyer's view as limiting the types of lies that may be prohibited by the state to those that cause or are likely to cause tangible harm).

61. *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring).

62. *Id.* at 741–44 (Alito, J., dissenting).

defrauded the United States Department of Veterans Affairs for \$1.4 million in undeserved benefits.<sup>63</sup> But more significantly, the dissent simply believed that the range of potential harms that should suffice to strip a lie of protection was much broader than that adopted by the majority.<sup>64</sup> In the view of the dissent, intangible, unquantifiable harms such as the emotional insult suffered by a truly decorated veteran were sufficient to justify stripping First Amendment protection from a lie.<sup>65</sup> The key difference between the six Justices in the majority and the three in dissent, then, was the extent to which they were willing to defer to the government's conclusions that emotional or intangible harms were caused by lies about military honors. But even the dissent expressed concern about the possibility that criminalizing lies in some contexts might open "the door for the state to use its power for political ends."<sup>66</sup>

## 2. Lies that Produce Undeserved Material Gains

The opinions in *Alvarez* also suggest another valid reason for government regulation of lies. Even in the absence of (or in addition to) harm, the state may prohibit lying to stop the liar from obtaining an undeserved personal benefit. Thus, lies that produce "material gain" for the speaker are also not speech, and their regulation is therefore not governed by the Free Speech Clause.<sup>67</sup> Justice Kennedy noted in his plurality opinion that one of the flaws of the Stolen Valor Act was that it did not limit criminal liability to those who lied about military honors to produce a "material gain" or "material advantage."<sup>68</sup> As he wrote, "Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of

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63. *Id.*

64. *Id.*

65. *Id.* at 743–44.

66. *Id.* at 751 (identifying false statements about "philosophy, religion, history, the social sciences, the arts, and *other matters of public concern*" as categories of lies that would be uniquely dangerous to criminalize because of the risk that truthful or debate-enhancing speech could be chilled, but failing to consider that some lies—lies told by investigators or whistleblowers to gain access, for example, may actually serve the goal of producing truth) (emphasis added).

67. *Id.* at 723 (plurality opinion).

68. *Id.*



employment, it is well established that the Government may restrict speech without affronting the First Amendment.”<sup>69</sup> Enforcement of the Stolen Valor Act did not fall within this category because Alvarez’s lies “do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal [of Honor].”<sup>70</sup>

It is not entirely clear, however, whether material gain is an independent factor that permits the government regulation of lies or if it is simply the flip side of the harm limitation. Most lies that cause third-party harm also produce material gains for the speaker, and vice-versa. Fraud, for example, causes financial harm to the victim and undeserved financial benefits to the speaker. Similarly, misappropriated trademarks can cause harm to the trademark holder and to consumers, who may be misled into purchasing the wrong product, but also produce unjust commercial gains for the infringer.<sup>71</sup>

As a practical matter, it is difficult to conceive of a benefit that one could obtain that would be improper in the absence of such cognizable harm to another. There do not appear to be any existing laws, including those authorizing recovery for unjust enrichment, that would allow one to recover for one’s material gain that did not also cause harm to the complaining party. Indeed, Congress’s amendment of the Stolen Valor Act after *Alvarez*, while referring only to a material gain, implies a defrauded or injured victim. The new statute makes it a federal offense to fraudulently hold oneself out as a recipient of the military honors covered by the original Stolen Valor Act “with [the] intent to obtain money, property, or any other tangible benefit.”<sup>72</sup> By definition, the material gain must be at the expense of a private or public entity who is providing an undeserved benefit. Harm and benefit are likely inextricably linked in the context of misrepresentations.

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69. *Id.*

70. *Id.* at 714.

71. *See id.* at 744 (“Surely it was reasonable for Congress to conclude that the goal of preserving the integrity of our country’s top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags.”).

72. 18 U.S.C. § 704(b) (Supp. I 2013).

D. *Alvarez and the Standard of Review*

While the plurality and concurring opinions are in general agreement about the categories of lies that may be constitutionally prohibited, they part ways over the relevant standard of review.<sup>73</sup> Indeed, one of the challenges to forecasting the law in this area stems from the absence of a majority opinion on this point. In *Marks v. United States*, the Supreme Court assured lower courts that plurality decisions create binding precedent and instructed that the precise holding is the reasoning of the Justices “who concurred in the judgments on the narrowest grounds.”<sup>74</sup> This assessment, however, is much more difficult than the Court seems to have imagined.<sup>75</sup> Quite often there is no truly “narrower” reasoning, but instead there are simply “different” analytic paths to the same outcome.<sup>76</sup> The Court itself has on occasion explained, “[w]e think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.”<sup>77</sup> To a certain extent, then, the exact contours of the protection for lies will be left open until the Supreme Court takes another case addressing the question because the disagreement on this discrete point is so patent between the judges concurring in the result.<sup>78</sup>

Justice Kennedy, writing for himself, Chief Justice Roberts, Justice Sotomayor, and Justice Ginsburg, viewed the

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73. See *United States v. Swisher*, 811 F.3d 299, 307 (9th Cir. 2016) (“The Court could not, however, agree on the appropriate level of scrutiny for the sort of lies targeted by § 704(b).”).

74. 430 U.S. 188, 193 (1977) (alteration in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1967)).

75. There is an established literature noting the difficulty of ascertaining the holding of a plurality decision with specificity. See, e.g., Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 822 (2017); Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933, 936 (2013).

76. *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc); *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS, 2017 WL 2912423, at \*12 (D. Utah July 7, 2017) (noting that *Alvarez’s* split on the standard of review was “one of kind . . . not breadth”). The authors disclose that they serve as plaintiffs’ counsel in the latter case.

77. *Nichols v. United States*, 511 U.S. 738, 745–46 (1994); see also *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (refusing to engage in a *Marks* rule analysis in the face of lower court disagreement as to a prior plurality’s holding).

78. See *Chen & Marceau*, *supra* note 6, at 1452–53.

Stolen Valor Act as a limit on pure speech, and applied strict scrutiny.<sup>79</sup> The plurality recognized that

when a pretender claims the Medal to be his own, the lie *might harm the Government* by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie *may offend* the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.<sup>80</sup>

Despite these putative harms, the plurality concluded that because the law's restriction on speech was not absolutely necessary to prevent the injuries in question, it failed First Amendment scrutiny.<sup>81</sup>

Justice Breyer, writing for himself and Justice Kagan, advanced an alternative approach to standard First Amendment doctrine that he has been developing in recent terms that cautions against automatically reviewing content-based regulations under strict scrutiny. Instead, he argued, the Court should "determine whether the statute works speech-related harm that is out of proportion to its justifications."<sup>82</sup> This is a form of intermediate scrutiny that calls for a more generalized balancing approach to reviewing government speech restrictions.<sup>83</sup> Justice Breyer did not dispute that the restriction on speech about winning military honors was content-based, but given what he viewed as the more limited harm that restrictions on such nonpolitical speech will have on the marketplace of ideas, he announced a preference for a version of intermediate scrutiny.<sup>84</sup> Notably, even under that standard, he deemed the socially valueless lie at issue in *Alvarez* to be protected.<sup>85</sup>

Even Justice Breyer's concurrence, however, seems to accept that restrictions on some types of lies might warrant

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79. *United States v. Alvarez*, 567 U.S. 709, 725–26 (2012) (plurality opinion).

80. *Id.* at 726 (emphasis added).

81. *Id.*

82. *Id.* at 730 (Breyer, J., concurring).

83. Mark Tushnet has described this as Justice Breyer's partial "doctrinalization" of the First Amendment. Tushnet, *supra* note 49, at 511–13.

84. *Alvarez*, 567 U.S. at 730–31 (Breyer, J., concurring).

85. *Id.* at 736–37.

strict scrutiny. First, he noted that in some contexts lies have social value. As he observed:

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.<sup>86</sup>

Second, Justice Breyer cautioned that laws targeting lies that suggest government efforts to control highly debatable areas of public discourse should be viewed with great skepticism.<sup>87</sup> He wrote, "Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny."<sup>88</sup> Moreover, he noted the danger of giving the government broad regulatory power over lies out of fear that it would "provide[] a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively . . . ."<sup>89</sup>

Accordingly, although the two opinions in support of striking down the Stolen Valor Act agreed that the First Amendment protects the lies in question, there is no shared reasoning or commonality of approach as to the applicable level of scrutiny. Neither opinion is "narrower," nor is there any "shared agreement," but rather each simply invokes different, and incompatible, tiers of scrutiny.

Without a clear holding, some lower courts have analyzed challenges to governmental regulations of lies under Justice

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86. *Id.* at 733. A similar sentiment was echoed by Justice Alito in his dissent. *Id.* at 751–52 (Alito, J., dissenting).

87. *Id.* at 731–32 (Breyer, J., concurring).

88. *Id.*

89. *Id.* at 734.

Kennedy's ideal of strict scrutiny.<sup>90</sup> At the very least, there seems to be a tendency among lower courts to lean toward strict scrutiny when the lies targeted by government action are of a "political" nature.<sup>91</sup> Still other courts have reserved the question; for example, the Ninth Circuit recently explained that given that the law in question failed intermediate scrutiny, "we need not determine whether the plurality opinion or Justice Breyer's opinion constitutes the holding" with regard to the appropriate level of scrutiny to apply.<sup>92</sup>

In the next Part of this paper, we consider the variety of lies that can be told and critique the Court's binary distinction between harmful and beneficial lies as largely unworkable.

## II. THE ILLUSIVENESS OF THE *ALVAREZ* HARM/BENEFIT STANDARD

After *Alvarez*, lies may be presumptively covered by the First Amendment, but it is also clear that not all lies are covered. As we have discussed, all six Justices in the plurality and concurring opinions agree that lies that cause, or are particularly likely to cause, specific harm fall outside the protections of the First Amendment. The plurality also adds that certain types of lies that produce undeserved gains or benefits for the speaker do not have any salience under the First Amendment.

Because neither opinion fully elaborates on the harm/benefit limiting principle, there remains a great deal of confusion over just what type of lies the government may ban. As a starting point, the Court recognized that *Alvarez's* lie deserved constitutional protection. But even this lie was not without benefit to *Alvarez* himself or any harm to others. After all, if *Alvarez's* lie helped him "gain respect" with any listener that he otherwise would not have enjoyed, that could be understood as an undeserved gain.<sup>93</sup> Similarly, it is certainly plausible that, as the government claimed, veterans who received military honors are harmed, at least emotionally, by the dilution of the value of their medals by those who falsely

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90. Chen & Marceau, *supra* note 6, at 1453–54.

91. See, e.g., 281 Care Comm. v. Arneson, 766 F.3d 774, 784 (8th Cir. 2014); Susan B. Anthony List v. Driehaus, 814 F.3d 466, 473 (6th Cir. 2016).

92. United States v. Swisher, 811 F.3d 299, 317 n.13 (9th Cir. 2016).

93. *Alvarez*, 567 U.S. at 714 (plurality opinion).

claimed to have earned them. As the dissenters observed, by analogy to trademark protections, “[s]urely it was reasonable for Congress to conclude that the goal of preserving the integrity of our country’s top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags.”<sup>94</sup>

If that is the case, then how could the Court decide that Alvarez’s lies were covered by the First Amendment, and that the Stolen Valor Act was unconstitutional? The answer is simple. *Every* lie causes some harm or produces some degree of benefit—but with regard to their impact, not all lies are created equal. The remainder of this Part picks up where Alvarez left off, and establishes a working taxonomy of the potential types of harms and benefits that may flow from lies.

#### A. *All Lies Cause Some Harm or Produce Some Benefits*

Alvarez established a presumption of protection for lies by requiring “proof of injury” before stripping a lie of First Amendment coverage.<sup>95</sup> Such a limit ensures that the threat of “criminal punishment [does not] roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.”<sup>96</sup> But this intuitively sensible limit creates a paradox because in the realm of intentional lies, it is fair to say that all lies produce benefits and/or cause harm. One only tells an intentional lie in order to obtain some benefit or affect some outcome. The benefit could be as benign as protecting a child’s innocence (“No one was hurt in the accident”); the harm may be as malevolent as a fraudulent scheme resulting in the appropriation of an elderly person’s retirement savings. But the deliberately told lie has an impact on the listener, often on the speaker, and sometimes on society or its institutions more generally.

Some who are skeptical of the need to provide constitutional protection for lying have posited that a wide range of the most common lies need not even be classified as lies. It has been suggested that “white lies” and “exaggerations,” for example, are qualitatively different; they

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94. *Id.* at 744 (Alito, J., dissenting).

95. *Id.* at 736 (Breyer, J., concurring).

96. *Id.*

are so petty that they do not cause real injury.<sup>97</sup> But this argument either proves too much or too little. If it is the case that courts are going to have to engage in a case-by-case analysis of whether a lie on a particular topic in a given context is or is not sufficiently harmful to justify its regulation, then we have entrusted to the government a “broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”<sup>98</sup>

Or more likely, this characterization of certain lies as entirely harm-free is just “patently not true.”<sup>99</sup> An applicant’s lie to a potential employer by telling her that she has “beautiful kids” or that his only weakness is “that I work too hard” could very well be material insofar as the answers shape the employer’s impression of the candidate and ultimately affect the hiring decision. White lies, exaggerations, and puffery are easy to dismiss as not “real” lies, but if the falsehood is stated deliberately and alters the listener’s course of behavior, there is no reason to treat them as non-lies. Nor is there such an obvious dividing line between puffery and white lies on the one hand and fraud or injurious deception on the other.

First Amendment doctrine ought not to be in the business of parsing out an endless number of amorphous categories of favored and thus protected lies. It is not the work of constitutional doctrine to draw a line between the lie one makes to impress someone to get a date and the lie someone tells to get invited over to another’s house or place of business.<sup>100</sup> Categorizing lies in this fine-grained way is a fool’s errand.

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97. *United States v. Alvarez*, 638 F.3d 666, 686 (9th Cir. 2011) (O’Scannlain, J., dissenting from denial of rehearing en banc) (explaining that such lies “would hardly be falsifiable”); *see also Alvarez*, 567 U.S. at 749 (Alito, J., dissenting) (“[M]any in our society either approve or condone certain discrete categories of false statements, including false statements made to prevent harm to innocent victims and so-called ‘white lies.’”).

98. *Alvarez*, 567 U.S. at 723 (plurality opinion). This concern led Justice Breyer to also worry about the problem of selective enforcement of laws prohibiting lying. *Id.* at 743 (Breyer, J., concurring).

99. *Alvarez*, 638 F.3d at 675 (Kozinski, C.J., concurring in denial of rehearing en banc).

100. Ag-Gag laws criminalize the latter, making it unlawful to use a misrepresentation in order to gain access to an agricultural facility. *See, e.g., IDAHO CODE §18-7042(1)(a)* (2014), held *unconstitutional* by *Animal Legal Def. Fund v. Otter*, 118 F. Supp.3d 1195 (D. Idaho 2015). The authors disclose that they serve as plaintiffs’ counsel in this litigation.

More importantly, any such categorization misses the point. Designating certain small or common lies as less harmful and therefore protected is a merely semantic exercise. Nearly every lie, if believed, causes some reliance by the listener and produces some combination of benefits and harms. The extent of reliance and the seriousness of injuries certainly differs depending on the context, but some degree of harm is inextricably wedded to the very act of lying. And it must be acknowledged that most lies are “material” in the sense that they actually affect behavior and alter the relevant relationships.<sup>101</sup>

A useful example in this regard is the class of lie at issue in *Alvarez*—a lie to “puff up oneself.” Such a lie does not inform, inspire, or provoke thinking about matters of public significance. It almost never contributes in a meaningful way to discourse or the discovery of truth and its prohibition does not chill truthful speech. But quite often, such a lie will create a web of benefits and burdens. For example, the fact that people might take someone more seriously because they believe he is a decorated war veteran could suffice to render the lie in *Alvarez* unprotected based on the harm principle. Or the injury of wrongly attributing credibility to someone might just be the tolerable cost of a white lie or puffery. A person falsely claiming military honors might as a result be elected as a public official, thereby providing him material gain. A journalist or blogger who writes opinion pieces might have her opinion sought after, at least in part, because she falsely represents herself to be a Medal of Honor recipient. In yet another scenario, perhaps someone who operates a “fake news” website may attract more readers (and earn money through advertising for each click on his website) by claiming to be a decorated military veteran. Or more mundanely, one who falsely claims to be a veteran might attract more customers to his newly opened commercial gym. These are just some scenarios that suggest the range of benefits and harms that could directly result from a lie about military honors. Indeed, the range of harms and benefits that might flow from the universe of other types of lies that might be subject to government regulation is staggering.

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101. Material is defined as “[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form.” *Material*, BLACK’S LAW DICTIONARY (10th ed. 2014).



Recognizing that sorting through these possible harms and benefits is both undesirable and impracticable, the key lesson is that all lies generate some harm or benefit. As we have argued, to say that *any* such benefit or harm removes the mistruth from the protections of the First Amendment altogether would be to render *Alvarez* a dead letter. Indeed, in *Alvarez* itself, the Court recognized the government's argument that it is a matter of "common sense that false representations have the tendency to dilute the value and meaning of military awards," and yet such a "harm [to] the Government by demeaning the high purpose of the award" was not deemed sufficient to take these lies outside the protections of the First Amendment.<sup>102</sup>

Only when a lie closely resembles the sort of tangibly or legally cognizable harmful lie that has been historically unprotected do the First Amendment protections fall away. Stated differently, most of the harm incidental to a lie is not of such a form or degree as to warrant stripping the lie—as an act of pure speech—of First Amendment coverage, but the closer a lie gets to true fraud, or one of the other historically unprotected categories, the more likely it is that the lie will be treated as outside the reach of the First Amendment.<sup>103</sup>

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102. *Alvarez*, 567 U.S. at 726 (plurality opinion). Even assuming there was such an injury, the government failed to show why other non-speech-limiting approaches would not be sufficient to remedy the harm caused by such lies. If there is a risk of injury to the Government or other Medal of Honor recipients by persons falsely claiming to have received such honors, the Court noted that "at least one less speech-restrictive means" existed "by which the Government could likely protect the integrity of the military awards system. A Government-created database [that would] list Congressional Medal of Honor winners." *Id.* at 729.

103. A question that is beyond the scope of this project, but likely to come up, is the extent to which content-based restrictions of unprotected lies are unconstitutional. As a general matter, content-based restrictions on speech have been permitted when confined to the few "historic and traditional categories [of low-value speech] long familiar to the bar." *Id.* at 717 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)). However, content-based restrictions within the categories of unprotected speech may also violate the First Amendment. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."). Even among the categories of speech identified by the majority in *Alvarez* as unprotected—for example fraud, under *R.A.V.*, one could make the argument that a content-based restriction on fraud, proscribing *only* agricultural fraud, for example, would be subject to strict scrutiny. Of course, this opens the door to a range of free speech challenges to distinct types of fraud, including banking fraud or investment fraud, unless the reason for singling out that particular type of fraud was related to the

*Alvarez's* promise that the First Amendment protects lies will be meaningless if the protection is imagined to apply only to lies that are *entirely* incapable of causing any harm. Accordingly, there must be some better-developed way of distinguishing which types of harms are sufficient to either exempt certain anti-lying laws (such as fraud statutes) from constitutional scrutiny or to justify some sort of government regulation without sacrificing too much speech.

### B. *The "Falsity Alone" Limiting Principle*

Building on the point we make in the previous Section, the relevant limiting principle for the constitutional protection of lies cannot be found in *Alvarez's* suggestion that one of the unique features of the Stolen Valor Act was that it criminalized "falsity alone" or falsity and "nothing more."<sup>104</sup> To be sure, it is unlikely that many lawyers or legislators will argue directly that any lie, no matter how small the harm, warrants criminalization. It is simply not politically palatable, much less practicable, to criminalize all lies, or even a large swath of them. But there are subtler and less transparent ways of making essentially the same argument. In this vein, proponents of laws criminalizing a wide range of lies, including perhaps political lies or politically motivated fake news, are likely to seize on the "falsity alone" language from *Alvarez* as a justification for asserting that such proscriptions are constitutionally permissible. In essence, this is tantamount to the claim that any lie that causes any change in behavior or produces any benefit or harm, no matter how small, falls outside the coverage of the First Amendment. But that would be in conflict with the *Alvarez* plurality and concurring opinions, which impose some sort of materiality or cognizability requirement on any harm or benefit produced by lies.

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"distinctively proscribable content" of the speech in question. *Id.* We take no position on this issue in our current Article.

104. *Alvarez*, 567 U.S. at 719. At the time, the Stolen Valor Act stated: "Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both." Stolen Valor Act, Pub. L. No. 109-437, 120 Stat. 3266 (2006). After *Alvarez*, that section was amended to add a requirement that the offender lied "with the intent to obtain money, property, or other tangible benefit." 18 U.S.C. § 704(b) (2015).

A notable example of a bold approach to the falsity alone argument is Idaho's briefing in defense of the litigation challenging the constitutionality of its Ag-Gag law.<sup>105</sup> The Idaho law criminalizes all misrepresentations told in order to gain access to an agricultural facility. Thus, lies about the need to use the restroom, a desire to make a purchase or use the services of the facility, or a wish to work for the company to gain such access are all crimes. According to Idaho, the prohibitions on lying in the Ag-Gag statute are not covered by the First Amendment because the statute does not regulate "falsity and nothing more," but rather targets the fact that one gains a benefit in the form of limited, consensual access, or perhaps a harm in the form of intrusion on private property interests, based on the deception.<sup>106</sup>

According to this view, the defining feature of a proscribable lie is that it "causes" some change in behavior or circumstances. Under this reasoning, any law that regulates a lie that causes any conceivable harm or benefit (unlike the Stolen Valor Act, which criminalized "falsity and nothing more") is constitutional, even if that harm is not clearly cognizable at common law.<sup>107</sup> This reading of *Alvarez* would mean that any "causal link between the misrepresentation" and a change in behavior by another person takes a lie outside the protections of the First Amendment.<sup>108</sup>

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105. IDAHO CODE § 18-7042(1)(a) (2017), *held unconstitutional* by *Animal Legal Def. Fund v. Otter*, 118 F. Supp.3d 1195 (D. Idaho 2015).

106. Brief of Appellant at 17–22, *Animal Legal Def. Fund v. Wasden*, No. 15-35960, 2016 WL 1640034 (9th Cir. Apr. 20, 2016).

107. It is far from clear that an entry gained by deception suffices to state any sort of tangible or intangible common law harm. *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999); *Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves."); *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS, 2017 WL 2912423, at \*7 (D. Utah July 7, 2017) (concluding that those gaining access to commercial property by deception do not cause "trespass-type harm").

108. Brief of Appellant, *supra* note 106, at 14. The State goes on to emphasize that the Ag-Gag law does not sweep within its reach protected, harmless lies because it does "not criminalize resume inflation or interview or application puffery." *Id.* But it is unclear why the State believes this (or any) such limitation on the reach of the Ag-Gag law exists. The plain text of the statute makes it a crime for any person to gain entry to an agricultural facility based on a misrepresentation. Surely lies about how hard one works, or how excited he is about the job or the salary, or exaggerations about her experience in the field

Distilled to its essence, these arguments amount to a claim that *Alvarez* protects only lies that produce no benefit and no harm or lies that do not in any way alter the status quo. Such a reading of *Alvarez* is unsupportable. First, the Stolen Valor Act itself arguably regulated more than falsity alone. All nine Justices seemed to be in agreement that a lie about military honors could cause emotional harm to the actual recipients of such honors and could damage the credibility and sense of selectivity surrounding the Medal of Honor. The lie at issue was not simply a mistruth spoken into a vacuum where it had no impact. More importantly, Justice Breyer specifically considered the problem of political frauds, for example, and described their criminalization as “particularly dangerous” in spite of the fact that such lies are uniquely likely to alter behavior: “In the political arena a false statement is *more likely to make a behavioral difference* (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous . . . .”<sup>109</sup>

Arguing that only those lies that cause no harm or are false and nothing more is the legal equivalent of saying that only those lies that no one hears or that have no effect on the emotions or lives of anyone are protected. It cannot be that the speech protection of *Alvarez* protects only lies that generate no measurable impact or change in behavior, because that category of lies is essentially a null set. Such a reading of *Alvarez* would mean that the Stolen Valor Act could be rewritten to say that anyone who falsely claims to have won the Medal of Honor, and by so doing hurts the feelings of another, impresses another, or is invited to a dinner party because of the lie, may be criminally punished. This would not only dilute the rule from *Alvarez*, but would completely undermine it. Surely the Court could not endorse such a reading.

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could influence an employer’s decision to hire a person. That is, each of these lies could cause a change in an employer’s behavior. Yet this seems to be well within the range of “puffery” that the State blithely concedes is protected. Labels like puffery, exaggeration, and non-harm-causing lies are not even remotely clear enough to permit a coherent distinction along these lines.

109. *United States v. Alvarez*, 567 U.S. 709, 738 (Breyer, J., concurring) (emphasis added).

C. *Entry onto Property as Insufficient Harm Flowing from a Lie*

If a law regulating lies must do more than proscribe falsity alone, we still must determine when the harm it addresses is sufficient to preclude First Amendment coverage. The laws that are historically not covered tend to be those directed at prohibiting tangible property harms, such as financial loss. An interest that has been asserted by some states as sufficient to remove a law from First Amendment scrutiny in recent litigation is the protection of access to private property.

One type of lie that is both common among investigative journalists and activist whistleblowers and has been targeted by lawmakers for criminalization is a lie used to facilitate access to private property. Perhaps no single question regarding the First Amendment coverage for lies is more critical. If lies that facilitate entry are categorically outside the scope of free speech protections, then legislatures are free to turn civil rights testers,<sup>110</sup> Pulitzer Prize winning journalists,<sup>111</sup> and even the likes of Upton Sinclair<sup>112</sup> into criminals. It would seem to turn the First Amendment on its head to treat the lies used to gain access to investigate the unsanitary practices of a food producer, the abusive practices of a daycare, or the racist rental policies of a property management company as unprotected, while treating the “pathetic” lie at issue in *Alvarez* as enjoying full First Amendment protection. But such a view is not without its adherents.

Professor Eugene Volokh has argued that when one uses a misrepresentation in order to facilitate an entry to private property and an accompanying investigation, there is “harm” sufficient to place such lies within the narrow category of lies that falls outside the First Amendment’s scope.<sup>113</sup> The harm,

110. *Fair Housing Testing Program*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/crt/fair-housing-testing-program-1> (last updated Aug. 19, 2016) [<https://perma.cc/GF5X-8G75>].

111. *Undercover Reporting*, UNDERCOVER REPORTING, <http://dlib.nyu.edu/undercover/> (last visited June 17, 2017) [<https://perma.cc/7MVS-8QDZ>].

112. Sinclair’s deceptive entry into meatpacking plants at the turn of the twentieth century spurred a prompt legislative response from Congress in the form of the Federal Meat Inspection Act and the Pure Food and Drug Act. See Chen & Marceau, *supra* note 6, at 1456–57.

113. Eugene Volokh, *Thoughts on the Court Decision Striking Down Idaho’s*

Volokh posits, is an intrusion onto legitimate property interests.<sup>114</sup> As he puts it, “being duped into hiring someone, or into opening your property to someone, based on affirmative lies would indeed count as a specific harm, even in the absence of physical property damage caused by the employee or visitor.”<sup>115</sup> In his view, the lie inflicts an injury on one’s right to exclude others that is tantamount to fraud:

Consider, for instance, going onto someone’s property by consent when the consent has been gotten by intentional misrepresentation. State law could treat this as tortious trespass, and often does (even if state law could also sometimes choose not to treat it as a tort, for instance if the state wants to leave latitude for undercover newsgathering). The intrusion on someone’s property is itself a harm, whether the intruder gets access to the property without consent — or with consent procured by lying. And if such actions can constitutionally be treated as a tort, they can constitutionally be treated as a crime, too.<sup>116</sup>

It is true that some type of injury, at least psychological harm, could flow from deceptive entry. It is never pleasant to realize that you have been “duped,” whether the deception leads you to believe that someone is a true friend, a potential business partner, or perhaps someone willing to donate money to your political campaign. Although, of course, that harm would not manifest itself until the deception is later revealed. Nonetheless, for several reasons, it is a radical position to treat all consent secured by deception as unequivocally vitiating consent.

First, as already explained, it would be perverse to imagine a First Amendment wherein the protection for “fake news” and

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“Ag-Gag” Law, WASH. POST, (Aug. 6, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/06/thoughts-on-the-court-decision-striking-down-idahos-ag-gag-law/?utm\\_term=.c50182315390](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/06/thoughts-on-the-court-decision-striking-down-idahos-ag-gag-law/?utm_term=.c50182315390) [https://perma.cc/8YDA-AQAH].

114. *Id.*

115. *Id.*

116. *Id.* For an interesting argument suggesting that trespass law ought to be modified from a strict liability regime to one that “would force courts to explicitly weigh the interests of society in access against the potential costs to property owners,” thus accommodating some types of undercover investigations, see Benjamin Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1094 (2011).

for self-serving lies about things such as military honors were fully protected, but a lie that is used to facilitate investigative journalism on matters of public concern is not.<sup>117</sup> Second, such a capacious definition of the sort of “harm” that justifies excluding speech from First Amendment protection swings wide open the back door to treating nearly any posited government interest as a sufficient harm to justify restricting lies. Trespass without any physical damage is truly the most nominal of harms. Indeed, trespass law is unique in that it explicitly allows for recovery based on unlawful entry *even though* there are no actual damages.<sup>118</sup> This may be sensible policy in the realm of property law,<sup>119</sup> but it has no application in defining the contours of actual harms that are sufficient to justify leaving pure speech uncovered by the First Amendment.<sup>120</sup> To put the matter differently, trespass, as a doctrine that explicitly eschews a requirement of harm, is not a useful vehicle for defining what level of specific harm is sufficient to justify eliminating First Amendment protection.

Finally, and no less importantly, Professor Volokh’s conclusion that such lies cause harm rests in part on the doctrinal premise that entry gained by deception is a trespass. Although the Restatement of Torts speaks in sweeping terms

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117. Others have observed a parallel asymmetry in the First Amendment doctrine. Dorf & Tarrow, *supra* note 9, at 9 (noting that the right of access and journalism do not receive special First Amendment protection vis-à-vis rights to tell outright lies).

118. See, e.g., *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 306 F.3d 806, 820 (9th Cir. 2002) (compiling cases about trespass as a nominal harm).

119. The reason the common law did not require landowners to show actual damages in civil trespass actions was that the tort’s underlying purpose was not compensation or deterrence (although actual damages could be proven and awarded), but disabling trespassers from asserting title or easement by adverse possession. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 75 (5th ed. 1984) (“The plaintiff recovered nominal damages where no substantial damage was shown . . . . The action was directed at the vindication of the legal right, without which the defendant’s conduct, if repeated, might in time ripen into prescription; and there was no room for the application of the maxim that the law does not concern itself with trifles.”) (footnotes omitted).

120. Certainly there are many scenarios where a deceptive entry may cause concrete, actual harm. For example, a wedding crasher who eats food and consumes drinks should be fully liable for the actual financial loss caused by his entry. It is also possible that entry into certain events or locations may deprive one of intimate privacy in a way that is harmful. But as a general rule, entry occasioned by deception is not itself a sufficient harm to justify excluding such lies from the coverage of the First Amendment.

about deception vitiating consent,<sup>121</sup> such a position has never truly reflected the state of the law. The reality is considerably more complicated.<sup>122</sup> Generalizations about common law doctrines across all American jurisdictions are always perilous, and it is particularly difficult to prove a negative. But there do not appear to be any courts that have squarely held that entry or access gained by a lie or misrepresentation is always a trespass.<sup>123</sup> As Judge Posner has explained, when a person gains entry into a business through deception, where the business owner invites entry (but does not know the investigator's true purpose), the liar has not committed a true trespass because there is no invasion of "the specific interests [that] the tort of trespass seeks to protect."<sup>124</sup> Some commentators simply recognize that the law is unsettled in this area, but also suggest that fraudulent inducement does not generally vitiate consent. However, a fraud that deceives one about the very nature of the acts in question, for example pretending to be a doctor providing medical care by engaging in otherwise unwanted touching, does vitiate consent.<sup>125</sup>

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121. RESTATEMENT (SECOND) OF TORTS § 892B(2) (AM. LAW. INST. 1979) ("If the person consenting to the conduct of another is induced to consent by . . . the other's misrepresentation, the consent is not effective . . .").

122. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 30 F. Supp. 2d 1182, 1202 (D. Ariz. 1998) ("[T]respass cases involving fraudulently induced consent have reached contradictory results . . .").

123. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 518 (4th Cir. 1999) ("Although the consent cases as a class are inconsistent, we have not found any case suggesting that consent based on a resume misrepresentation turns a successful job applicant into a trespasser the moment she enters the employer's premises to begin work."). Deception may well vitiate consent when the deception is as to the very nature of the act in question. The classic examples here arise out of persons who pretend to be performing a medical procedure, but in fact are engaging in a sexual act. See, e.g., *People v. Quinlan*, 231 Ill. App. 3d 21, 25, 596 N.E.2d 28, 31 (1992) ("D.S. consented to an invasive medical procedure, not to sexual acts. Since defendant's acts were not a medical procedure, the evidence proved beyond a reasonable doubt that D.S. did not give knowing consent."). Outside of the line of cases sustaining sexual assault convictions when the consent is to a fundamentally different act, the common law notion that deception vitiates consent does not appear to have considerable viability.

124. *Desnick v. Am. Broad. Companies, Inc.*, 44 F.3d 1345, 1352 (7th Cir. 1995). We addressed these claims in our prior work as well. *Chen & Marceau*, *supra* note 6, at 1494–95. In a case where consent was fraudulently induced, but consent was nonetheless given, plaintiff has no claim for trespass. *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756–57 (N.D. Cal. 1993).

125. Deception may not vitiate consent where "the mistake does not bear so directly and immediately upon the conduct or the invasion it inflicts as to invalidate the consent itself and permit a tort action as if it never had been



The rights to dominion and control protected by the law of trespass are well settled; persons have a right to exclude anyone and everyone from their property.<sup>126</sup> One can exclude persons because she does not trust them, or she does not like their attitude, or even if she simply finds their speech annoying or boring. But lies are pure speech.<sup>127</sup> And any assumption that all access obtained in part or in whole because of a lie is tantamount to trespass is unsupported by the weight of authority. Indeed, as the district court in the Idaho Ag-Gag case noted, “the limited misrepresentations [the animal rights organization] says it intends to make—affirmatively misrepresenting or omitting political or journalistic affiliations, or affirmatively misrepresenting or omitting certain educational backgrounds—will most likely not cause any material harm to the deceived party.”<sup>128</sup>

In short, whatever nominal harm may flow from consent obtained at least in part by deception is insufficient to categorically exempt such expression from First Amendment coverage.<sup>129</sup> There was no general trespass in such circumstances under the common law because persons are said

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given.” RESTATEMENT (SECOND) OF TORTS § 892B cmt. g. In the case of undercover journalists or investigators, while the property owner may not be fully aware of the identity of that person, she is not mistaken as to the essential nature of the act, which is consent for a person to enter onto her land. For a thorough discussion of the balancing of interests between the value of newsgathering and potential intrusions on privacy, see Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173 (1998).

126. See David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL'Y 39 (2000); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

127. Spoken or written lies are unequivocally “pure speech. And when it comes to pure speech, truth is not the sine qua non of First Amendment protection.” *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc).

128. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1203–04 (D. Idaho 2015); see also *Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS, 2017 WL 2912423, at \*7 (D. Utah July 7, 2017).

129. In *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), the court construed the common law recognizing no injury when consent to enter (even a home) is gained by lies. *Id.* at 247–48. As the court observed, “[o]ne who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves.” *Id.* at 249. It is telling that later in the opinion, the court noted that the First Amendment is not a “license to trespass,” *id.* at 249, implying that securing access through deception is not tantamount to trespass.

to assume the risk that an invited guest may be a false friend and publish an account of what he observes. A world where all deceptions that result in consequences or access are deemed unprotected is, as Chief Judge Kozinski correctly observed, chillingly dystopian.<sup>130</sup> In such a world, lies about one's feelings for another in order to secure a social invitation could be criminalized.<sup>131</sup> Surely if a lie about being a journalist so that one can document horrific workplace conditions could be criminalized, so can braggadocio used to earn love, affection, friendship, admiration, or respect.

#### *D. Materiality as a Limiting Principle*

At several points, both the plurality and concurrence in *Alvarez* invoke terms that appear to limit the scope of harms that would exempt lies from First Amendment coverage. As discussed above, Justice Kennedy used the terms “legally cognizable”<sup>132</sup> and “material”<sup>133</sup> to limit the scope of relevant harms or gains, while Justice Breyer wrote of “specific”<sup>134</sup> harms as a limiting principle. We might surmise, then, that the state can regulate lies that cause cognizable or material harms to others and/or produce material benefits to the speaker, but there is little else to help us understand those modifiers. These terms are still relatively unstable.

Some clues can be discerned from the context in which the Justices use these terms. At one point, Justice Breyer focused

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130. *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc).

131. Distinct concerns might arise if a law criminalized access or recording relating only to purely private or intimate details, as opposed to commercial interests. Indeed, the First Amendment provides heightened protection for speech-related activities that relate to matters of public, not private, concern. *See, e.g., Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011); *Dun & Bradstreet v. Green Moss Builders, Inc.*, 472 U.S. 749, 759 (1985).

132. *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

133. To be sure, at some points the *Alvarez* opinions focus on materiality as a modification of the *lie* as opposed to the resulting harm. *Id.* at 734, 738–39 (Breyer, J. concurring); *id.* at 747 (Alito, J., dissenting). One way of reading this is to infer that the Court is concerned about causation. That is, materiality here might suggest that the lie was sufficiently material to cause a change in the behavior of the listener. A materiality requirement applied to the falsehood itself would, of course, narrow the scope of such regulations, as Justice Breyer notes at several points. *Id.* at 734, 738–39 (Breyer, J., concurring). Our focus in this Article is on materiality as a limit of the related harm or advantage.

134. *Id.* at 736.

on the idea that lies are exempt from First Amendment coverage when they cause “specific harm to identifiable victims.”<sup>135</sup> While this certainly helps to narrow the scope of lies that the state can regulate, it still offers relatively little guidance. Perjury, for example, which is universally accepted as a form of lying that is not covered by the First Amendment, can harm the parties involved in a lawsuit, and thereby affect “identifiable victims.” But perjury is also understood to undermine the integrity of the justice system as a whole, which cannot be said to adversely affect individuals. In this respect, Justice Breyer’s formulation is underinclusive. At the same time, because it does not further elaborate on what it means by “specific,” it may be overinclusive in that it might be understood to exempt lies that cause any harm that is articulable, such as Volokh’s assertion about complete autonomy in the control over one’s property, without regard to the degree or significance of that harm.

Another possible limitation on the types of harms that disqualify a lie from First Amendment protection can be gleaned from the plurality opinion. Justice Kennedy talks about the government interest in preventing speakers from securing a “material gain” in a manner that implies that he means some commercial benefit.<sup>136</sup> This makes some sense in that it is the type of harm associated with categorically uncovered speech, such as different types of fraud. When *A* lies to *B* to get *B* to give money to *A* under false pretenses, there is a direct and material commercial benefit to *A*.

But Justice Kennedy did not elaborate on what he meant by material gain or whether the false factual statement must be directly related to that gain. If one accepts this framework, then the material benefit factor might also be applied to allow regulation of a newspaper whose undercover journalist lies to gain access to groundbreaking information of public concern and produces a prize-winning article. The argument here would be that because the article helps sell more magazines or generates more advertising revenue, the newspaper has materially benefited from its employee’s lie. Similarly, the government might argue that such lies are not covered where the journalist herself gains a material benefit from her

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135. *Id.* at 734.

136. *Id.* at 723 (plurality opinion).

undercover work, such as winning a prestigious award, perhaps including cash,<sup>137</sup> or a raise or promotion.

In the context of political activists, we might see the same types of arguments. For example, an undercover activist who lies to gain access to private property, resulting in a widely publicized exposé that results in major legislative reform, may also increase publicity for the nonprofit organization for whom he works, and generate more donations from those inspired by the investigation. If that counts as material gain, then a substantial amount of important speech—what we have branded “high value lies” or “investigative deceptions”<sup>138</sup>—would fall outside the First Amendment’s coverage.

The post-*Alvarez* lower court decisions on lies do not provide considerably more guidance. In *United States v. Swisher*, the Ninth Circuit examined the constitutionality of another part of the Stolen Valor Act that criminalizes the act of wearing military medals one has not earned, as opposed to speaking about them.<sup>139</sup> The court held that the First Amendment prohibits the enforcement of this law because it was not limited to lies for which there was “proof of specific harm to identifiable victims.”<sup>140</sup> Moreover, the court said, there was no requirement that the government show that “someone was deceived into following a course [of action] he would not have pursued but for the deceitful conduct.”<sup>141</sup> Even this

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137. Winners of the Pulitzer Prize in journalism for most categories, for example, receive a \$15,000 award. *Pulitzer Board Raises Prize Award to \$15,000*, PULITZER PRIZES (Jan. 3, 2017), <http://www.pulitzer.org/news/pulitzer-board-raises-prize-award-15000> [<https://perma.cc/43TQ-MK7V>].

138. See Chen & Marceau, *supra* note 6, at 1454–71.

139. 811 F.3d 299 (9th Cir. 2016). See also *United States v. Hamilton*, 699 F.3d 356, 373 (4th Cir. 2012) (upholding the medal-wearing provision of the Stolen Valor Act because the wearing of an unearned medal is more convincing evidence of actual attainment than words alone). A couple of other cases have upheld the application of laws against lying in contexts in which the harms were more readily identifiable. See, e.g., *United States v. Williams*, 690 F.3d 1056, 1063–64 (8th Cir. 2012) (upholding statutes criminalizing hoax bomb reports because they criminalize “only those lies that are particularly likely to produce harm”); *United States v. Gardner*, 993 F. Supp. 2d 1294, 1307 (D. Or. 2014) (upholding as constitutional the Victim and Witness Protection Act, 18 U.S.C. § 1512, which criminalizes “knowingly engaging in misleading conduct towards another person with intent to hinder, delay and prevent the communication to a federal law enforcement officer of truthful information relating to the commission of a federal offense,” because the statute regulates “speech integral to criminal conduct,” a historically regulated category of speech).

140. *Swisher*, 811 F.3d at 315.

141. *Id.* (alteration in original).

elaboration does not offer helpful insights into the harm requirement. Just as every lie causes some form of harm, many lies result in altered behavior—that is, the lie results in someone following a course of conduct that he would not have taken but for the lie. But just as not all harms should suffice to remove First Amendment coverage from the realm of falsehoods, it would be odd to suggest that any lie that plays a role in influencing one’s behavior is beyond the Constitution’s coverage. For example, the fact that a co-worker wears a particular item of clothing to the office more frequently because a friend falsely told him it was stylish, or the fact that someone eats a particular diet because she relies on someone’s lies about how good it makes her feel, ought not remove those lies from the First Amendment’s coverage even though they produced changes in behavior (though as we discuss below, the value of that lie is also relatively low).

*Golb v. Attorney General New York* provides a useful illustration of the efforts of lower courts to grapple with this aspect of *Alvarez*.<sup>142</sup> In *Golb*, a prisoner petitioned for a writ of habeas corpus after being convicted in state court for criminal impersonation in the second degree and forgery in the third degree.<sup>143</sup> The petitioner had engaged in a bizarre and elaborate scheme to steal the identities of scholars who disagreed with his father’s academic position on the origin of the Dead Sea Scrolls.<sup>144</sup> Rather than use identity theft for the purpose of securing commercial gain, the petitioner used it to undermine the credibility of academic critics of his father’s work.<sup>145</sup> He argued that under *Alvarez*, the state laws were unconstitutionally overbroad on the ground that the laws criminalized false speech designed to cause *intangible* (as opposed to “material”) harm to someone’s reputation.<sup>146</sup> In rejecting the petitioner’s claim, the district court noted that:

Even if *Alvarez* could be read to suggest that it is impermissible to punish false speech unless the speaker intended to gain a “material” advantage or cause a

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142. No. 15 Civ. 1709 (KPF), 2016 WL 297726 (S.D.N.Y. Jan. 21, 2016), *appeal docketed*, No. 16-647 (2d Cir. Mar. 3, 2016).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

“material” harm, the plurality in that case never equated “material” advantages or harms with tangible ones. . . . To the contrary, the plurality repeatedly suggested that harms and benefits can be “material” even if they are intangible. . . . For example, the plurality observed that perjury statutes are constitutional, even though they criminalize false speech, because perjury causes intangible harm to “the integrity of judgments that are the basis of the legal system.” . . . Thus, the *Alvarez* plurality clearly believed it was permissible to criminalize at least some false speech that has the potential to cause intangible injuries.<sup>147</sup>

But *Alvarez* is unclear on whether intangible harms to *individuals* as opposed to the government or the court system, which have a history and tradition of proscription, can amount to a material harm sufficient to place the harm-causing lie outside of the First Amendment. However, it is certainly true that there are different areas of the law in which intangible harms are deemed legally cognizable. For example, in the law of standing, the Supreme Court has recognized that in appropriate circumstances, Article III injuries may include not only tangible physical and economic harms, but also harms to aesthetic and recreational interests.<sup>148</sup> It is conceivable, then, that some injuries that are intangible might be sufficient to place certain types of lies beyond the concern of the Speech Clause.

*Alvarez's* lack of clarity as to what constitutes a material harm leaves lower courts as well as speakers in a state of confusion. Greater certainty is needed. Perhaps the determination about which injuries or benefits are caused by lying should be qualitative. That is, we could try to distinguish lie-based harms and gains by category, such as financial, emotional, or physical. But as the *Golb* case concludes, it is quite possible that some intangible or less tangible harms suffice, and, in any event, any division of the lies into qualitative categories neglects the fact that even within categories there can be large differences in the *degree* of harm, ranging from devastating to de minimis. This might lead one to

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147. *Id.* at \*19 (citations omitted).

148. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000).

conclude that the preferable approach is to focus on the quantitative differences in harms and benefits, focusing on the degree of harm rather than the formal category of injury under which it falls. This too, however, proves unworkable as it leaves courts in the business of trying to figure out how much harm is “enough” to remove a category of lying from the scope of First Amendment coverage. It is doubtful, for example, that a fraud that results in the listener paying the liar only fifty cents would jettison that particular fraud from a type of non-speech under *Chaplinsky*<sup>149</sup> to the category of fully protected speech under *Alvarez* merely because the harm is de minimis.

Even at a categorical level, this type of balancing seems problematic and unsatisfying. The problem with this approach to examining lie-based harms and benefits is that the law would require disaggregating lies into a potentially infinite set of subcategories determined by courts on a case-by-case basis, producing very little in the way of doctrinal coherence or predictability.

Because this problem seems like an intractable one, we propose instead a different approach that relies on the examination of both the value of certain categories of lies and the harms that are likely to be associated with them, as well as the associated risks to free speech that government regulation would likely induce. In many ways, this is really not unlike what the Court has already done in the no-value speech context. As discussed earlier, in *Chaplinsky* the Court overtly articulates an approach that categorically balances the value of certain categories of speech against the social harms assumed to be caused by such speech. Implicit in this approach, we believe, is the Court’s assumption that even content-based regulation in this area is unlikely to present a grave risk that the government is regulating expression for the purpose of suppressing ideas or interfering with public discourse.

### III. TOWARD A THREE-TIERED FRAMEWORK

The first two Parts of this Article have shown that *Alvarez* leaves us with lingering uncertainties about the scope of free

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149. Recall that in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court held that categories of speech that have no or little value and also cause social harm are not even covered by the First Amendment.

speech protection for lies. There is confusion as to the type of lies covered by *Alvarez* and a lack of majority agreement on the proper level of scrutiny to apply to restrictions on lies. For reasons of clarity and in the service of the underlying purposes of the First Amendment, we have argued that the majority of lies are covered by the First Amendment.<sup>150</sup> However, the coverage of all but the most harmful, historically unprotected lies need not mean that all lies are equally *protected*. Indeed, the central claim of this Article is that all lies are not created equal.

A sensible compromise would be to recognize that limits on what we will call “socially routine lies” are subject to intermediate scrutiny, but that limits on lies that acutely promote the fundamental theoretical values underlying the Speech Clause are subject to strict scrutiny. Such an approach leaves ample room to regulate the run-of-the-mill lie if it is truly harmful, while providing heightened protection for the sort of lie that facilitates access in service of the marketplace of ideas and in furtherance of our historical tradition of activist-journalism.<sup>151</sup>

#### A. *First Tier Lies*<sup>152</sup>

Our invitation to treat some lies as more valuable than others is consistent with Justice Breyer’s opinion in *Alvarez*, where he noted that lies are ubiquitous and that some may even serve “useful human objectives.”<sup>153</sup> Here, we list categories of lies that should receive presumptive First

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150. Chen & Marceau, *supra* note 6, at 1506–07. On the coverage/protection distinction, see Schauer, *supra* note 34.

151. Dorf & Tarrow, *supra* note 9, at 9.

152. For the purposes of this discussion, we set aside a class of lies that received First Amendment protection even prior to *Alvarez*, not because they have any particular social or political value, but because permitting regulation of such lies presents a very high risk that the law will chill the expression of truthful speech. That is, these lies receive constitutional protection for utilitarian reasons. We discuss this category of lies, such as defamation claims brought by public officials or public figures, at length in our prior work. See Chen & Marceau, *supra* note 6, at 1447–51. This rationale for protecting lies was recognized by Justice Breyer in his *Alvarez* concurrence. *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring) (“[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby ‘chilling’ a kind of speech that lies at the First Amendment’s heart.”).

153. *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring); see also Norton, *supra* note 48, at 164 (“Some lies have instrumental or even moral value.”).



Amendment coverage, and should also be protected by the highest standard of judicial review—strict scrutiny. The latter is called for because these lies: (1) are most likely to be targeted by governments through content-based regulation; (2) promote discourse on matters of great public concern in a manner consistent with pure political expression; and (3) are less likely to cause specific harm to identifiable victims than other types of lies.

### 1. High Value Lies

In our prior work, we identified a particular class of lies used by undercover journalists and political activists to gain access to places and information that they would otherwise be unable to obtain.<sup>154</sup> Tactical use of such lies has a long history in American journalism and activism, from Upton Sinclair to his modern-day heirs. We dubbed these lies “investigative deceptions”—lies used to secure truthful factual information about matters of public concern.<sup>155</sup> Our central claim was that investigative deceptions have intrinsic value and therefore should be treated differently from other types of lies and warrant the greatest constitutional protection. Specifically, we argued that investigative deceptions deserve the highest level of constitutional protection because they advance the underlying purposes of free speech: they enhance political discourse, help reveal the truth, and promote individual autonomy.<sup>156</sup>

Protection of investigative deceptions from laws targeting their use by journalists and activists is especially critical because there are already significant limits on the ability of the press to report on matters of public concern that occur in private. Under current law, for example, there is no newsgatherer’s privilege, meaning that journalists may not claim exemption from generally applicable laws even if compliance with such laws could undermine their ability to engage in robust investigation and reporting.<sup>157</sup> Indeed, as Michael Dorf and Sidney Tarrow observe in a forthcoming

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154. Chen & Marceau, *supra* note 6, at 1454–46.

155. *Id.*

156. *Id.* at 1471–73.

157. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality).

paper, current law establishes a framework under which the law paradoxically protects the dissemination of knowingly false information (e.g., “fake” news) more than it protects the right of journalists and activists to access (and therefore, ultimately, to expose) truthful information.<sup>158</sup>

If placed on a continuum of social value, investigative deceptions would certainly have to be viewed as promoting greater good than one’s gratuitous, self-serving lies about winning the Medal of Honor. As we argued, there is a long history of muckraking journalism that has relied on these types of deceptions, whether by overt lie or by material omission. Such lies resulted in disclosure of information that has spurred food and animal welfare reforms in the past century on numerous occasions, from Upton Sinclair’s revelations about the Chicago meatpacking industry<sup>159</sup> to the Humane Society’s investigation of a California slaughterhouse that led to state law reforms and the largest beef recall in the nation’s history.<sup>160</sup>

Moreover, these types of high value lies ought to receive the highest level of protection because, at the level of abstract or categorical balancing, they produce much more benefit than they cause harm. Any harms they cause are likely to be relatively minor in relation to the values of the resulting disclosures, which produce benefits not only to individuals but frequently to the public at large. This is particularly so when the private property accessed is commercial property in a highly regulated industry, as opposed to a private individual’s personal residence or the confines of a private space such as a restroom or locker room, where privacy interests are significantly higher. And, as we rebutted in detail in our prior work, any damage associated with the disclosure or publication of truthful information discovered as a result of deception-based access is caused not by the lie, but by the underlying

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158. Dorf & Tarrow, *supra* note 9, at 9–10.

159. THE MUCKRAKERS 205–06 (Arthur Weinberg & Lila Weinberg eds., University of Illinois Press 2001) (1961).

160. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST (Feb. 18, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html> [<https://perma.cc/7HFP-NVGE>]; *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452, 458 (2012) (“[T]he video also prompted the California legislature to strengthen a pre-existing statute governing the treatment of nonambulatory animals . . .”). *But see id.* at 459 (nullifying the California law as preempted by federal law).

conduct that is exposed by the lies.<sup>161</sup>

Another way of distinguishing investigative deceptions from all other lies is that investigative deceptions are undertaken with the specific purpose of disclosing truthful information on matters of public concern. Many other lies facilitate tangible or intangible personal benefits and cause cognizable harm to another. But as a federal district court in one of the Ag-Gag cases explained, “undercover investigators tell such lies in order to find evidence of animal abuse and expose any abuse or other bad practices the investigator discovers.”<sup>162</sup> Viewed in this manner, investigative deceptions have great social utility and therefore should receive the highest level of First Amendment protection.

Professor Volokh criticizes this aspect of that court’s analysis as follows:

Whether a prospective employee’s lies are told out of a motive to make money, or out of a motive to get employment so he could get in the facility and videotape the contents, the employer is still being defrauded. And a public-spirited motive for getting a salary under false pretenses, or getting access to property under false pretenses, does not, I think, give a First Amendment immunity to the fraud.<sup>163</sup>

Certain aspects of First Amendment doctrine permit an inquiry into a speaker’s state of mind as relevant to First Amendment analysis,<sup>164</sup> while others do not.<sup>165</sup> As we have discussed at length, there is in fact a substantial distinction between the type of résumé fraud that is sometimes used by unscrupulous applicants to obtain jobs that they are not qualified to perform (e.g., lying about attending medical school to obtain a job as a surgeon) and an investigator lying to get a job that she *is* competent to perform, but with the goal of exposing the

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161. Chen & Marceau, *supra* note 6, at 1501–06.

162. Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1204 (D. Idaho 2015).

163. Volokh, *supra* note 113.

164. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (requiring public-figure plaintiffs suing for defamation to show that the statements were made with actual malice or reckless disregard for the truth).

165. See *United States v. O’Brien*, 391 U.S. 367, 382 (1968) (explaining that the sincere motive of a person who engages in symbolic expression is not relevant to whether laws of general applicability are viewed as restricting speech).

employer's misconduct or illegality. The latter cannot be construed as fraud if the undercover journalist or investigator is qualified (sometimes overqualified) to do the job and competently performs her job duties while simultaneously making observations for later disclosure.<sup>166</sup> Stated differently, the term fraud is simply inapt in the context of the sort of harmless misrepresentation (understating qualifications, refusing to reveal journalistic credentials or political affiliations, and the like) used by investigative journalists.

## 2. Lies in Political Campaigns

Modern political campaigns seem to be increasingly filled with false statements by candidates, their surrogates, and independent political action committees. Of course, lying in politics is not solely a twenty-first-century phenomenon. Nonetheless, policymakers and the general public seem to be reacting with a greater sense of alarm in recent years and the advent of inexpensive and rapid transmission of campaign speech through digital communication technologies has exacerbated fears about false political expression. These concerns have led to efforts to adopt legal provisions subjecting those who make verifiably false factual statements in political campaigns to criminal or civil sanctions.

The limited case law addressing such false campaign speech restrictions since *Alvarez* has uniformly classified political lies as pure speech under the First Amendment. In *281 Care Committee v. Arneson*, the Eighth Circuit invalidated a section of the Minnesota Fair Campaign Practices Act that criminalizes the preparation or dissemination of paid political advertising or campaign material about a ballot initiative that is either knowingly false or shows reckless disregard for its falsity.<sup>167</sup> The court held that the statute governed core political speech and must therefore be subject to the most exacting scrutiny.<sup>168</sup> In doing so, the court rejected the state's claim that *Alvarez* only required intermediate scrutiny.<sup>169</sup> Although the court recognized that there were serious state interests in protecting electoral integrity, it held that for

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166. Chen & Marceau, *supra* note 6, at 1495–99.

167. 766 F.3d 774 (8th Cir. 2014).

168. *Id.* at 784.

169. *Id.* at 782–84.

multiple reasons the state law was not narrowly tailored. First, it noted that the ease with which almost anyone could file a charge under the law could foreseeably result in parties filing unsubstantiated fraud claims against their political opponents, essentially converting the false campaign speech law into a tool that might ironically invite its own false claims (that is, false claims about the falsity of a political opponent's speech).<sup>170</sup> Second, the court found that counter speech was a less restrictive alternative and was actually the most effective way to address false campaign speech.<sup>171</sup> Third, the court found that the statute's mens rea requirement was insufficient to meet the narrow tailoring requirement because it did nothing to stop frivolous or false claims of false campaign speech from being initiated against speakers.<sup>172</sup> Finally, the court rejected the argument that the law's limited application to only paid political advertising, as well as its exemptions for news media, saved it from invalidation. Rather, the court concluded, these limitations underscored the law's underinclusiveness.<sup>173</sup>

More recently, in *Susan B. Anthony List v. Driehaus*,<sup>174</sup> the Sixth Circuit struck down several Ohio laws that prohibited people from disseminating knowingly false information about a political candidate.<sup>175</sup> As in *281 Care Committee*, the court here found that the law was subject to strict scrutiny because it directly prohibited core political speech.<sup>176</sup> The Sixth Circuit accepted the state's assertion that it had a compelling interest in "preserving the integrity of its elections, protecting 'voters from confusion and undue influence,' and 'ensuring that an individual's right to vote is not undermined by fraud in the election process.'"<sup>177</sup> But like the Eighth Circuit, the court here found Ohio's false campaign speech law to be insufficiently tailored. Among other things, the court found that the Ohio law was not well tailored to ensure fair elections because the processes for resolving complaints were too cumbersome and could easily stretch past the election itself.<sup>178</sup> Furthermore, as

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170. *Id.* at 789–92.

171. *Id.* at 793–94.

172. *Id.* at 794.

173. *Id.* at 794–95.

174. 814 F.3d 466 (6th Cir. 2016).

175. *Id.* at 474.

176. *Id.* at 473.

177. *Id.*

178. *Id.* at 474.

with the Minnesota false campaign speech law, the Ohio law was capacious enough to entertain even frivolous claims of false speech.<sup>179</sup> Third, the law prohibited all false statements about a candidate, even nonmaterial statements that were not even germane to the issues at stake in the election.<sup>180</sup> Furthermore, the court found the law to be both over- and underinclusive.

Causing damage to a campaign that ultimately may not be in violation of the law, through a preliminary probable cause ruling, does not preserve the integrity of the elections and in fact undermines the state's interest in promoting fair elections. At the same time, the law may not timely penalize those who violate it, nor does it provide for campaigns that are the victim of potentially damaging false statements.<sup>181</sup>

Unlike investigative deceptions, political campaign lies cannot fundamentally be characterized as high value lies, or as lies that serve the goals of the First Amendment. Indeed, they may very well inflict harm on the public's ability to discern the truth and to exercise their vote accordingly. For example, the persistent, false claims about Barack Obama's birthplace may have had lasting and potentially damaging effects. However, the courts that have addressed laws restricting political lies have found that laws regulating false campaign speech may be a cure that is worse than the disease.<sup>182</sup> That is, the courts have been concerned about the regulation of political lies out of the fear that it might impede truthful political expression.

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179. *Id.* at 474–75.

180. *Id.* at 475.

181. *Id.*

182. *See, e.g.,* United States v. Alvarez, 567 U.S. 709, 738 (2012) (Breyer, J., concurring). In another part of his opinion, Justice Breyer expressed another concern that might be relevant to regulating political campaign lies which is the risk of selective enforcement. As he noted,

the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.

*Id.* at 734.

In addition to the concerns about the abuse of such laws by political opponents, there are serious questions about whether these laws may be overbroad and vague. Political campaigns are full of heated rhetoric, exaggeration, and bluster. It may be difficult, and even dangerous, for the state to get involved in determining which statements are verifiably and objectively false and which are more like inflated campaign rhetoric or characterizations that are vaguely misleading. The danger of deterring truthful political speech is simply too great a cost to justify criminalizing intentional political lies. Accordingly, we largely agree with the courts that have addressed the issue thus far, and would classify restrictions on political campaign lies, whether about ballot issues or candidates, to be suspect and subject to the highest level of First Amendment scrutiny.<sup>183</sup> Such lies are not high value lies, but their criminalization poses the high risk of chilling truthful speech, and they therefore should be placed in the first tier.

### B. *Second Tier Lies: Socially Routine Lies*

Many lies may be valuable across a wide range of social contexts, even though their expression does not advance the First Amendment values of promoting democracy or facilitating the search for truth.<sup>184</sup> Or they may simply have social utility unrelated to the advancement of public discourse, as Justice Breyer noted in *Alvarez*.<sup>185</sup> More glibly, but equally on point, Chief Judge Kozinski has noted a long list of lies that he recognized as a part of everyday human interaction. If the government can punish one who lies about having been awarded a medal, he observed, so too could it prosecute

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183. For other recent, relevant decisions, see *O'Toole v. O'Connor*, No. 2:15-cv-1446, 2016 WL 4394135, at \*11 (S.D. Ohio Aug. 18, 2016) (applying strict scrutiny to state judicial conduct rules that made it unethical for a judicial candidate to “[u]se the title of a public office or position immediately preceding or following [their] name . . . when the judicial candidate does not hold that office or position”); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1251–52 (Mass. 2015) (applying strict scrutiny under the Massachusetts Constitution to strike down a state statute that prohibited publishing false statements about political candidates or questions submitted to voters).

184. However, some such lies might promote individual autonomy through a process of self-realization. David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 92 (2012); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

185. *Alvarez*, 567 U.S. at 733.

the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."<sup>186</sup>

The lies mentioned by Justice Breyer and Chief Judge Kozinski, as well as many others, are not necessarily high value, but they also do not fall under the category of lies that have no value at all or are presumptively and indisputably harmful to third parties. It is a broad middle tier of lies that is neither presumptively harmful, nor valuable in the traditional sense that they promote political or social discourse. Thus, on the continuum of social value, these types of lies are less valuable than high value lies or political lies, but potentially have greater value than lies that have historically been subject to strong regulation, such as fraud or perjury.

Moreover, while there is not as great a danger that laws regulating socially routine lies would deter people from engaging in political discourse or dissent, they could nonetheless chill socially valuable speech. Suppose, for example, a legislature enacted, in good faith, a law making it a crime for any person to tell a lie during a public safety emergency. The underlying legitimate purpose of the law might have been to ensure that no person is misled during a fire or at an accident scene in ways that might be potentially harmful, such as an ambulance-chasing lawyer who tells an accident victim, "if you don't immediately retain me to represent you, your chances of a large recovery will be severely affected." But suppose an emergency relief worker wishes to lie to an injured victim to minimize the chance that he will panic, go into shock, or give up hope ("we're definitely going to get you out of here safely"). That emergency worker may forego the calming statement for fear of being subject to criminal penalties. Or

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186. *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc); *see also id.* at 674–75 (providing a long list of routine lies and the social or relational interests they serve).



consider a law prohibiting telling lies to family members, enacted by a state legislature to “facilitate family harmony and stability.” Such a law might deter a wide range of lies that family members employ for socially beneficial purposes, as in the case of parents telling a frightened child that “no one ever dies in plane accidents.”

Restrictions on this middle tier of socially routine lies should be subject to intermediate scrutiny. To be sure, it may seem odd to suggest that the government need only meet intermediate scrutiny to justify regulating what are probably the most common type of lies, and it is possible that the Court will settle on strict scrutiny as the appropriate standard of review for all lies covered by the First Amendment.<sup>187</sup> But at least two reasons suggest that applying intermediate scrutiny and reserving strict scrutiny for the most important and most vulnerable lies will provide adequate protection for the speech in question. First, it is unlikely that the government would try to regulate these types of meaningless falsehoods. The government in a liberal society would likely have little interest in enacting laws restricting these types of social or relational lies. Second, such restrictions on routine lies are unlikely to be driven by the types of invidious motives to silence political, religious, scientific, or other ideological opponents that are typically a concern of the First Amendment. That is, a law regulating white lies might be silly, but it is rarely going to be enacted with a hidden motive that is at odds with promoting free and open political, moral, or aesthetic discourse. Thus, such restrictions should be both rare and not particularly invasive of traditional free speech values.

Moreover, intermediate scrutiny should be more than sufficient to invalidate the regulation of lies in this category. If the state must offer a substantial justification for such a law, and not simply a legitimate one, it will be hard pressed to defend the restriction.

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187. Restrictions on lies are by definition content-based restrictions on speech. Such laws regulate lies, which are pure speech because they constitute spoken or written words, and discriminate based on the truth or falsity of those words, thus making them content-based.

*C. Third Tier Lies: Lies Not Covered by the First Amendment*

Finally, there are lies that remain outside the scope of the First Amendment without regard to recent developments in the law. As far as we can tell, there is universal agreement that the regulation of these types of lies does not trigger constitutional concerns because they unambiguously have no or little social value—that is, they fall at the very end of the continuum of social value—and also cause cognizable harms (as well as sometimes yielding undeserved benefits for the liar). These categories, as discussed above, include fraud, perjury, impersonating a government official, and making false statements to public officials.<sup>188</sup> The state may regulate or even ban third-tier lies because the harms here are presumptive. The only difficult question, a question we reserve for future projects, is whether content-based restrictions targeting subsets of otherwise proscribable lies will be subjected to strict scrutiny.<sup>189</sup>

Returning, then, to the coverage/protection distinction, the model we propose can be understood through the following chart.

<b>Category</b>	<b>First Tier: High Value Lies &amp; Campaign Lies</b>	<b>Second Tier: Socially Routine Lies</b>	<b>Third Tier: No Value Lies</b>
<b>Covered by First Amendment</b>	YES	YES	NO
<b>Protected by First Amendment</b>	YES <sup>190</sup>	YES <sup>191</sup>	NO

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188. See *supra* notes 46–48 and accompanying text.

189. See *supra* note 103 (discussing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992)).

190. First tier lies will be protected by the First Amendment unless the regulation meets strict scrutiny.

191. Second tier lies will be protected by the First Amendment unless the regulation meets intermediate scrutiny.

*D. Anticipating Critiques of the Three-Tiered Protection for Lies*

Skeptics of our three-tiered framework might argue that, as with any taxonomy of legal categories, it might evolve to be fairly unworkable. That is, while the categories we set out might be coherent in theory, they might actually be difficult to sort out, generating lots of litigation disputing which types of speech regulations fall into which of the three tiers. This critique might take two different forms. First, there might be a problem of leakage. That is, the boundaries of the three categories might be so porous that the categories end up not doing much work. A somewhat distinct, but related critique might be that tiers are useless because they only separate out small categories of lies in the first and third tiers, leaving an enormous middle tier of socially routine lies that converts our model into one where most cases still require ad hoc balancing.

As to the leakage critique, we think there is not bound to be much leakage because the category of uncovered lies is, by this point, fairly well established. The category of lies whose regulation draws strict scrutiny is new, but well defined and, we believe, limited in scope. So, while we may be naive, we maintain that there would not be too much argument about where to draw lines around our categories. As for the uselessness critique, our response is that while the first- and third-tier lies are likely to be the smaller groups, they are also the categories in which government regulation is most likely to arise. Uncovered lies are subject to a range of regulation because they are understood to be harmful in ways that government has the authority to address. High value lies and other political lies are likely to be targeted by government censors who want to interfere with public discourse. Thus, while the middle tier of lies might empirically be the largest, it is also the area in which government regulation is probably rarest. The kind of ad hoc intermediate scrutiny we advocate should be limited to the areas least likely to be targeted by legislators, and therefore should require relatively little attention from the courts.

## CONCLUSION

Each of the Court's opinions in *Alvarez* acknowledges that there is some harm associated with lies told about earning military honors, including a general dilution of the prestige associated with such honors. Yet, six Justices agreed that the lie in question fell within the protections of the First Amendment. But if lies are presumptively both covered and protected by the First Amendment, as *Alvarez* suggests, and if all lies produce some concomitant benefit and harm, then a critical issue is defining the dividing line between harms and benefits that are sufficient to justify the state's restrictions on lies, and harms that are either qualitatively or quantitatively inadequate to overcome constitutional protection for lies. In theory, First Amendment law could simply draw a doctrinal line between lies that cause serious enough harm, and those that do not. The problem is in the application. As we have attempted to show, it is virtually impossible to generate a meaningful hierarchy of harms caused by lies, except at the extremes.

Instead, many lies must be both covered and protected by the First Amendment even though they will produce some benefit to the speaker and some harm to the listener. But lies that most clearly advance the values and goals of free speech should receive the most protection, and the many socially routine lies should be protected only by intermediate scrutiny. Even under intermediate scrutiny, we anticipate that most regulations would be invalid, but that intermediate scrutiny could be satisfied in those rare cases in which the laws are laser-focused on an identifiable, specific harm that such lies produce. And those lies that cause tangible harm or produce material benefits in contexts that are divorced from the underlying purposes of the First Amendment will not be covered at all.

This trifurcated framework avoids the difficult, often intractable question of what type of harm suffices to strip a lie of protection, or what sort of motive for lying justifies heightened protection for lies. The categories are not entirely free from malleability, but there would be a strong presumption that most lies fall into the middle category, such that they are covered but only protected by intermediate scrutiny. This taxonomy of lies under the Constitution may

provide a structure of analytical coherence that protects a large span of lies while acknowledging that in some cases the government may have concrete interests in the harms caused by specifically defined categories of lies that justify their regulation.