

# AUTOBIOGRAPHICAL LIES AND THE FIRST AMENDMENT’S PROTECTION OF SELF-DEFINING SPEECH

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*This Article explores, through the lens of speech I refer to as “autobiographical lies,” the extent to which the First Amendment protects one’s ability to craft one’s own public persona. Thus far, courts and commentators have generally neglected to address the degree to which this particular autonomy-based value—the interest in individual self-definition—carries distinct weight under the First Amendment. This is unsurprising, since it is rare that an issue arises that directly implicates this interest in a manner that isolates it from more traditional free speech principles.*

*Recently, however, litigation has arisen surrounding the constitutionality of the Stolen Valor Act, a federal statute that criminalizes lying about having received military honors. The Act’s regulation of a particular subset of speech—knowing, factual falsehoods about oneself—uniquely crystallizes the question of whether, and to what extent, the self-definition interest merits protection under the First Amendment. By and large, there is no strong reason rooted in traditional First Amendment interests to protect these sorts of autobiographical lies. But if the self-definition interest has any meaningful constitutional force, then circumstances would surely exist under which such speech merits First Amendment protection, since freely choosing what to tell others about oneself—whether truth, half-truth, or falsehood—is a vital means of controlling how one defines oneself to the world.*

*After reviewing the current dispute surrounding the Stolen Valor Act, which has divided lower courts and at the time of this writing is pending before the Supreme Court, this Article outlines the doctrinal origins and basic characteristics of the self-definition interest. I argue that if one takes seriously the Supreme Court’s repeated assertions that the First Amendment is designed, at least in part, to preserve individual autonomy, then courts should accord at least some distinct constitutional weight to this interest. I then explore some of the practical implications of recognizing a constitutionally protected self-definition interest and apply these observations to the Stolen Valor Act, concluding that the Act, as currently constituted, should be deemed unconstitutional. Finally, I observe that a constitutionally protected right to define one’s public persona via one’s speech fits comfortably within the Constitution’s general protection of interests deemed essential to individual personhood.*

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INTRODUCTION

Here’s the scene: You’re at a cocktail party, engaged in a lively conversation. A discussion about the latest costume drama playing at the local Cineplex turns into a debate about the greatest movies of all time—which, inevitably, turns into a discussion about “The Godfather.” After a few minutes, one of your companions, noticing

that you've been strangely silent, asks, "You've seen 'The Godfather,' right?" "Of course!" you answer, quickly adding that Brando was indeed amazing in that wedding scene. Needless to say, you've never seen "The Godfather."

Most people, whether they admit it or not, are intimately familiar with this sort of scenario.<sup>1</sup> We have many reasons for telling lies about ourselves. Maybe we want to portray ourselves as sophisticated or knowledgeable. Maybe we're trying to impress a potential romantic interest. Or maybe, depending on the situation or our mood, we want to either draw attention to ourselves or make ourselves inconspicuous. And these lies often involve matters more serious than movies; in similar situations, one might lie about one's political leanings, religious views, ethnicity, or sexual orientation.

This scenario illustrates an important but largely unexplored issue surrounding our understanding of the First Amendment. Choosing what we tell others about ourselves is a vital means by which we portray ourselves to the world; communicating truths, half-truths, and even falsehoods is essential to our ability to craft and calibrate the personas we present to others. Although courts and commentators have long discussed, in the abstract, the role of autonomy interests under the First Amendment,<sup>2</sup> courts have rarely addressed the extent to which any constitutional significance should be accorded to this particular autonomy-based value, which I refer to as the interest in individual self-definition.<sup>3</sup> This is unsurprising; given the hodgepodge

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<sup>1</sup> A recent poll found that four out of five respondents have lied to others about having seen films. Ben Child, *Four Out of Five Tell The Godfather of All Lies About Seeing Classic Films*, GUARDIAN (Apr. 21, 2011, 5:45 EDT), <http://www.guardian.co.uk/film/2011/apr/21/the-godfather-lies-films-poll>. "The Godfather" was the most lied-about movie; approximately thirty percent of respondents had lied about seeing it. *Id.*

<sup>2</sup> See, e.g., C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (discussing the "liberty theory" of the First Amendment that protects conduct in order to foster "individual self-realization and self-determination"); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 232–34 (1992) ("Autonomy is the foundation of all basic liberties, including liberty of expression."); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213–15 (1972) (describing the "Millian Principle" of free expression as resting on the view that individuals are equal, rational, autonomous, and possess agency); see also *infra* Part III.B (discussing Supreme Court jurisprudence).

<sup>3</sup> Scholars have discussed the autonomy interest in individual self-definition—the interest in crafting one's public persona—in the context of privacy and publicity torts. See, e.g., Lisa M. Austin, *Privacy and Private Law: The Dilemma of Justification*, 55 MCGILL L.J. 165, 203 (2010) (referring to "an individual's capacity for identity formation in the sense of 'self-presentation'" in a discussion of privacy torts); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 285 (2005) (arguing, with respect to the right of publicity, that "every individual should be able to control uses of her identity that interfere with her ability to define her own public character"). Those discussions focus on one's right to prevent other private parties from commandeering one's

of principles underlying modern First Amendment jurisprudence, it is rare for an issue to arise that directly implicates this specific value in a manner that isolates it from more established and recognized free speech principles.<sup>4</sup>

Recently, however, litigation has arisen surrounding the constitutionality of the Stolen Valor Act,<sup>5</sup> a 2006 statute that criminalizes lying about having received military honors. Because the statute, as construed by the courts, punishes speakers for telling knowing, factual falsehoods about themselves—which I term “autobiographical lies”—the debate over its constitutionality uniquely crystallizes the question of whether, and to what extent, the interest in crafting and controlling one’s own public persona and identity merits protection under the First Amendment. By and large, there is no strong reason why a First Amendment concerned solely with the discovery of truth or the promotion of democratic self-government would protect these sorts of autobiographical lies. But if the self-definition interest has any distinct constitutional force, then circumstances would surely exist under which autobiographical lies merit First Amendment protection, since freely choosing what to tell others about ourselves—whether truth, half-truth, or falsehood—is a vital means of controlling how we define ourselves to the world. This self-definition interest, in my view, best explains the intuitive discomfort with the Stolen Valor Act that has thus far led multiple courts to deem the Act unconstitutional.<sup>6</sup>

The goal of this Article is not to argue that the self-definition interest (or the preservation of individual autonomy in general) is, or should be, the fundamental basis for the First Amendment’s protection of speech. As Steven Shiffrin has observed, “[f]reedom of speech should be valued for many reasons,” and the promotion of individual autonomy represents only one such reason.<sup>7</sup> Rather, I contend that if

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public persona; here, however, I examine the interest in individual self-definition as a positive right against which the government, within certain boundaries, cannot interfere.

<sup>4</sup> Cf. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 905 (1994) (“[A]utonomy-based arguments seem unlikely to possess clear and uniquely determining power in very many [First Amendment] contexts. . . . [since] the influence of autonomy would occur mostly in the background, not the foreground, and a number of competing values are likely to be in play.”).

<sup>5</sup> Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006) (codified at 18 U.S.C. § 704 (2006)).

<sup>6</sup> E.g., *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010); *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010), *rev’d*, No. 10-1358, 2012 WL 247995 (10th Cir. Jan. 27, 2012); *United States v. Kepler*, No. 4:11-CR-00017, 2011 U.S. Dist. LEXIS 152703 (S.D. Iowa May 31, 2011). The Supreme Court recently granted certiorari in *Alvarez*, the Ninth Circuit case. *United States v. Alvarez*, 80 U.S.L.W. 3141 (U.S. Oct. 17, 2011) (No. 11-210). At the time of this writing, the case is still pending.

<sup>7</sup> Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 559 (2011) (“Freedom of speech should be valued for

one takes seriously the Supreme Court's repeated assertions that the First Amendment is designed, at least in part, to preserve individual autonomy and self-realization, then courts should accord at least some constitutional weight to the interest in defining one's own public persona. The Stolen Valor Act litigation serves as a unique test case for isolating and evaluating the contours of this interest, given the lack of any strong reason other than the self-definition interest for protecting the sorts of autobiographical lies proscribed by the Act.

This Article proceeds as follows. In Part I, I briefly review some of the major Supreme Court cases regarding the constitutional status of false statements of fact. I then recap the recent Stolen Valor Act litigation and explain why courts' treatment of the issue has thus far been unsatisfying. In Part II, after surveying and rejecting various theories for protecting the sorts of autobiographical lies proscribed under the Stolen Valor Act, I identify the interest in individual self-definition as the fundamental basis for such protection. In Part III, I describe the basic characteristics of the self-definition interest and explore its doctrinal origins. In doing so, I explain why such an interest is best characterized as a First Amendment interest rather than a privacy interest. In Part IV, I explore some of the practical implications of recognizing a constitutionally protected self-definition interest and suggest basic frameworks within which courts may define the scope of such an interest. Applying these observations to the Stolen Valor Act litigation, I conclude that the statute, at least as currently constituted, should be deemed unconstitutional. I also make a few broader observations regarding the nature of the interest, which fits comfortably within the Constitution's general protection of interests deemed essential to the idea of individual personhood.

## I

### THE CONSTITUTIONAL STATUS OF FALSE STATEMENTS OF FACT AND THE STOLEN VALOR ACT LITIGATION

#### A. *Supreme Court Case Law Regarding False Statements of Fact*

Before delving into the Stolen Valor Act litigation, it is useful to touch briefly on some of the major Supreme Court cases addressing the constitutional status of false statements of fact. Of particular significance are two of the Court's early libel cases, *New York Times v. Sullivan*<sup>8</sup> and *Gertz v. Robert Welch, Inc.*,<sup>9</sup> and the Court's two most

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many reasons—not only liberty, self-realization, freedom, and autonomy but also truth, combating injustice, adaptation to change, democracy, equality, association, freedom of thought, and even order.”).

<sup>8</sup> 376 U.S. 254 (1964).

recent cases discussing the boundaries of the First Amendment, *United States v. Stevens*<sup>10</sup> and *Brown v. Entertainment Merchants Ass'n*.<sup>11</sup>

The Supreme Court has long classified defamation as one of the “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>12</sup> Its first in-depth discussion regarding the general constitutional status of false statements of facts, however, was in *Sullivan*, the seminal case in which the Court established the “actual malice” standard for libel actions involving the public conduct of public officials.<sup>13</sup> In reaching this conclusion, the *Sullivan* Court used notably broad language to describe the constitutional protection accorded to false factual statements:

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. *The constitutional protection does not turn upon the truth . . . of the ideas and beliefs which are offered.*<sup>14</sup>

The Court thus reasoned that “factual error” does not “suffice [ ] to remove the constitutional shield from criticism of official conduct.”<sup>15</sup>

In justifying constitutional protection of false factual statements, the *Sullivan* Court emphasized the risk of a significant chilling effect on speech, noting that “erroneous statement is inevitable in free debate”<sup>16</sup> and that “the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.”<sup>17</sup> The Court also endorsed, in a footnote, John Stuart Mill’s argument that “[e]ven a false statement may be deemed to make a valuable contribution to public debate,”<sup>18</sup> as a false statement can bring about “the clearer perception and livelier impression of truth, produced by its collision with

<sup>9</sup> 418 U.S. 323 (1974).

<sup>10</sup> 130 S. Ct. 1577 (2010).

<sup>11</sup> 131 S. Ct. 2729 (2011).

<sup>12</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *see also* *Beauharnais v. Illinois*, 343 U.S. 250, 254–57 (1952) (citing *Chaplinsky*, 315 U.S. at 571–72).

<sup>13</sup> 376 U.S. at 279–80 (holding that in such actions, the plaintiff must prove that the defamatory statement was made “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not”).

<sup>14</sup> *Id.* at 271 (emphasis added) (citations and internal quotation marks omitted).

<sup>15</sup> *Id.* at 273.

<sup>16</sup> *Id.* at 271.

<sup>17</sup> *Id.* at 278; *see also id.* at 279 (noting that the common law libel rule “dampens the vigor and limits the variety of public debate”).

<sup>18</sup> *Id.* at 279 n.19.

error.”<sup>19</sup> *Sullivan* thus strongly suggested that *all* false statements of fact are generally protected under the First Amendment, not only because of the practical necessity of providing “breathing space” for more important speech, but also because false speech has value in itself as a means of clarifying truth.

Ten years later, however, the Court’s opinion in *Gertz*<sup>20</sup> indicated a retreat from the position it had taken in *Sullivan*.<sup>21</sup> In *Gertz*, the Court first distinguished false *opinions* from false *facts*. The Court observed that “[u]nder the First Amendment there is no such thing as a false idea,” noting that “[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>22</sup> By contrast, the Court stated that “there is *no constitutional value* in false statements of fact,”<sup>23</sup> since “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”<sup>24</sup> The Court thus appeared to extend its characterization of defamation as speech falling outside the First Amendment’s protection to *all false statements of fact*. Deeming such speech “not worthy of constitutional protection”<sup>25</sup>—a sentiment the Court reiterated in later cases<sup>26</sup>—the Court apparently rejected the notion that false factual speech could have any independent

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<sup>19</sup> *Id.* (quoting JOHN STUART MILL, ON LIBERTY 15 (B. Blackwell ed. 1947) (1959) (internal quotation marks omitted)).

<sup>20</sup> In *Gertz*, the Court held that a defendant in a suit for libel against a private individual regarding a matter of public concern is not entitled to the protection of *Sullivan*’s “actual malice” standard. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974); *see also Sullivan*, 376 U.S. at 279–80 (establishing an “actual malice” standard for public officials seeking damages for “defamatory falsehoods”). The Court held, however, that private plaintiffs may only recover punitive damages upon a showing of “actual malice” under the *Sullivan* standard, 418 U.S. at 349–50, and that states may not impose strict liability in defamation actions involving private individuals, *id.* at 347.

<sup>21</sup> The Court arguably backtracked from its position in *Sullivan* almost immediately, stating a mere eight months after *Sullivan* that “the knowingly false statement and the false statement made with reckless disregard of the truth[ ] do not enjoy constitutional protection.” *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

<sup>22</sup> 418 U.S. at 339–40.

<sup>23</sup> *Id.* at 340 (emphasis added).

<sup>24</sup> *Id.* (quoting *Sullivan*, 376 U.S. at 270).

<sup>25</sup> *Id.* (“[False statements of fact] belong to that category of utterances which ‘are of 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.’” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

<sup>26</sup> *See, e.g.*, *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (observing that “false statements” are “unprotected for their own sake”); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (characterizing false statements of fact as “particularly valueless”); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech.”).

constitutional value, recognizing First Amendment protection for such speech only when necessary to “protect speech that matters.”<sup>27</sup>

More recently, in *Stevens*, the Court sought to clarify the basis by which the general boundaries of the First Amendment are drawn. The *Stevens* Court deemed unconstitutionally overbroad a federal statute that “criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty.”<sup>28</sup> In doing so, it recognized certain “historic and traditional categories” of speech that are “fully outside the protection of the First Amendment,” “including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.”<sup>29</sup> Although the Court’s wording suggests that this list may not be exhaustive, the Court notably did *not* include false statements of fact as a constitutionally unprotected category, despite its explicit inclusion of defamation and fraud as unprotected *subsets* of false factual speech.

In determining what categories of speech fall outside of the First Amendment’s protection, the Court rejected the government’s position that “[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”<sup>30</sup> The Court characterized such a cost-benefit analysis as “startling and dangerous,” decrying the idea that certain speech may be deemed unprotected “simply on the basis that [it] is not worth it.”<sup>31</sup> Rather, the Court disavowed any “freewheeling authority to declare new categories of speech outside the scope of the First Amendment” and suggested that the test is purely historical—that is, whether the category of speech in question “ha[s] been historically unprotected.”<sup>32</sup>

Last Term, in *Brown*, the Court reaffirmed the historical approach taken in *Stevens* in striking down a California ban on selling violent video games to minors.<sup>33</sup> Observing that *Stevens* “held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated,” the Court stated that speech may not be deemed unprotected “without persuasive evidence that a novel restriction on content is

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<sup>27</sup> *Gertz*, 418 U.S. at 340–41 (discussing the need to protect false statements in order to avoid “inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press”).

<sup>28</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1582, 1592 (2010).

<sup>29</sup> *Id.* at 1584, 1586 (citations omitted).

<sup>30</sup> *Id.* at 1585 (quoting Brief for the United States at 8, *Stevens*, 130 S. Ct. 1577 (No. 08-769) (internal quotation marks omitted)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1586.

<sup>33</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2279, 2741–42 (2011).



part of a long (if heretofore unrecognized) tradition of proscription.”<sup>34</sup> In deeming California’s statute unconstitutional, the Court observed that “speech about violence is not obscene”<sup>35</sup> and that there is no “longstanding tradition in this country of specially restricting children’s access to depictions of violence.”<sup>36</sup>

Thus, the Court’s guidance regarding the general constitutional status of false statements of fact has been murky at best.<sup>37</sup> Although *Sullivan* suggests that such speech has some inherent value and is generally protected under the First Amendment, *Gertz* and its progeny have since stated that false statements of fact carry no constitutional value and are unworthy of First Amendment protection. Yet *Stevens* did not explicitly include false statements of fact—at least as a general category—in its list of unprotected categories of speech. And to confuse matters further, *Stevens* and *Brown* appear to reject the very concept of cost-benefit balancing in defining the boundaries of the First Amendment, focusing solely on whether a given category of speech has historically been deemed unprotected. With this background in place, I now turn to the recent litigation surrounding the Stolen Valor Act.

### B. *The Stolen Valor Act Litigation*

In 2006, Congress passed the Stolen Valor Act,<sup>38</sup> which expanded the longstanding federal prohibition against the unauthorized wearing of military medals and badges.<sup>39</sup> In relevant part, the statute provides that anyone who “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 [or any other military honor] shall be fined under this title, imprisoned not more than six months, or both.”<sup>40</sup> The statute includes enhanced penalties for those who falsely represent that they have been awarded the Congressional Medal of Honor, allowing for up to one year of imprisonment under those circumstances.<sup>41</sup> Both Congress’s findings accompanying the passage of the Act and statements from the Act’s

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<sup>34</sup> *Id.* at 2734.

<sup>35</sup> *Id.* at 2735.

<sup>36</sup> *Id.* at 2736.

<sup>37</sup> It will be interesting to see how the Court addresses this subject in *Alvarez*. See *supra* note 6 (noting that the Supreme Court has recently granted certiorari in *Alvarez* to decide the constitutionality of the Stolen Valor Act).

<sup>38</sup> Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006) (codified at 18 U.S.C. § 704 (2006)).

<sup>39</sup> Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

<sup>40</sup> 18 U.S.C. § 704(b).

<sup>41</sup> *Id.* § 704(c)(1).

sponsors indicate that Congress designed the Act to preserve the integrity of military honors and to uphold the dignity and respect accorded to those who have rightfully received such honors.<sup>42</sup> According to the New York Times, the Justice Department has prosecuted more than sixty people under the Act since its passage, and “thousands of cases are reported each year.”<sup>43</sup>

Since the Act’s passage, the constitutionality of its prohibition on lying has been challenged on multiple occasions, and courts have split on the issue. The Western District of Virginia upheld the statute against constitutional challenge,<sup>44</sup> while the District of Colorado<sup>45</sup> and the Ninth Circuit<sup>46</sup> struck it down.<sup>47</sup> In October 2011, the Supreme Court granted certiorari in *United States v. Alvarez*, the Ninth Circuit case,<sup>48</sup> and in January 2012, the Tenth Circuit reversed the District of Colorado’s decision and upheld the statute.<sup>49</sup> Because, at the time of this writing, *Alvarez* is still pending, I focus my attention primarily on that case.

The facts of *Alvarez* are straightforward. During a joint meeting between two neighborhood water-district boards, Xavier Alvarez, a newly elected board member, introduced himself by stating: “I’m a

<sup>42</sup> In passing the Act, Congress found that “[f]raudulent claims surrounding the receipt of [military honors] damage the reputation and meaning of such decorations and medals” and that “[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals.” Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266. When he introduced the bill in the Senate, Senator Kent Conrad stated that “there are some individuals who diminish the accomplishments of award recipients by using . . . fake medals—or claim to have medals that they have not earned—to gain credibility in their communities.” 151 CONG. REC. 25,769 (2005); see also 152 CONG. REC. 22,574 (2006) (statement of Rep. Jim Sensenbrenner) (“[T]he significance of these medals is being devalued by phony war heroes who fabricate their honors and military careers. They do so for greed and selfishness, and disrespect the service and sacrifice of our military heroes, as well as the honor they uniquely deserve.”); *id.* at 22,575 (statement of Rep. John Kline) (“By passing the Stolen Valor Act this afternoon, we have a unique opportunity to return to our veterans and military personnel the dignity and respect taken by those who have stolen it and dishonor them.”).

<sup>43</sup> Dan Frosch, *Fighting for the Right To Tell Lies*, N.Y. TIMES, (May 20, 2011), <http://www.nytimes.com/2011/05/21/us/21valor.html>.

<sup>44</sup> *United States v. Robbins*, 759 F. Supp. 2d 815, 816 (W.D. Va. 2011).

<sup>45</sup> *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010), *rev’d*, No. 10-1358, 2012 WL 247995 (10th Cir. Jan. 27, 2012).

<sup>46</sup> *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3141 (U.S. Oct. 17, 2011) (No. 11-210).

<sup>47</sup> The Southern District of Iowa also struck down the Stolen Valor Act in an unpublished order. *United States v. Kepler*, No. 4:11-CR-00017, 2011 U.S. Dist. LEXIS 152703 (S.D. Iowa May 31, 2011). The government appealed, and the case is currently pending in the Eighth Circuit. See *United States v. Kepler*, No. 11-2278 (8th Cir. Oct. 20, 2011) (order staying appeal pending the Supreme Court’s decision in *Alvarez*).

<sup>48</sup> *United States v. Alvarez*, 80 U.S.L.W. 3141 (U.S. Oct. 17, 2011) (No. 11-210).

<sup>49</sup> *United States v. Strandlof*, No. 10-1358, 2012 WL 247995, at \*3 (10th Cir. Jan. 27, 2012), *rev’g* 746 F. Supp. 2d 1183 (D. Colo. 2010).

retired marine of 25 years. I retired in the year of 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around.”<sup>50</sup> Alvarez, however, was never awarded the Congressional Medal of Honor—in fact, he had never served in the armed forces. Apparently, Alvarez had a long history of lying about himself. Among other things, he claimed that he rescued the American ambassador during the hostage crisis in Iran, played hockey with the Detroit Red Wings, and secretly married a Mexican starlet.<sup>51</sup> Alvarez was indicted on two counts of violating the Stolen Valor Act.

After the district court denied Alvarez’s motion to dismiss the indictment, which challenged the constitutionality of the statute, Alvarez pled guilty conditioned on his appeal of the issue.<sup>52</sup> On appeal, a divided panel of the Ninth Circuit reversed. Judge Milan Smith, writing for the majority, began by noting that “First Amendment protection does not hinge on the truth of the matter expressed,” stating that “while some false factual speech may be proscribable, the Supreme Court has shown that not all of it is.”<sup>53</sup> Relying heavily on the reasoning in *Sullivan*, the majority rejected the government’s view that false statements of fact generally fall outside of the First Amendment’s scope and that it is up to the speaker to show otherwise in a particular case. The majority observed that “the right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment.”<sup>54</sup> Thus, it held that the First Amendment “presumptively protect[s] *all* speech against government interference”—including false statements of fact—unless the government is able to “demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection.”<sup>55</sup>

Then, relying on *Stevens*, the *Alvarez* majority examined whether the speech in question fit within the “historical and traditional categories long familiar to the bar” of speech excluded from First Amendment protection.<sup>56</sup> Observing that the *Stevens* Court’s recitation of historical exceptions did *not* include false factual speech in

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<sup>50</sup> 617 F.3d at 1200.

<sup>51</sup> *Id.* at 1200–01.

<sup>52</sup> *Id.* at 1199.

<sup>53</sup> *Id.* at 1203.

<sup>54</sup> *Id.* at 1205.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1206 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010)).

general, but rather only subcategories of such speech in the form of defamation and fraud, the majority rejected the notion that all false statements of fact are historically unprotected under the First Amendment.<sup>57</sup> The court stated that even if the statute is read to require the speaker's knowledge that his statement is false, the proscribed speech did not constitute defamation, fraud, or any other category of historically unprotected speech.<sup>58</sup> The court therefore deemed the speech protected under the First Amendment; since the statute represented a content-based speech restriction, the court subjected it to strict scrutiny and, unsurprisingly, found it wanting under that standard.<sup>59</sup>

In a long dissent, Judge Jay Bybee disagreed with the majority's holding that the First Amendment generally protects false statements of fact. He began by quoting *Gertz* and other Supreme Court cases that emphasize the inherent lack of value in false statements of fact and reiterated the statement in *Gertz* that "the erroneous statement of fact is not worthy of constitutional protection."<sup>60</sup> Judge Bybee thus concluded, again quoting *Gertz*, that "[f]alse statements are unprotected by the First Amendment except in a limited set of contexts where such protection is necessary 'to protect speech that matters.'"<sup>61</sup> He further argued that even within the exception for "protecting speech that matters," "the *knowingly* false statement and the false statement made with reckless disregard of the truth[ ] do not enjoy constitutional protection."<sup>62</sup>

Thus, in Judge Bybee's view, the "general rule" is that "false statements of fact are *not protected* by the First Amendment, irrespective of a cognizable harm to a specific person."<sup>63</sup> Judge Bybee characterized false statements of fact as a "historically unprotected category of speech" under *Stevens*, arguing that with respect to such historically unprotected speech—like obscenity—the government need not "even *identify*, much less *prove*, a cognizable harm in every case."<sup>64</sup> Judge Bybee therefore found no need to apply strict scrutiny in the matter at hand and deemed the statute constitutional as applied to Alvarez's case.<sup>65</sup>

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<sup>57</sup> *Id.* at 1206–08.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1202, 1215–18.

<sup>60</sup> *Id.* at 1218 (Bybee, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)).

<sup>61</sup> *Id.* at 1218–19 (quoting *Gertz*, 418 U.S. at 341).

<sup>62</sup> *Id.* at 1219 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 64 (1964)).

<sup>63</sup> *Id.* at 1228.

<sup>64</sup> *Id.* at 1228–29.

<sup>65</sup> *Id.* at 1235.

The fundamental disagreement between the majority and Judge Bybee—and the primary basis for their analyses—was their different conceptions of the general constitutional status of false statements of fact. In the majority’s view, the First Amendment generally protects false statements of fact, apart from some historical exceptions such as fraud or defamation. In Judge Bybee’s view, false statements of fact generally fall *outside* the First Amendment’s protection unless protection of such speech is necessary to protect “speech that matters.” Other courts that have ruled on the issue have also largely rested their conclusions on their assumptions regarding the general constitutional status of false factual speech. Both the district court in *United States v. Robbins* and the Tenth Circuit in *United States v. Strandlof* adopted Judge Bybee’s view in upholding the statute; the Tenth Circuit, for example, based its decision on the “principle” that “false statements of fact do not enjoy constitutional protection, except to the extent necessary to protect more valuable speech.”<sup>66</sup> By contrast, the district court in *Strandlof* assumed such false statements to be generally protected under the First Amendment and on this basis deemed the statute unconstitutional.<sup>67</sup>

C. *The Misplaced Focus on a General Standard and the Illusory Nature of the Supreme Court’s “Historical” Test*

Neither the majority’s opinion nor Judge Bybee’s dissent, however, is wholly satisfying. As noted, both sides focus primarily on the general constitutional status of false statements of fact, treating the issue as effectively outcome determinative. But even if one accepts either side’s assumption regarding the issue, this assumption alone is insufficient to resolve whether statutes like the Stolen Valor Act are constitutional, since both sides acknowledge that exceptions exist to the general rule.

Even under the majority’s assumption that the First Amendment generally protects false statements of fact, courts must still determine whether the particular speech proscribed by the Act should fall within an exception to this general rule. In its analysis, the *Alvarez* majority acknowledged categories of unprotected speech identified by the

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<sup>66</sup> *United States v. Strandlof*, No. 10-1358, 2012 WL 247995, at \*1 (10th Cir. Jan. 27, 2012); *see also* *United States v. Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011) (“[F]alse statements of fact are generally unprotected, aside from the protection for ‘speech that matters.’” (quoting *Gertz*, 418 U.S. at 341)).

<sup>67</sup> *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1187–88 (D. Colo. 2010) (discussing the difficulty of “trying to shoehorn the Stolen Valor Act into the First Amendment fraud exception” set forth in *Stevens*), *rev’d*, No. 10-1358, 2012 WL 247995 (10th Cir. Jan. 27, 2012).

*Stevens* Court, such as fraud, defamation, and speech integral to criminal conduct, and concluded that the speech in question did not fit into any of these categories. On this basis, the majority concluded that the speech is protected and strict scrutiny must apply.<sup>68</sup> But the *Stevens* Court clearly did *not* characterize its list of historically excluded categories as exhaustive. Indeed, it explicitly recognized that there may be “some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”<sup>69</sup> The *Alvarez* majority, however, did not discuss whether the speech might fit into any other heretofore unenumerated category of excluded speech.

Similarly, Judge Bybee’s assumption that false statements of fact are generally *unprotected* under the First Amendment recognizes exceptions where protection of falsehood is necessary “to protect speech that matters.”<sup>70</sup> But Judge Bybee failed to give a satisfactory account of what exactly constitutes “speech that matters.” First, he merely walked through the specific policy concerns underlying the Court’s establishment of the *Sullivan* rule and noted that “[t]he principles in [*Sullivan*] do not extend to false self-promotion.”<sup>71</sup> The Supreme Court, however, has never stated that the particular policy rationale underlying *Sullivan*—preventing public officials from suppressing criticism of their official actions—is the sole basis upon which falsehood must be constitutionally protected. Judge Bybee then simply concluded, with little additional explanation, that he “can see no value in false, self-aggrandizing statements by public servants” and that “[i]f the Stolen Valor Act ‘chills’ false autobiographical claims by public officials such as Alvarez, our public discourse will not be the worse for the loss.”<sup>72</sup>

Thus, regardless of which assumption one makes regarding false factual statements in general, an additional question must necessarily follow: Even if false factual statements are generally protected, is this particular false speech the sort that is excepted from First Amendment protection, like fraud or defamation? Conversely, even if false factual statements are not generally protected, is this particular

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<sup>68</sup> 617 F.3d at 1206–14.

<sup>69</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

<sup>70</sup> 617 F.3d at 1228 (Bybee, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

<sup>71</sup> *Id.* at 1233.

<sup>72</sup> *Id.*

false speech necessary to protect “speech that matters”? Or, indeed, is the speech *itself* “speech that matters”?<sup>73</sup>

So how is a court to make these sorts of judgments? As noted above, *Stevens* and *Brown* dictate a purely historical inquiry for defining the boundaries of the First Amendment, explicitly rejecting an “ad hoc” cost-benefit analysis tied to the value of the speech in question.<sup>74</sup> But what exactly constitutes a “longstanding tradition”<sup>75</sup> sufficient to recognize the exclusion of speech from First Amendment protection is unclear. For example, one could argue that the Court’s statements in earlier cases like *Gertz*<sup>76</sup> constitute a “longstanding tradition” of excluding the sorts of lies proscribed by the Stolen Valor Act. On the other hand, one could argue that those general statements are far too broad to apply in this novel situation.

Furthermore, how far back in time must one look to establish a “longstanding tradition” of exclusion? Is the Court’s modern First Amendment jurisprudence<sup>77</sup> of too recent a vintage to establish such a “tradition”? If so, an examination of the more distant past does little to clarify things. A survey of nineteenth-century treatises indicates that while commentators of that era clearly delineated defamation<sup>78</sup>—and sometimes other areas of speech such as obscenity

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<sup>73</sup> For example, the infamous Sedition Act of 1798, which criminalized “seditious libel” against the government, specifically targeted only false speech, since it allowed defendants the defense of truth. The *Sullivan* Court, however, recognized the “broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.” *New York Times v. Sullivan*, 376 U.S. 254, 273–76 (1964).

<sup>74</sup> What exactly the Court meant by describing such balancing as “ad hoc” is unclear. The government’s proposed rule, which the Court rejected, called for “categorical balancing of the value of the speech against its societal costs.” *Stevens*, 130 S. Ct. at 1585 (citation omitted).

<sup>75</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2736 (2011).

<sup>76</sup> See *supra* notes 20–27 and accompanying text (describing the Court’s apparent rejection of First Amendment protection for false statements of fact).

<sup>77</sup> Prior to Congress’s passage of the Espionage Act of 1917, the Supreme Court never directly considered the First Amendment’s protection of free speech. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 8 (2d ed. 2003). Most commentators therefore date the beginning of the modern era of free speech jurisprudence to the passage of the 1917 Act. See, e.g., *id.*; DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 1 (1997) (noting the traditional view that modern First Amendment jurisprudence was created following the 1917 Act).

<sup>78</sup> See, e.g., HENRY CAMPBELL BLACK, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* 473–74 (St. Paul, West Publ’g Co. 1895) (stating that the First Amendment “does not do away with the law of liability for defamation of character”); THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* \*422 (Boston, Little, Brown, & Co. 3d ed. 1874) (stating that the First Amendment does not extend to statements that “by their falsehood and malice . . . injuriously affect the standing, reputation, or pecuniary interests of individuals”); JOHN ORDRONAU, *CONSTITUTIONAL LEGISLATION IN THE UNITED*

and “blasphemy”<sup>79</sup>—as falling outside of the First Amendment’s coverage, they did not opine on the general constitutional status of false statements of fact.<sup>80</sup> Similarly, while courts of that time addressed a wide range of issues regarding defamatory speech,<sup>81</sup> they did not appear to discuss, at least in a consistent and widespread manner, the general constitutional status of false statements of fact.<sup>82</sup> The historical record is thus highly malleable; depending on one’s characterization, it could either support or undermine the argument that a “longstanding tradition” of First Amendment exclusion reaches the sorts of lies proscribed under the Stolen Valor Act.<sup>83</sup>

This example reveals the fundamentally illusory nature of the Court’s historical analysis for determining the boundaries of the First Amendment. The Court has long made clear that the inherent reason for excluding speech like obscenity and fighting words from First Amendment protection is because the speech is “of such slight social value as a step to truth that any benefit that may be derived from [it]

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STATES 238 (Philadelphia, T. & J.W. Johnson & Co. 1891) (stating that people “cannot take refuge” under the First Amendment “in order to protect themselves against legal responsibility for defaming private character”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1881, at 739–40 (Boston, Hilliard, Gray, & Co. 1833) (arguing that freedom of speech does not “stop the legislature from passing any laws to punish libels and inflammatory publications”).

<sup>79</sup> See BLACK, *supra* note 78, at 474 (stating that obscene and blasphemous publications are excluded from First Amendment protection); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 308 (Boston, Little, Brown, & Co. 3d ed. 1898) (same).

<sup>80</sup> See, e.g., BLACK, *supra* note 78, at 472–80; COOLEY, *supra* note 78, at \*414–65; ORDRONAUX, *supra* note 78, at 236–40; STORY, *supra* note 78, §§ 1874–1886, at 731–45.

<sup>81</sup> See RABBAN, *supra* note 77, at 155–65, and cases cited therein (describing courts’ analyses of libel and contempt cases).

<sup>82</sup> Many courts recognized that the First Amendment does not extend to defamatory speech, but they generally discussed the issue narrowly, without expanding their discussion to false statements of fact as a whole. See, e.g., *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (observing, in dicta, that “the freedom of speech . . . does not permit the publication of libels, blasphemous or indecent articles”); *Corliss v. E.W. Walker Co.*, 57 F. 434, 435 (C.C.D. Mass. 1893) (noting that the First Amendment does not protect any publication that “by its falsehood and malice, may injuriously affect the standing, reputation, or pecuniary interests of individuals”); *Arnold v. Clifford*, 1 F. Cas. 1177, 1178 (C.C.D.R.I. 1835) (No. 555) (“The liberty of the press does not include the right to publish libels.”); *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 286–88 (Mich. 1899) (discussing *Corliss*). Cf. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000) (“A century ago, lying raised moral and reputational questions but only rarely legal ones.”).

<sup>83</sup> For example, one could construe the historical exclusion of defamation from the First Amendment—as well as the exclusions of, say, fraud and perjury—as merely manifestations of a general historical understanding that *all* false speech is unprotected. Conversely, one could argue that no historical basis exists for excluding false speech outside of these particular historically recognized subsets, all of which arguably involve material harms that do not exist in the present scenario.



is clearly outweighed by the social interest in order and morality.”<sup>84</sup> And although the *Stevens* Court sought to couch this cost-benefit evaluation as merely “descriptive” of unprotected speech rather than “set[ting] forth a test that may be applied as a general matter,”<sup>85</sup> the Court’s historical approach, unless applied in the narrowest possible sense, ultimately requires that such value judgments be made.

Any analysis premised on a historical inquiry can operate in radically different ways based on the level of generality taken. For example, consider the Court’s substantive due process jurisprudence, which requires that fundamental rights recognized under the Due Process Clause be “deeply rooted in this Nation’s history and tradition.”<sup>86</sup> Suppose a state passes a law completely banning in vitro fertilization procedures, and someone decides to challenge the constitutionality of the law under a substantive due process theory.<sup>87</sup> If the right in question is defined in the narrowest possible terms—say, a fundamental right of access to in vitro fertilization—then it is likely doomed to failure, since obviously this particular right has never been contemplated (indeed, could not have been contemplated) until recently.<sup>88</sup> On the other hand, if the right is defined on a much broader level of generality—say, a fundamental right to control one’s reproductive decisions—then this opens the door to analogizing and tying the interest at stake to other historically recognized interests, such as the right to use contraception or to have an abortion.<sup>89</sup>

The same observation applies here. Under the narrowest possible interpretation of the *Stevens* Court’s analysis, no novel category of speech, when viewed in isolation, can be deemed “historically unprotected” simply by reason of its novelty alone. And this is true not only where the speech itself is novel—for instance, postings on social media websites—but also where the *regulation* is novel, regardless of the novelty of the speech itself. As Mark Tushnet has observed, legislatures typically do not regulate certain categories of speech unless

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<sup>84</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (same); *New York v. Ferber*, 458 U.S. 747, 754 (1982) (same).

<sup>85</sup> *Stevens*, 130 S. Ct. at 1586.

<sup>86</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

<sup>87</sup> I discuss this issue in greater detail in Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792 (2005).

<sup>88</sup> Cf. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) (plurality opinion) (rejecting a biological father’s parental rights claim by characterizing the right as that of “the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child”).

<sup>89</sup> See *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception).

and until a sufficiently serious social problem arises.<sup>90</sup> But if courts conduct historical analyses at the narrowest possible level, then *any* newly regulated speech—even if it has been around since time immemorial—cannot be deemed historically unprotected simply because it has never before been regulated by legislatures or considered by courts.

It is highly unlikely that the Court intended to freeze the present boundaries of the First Amendment in this manner. Indeed, in *Stevens*, the Court recognized the possibility of “categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law,”<sup>91</sup> and in *Brown*, it recognized the possibility of a “long (if heretofore unrecognized) tradition of proscription.”<sup>92</sup> But to evaluate novel speech regulations on a broader level, the Court must necessarily discern by analogy whether the regulated speech is sufficiently similar to other historically recognized categories of speech to warrant similar treatment. And determining whether the speech in question can or should be analogized to historically excluded categories of speech requires the Court to ascertain why that historical speech was deemed unprotected in the first place. The Court must identify which particular characteristics of the historically excluded speech are analytically significant in measuring its “social value” against “the social interest in order and morality,”<sup>93</sup> then determine whether the speech in question shares those key characteristics.

This, of course, brings us back to the value-based analysis that the *Stevens* Court purported to reject. Even in conducting a “historical” analysis, a court must still evaluate the relative value and harm of the speech in question to map out the boundaries of the First Amendment. And the court’s judgment on this issue is likely to dictate the manner in which it conducts its historical analysis—for example, how it will characterize the speech or at what level of generality it will draw analogies.

*Brown* itself illustrates the illusory nature of the Court’s “historical” boundary analysis. Justice Scalia, writing for the majority, categorized the speech proscribed by the California statute as “speech about violence” and struck down the statute because such speech is

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<sup>90</sup> Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* 16 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-02, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1737930](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930).

<sup>91</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

<sup>92</sup> *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011).

<sup>93</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

not obscene and a “longstanding tradition” of “restricting children’s access to depictions of violence” did not exist.<sup>94</sup> But as Justice Breyer suggested in his dissent, the speech in question need not be characterized in this manner; for example, it can be characterized in terms of its harm to children rather than its violent substance.<sup>95</sup> Although Justice Breyer did not take this route, one could, on this basis, deem the consumption of such harmful speech by children unprotected by the First Amendment under a “longstanding tradition” of speech laws aimed at protecting children’s development and well-being, such as laws banning the sale of obscene materials to minors.

This alternative characterization seems to be the basis for Justice Alito’s lengthy opinion concurring in the judgment, which was notably joined by Chief Justice Roberts, the author of the *Stevens* opinion establishing the historical test. Focusing solely on the question of harm—and not once delving into historical analysis—Justice Alito expressed trepidation about the Court’s broad ruling, questioning the majority’s view that “violent video games really present no serious problem.”<sup>96</sup> Noting that “the experience of playing video games . . . may be very different from anything that we have seen before,” and recounting in detail the interactive nature and often gruesome content of certain video games, Justice Alito was troubled by the possibility of “games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.”<sup>97</sup> Thus, Justice Alito stated that he “would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem.”<sup>98</sup>

Justice Alito’s sole focus on the question of harm rather than a “historical analysis”—and the Chief Justice’s apparent endorsement of his approach—highlight the illusory nature of the *Stevens* test. There is no purely “neutral” means of historical analysis. A court can characterize the speech in question in multiple ways and craft analogies to “longstanding tradition” at varying levels of generality and abstraction. In the end, the relative value and harm associated with the speech in question remains central to the analysis, since it is a court’s sense of these values that will influence how it conducts the historical analysis.

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<sup>94</sup> *Brown*, 131 S. Ct. at 2735–36.

<sup>95</sup> *Id.* at 2762 (Breyer, J., dissenting) (“[T]he special First Amendment category I find relevant is not (as the Court claims) the category of ‘depictions of violence,’ but rather the category of ‘protection of children.’” (citation omitted)).

<sup>96</sup> *Id.* at 2742 (Alito, J., concurring in the judgment).

<sup>97</sup> *Id.* at 2748–50.

<sup>98</sup> *Id.* at 2751.

Thus, regardless of any assumption made regarding the general constitutional status of false statements of fact, and despite the claim in *Stevens* and *Brown* that value judgments are irrelevant, evaluating the constitutionality of the Stolen Valor Act effectively boils down to two related questions: What, if any, is the particular First Amendment value in the autobiographical lies proscribed under the Stolen Valor Act, and is that value sufficient to warrant their protection in light of the associated harm?

This question cannot be answered, however, without a sense of why exactly we have a First Amendment in the first place. In the next Part, I take a step back to briefly survey the general landscape of First Amendment theory before addressing the extent to which the sort of false speech covered by the Stolen Valor Act—knowing, false statements of empirical fact about oneself—might carry constitutional value.

## II

### THEORETICAL BASES FOR THE PROTECTION OF SPEECH AND THE UNIQUE NATURE OF AUTOBIOGRAPHICAL LIES

#### A. *Traditional Rationales for the Protection of Speech*

Scholars have long debated the theoretical foundations of freedom of speech in general and the First Amendment specifically, with different commentators arguing that particular interests constitute the primary or sole basis for singling out speech for special protection.<sup>99</sup> There is general agreement, however, that our current First Amendment jurisprudence is not built upon a single, coherent theory of free expression,<sup>100</sup> since courts have recognized a patchwork of different interests underlying the protection of speech. Although commentators frame these interests in different ways, three general rationales are most commonly advanced as bases for the First Amendment's protection of free speech: the pursuit of truth, the pro-

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<sup>99</sup> See, e.g., Baker, *supra* note 2 (autonomy); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (democratic self-governance); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (“individual self-realization”).

<sup>100</sup> See, e.g., KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 34 (1989) (“The nonconsequentialist justifications, like the consequentialist ones, fall short of setting clear principles that can be confidently applied to decide what practices of suppression are unwarranted.”); Redish, *supra* note 99, at 591 (“There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression.”); Shiffirin, *supra* note 7, at 559–60 (“No theory has dominated the Court’s complex accommodations.”).

motion of democratic self-government, and the preservation of individual autonomy and self-realization.<sup>101</sup>

### 1. *The Pursuit of Truth*

The argument that free speech is necessary to promote the discovery of truth is deeply rooted in free speech literature, dating back to John Milton's argument in defense of a free press in *Areopagitica*.<sup>102</sup> This argument is most commonly associated with John Stuart Mill, who premised his defense of free expression on the view that suppression of an opinion that either turns out to be true or contains an element of truth would deprive society of "the opportunity of exchanging error for truth."<sup>103</sup> Indeed, in Mill's view, even the suppression of opinions that turn out to be false would interfere with the discovery of truth, since testing and rejecting such opinions creates "the clearer perception and livelier impression of truth."<sup>104</sup> To Mill, any strongly held opinion, even if true, "will be held as a dead dogma, not a living truth," unless it is "fully, frequently, and fearlessly discussed."<sup>105</sup>

Mill's view is rooted in the basic assumption that the truth is most likely to emerge from an open clash of conflicting ideas and opinions. Thus, this view shares assumptions made by both the American legal system, which deems adversarial conflict the best means of ascertaining truth, and Adam Smith's "invisible hand," which assumes that free, open competition ultimately leads to the best allocation of resources.<sup>106</sup> Mill's position is most famously encapsulated in the "marketplace of ideas" metaphor outlined by Justice Holmes, who stated that "the ultimate good desired is better reached by free trade in ideas" and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."<sup>107</sup>

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<sup>101</sup> See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970); STONE ET AL., *supra* note 77, at 9–15; Redish, *supra* note 99, at 591. Other possible rationales include checking government abuse, encouraging tolerance, and functioning as a "safety valve." STONE ET AL., *supra* note 77, at 15–16.

<sup>102</sup> GREENAWALT, *supra* note 100, at 16.

<sup>103</sup> JOHN STUART MILL, *ON LIBERTY* 87 (David Bromwich & George Kate eds., Yale Univ. Press 2003) (1959).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 103.

<sup>106</sup> FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 16 (1982).

<sup>107</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). A common critique of this theory is that it rests on an assumption that public discourse operates under a framework involving particular "intellectual virtues," such as rational thought, fairness, and honesty, which is certainly not always the case. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011); see also SCHAUER, *supra* note

## 2. Democratic Self-Governance

Another view, most notably advanced by Alexander Meiklejohn, posits that free expression is a necessary requirement for the operation of democratic self-government. According to Meiklejohn,

When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.<sup>108</sup>

Thus, in Meiklejohn's view, self-governance necessarily requires the free exchange of ideas; because the *citizens* are the sovereigns, they must possess the ability to propose, debate, and share ideas and information in order to rule effectively.<sup>109</sup> Free speech is therefore justified because “the people . . . have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others.”<sup>110</sup> Under this view, the core of the First Amendment is the protection of “public discourse,” which can be described as “speech by which public opinion is formed.”<sup>111</sup> This view therefore suggests that political speech lies at the center of First Amendment protection, although other areas of speech, such as literature and art, may also be protected to the extent that they aid the populace in public deliberation and self-governance.<sup>112</sup>

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106, at 30 (noting that this theory “presupposes a process of rational thinking” and therefore “weakens or dissolves when the process does not obtain”).

<sup>108</sup> ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (2007).

<sup>109</sup> See *id.* at 25–27; SCHAUER, *supra* note 106, at 38.

<sup>110</sup> Meiklejohn, *supra* note 99, at 263.

<sup>111</sup> James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497–98 (2011); see also Post, *supra* note 107, at 485–86 (“Public discourse includes all communicative processes deemed necessary for the formation of public opinion.”).

<sup>112</sup> See Meiklejohn, *supra* note 99, at 263 (“I believe, as a teacher, that the people do need novels and dramas and paintings and poems, because they will be called upon to vote.” (internal quotation marks omitted)). Of course, this position leads to difficult line drawing in determining exactly what sort of speech should be protected. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–27 (1971) (discussing the difficulties of drawing such lines and proposing that First Amendment protection extend only to “the outer limits of political speech”); Redish, *supra* note 99, at 598–601 (challenging Bork's position); Eugene Volokh, *The Trouble With “Public Discourse” as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 567–68 (2011) (arguing that the “public discourse” limitation is “unsound” given “the difficulty of defining the category”).

### 3. *Individual Autonomy and Self-Realization*

The third rationale often set forth to justify the protection of free speech is the promotion and protection of individual autonomy and self-realization. Under this rationale, speech should be protected insofar as it “fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others.”<sup>113</sup> As Thomas Emerson put it, “expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self”; as a result, “suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man’s essential nature.”<sup>114</sup> Of course, autonomy, within the context of speech regulation, is a slippery concept with many potential meanings.<sup>115</sup> It could mean, among other things, the freedom to develop one’s faculties and express oneself in the way one chooses,<sup>116</sup> the freedom to contribute one’s views to the marketplace of ideas on equal footing,<sup>117</sup> or the freedom to be fully informed of all views in making individual decisions.<sup>118</sup> In any event, freedom of speech under this view is an essential attribute of individual personhood,<sup>119</sup> premised on the idea that “[o]ur ability to deliberate, to reach conclusions about our good, and

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<sup>113</sup> Baker, *supra* note 2, at 966.

<sup>114</sup> Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879 (1963).

<sup>115</sup> See Fallon, *supra* note 4, at 877–78 (distinguishing between “descriptive” and “ascriptive” autonomy); T.M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 *VA. L. REV.* 541, 546–47 (2011) (highlighting the many different ways in which autonomy may be understood).

<sup>116</sup> See SCHAUER, *supra* note 106, at 49 (describing the view that free speech facilitates “continual[ ] striving for improvement and self-development”); Baker, *supra* note 2, at 992 (describing the view that free speech advances “self-realization”).

<sup>117</sup> See Baker, *supra* note 2, at 992 (“[R]especting people’s autonomy as well as people’s equal worth requires that people be allowed an equal right to participate in the process of group decision making . . . .”); Scanlon, *supra* note 115, at 546 (identifying one definition of autonomy as giving equal respect to all ideas).

<sup>118</sup> See Scanlon, *supra* note 2, at 215–22 (arguing that autonomy requires the right to receive information for developing one’s beliefs); see also SCHAUER, *supra* note 106, at 68–70 (describing Scanlon’s view of autonomy).

<sup>119</sup> See SCHAUER, *supra* note 106, at 68–70 (describing theories linking freedom of expression to the notion of “individual sovereignty”); Fried, *supra* note 2, at 233 (characterizing freedom of expression as essential to “our status as free and rational persons”); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 *HARV. C.R.-C.L. L. REV.* 159, 165–70 (1997) (linking free expression to Kant’s theories regarding “autonomy and personhood”); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 *GEO. L.J.* 245, 312–13 (2003) (discussing “theories that view free speech as an irreducible attribute of personal sovereignty”).

to act on those conclusions is the foundation of our status as free and rational persons.”<sup>120</sup>

### B. Possible Rationales for the Protection of Autobiographical Lies

The Stolen Valor Act imposes criminal penalties on those who falsely claim to have received military honors—a factual matter subject to empirical proof.<sup>121</sup> Furthermore, courts have read into the Act a requirement that the speaker *know* the statement to be false.<sup>122</sup> Construed in this manner, the Act implicates a particular subset of speech—knowing, false statements of empirically provable fact about oneself—that I refer to as “autobiographical lies.”

So what, if any, is the First Amendment value in autobiographical lies? One common argument for the protection of lies—premised on the “pursuit of truth” theory of the First Amendment—is that such speech, even if false, has innate value insofar as it helps to illuminate the truth. This argument, which was made by the Supreme Court in *Sullivan* and highlighted by the *Alvarez* majority, is premised on Mill’s observation that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”<sup>123</sup> With respect to autobiographical lies, however, this argument has little force. Generally, nobody knows more about me than myself, and this is clearly understood and assumed by anyone I encounter. So if I make a false statement about myself, it is far more likely that my audience will accept and propagate the statement rather than challenge it and generate a greater understanding of the truth.

Another possible reason for protecting autobiographical lies is to prevent a chilling effect on more valuable speech. Even if one assumes

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<sup>120</sup> Fried, *supra* note 2, at 233. A common critique of this argument is that autonomy serves little use as a First Amendment value, since it is a broad and pervasive value that can extend to *all actions*, not just speech. See *infra* note 145 (discussing the theoretical debate surrounding this critique).

<sup>121</sup> This is in contrast with statements of opinion (e.g., “The President is doing a great job.”) or statements of fact not capable of empirical proof (e.g., “I really enjoyed that meal.”).

<sup>122</sup> *United States v. Strandlof*, No. 10-1358, 2012 WL 247995, at \*3 (10th Cir. Jan. 27, 2012); *United States v. Alvarez*, 617 F.3d 1198, 1209 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3141 (U.S. Oct. 17, 2011) (No. 11-210); *United States v. Robbins*, 759 F. Supp. 2d 815, 819 (W.D. Va. 2011). Generally speaking, “federal statutes are to be construed so as to avoid serious doubts as to their constitutionality,” as long as “it is fairly possible to interpret the statute in a manner that renders it constitutionally valid.” *Comm’ns Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988).

<sup>123</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting MILL, *supra* note 19, at 15).



that false speech has minimal value in itself, protecting it may be necessary to give more valuable speech the “breathing space” it needs to flourish. Since “[t]he risk of liability for falsehoods tends to deter not just false statements but also true statements,” penalizing false speech, the argument goes, might deter speakers from making constitutionally valuable statements, either because of their own uncertainty regarding the truth of their statements or because of the risk of judicial error.<sup>124</sup> Thus, for example, penalizing such lies may discourage expression that advances truth or inhibit speakers from participating in open democratic deliberation.<sup>125</sup> This rationale was the primary basis for the Supreme Court’s development of the “actual malice” rule in *Sullivan*,<sup>126</sup> and the *Alvarez* majority reiterated the argument in deeming the Stolen Valor Act unconstitutional.<sup>127</sup>

When applied to autobiographical lies, however, this concern is marginal at best.<sup>128</sup> For obvious reasons, speakers are usually highly certain regarding empirical facts about their own lives. Thus, even if autobiographical lies were prohibited, people would likely be undeterred from making truthful statements about themselves.<sup>129</sup> Furthermore, if we stick to the subset of *empirically provable* autobiographical statements—rather than statements expressing individual preferences or states of mind that are not directly knowable to anyone but the speaker<sup>130</sup>—the truth of many of these statements would be

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<sup>124</sup> Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment’s “False Statements of Fact” Exception*, 6 STAN. J. C.R. & C.L. 343, 351 (2010).

<sup>125</sup> As noted in Part II.A.2, *supra*, however, a democracy-based view of the First Amendment is concerned primarily with political speech. Weinstein, *supra* note 111, at 497–98. Thus, to the extent the autobiographical lies in question involve speech unrelated to public discourse and decision making—like, for example, lying about your educational credentials to impress someone at a bar—regulation of such speech could not result in any “chilling effect” on the promotion of democratic self-governance.

<sup>126</sup> See 376 U.S. at 277–79 (discussing the danger that “would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so”).

<sup>127</sup> 617 F.3d at 1203 (citing *Sullivan*, 376 U.S. at 271–72).

<sup>128</sup> Eugene Volokh’s amicus brief in *Strandlof* includes an insightful discussion of this point within the context of the Stolen Valor Act. See Volokh, *supra* note 124, at 352–53.

<sup>129</sup> *Id.* at 352.

<sup>130</sup> For example, suppose I tell someone that I thought his casserole was the most delicious I’ve ever had, or that I’m breaking up with her because I’m not ready for a relationship. I might be telling the truth, but because these sorts of statements are based on my thoughts and state of mind, they are not subject to empirical proof. Thus, if *false* statements of this sort are proscribed, I run some risk of being erroneously punished, making me more reluctant to make these sorts of statements in the first instance.

relatively easy to verify in court.<sup>131</sup> For example, assume that I tell someone that I was the quarterback of my high-school football team or that I was born in Michigan. Not only would I be highly likely to know whether that statement was true or false, but it would also be relatively easy for the legal system to determine whether such a statement was true or false. Contrast this with, say, statements about historical events, scientific theories, or the government, where both the speaker's uncertainty regarding the truth of these statements and the difficulty of verifying them in court would likely lead to a substantial chilling effect.<sup>132</sup>

Another potential justification for protecting autobiographical lies is general uneasiness with appointing the government as the arbiter of truth.<sup>133</sup> Injecting the government into disputes over truth might risk government endorsement of a particular viewpoint and give that viewpoint the veneer of orthodoxy.<sup>134</sup> Furthermore, the government may, in particular circumstances, have interests that stand in tension with fundamental free speech principles—most obviously in the context of a seditious libel statute.<sup>135</sup> But this concern is most relevant in circumstances where the disputed facts are politically charged and involve the risk that the government will manipulate discussions of public interest. Otherwise, courts are in the business of arbitrating truth all the time—for example, in fraud and libel cases.<sup>136</sup> There is no special reason why tasking the legal system with evaluating the truth-

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<sup>131</sup> Volokh, *supra* note 124, at 352. Of course, there may be autobiographical statements that are *not* as easy to verify, and regulating such speech might indeed create some chilling effect.

<sup>132</sup> *Id.*

<sup>133</sup> Such reasoning may find its strongest theoretical resonance in a “checking value” conception of the First Amendment, under which speech is protected in order to “check[] the abuse of power by public officials.” Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

<sup>134</sup> See Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 16–22 (2008). Gey argues that under what he calls a “structural” model of the First Amendment, “[g]overnment simply has no business in enforcing its version of metaphysical or ideological truth.” *Id.* at 20. In his view, even false statements of fact may not be suppressed simply because they are “wrong or untrue,” since “[t]he benefits to be achieved by having the government correct the dissemination of factual falsehoods would be far outweighed by the signaling effect of having the government settle intellectual disputes through legal sanctions.” *Id.* at 21–22.

<sup>135</sup> See SCHAUER, *supra* note 106, at 81–82 (describing the risks involved where “the regulation of speech on grounds of interference with government . . . is entrusted to those very [government officials] who . . . have the most to lose from arguments against their authority”).

<sup>136</sup> See Fried, *supra* note 2, at 240 (noting that while we often delegate fact-finding to government agencies, “[w]here governments’ own interests are at stake (as in political discussions and the promotion of candidates), . . . we withdraw this delegation because of the inherent conflict of interest”).

fulness of autobiographical statements—at least as a general matter—would be particularly problematic; indeed, courts regularly judge the veracity of such statements in evaluating witness testimony. And again, unlike lies about, for example, scientific theories, the truth behind factual autobiographical lies is often easy to determine, thus diminishing any risk of undue government influence on public discourse.

In his *Alvarez* majority opinion, Judge Smith hints at a final possible argument justifying constitutional protection of autobiographical lies: the idea that “the right to speak and write whatever one chooses—including, to some degree . . . demonstrable untruths—without cowering in fear of a powerful government is . . . an essential component of the protection afforded by the First Amendment.”<sup>137</sup> This argument presumably underlies Judge Smith’s “parade of horrors” at the outset of the opinion, where he notes, among other things, that upholding the Stolen Valor Act would leave “no constitutional bar to criminalizing lying about one’s height, weight, age, or financial status on Match.com or Facebook.”<sup>138</sup> Judge Smith, however, never expands on what he means by “the right to speak and write whatever one chooses”; certainly, he could not have meant this statement literally.

Judge Smith’s statements are not premised on a straightforward truth-seeking or democracy-advancing view of free expression. These statements, however, are the closest the *Alvarez* majority comes to articulating the intuitive discomfort with the Stolen Valor Act, and they begin to illustrate why the sort of autobiographical speech proscribed under the Act might deserve constitutional protection. There is a very real sense that although the government can permissibly regulate false speech in the context of, say, fraud, defamation, or perjury, regulation of this particular type of false speech somehow feels much more fundamentally intrusive.

Although Judge Smith touched on the root of this uneasiness only in the vaguest of terms, Chief Judge Alex Kozinski, in his opinion accompanying the denial of rehearing en banc in *Alvarez*, outlined this interest in detail. Noting that “truth is not the sine qua non of First Amendment protection,” Judge Kozinski observed that *Alvarez*’s conviction was “especially troubling” because he was punished for “speaking about himself, the kind of speech that is intimately bound up with a particularly important First Amendment purpose: human

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<sup>137</sup> *United States v. Alvarez*, 617 F.3d 1198, 1205 (9th Cir. 2010), cert. granted, 80 U.S.L.W. 3141 (U.S. Oct. 17, 2011) (No. 11-210).

<sup>138</sup> *Id.* at 1200.

self-expression.”<sup>139</sup> Judge Kozinski then stated that “[a]n important aspect of personal autonomy is the right to shape one’s public and private persona by choosing when to tell the truth about oneself, when to conceal and when to deceive.”<sup>140</sup>

This interest in individual self-definition best explains the intuitive discomfort surrounding the Stolen Valor Act. The only convincing justification for protecting the sorts of autobiographical lies proscribed under the Act is that the interest in crafting the contours of one’s own public persona carries distinct constitutional weight under the First Amendment that could potentially trump the regulatory interest behind the government’s proscription of the speech in question.

### III

#### THE INTEREST IN INDIVIDUAL SELF-DEFINITION AS A FIRST AMENDMENT PRINCIPLE

The Stolen Valor Act litigation thus forces us to consider whether preservation of the interest in individual self-definition is, or should be, a value holding constitutional weight under the First Amendment. In this Part, I first describe in greater detail exactly what this interest entails. I then explain why evaluating the constitutional status of autobiographical lies like those proscribed under the Stolen Valor Act serves as a unique test case for examining the contours of such an interest. Finally, I conclude that if we take seriously the Supreme Court’s assertions that the First Amendment is designed, at least in part, to preserve individual autonomy and self-realization, then courts should recognize the self-definition interest as a free speech value that carries distinct constitutional weight.<sup>141</sup>

#### A. *The Nature of the Self-Definition Interest*

##### 1. *The Interest Described*

The interest in individual self-definition, viewed in the context of the First Amendment, recognizes that speech holds intrinsic value apart from aiding in the discovery of truth or promoting democratic self-governance: We also speak in order to define, develop, and

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<sup>139</sup> *United States v. Alvarez*, 638 F.3d 666, 673–74 (9th Cir. 2011) (Kozinski, C.J., concurring in the denial of rehearing en banc), *denying reh’g* 617 F.3d 1198 (9th Cir. 2010).

<sup>140</sup> *Id.* at 675.

<sup>141</sup> Of course, just because the self-definition interest has some constitutional value does not mean that the government can never regulate certain autobiographical lies or other speech that implicates this interest to a significant extent. As I discuss in detail in Part IV, *infra*, the government’s particular interests in regulating the harm associated with the speech in question play a significant role in the analysis.

express ourselves as individuals.<sup>142</sup> It recognizes people's fundamental interest in controlling the contours of their public personas and the fashion in which these personas are constructed.<sup>143</sup> Speech, after all, is the primary means by which we present our identities to the world, and having the freedom to determine how we approach this project is an integral aspect of individual autonomy. The interest in defining oneself through speech is among what Laurence Tribe called the "outward-looking aspects of self that are expressed . . . through seeking to project one identity rather than another upon the public world."<sup>144</sup>

This interest is, of course, extremely broad and amorphous, with boundaries that are potentially difficult to discern. Presumably, nearly all speech—or, indeed, nearly all action<sup>145</sup>—can be characterized as part of one's project of self-definition. I will, for the moment, put this concern aside.<sup>146</sup> While a great deal of speech will likely implicate the self-definition interest to some extent, it seems equally clear that certain categories of speech, viewed in the abstract, are far more likely than others to implicate this interest. Thus, for present purposes, I focus on one of the clearest of these categories: autobiographical statements, or statements we make about ourselves.

Statements about ourselves are typically the most direct way by which we craft our personas for others. We make such statements all the time—we tell people where we're from, what we do for a living, and so forth. What information we choose to disclose and how we disclose it are integral parts of how we define ourselves to others. For

<sup>142</sup> Baker, *supra* note 2, at 992.

<sup>143</sup> See *Alvarez*, 638 F.3d at 674–75.

<sup>144</sup> LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 887–88 (1978); see also *id.* at 888 (describing the aspiration "to be master of the identity one creates in the world").

<sup>145</sup> Arguably all human conduct, beyond speech, can be characterized as playing an important role in each person's project of self-definition. This reflects the general critique leveled by Robert Bork and others against autonomy-based theories of free speech: Because one could characterize all human conduct, not just speech, as advancing individual autonomy, such an interest cannot justify protecting speech to a degree greater than any other conduct. See, e.g., Bork, *supra* note 112, at 25 (rejecting the argument that speech deserves special protection because of its ability to promote self-development, since other activities can also achieve this objective); Post, *supra* note 107, at 479–80 (finding autonomy-based rationales unpersuasive because "the value of autonomy extends not merely to the speech of persons but also to the actions of persons"). But see Redish, *supra* note 99, at 598–601 (arguing that Bork's view of the First Amendment is vulnerable to a similar critique and challenging "Bork's assumption that any principled first amendment theory must rely solely on values that are *uniquely* protected by speech"). I will sidestep this theoretical debate, however, since it is sufficient for present purposes simply to note that the Supreme Court has long recognized autonomy interests as significant to First Amendment analysis. See *infra* Part III.B (discussing the Court's recognition of autonomy interests in First Amendment cases).

<sup>146</sup> I discuss this issue in greater detail in Part IV.A.1, *infra*.

example, if you are trying to impress a potential employer at a job interview, you might emphasize your educational credentials and speak about past professional successes. You likely would *not* discuss the copious amounts of recreational drugs you used when you were in college, since, in that situation, you'd presumably want to portray yourself as someone who is accomplished, sober, and responsible.

Of course, we do not paint the same picture of ourselves for every person. The persona we construct for our friends is different from the one we construct for our employers, parents, or spouses. For example, while you are unlikely to tell a potential employer about your youthful indiscretions, you may be more than happy to share these stories to impress a group of counter-cultural types at a party. Indeed, all of these distinct personas may differ from the persona that you construct for yourself—that is, the person that you consider yourself to be.<sup>147</sup>

The interest in self-definition is rooted in an autonomy-based conception of the First Amendment: the idea that protecting speech is necessary to preserve the freedom to “judge for myself what is good and how I shall arrange my life in the sphere of liberty that the similar spheres of others leave me.”<sup>148</sup> As noted above, “autonomy” is often a messy term that can mean all sorts of things. Under any basic conception of autonomy, however, a fundamental component of being an autonomous individual is exercising control over who you are—and who you are is, to a significant extent, a function of who you *define yourself to be* to others.<sup>149</sup> And of course, one of the primary means by which we define ourselves is by deciding what to say about ourselves and how we will say it. So to the extent the preservation of individual autonomy constitutes a general principle upon which the First Amendment's protection of speech is based, recognition of a constitutionally significant self-definition interest should follow, since our control over how we construct our identities is an integral component of that autonomy.

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<sup>147</sup> See *infra* notes 259–60 and accompanying text.

<sup>148</sup> Fried, *supra* note 2, at 233.

<sup>149</sup> See TRIBE, *supra* note 144, at 887–89 (describing the “outward-looking aspects of self” as essential to the idea of personhood and autonomy). As Tribe notes, “[F]reedom to have impact on others—to make the ‘statement’ implicit in a public identity—is central to any adequate conception of the self.” *Id.* at 888; see also JULIUS C.S. PINCKAERS, FROM PRIVACY TOWARD A NEW INTELLECTUAL PROPERTY RIGHT IN PERSONA 242 (1996) (“From the principle of personal autonomy it follows that every human being should have the right to develop his own identity and to decide how and what aspects of this personal identity will be shown to the rest of the world.”).

## 2. *The Significance of Autobiographical Lies*

As a conceptual matter, this is all pretty straightforward, but insofar as *true* statements about oneself are concerned, it is difficult to identify the doctrinal import of this observation. Any government regulation of true factual statements about oneself would usually implicate First Amendment concerns. But this is simply because the First Amendment—at least within the boundaries of what is traditionally deemed “freedom of speech”<sup>150</sup>—generally covers and substantially protects true speech,<sup>151</sup> typically for reasons, such as the pursuit of truth or the advancement of democratic self-government, that are unrelated to and often overshadow any autonomy-based interest in self-definition. This idea is reflected in Richard Fallon’s observation that “autonomy-based arguments seem unlikely to possess clear and uniquely determining power in very many [First Amendment] contexts,” since “the influence of autonomy would occur mostly in the background, not the foreground, and a number of competing values are likely to be in play.”<sup>152</sup>

As illustrated by the cocktail party example in the Introduction, however, we often lie about ourselves as a means of controlling how we portray ourselves to the world. Once we shift our view to the sorts of autobiographical lies proscribed under the Stolen Valor Act—knowing, false statements of empirically provable fact about oneself—the picture gets substantially murkier. For obvious reasons, traditional justifications for constitutionally protecting truthful speech drop out. And as discussed above, the typical arguments for protecting certain types of false speech usually drop out as well; concerns such as a chilling effect on protected speech and disruption of the marketplace of ideas are, for the most part, not implicated in any substantial way by regulation of autobiographical lies.<sup>153</sup>

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<sup>150</sup> As Frederick Schauer has noted, “speech” is an incredibly broad term, and the First Amendment simply “does not show up” in many situations involving what would commonly be considered “speech” (for example, securities violations, antitrust violations, or criminal solicitation). Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–74 (2004). Schauer observes that “if there exists a single theory that can explain the First Amendment’s coverage, it has not yet been found,” since “the existing justifications for a free speech principle cannot individually or collectively explain the First Amendment’s development.” *Id.* at 1786–87.

<sup>151</sup> See, e.g., Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 311 (1983) (“Supreme Court decisions over the course of the twentieth century suggest that the Court shares the historical understanding that the first amendment protects truthful speech in all but the most extreme situations.”).

<sup>152</sup> Fallon, *supra* note 4, at 905.

<sup>153</sup> See *supra* Part II.B.

These sorts of lies, however, clearly serve the interest in individual self-definition, as they expand the boundaries of how we can define ourselves to others. If autobiographical lies were prohibited, then although I would still retain some freedom to choose what I tell people about myself, I would be barred from telling them something untrue: I can't claim to have played varsity football in high school when I didn't, or that I grew up in France when I was in fact raised in Des Moines. Failing to recognize First Amendment protection of such speech would thus allow the government to wrest some control of our self-definition project away from us; in deciding what to disclose about ourselves to others, we would be limited to working with true facts about ourselves. As Judge Kozinski put it, a significant aspect of the self-definition interest is "choosing when to tell the truth about oneself, when to conceal and *when to deceive*."<sup>154</sup>

One might question, however, why the self-definition interest should extend to lies at all. After all, one could argue that since false speech operates by deception, it causes harms that true speech (or speech that is not demonstrably false) does not implicate—harms that might justify excluding false speech from the realm of "legitimate" self-defining speech. Truthful autobiographical statements, however, are often as deceptive as false ones. For example, people often select the true facts they disclose about themselves in order to create a false impression for a particular audience: A college student may talk exclusively with his parents about his school work to give them the impression that he is hardworking and ambitious, even though he may in fact be lazy and unmotivated, or someone looking to impress a date might ramble on about his charitable work without disclosing that the work was in fact court-ordered community service.

Indeed, the self-definition interest, by its very nature, *assumes* some element of deception.<sup>155</sup> As noted above, we constantly craft different personas to present to different audiences. We want our parents to view us in one way, our friends to view us in another way, and

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<sup>154</sup> *United States v. Alvarez*, 638 F.3d 666, 675 (9th Cir. 2011) (emphasis added), *denying reh'g* 617 F.3d 1198 (9th Cir. 2010); *see also id.* at 674 ("Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all.").

<sup>155</sup> Generally speaking, deception is ubiquitous in human behavior and society. It is "a crucial dimension of all human associations, lurking in the background of relationships between parents and children, husbands and wives, employers and employees, professionals and their patients, governments and their citizens." DAVID LIVINGSTONE SMITH, *WHY WE LIE* 12 (2004). The ubiquity of deception is reflected not just in the things we say, but also in the clothes we wear, the cosmetic enhancements we use, and the social conventions we follow. *Id.* at 16–18; *see also* Anita L. Allen, *Lying To Protect Privacy*, 44 *VILL. L. REV.* 161, 165–67 (1999) (detailing how "[p]eople lie all the time").



so forth, and we calibrate the things we say—true or false—accordingly. It thus seems incorrect to say that only true speech legitimately advances the self-definition interest. Although it may often be subtle, deception in some form is pervasive in crafting our public personas, and autobiographical lies advance the self-definition interest as much as true statements.<sup>156</sup>

At this point, I should clarify that in characterizing autobiographical lies as advancing the self-definition interest, I do not make any claims regarding the *morality* of any such lies. As a general matter, we value honesty as a moral virtue and most people consider lying, in nearly all of its forms, to be wrongful. But of course, the First Amendment protects all sorts of expression that many deem immoral, like hate speech or ultraviolent video games. So to say that autobiographical lies might advance a protected First Amendment interest is not to say that they are morally right; indeed, many would disapprove of such speech and subject the speaker to social censure as a result. Thus, when I refer to the self-definition interest as rooted in autonomy values, I am not referring to autonomy in a strictly deontological, Kantian sense.<sup>157</sup> Rather, I refer to a more pragmatic conception of autonomy based on the simple and deeply rooted<sup>158</sup> anti-paternalist principle that each person is entitled to a limited

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<sup>156</sup> At the moment, I only mean to establish that the self-definition interest is implicated by false speech as well as true speech. Of course, the harms associated with autobiographical lies might, in a particular case, trump any self-definitional value of such speech. I discuss this issue at length below. See *infra* Part IV.A.2.

<sup>157</sup> See Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1113–15 (2006) (describing the shortcomings of a purely Kantian account for excluding lies from First Amendment protection). Under Kant's view of autonomy, lying in any form is a clear moral offense, since it undermines the autonomy of others by manipulating them to serve the speaker's own ends. "Tricking" the listener by telling her an autobiographical lie would thus not be deemed an exercise of the speaker's autonomy; rather, it would be tantamount to imposing "mental slavery" on the listener, casting the listener as the speaker's instrument and denying her the freedom to pursue her own ends. David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354–55 (1991) (noting that "lying is wrong because it violates human autonomy," as it "forces the victim to pursue the speaker's objectives instead of the victim's own objectives"); see also Redish, *supra* note 99, at 627 (stating that "[t]he dissemination of undisputedly false factual information" is not a "valid means of aiding private self-government, since such information cannot be thought to provide legitimate guidance to individual decisionmaking"). Indeed, Kant famously argued that one has a moral duty to respond truthfully even if asked by a murderer for the whereabouts of his victim. Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 534 (2011).

<sup>158</sup> See Fallon, *supra* note 4, at 902–03 ("Autonomy is an ideal with distinctive importance in modern life. In the cacophony of pluralist culture, the 'idea has entered very deep' that every person possesses her own originality, and that it is of 'crucial moral importance' for each to lead a life that is distinctively self-made.").

sphere within which she is free from external coercion or interference, the bounds of which are defined by the extent to which her actions result in cognizable harm to others.<sup>159</sup>

Evaluating the constitutional status of the sorts of autobiographical lies proscribed under the Stolen Valor Act thus uniquely isolates the autonomy-based self-definition interest from other rationales for protecting speech and forces courts to consider the extent to which this interest carries any constitutional weight. And if one takes at face value the Supreme Court's frequent endorsement of autonomy-based rationales for the First Amendment and its case law emphasizing the individual's right to dictate his own speech, then courts evaluating regulations of such speech should recognize that the self-definition interest carries some degree of constitutional weight that must be accounted for in their analyses.

### *B. The Doctrinal Basis for Recognizing the Self-Definition Interest*

The general idea that the First Amendment protects speech in order to preserve individual autonomy and promote self-fulfillment has long been reflected in the Supreme Court's First Amendment jurisprudence. Probably the best-known early articulation of this idea comes from Justice Brandeis's famous concurrence in *Whitney v. California*:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.<sup>160</sup>

The Court has since frequently emphasized the significance of autonomy interests in explaining the basis for the First Amendment's protection of speech. For example, in *Cohen v. California*, the Court observed that the First Amendment was "designed and intended to remove governmental restraints from the arena of public discussion"

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<sup>159</sup> *Id.* at 890 ("Ascriptive autonomy entails sovereignty within a sphere bounded by the requirement of respect for the rights of others." (footnote omitted)). Fallon distinguishes between "descriptive autonomy," which focuses on individuals' ability to act in an informed and rational manner, and "ascriptive autonomy," a more anti-paternalist concept of autonomy that rests on individuals' right to make their own decisions, even if ill-considered or unwise. *Id.* at 886–93. The view of autonomy I adopt here basically tracks Fallon's conception of "ascriptive autonomy." Another useful point of comparison is Mill's "harm principle" that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." MILL, *supra* note 103, at 80.

<sup>160</sup> 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

based on “the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”<sup>161</sup> And more recently, in *Bose Corp. v. Consumers Union of United States, Inc.*, the Court stated that “[t]he First Amendment presupposes that the freedom to speak one’s mind is . . . an aspect of individual liberty—and thus a good unto itself.”<sup>162</sup>

Out of this often hazy rhetoric regarding the importance of autonomy interests to the protection of speech,<sup>163</sup> the Court has singled out the interest in individual self-expression as a discrete value protected by the First Amendment. In *Police Department of Chicago v. Mosley*, Justice Marshall, writing for the Court, stated that “our people are guaranteed the right to express any thought, free from government censorship,” in order “to assure self-fulfillment for each individual.”<sup>164</sup> A few years later, in *First National Bank of Boston v. Bellotti*, the Court stated that “[t]he individual’s interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion.”<sup>165</sup> More recently, the Court observed that “[i]t is through speech that our convictions and beliefs are . . . expressed [ ] and tested.”<sup>166</sup>

The interest in self-definition can be viewed as a form of this autonomy-based interest in self-expression, reflecting the Court’s observation that “[i]t is through speech that our personalities are

<sup>161</sup> 403 U.S. 15, 24 (1971).

<sup>162</sup> 466 U.S. 485, 503 (1984); *see also* *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”).

<sup>163</sup> The Court is often neither clear nor systematic in delineating the principles underlying the First Amendment, blurring the lines between truth-seeking rationales, democracy-advancing rationales, and autonomy-based rationales. For example, the *Whitney* passage quoted above is immediately followed by Brandeis’s observation that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth” and that “public discussion is a political duty.” 274 U.S. at 375. And the passage quoted from *Cohen* could also be read to suggest a democracy-based view of the First Amendment. *See* 403 U.S. at 24.

<sup>164</sup> 408 U.S. 92, 96 (1972); *see also* *Procnunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (“The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”).

<sup>165</sup> 435 U.S. 765, 777 n.12 (1978); *see also* *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 534 n.2 (1980) (observing that in addition to advancing the discovery of truth and promoting democratic self-government, “[f]reedom of speech also protects the individual’s interest in self-expression”); *Citizens United v. FEC*, 130 S. Ct. 876, 972 (2010) (Stevens, J., concurring in part and dissenting in part) (“One fundamental concern of the First Amendment is to ‘protect the individual’s interest in self-expression.’” (alteration in original) (quoting *Consol. Edison, supra*)).

<sup>166</sup> *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 817 (2000).

formed and expressed.”<sup>167</sup> But although the Court has often characterized the protection of individual self-expression as a significant First Amendment concern, it has not, as a general matter, expressly centered its constitutional analyses around this interest. Rather, the Court has typically called upon the interest merely to provide additional support for its primary arguments or to add a rhetorical flourish to its assertions.<sup>168</sup>

This is consistent with Fallon’s observation that autonomy-based arguments often recede into the background, since other, more significant First Amendment values are frequently at stake in a given case.<sup>169</sup> And on a theoretical level, this observation makes some sense; as noted above, it is often difficult to draw clear boundaries when working with autonomy-based theories of the First Amendment, since nearly all human conduct can be characterized, to some extent, as implicating autonomy interests.<sup>170</sup> It may be that other traditional First Amendment values such as the pursuit of truth or the promotion of democratic self-governance typically carry greater constitutional weight than autonomy-based values simply because they are more uniquely tied to the particular nature of speech or are more concretely connected to the underlying system of government contemplated by the Constitution. Indeed, it may be that autonomy-based interests do substantial analytical work primarily in situations where such interests are strongly implicated and other, more concrete constitutional values are not squarely implicated.<sup>171</sup>

Nevertheless, when one digs beneath the surface of the Court’s First Amendment jurisprudence, the roots of a constitutional interest in individual self-definition can be clearly discerned. Take, for example, the Court’s cases addressing the issue of compelled speech. In *West Virginia Board of Education v. Barnette*—where the Court

<sup>167</sup> *Id.* at 817.

<sup>168</sup> For example, *Bellotti* and *Consolidated Edison* dealt with state restrictions on corporate speech. In striking these restrictions down, the Court relied primarily on truth- and democracy-based concerns with the restrictions, referring to the self-expression interest only in footnotes. See *Bellotti*, 435 U.S. at 776–78; *Consol. Edison Co.*, 447 U.S. at 533–35. It is also difficult to identify specifically how the self-expression interest concretely impacted the analyses in *Mosley* and *Playboy*, apart from its rhetorical value.

<sup>169</sup> See Fallon, *supra* note 4, at 905.

<sup>170</sup> See *supra* notes 145–46 and accompanying text.

<sup>171</sup> In a similar vein, Fallon notes that

treating autonomy as a value of constitutional status does not imply that every case will be decided in such a way as to respect or promote autonomy or that regulation that arguably enhances autonomy is always permissible. To credit autonomy as a constitutional value means that autonomy is one of the values that doctrinal rules should be crafted to protect, and that autonomy might guide doctrinal implementation or development in doubtful cases.

Fallon, *supra* note 4, at 904.

deemed mandatory recitation of the Pledge of Allegiance in schools unconstitutional—the essence of the Court’s reasoning was that the First Amendment “guards the individual’s right to speak his own mind,” which includes the ability to refrain from saying something he does not agree with.<sup>172</sup> The Court framed its analysis at the outset in terms that suggest a self-definition interest, characterizing the speaker’s interest as a “right of self-determination in matters that touch individual opinion and personal attitude.”<sup>173</sup>

When viewed through the lens of this formulation, the Court’s rationale in reaching its conclusion strongly suggests that the interest in individual self-definition warrants at least some degree of constitutional protection. Because each person possesses a right to “self-determin[e]”<sup>174</sup> her own identity by speech, the government cannot force her to say something she doesn’t want to say; such compelled speech hijacks this interest by forcing her to adopt a public persona that she does not want. Although the government could presumably argue that the speaker is still free to agree or disagree with the compelled speech in her own mind, this, in the Court’s view, is insufficient: An individual’s right to “freedom of mind” necessarily includes the right to publicly define oneself via one’s speech in the way that one chooses.<sup>175</sup> Thus, by forcing someone to, say, recite the Pledge of Allegiance or display a “Live Free or Die” license plate on her car, the government wrests away the individual’s control over her own identity and forces her to adopt, against her will, a public persona that parrots the state’s ideological message.<sup>176</sup> The Court has made clear that such co-opting of individuals’ self-definition interest violates the First Amendment.

The self-definition interest is also reflected in the Court’s expressive association jurisprudence, which touches on similar issues of compelled speech. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,<sup>177</sup> the Court unanimously held that Massachusetts’s public accommodations law could not constitutionally force the orga-

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<sup>172</sup> 319 U.S. 624, 634 (1943).

<sup>173</sup> *Id.* at 631.

<sup>174</sup> *Id.*

<sup>175</sup> See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’” (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943))).

<sup>176</sup> See *id.* at 713 (holding that the government cannot “constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public”).

<sup>177</sup> 515 U.S. 557 (1995).

nizer of a St. Patrick's Day parade to include the Irish-American Gay, Lesbian, and Bisexual Group of Boston in its parade. Emphasizing the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message,"<sup>178</sup> the Court observed that the group organizing the parade expresses itself by "select[ing] the expressive units of the parade from potential participants" and that doing so is tantamount to "invok[ing] its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another."<sup>179</sup> In *Boy Scouts of America v. Dale*,<sup>180</sup> the Court similarly deemed unconstitutional the forced inclusion of an openly gay member into the Boy Scouts, characterizing such action as tantamount to compelled speech. In the Court's view, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior"—a message that the Boy Scouts did not support.<sup>181</sup>

The Court's reasoning in these cases therefore reflects an understanding that the interest in individual self-definition carries some constitutional weight under the First Amendment: At a certain point, the government cannot constitutionally interfere with an individual's right to define himself by his own speech. Thus, an individual cannot be forced to act as a public "billboard" for an ideological message with which he does not agree;<sup>182</sup> he must, within limits, be free to craft his own public persona by saying what he pleases. Similarly, an expressive association cannot be forced to accept members that, by their presence, contradict the association's own self-definitional goals; the association is entitled to control how it defines itself to the world. As the *Barnette* Court observed, these sorts of infringements of an individual's right to dictate the contours of his public persona "invade[ ] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>183</sup>

Thus, the roots of the self-definition interest are easily discerned within the Supreme Court's First Amendment jurisprudence. Although this particular interest often overlaps with traditional

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<sup>178</sup> *Id.* at 573.

<sup>179</sup> *Id.* at 574.

<sup>180</sup> 530 U.S. 640 (2000).

<sup>181</sup> *Id.* at 653.

<sup>182</sup> *Wooley v. Maynard*, 430 U.S. at 715 (describing a "Live Free or Die" license plate as a "'mobile billboard' for the State's ideological message").

<sup>183</sup> *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

truth- or democracy-based rationales for protecting speech and may be overshadowed by them, the Supreme Court's rhetoric and analyses indicate that the interest does carry distinct constitutional weight. The obvious next question, then, is *how much weight* the interest carries when balanced against the government's regulatory interests.

### C. *A Privacy Interest or a First Amendment Interest?*

Before moving on to this question, however, I want to address the suggestion, raised by Judge Jones in *Robbins*, that the autonomy-based concerns associated with regulations such as the Stolen Valor Act are better addressed under the constitutional rubric of *privacy* rather than the First Amendment. Under this view, the government's ability to regulate certain autobiographical lies may be limited not because of some speech-based right to define oneself in the way one pleases, but simply because the government cannot constitutionally interfere with "wholly private interactions."<sup>184</sup> According to Judge Jones, the Constitution's protection of privacy might limit the sorts of slippery slope scenarios outlined in *Alvarez*, such as "the criminalization of lying about such matters as one's weight or age or smoking habits."<sup>185</sup>

"Privacy," of course, is a highly ambiguous term that can mean all sorts of things. Indeed, under its broadest meaning—a general desire to be left alone—it is essentially synonymous with "autonomy," allowing one to characterize *any* autonomy-based interest, including all speech-based autonomy interests, as based in "privacy."<sup>186</sup> But Judge Jones distinguishes privacy interests from First Amendment interests, making clear that this is not the definition he has in mind.<sup>187</sup> Rather, his reference to "wholly private interactions" suggests that when he discusses privacy rights, he is referring to one's right to be free from government regulation of one's most intimate affairs.

Judge Jones supported his assertion by citing the Supreme Court's decision in *Stanley v. Georgia*,<sup>188</sup> where the Court deemed

<sup>184</sup> United States v. Robbins, 759 F. Supp. 2d 815, 821 (W.D. Va. 2011).

<sup>185</sup> *Id.*

<sup>186</sup> See TRIBE, *supra* note 144, at 888–89 (describing the general lack of clarity in defining "privacy" and observing that "[a] concept in danger of embracing everything is a concept in danger of conveying nothing"). Tribe outlines a broad conception of "privacy" and "personhood" rights that encompasses terms like "autonomy" and "identity," noting that these rights manifest themselves through a wide array of different constitutional protections. *Id.*; see *infra* note 253 and accompanying text (discussing constitutional protections of "personhood").

<sup>187</sup> *Robbins*, 759 F. Supp. 2d at 821 (distinguishing "the Constitution's privacy protection" from the First Amendment issue raised in the case).

<sup>188</sup> 394 U.S. 557 (1969).

unconstitutional a Georgia statute criminalizing the private possession of obscene material in one's home. In *Stanley*, the Court identified two distinct constitutional interests implicated by the statute: first, a First Amendment right "to receive information and ideas, regardless of their social worth," and second, a right against "unwanted governmental intrusions into one's privacy."<sup>189</sup> The Court combined these two interests into a hybrid First Amendment and privacy right: "the right to read or observe what [one] pleases . . . in the privacy of [one's] own home."<sup>190</sup> It concluded that criminalizing the mere possession of obscene material in one's own home violated this right, since such regulation was tantamount to "giving government the power to control men's minds."<sup>191</sup>

The reasoning of *Stanley*, however, does not comfortably apply to government regulation of autobiographical lies. The touchstone of the *Stanley* Court's reasoning is that the *recipient* of speech is entitled to a limited zone of privacy, such as his own home, within which he is free to read, observe, or listen to whatever speech he pleases.<sup>192</sup> The present question, however, revolves around the *speaker* and his ability to *disseminate* autobiographical lies. Thus, someone like Alvarez cannot be compared to Stanley, who was merely consuming obscene information and ideas in his own home. Rather, Alvarez is best compared to those who *distributed* the obscene materials in question, and the Court has clearly distinguished between the dissemination of obscene speech, which the government can regulate broadly,<sup>193</sup> and the consumption of such speech, which is subject to the constitutional boundaries outlined in *Stanley*.<sup>194</sup> Thus, while *Stanley* holds that privacy concerns may protect, within certain limits, a person's ability to consume any low-value speech he pleases, it does *not* support the proposition that the same privacy concerns justify protecting one's ability to disseminate such speech.

Even if *Stanley* does not reach the present issue, however, could the Constitution's protection of privacy *ever* extend to the dissemination of autobiographical lies? I do think there is at least one scenario

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<sup>189</sup> *Id.* at 564.

<sup>190</sup> *Id.* at 565.

<sup>191</sup> *Id.*

<sup>192</sup> There are some limits to this principle, most notably in the case of child pornography. See *Osborne v. Ohio*, 495 U.S. 103, 108–11 (1990) (deeming an Ohio statute criminalizing possession of child pornography constitutional "[g]iven the importance of the State's interest in protecting the victims of child pornography").

<sup>193</sup> See, e.g., *Smith v. California*, 361 U.S. 147, 152 (1959) (observing, in a case dealing with the dissemination of obscenity, that "obscene speech and writings are not protected" by the First Amendment).

<sup>194</sup> *Stanley*, 394 U.S. at 565–68.



where this could be the case: if the government prohibited such lies, made in private, between close relations (for example, telling your spouse that you were working late when you were actually out with friends, or telling your mother that you've quit smoking). The prevailing instinct as to why such a regulation might be unconstitutional may well be privacy concerns—the idea that there exists a certain sphere of intimate communication within which the government cannot regulate—rather than the limitation of people's interest in defining their own personas.

Outside of this narrow category of intimate speech not intended for broad dissemination, however, I don't think the privacy rubric fully captures what makes us uneasy about the government's regulation of autobiographical lies. Many would feel uncomfortable about a law that would prohibit, say, falsely stating to strangers at a bar that you were the valedictorian of your high school class or claiming on your Match.com profile that you've never been married when you've in fact been divorced twice. But the root of this uneasiness isn't really premised on the government's invasion of our *privacy*. After all, this sort of speech is *meant* to be broadcast openly, so it's difficult to frame such concern in terms of the government impinging upon an intimate communicative sphere. Rather, this uneasiness seems rooted more in the government's restriction of our self-definition interest by limiting our freedom to control the ways in which we define ourselves to others.<sup>195</sup>

So while privacy concerns might be implicated in some cases where the government regulates autobiographical lies, I don't think they fully capture the source of our discomfort with such regulation. In many cases, we would be uncomfortable with regulation of autobiographical lies not for privacy reasons, but rather for reasons related to our autonomy interests as speakers—we are uneasy because the regulation limits our ability to construct our own public personas via speech. The fact that this First Amendment interest may, in some cases, overlap with privacy concerns does not change the fact that it carries significant, independent weight in many other cases. Thus, we do need to examine government regulation of autobiographical lies through the lens of a First Amendment interest in self-definition.

I don't intend to imply that there is a clear answer here. As I've noted, "privacy" is a slippery concept, and the distinction between a privacy interest and a First Amendment interest may be more about

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<sup>195</sup> This distinction parallels Tribe's distinction between what he calls the "inward-looking face of privacy"—which is based on "secrecy, sanctuary, or seclusion"—and the "outward-looking aspects of self." TRIBE, *supra* note 144, at 887.

intuition than anything else. Nor do I mean to say that the interest in self-definition is completely unrelated to privacy interests; indeed, as I discuss below, both interests are linked to a meta-interest in individual personhood that pervades the Bill of Rights.<sup>196</sup> I do think, however, that the rubric of privacy, at least as outlined in Judge Jones's opinion and in *Stanley*, does not fully capture the particular reasons why government regulation of the sorts of autobiographical lies proscribed under the Stolen Valor Act may be deemed unconstitutional.<sup>197</sup>

#### IV

##### THE CONTOURS OF THE SELF-DEFINITION INTEREST

In this Part, I will address the doctrinal and broader theoretical implications of recognizing a First Amendment interest in self-definition, including the question of how much constitutional weight the interest might carry when balanced against the government's regulatory interests. Again, my goal here is not to argue that the self-definition interest or autonomy-based interests in general constitute the primary theoretical basis for the First Amendment's protection of speech. Indeed, as I discussed earlier, this interest is often overshadowed by other, more robust First Amendment concerns, such as the pursuit of truth or promoting democratic self-government. When compared to these overlapping concerns, the constitutional force exerted by the self-definition interest is often relatively small and relegated to a secondary role in constitutional analyses.

Rather, my goal here is simply to assert that the interest in individual self-definition is a discrete First Amendment value that holds distinct constitutional weight apart from other constitutional concerns. And even though this interest might sometimes be relegated to the background, the Stolen Valor Act litigation reveals that in at least one particular area of speech regulation—the regulation of autobiographical lies—preserving the self-definition interest represents the *sole* constitutional basis for the protection of speech. My discussion below regarding the contours of the self-definition interest therefore focuses on the extent to which the government can regulate the sorts of autobiographical lies proscribed under the Stolen Valor Act.

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<sup>196</sup> See *infra* Part IV.C.

<sup>197</sup> And for what it's worth, all of the other opinions discussing the constitutionality of the Stolen Valor Act—including Chief Judge Kozinski's opinion in *Alvarez*, which specifically touched upon the self-definition interest—discussed the issue in speech terms rather than in privacy terms. See *supra* Part I.B (describing the Stolen Valor Act litigation); *supra* notes 137–40 and accompanying text (describing the *Alvarez* opinions of Chief Judge Kozinski and Judge Smith).

A. *The Weight of the Self-Definition Interest in First Amendment Analysis*

Of course, merely recognizing that the self-definition interest exerts some independent gravitational force in the constitutional analysis does not mean that this force cannot be overcome in the face of substantial regulatory concerns. So if we assume that the First Amendment protects, to some extent, one's interest in individual self-definition, exactly how much constitutional weight does this interest carry? Or, to frame it in different terms, when the government's regulatory concerns are taken into account, how much countervailing force does the self-definition interest exert when one assesses the regulation's constitutionality?

It is impossible to articulate in a categorical manner exactly how much constitutional weight the interest holds. This is a highly particularized inquiry—in each case, a court would need to examine both the speech in question and the government's interests in regulating that speech and, on this basis, determine whether the speaker's interest in self-definition outweighs the harms associated with his speech. I therefore do not presume to offer an all-encompassing checklist of factors or a concrete test for determining the exact circumstances under which the self-definition interest trumps the government's desire to regulate autobiographical lies. Rather, what follows is a series of observations regarding some of the major issues that will likely arise in evaluating the relative constitutional weight of the self-definition interest and some preliminary thoughts on how courts might approach these issues.

In order to frame the discussion below properly, however, I should clarify a few points regarding the doctrinal framework. Because I focus on government regulation of knowing autobiographical lies, my observations are focused primarily on determining the *boundaries* of the First Amendment—that is, the extent to which certain types of autobiographical lies are covered by the First Amendment in the first instance. As discussed above, although *Stevens* and *Brown* prescribe a historical analysis to determine the boundaries of the First Amendment, such an analysis is largely illusory and, as a practical matter, requires the same sort of cost-benefit balancing that the Court decried.<sup>198</sup> Formally speaking, *applying* the

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<sup>198</sup> Again, the *Stevens* Court criticized this sort of open-ended, fact-specific boundary analysis as “highly manipulable,” since it leaves courts with significant discretion to determine, on a case-by-case basis, what speech is worthy of constitutional protection. *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010). But doctrinal boundaries are *always* determined on a case-by-case basis. As noted above, the constitutional status of a particular category of speech often remains opaque until the government attempts to regulate

First Amendment—which involves the familiar levels of scrutiny, tailoring requirements, and so forth—kicks in only after this initial determination of First Amendment coverage is made.<sup>199</sup>

On a purely conceptual level, however, these formally separate analyses often bleed into each other. Assume, for instance, that a court upholds the government's regulation of certain knowingly false speech because it is supported by a strong government interest in protecting people against material harm. The court's rationale could be conceptualized in terms of the *boundaries* of the First Amendment: The minimal value of the speech is greatly outweighed by the government interest, so the First Amendment does not even come into play in the first instance. Alternatively, it could be conceptualized in terms of the *application* of the First Amendment: False speech warrants some protection under the First Amendment, but preventing material harm is so clearly a compelling government interest (and the regulation is sufficiently tailored in advancing that interest) that it trumps any value the speech might have. Under either analysis, the result and the basic rationale are the same: The regulation comports with the First Amendment because the speech in question has little relative value and is trumped by the powerful government interest in preventing material harm.

I thus do not take great pains to sort out the particulars of where exactly in the doctrinal analysis each of the following observations might apply. Although, again, the “boundary” analysis is my main focus, the self-definition interest may be equally relevant to the “application” analysis. My goal here is simply to elucidate some key conceptual factors germane to evaluating the constitutionality of government regulations burdening the interest in individual self-definition, particularly in the context of autobiographical lies.

### 1. *The Nature of the Speech*

Although I will focus my discussion on the subject of autobiographical lies, I want to make a few preliminary observations regarding the tricky issue of identifying “self-defining” speech. As

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that speech for the first time, and any novel speech regulation will necessarily involve discretion and judgment calls in the form of analogical reasoning. Like all aspects of First Amendment jurisprudence, the boundaries of the First Amendment are dictated via common law development, wherein some degree of indeterminacy and open-endedness is inevitable. See Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1202 (1988) (“Naturally, common law development, as apt a characterization as any for what the courts do with respect to the first amendment, cannot design the edifice in advance.”).

<sup>199</sup> See Schauer, *supra* note 150, at 1769–74 (distinguishing between the coverage and the protection of the First Amendment).

noted above,<sup>200</sup> this issue raises the sorts of line-drawing problems often associated with autonomy-based rationales for protecting speech. Doesn't nearly all speech, at least in the abstract, advance one's interest in self-definition? Couldn't *anything* that we say—not just the statements we make about ourselves—be deemed part of the project of crafting our public personas?<sup>201</sup>

These observations certainly ring true. We develop our personas through all sorts of things that we say. For example, I may loudly criticize a particular political candidate in order to broadcast my political leanings, or I might praise the successes of my rival to display magnanimity. Often the mere fact that I am the *source* of certain speech, even if that speech isn't directly about myself, plays a significant role in crafting how I am perceived by others. Thus, nearly all speech—not just autobiographical statements—can be said to implicate the self-definition interest in some way.

But some speech implicates this interest to a greater extent than other speech. For instance, autobiographical statements aimed at coloring the audience's psychological perception of the speaker,<sup>202</sup> at least as a general matter, will presumably implicate the self-definition interest in a more direct and meaningful way than purely informational statements about matters unrelated to the speaker or her views.<sup>203</sup> We can make such distinctions of degree based on our sense of the typical content of such statements, the contexts in which the statements are usually made, and the speaker's likely goals in these contexts.<sup>204</sup> This does not mean that informational speech regarding matters unrelated to the speaker could not, under certain circumstances, implicate the self-definition interest to a significant and meaningful degree; by nature, these sorts of determinations will be highly fact-specific. But in making these determinations, courts can rely on the sorts of intuitive judgments described above, looking closely at the

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<sup>200</sup> See *supra* note 145 and accompanying text (noting that nearly all speech and actions may be characterized as part of one's project of self-definition).

<sup>201</sup> A similar critique can be made of the "public discourse" view of the First Amendment, since "all communications more or less influence the content of public opinion." Robert Post, *Participatory Democracy as a Theory of Free Speech: A Reply*, 97 VA. L. REV. 617, 622 (2011).

<sup>202</sup> For example, telling strangers at a cocktail party that you own a house in the Hamptons or that you like to do charity work on the weekends.

<sup>203</sup> For example, telling someone that the bathroom is down the hall, or that the cherry blossoms in the park have started to bloom. Again, this is not to say that such informational speech does not advance the self-definition interest at all—as noted earlier, nearly all speech can be said to implicate the interest to some extent.

<sup>204</sup> Cf. Post, *supra* note 201, at 622 (similarly arguing that "there are normative definitions of role that underlie many judgments concerning the boundaries of public discourse").

content of the statement, the surrounding context, and the likely goals of the speaker.

Thus, to recognize that nearly all speech might implicate the self-definition interest to some extent does not render this interest meaningless in a constitutional analysis, since the extent to which the particular speech in question implicates the interest can vary widely. And given that the self-definition interest, even at its zenith, often takes only secondary analytical importance where more robust constitutional values are at stake, one can safely conclude that in cases where the speech in question implicates the self-definition interest only to a limited extent, the interest is unlikely to carry much (if any) analytical weight against the regulatory interests advanced by the government.<sup>205</sup>

Having made these observations regarding the nature of the speech in question, I now focus my analysis exclusively on one particular category of speech: knowing, factual lies about oneself that are intended to influence one's public perception (that is, the sorts of autobiographical lies that are proscribed under the Stolen Valor Act). I focus on such autobiographical lies for two reasons. First, this category of speech, by definition, implicates the self-definition interest to a significant degree, thus allowing for a deeper examination of how much constitutional force this interest might wield in the face of government regulation. Second, as noted above,<sup>206</sup> this category of speech—because it dwells at the murky boundaries of the First Amendment's coverage—uniquely isolates the self-definition interest from other constitutional interests, making regulation of such speech a useful test case for exploring the full dimensions of the interest.

## 2. *Harm and the Government's Regulatory Interest*

Under what circumstances can the government regulate the sorts of autobiographical lies proscribed under the Stolen Valor Act? Speech, of course, can cause great harm; as Harry Wellington noted, it can “offend, injure reputation, fan prejudice or passion, and ignite the world.”<sup>207</sup> The underlying premise of the First Amendment, however, is that speech is entitled to greater immunity from government regulation than other forms of human conduct.<sup>208</sup> At what point, then, do the government's regulatory interests trump the First Amendment

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<sup>205</sup> Cf. Fallon, *supra* note 4, at 905 (“[A]utonomy-based arguments seem unlikely to possess clear and uniquely determining power in very many contexts.”).

<sup>206</sup> See *supra* Part II.B (examining possible rationales for the protection of autobiographical lies).

<sup>207</sup> Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106 (1979).

<sup>208</sup> STONE ET AL., *supra* note 77, at 9.

interest in self-definition? What sorts of actual or potential harm must be at stake?

These questions cannot easily be answered in an abstract manner. There are infinite potential harms against which the government may choose to regulate and countless variations and forms that these harms and regulatory interests can take. But while it may be impossible to create any sort of concrete, clearly delineated scale against which to measure the government's regulatory interest, a number of principles may be useful in guiding courts tasked with evaluating the constitutionality of statutes like the Stolen Valor Act.

Within the universe of autobiographical lies, we can derive some of these principles from the current legal landscape. For example, any autobiographical lie that one makes while testifying under oath would constitute perjury, which has long been recognized as falling outside the scope of the First Amendment.<sup>209</sup> Similarly, an autobiographical lie made to a federal investigator would run afoul of 18 U.S.C. § 1001, which prohibits making false statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch,"<sup>210</sup> and there appears to be little debate regarding the constitutionality, at least under the First Amendment, of this longstanding statute.<sup>211</sup> These data points highlight the government's uniquely strong regulatory interest in preserving the integrity of its own institutions,<sup>212</sup> and if regulation of autobiographical lies can be construed as serving such a regulatory interest, the government's interest likely trumps any interest in individual self-definition tied to the speech in question.

Another category of false speech that is clearly excluded from the First Amendment's coverage is fraud.<sup>213</sup> If I were to falsely claim that I own valuable real estate and "sell" it to someone on this basis (thereby tricking them out of their hard-earned money), then my autobiographical lie would clearly amount to fraud that is not entitled to any First Amendment protection, regardless of how much

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<sup>209</sup> See, e.g., *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 n.10 (1961) (observing that an all-inclusive reading of the First Amendment "cannot be reconciled with the law relating to . . . perjury").

<sup>210</sup> 18 U.S.C. § 1001 (2006).

<sup>211</sup> See, e.g., *Clipper Express v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body."). Many states have similar provisions. See, e.g., N.Y. PENAL LAW § 190.23 (2000); N.C. GEN. STAT. ANN. § 14-225 (2000).

<sup>212</sup> See, e.g., Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515, 1522–23 (2009) (describing perjury and obstruction as "serious crimes that can undermine the integrity of the courts and the criminal justice system as a whole").

<sup>213</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

“self-definition” value my speech might carry. Contrast this, however, with the example presented in the Introduction of this Article: lying about having seen “The Godfather” in order to impress people at a party. If the government were to prohibit that sort of autobiographical lie solely on the ground that lies are generally immoral, then if the self-definition interest has any constitutional weight at all, it should surely apply to invalidate such a law.<sup>214</sup> What distinguishes the two scenarios is the presence of material harm (or a reasonable risk of such harm); indeed, the established fraud exception to the First Amendment presumably does not apply in the absence of any such harm.<sup>215</sup>

A significant factor in evaluating the government’s regulatory interest might therefore be whether the effect or intended effect of the speech in question can be characterized as material or purely psychological in nature. In other words, was the lie in question aimed at procuring some sort of material advantage, monetary or otherwise, or was it made solely in order to influence the speaker’s psychological standing with others?<sup>216</sup> If one pictures this as a spectrum, defrauding people out of their money through false claims of property ownership would sit on one extreme, while lying about having seen a movie to win the approval of social acquaintances would sit on the other. This idea can be conceptualized as a reflection of Mill’s harm principle: Autobiographical lies are constitutionally protected as long as they do not result in colorable material harm to others.<sup>217</sup>

This distinction between material and psychological effects makes sense given the nature of the self-definition interest. The interest is inextricably tied to the ways in which we are perceived by others; indeed, the *fundamental goal* of crafting one’s public persona through one’s speech is to influence and manage these perceptions. Thus, to the extent that autobiographical lies advance a constitutionally

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<sup>214</sup> One might argue that even in this scenario, the self-definitional value of autobiographical lies is simply too modest to trump even the minimal harms caused by such lies, such as interfering with people’s ability to evaluate speakers accurately or to select their friends. Such a position, however, is difficult to justify. As discussed above, the idea that the self-definition interest carries meaningful constitutional value has strong roots in Supreme Court jurisprudence, *see supra* Part III.B, and false speech serves this interest as much as true speech, *see supra* Part III.A.2. I therefore cannot see how the minimal harm caused by the autobiographical lies in the “Godfather” example could trump the significant self-definitional value of the speech.

<sup>215</sup> *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 110, at 765 (5th ed. 1984) (“[T]he [fraud] plaintiff must have suffered substantial damage before the cause of action can arise.”); RESTATEMENT (SECOND) OF TORTS § 525 (1977) (stating that fraud defendants are liable “for pecuniary loss” to the plaintiff).

<sup>216</sup> Many thanks to Mark Tushnet for suggesting this formulation.

<sup>217</sup> *See supra* note 159 (quoting MILL, *supra* note 103, at 80, on the harm principle).



protected self-definition interest, it naturally follows that the purely psychological effects of such speech cannot, as a general matter, be constitutionally regulated, since such regulation would undermine the very basis for protecting such speech.

The same, however, cannot be said of any purely material advantages gained as a result of such lies. Influencing or seeking to influence the speaker's psychological standing in the eyes of others constitutes the essential mechanism by which the self-definitional interest in autobiographical lies is advanced. Gaining material advantage as a result of such lies, by contrast, represents a step beyond this basic mechanism. While it is difficult to conceptualize how autobiographical lies could advance the self-definition interest without affecting or seeking to affect the psychological beliefs of others, one can easily imagine scenarios in which such speech advances the speaker's self-definition interest without any accompanying material benefit (for example, lying about having seen a movie). Thus, broadly distinguishing regulations of autobiographical lies targeting material harms from those targeting purely psychological harms follows from the essential characteristics of a constitutionally protected interest in individual self-definition.<sup>218</sup>

Of course, outside of the extreme examples outlined above, there will likely be difficulties in applying this principle in practice. For example, what exactly constitutes "material harm"?<sup>219</sup> Loss of money

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<sup>218</sup> I do not mean to suggest that this distinction between material and psychological harm holds in *all* First Amendment contexts involving false speech. The Supreme Court has recognized the constitutionality—within certain boundaries—of "false light" invasion of privacy laws, which provide redress for "the mental distress from having been exposed to public view" in a false manner. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *id.* at 387–88 (holding that such laws must require that the defendant acted with "actual malice"); *see also* *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 248–51 (1974) (confirming *Hill's* holding in a false light case where the plaintiffs suffered "outrage, mental distress, shame, and humiliation"). I suggest only that this distinction makes sense in the particular context of regulations proscribing autobiographical lies that directly implicate the speaker's interest in individual self-definition. The speech in *Hill* and *Cantrell* did not directly implicate this interest; rather, those cases involved speech that distorted and commandeered *other people's* self-definition interest, which is not entitled to the same degree of constitutional protection. For further discussion of lies that implicate other people's self-definition interests, see *infra* Part IV.A.3.

<sup>219</sup> Eugene Volokh crystallized this issue in a series of insightful blog posts. *See* Eugene Volokh, *Fraud, Interference with Government Functions, and Lies About Yourself (Including Your Military Decorations)*, VOLOKH CONSPIRACY (Apr. 13, 2011, 5:37 PM), <http://volokh.com/2011/04/13/fraud-interference-with-government-functions-and-lies-about-yourself-including-your-military-decorations>; Eugene Volokh, *The First Amendment and Knowingly False Statements of Fact*, VOLOKH CONSPIRACY (Mar. 21, 2011, 4:27 PM), <http://volokh.com/2011/03/21/the-first-amendment-and-knowingly-false-statements-of-fact-2>. Volokh appears unconvinced that a meaningful constitutional distinction exists among all of the different harms that might result from autobiographical lies. But there seems to

or property would certainly qualify; so, presumably, would things like lost business opportunities. But what about tricking someone into offering you a job? Or lying your way into someone's bed? Or lying to get someone to vote for you in an election? Furthermore, even if we can classify certain harms as "material" in the abstract, it may be difficult to identify the point at which the harm may be recognized as a direct result of the autobiographical lie. What if, for example, an autobiographical lie leads to a long-term relationship with someone, which eventually leads to that person giving the speaker money, gifts, sex, and so forth? Is the causal link between the lie and any material harm sufficient to vitiate any constitutional protection for the speech in question?

These are certainly difficult and potentially complicated questions, and I do not delve into them in detail here. But I note that drawing these sorts of difficult lines through common law development is *de rigueur* within First Amendment jurisprudence,<sup>220</sup> which is ultimately premised on a bare-boned textual provision offering little meaningful guidance in itself and lacking a clear historical record of the Framers' intent.<sup>221</sup> Furthermore, courts are already well versed in dealing with similar issues in the context of tort cases; for example, in evaluating a negligence claim, the court must determine whether the plaintiff suffered an actionable injury and whether a sufficient causal connection existed between the defendant's actions and the alleged injury.<sup>222</sup> Thus, although drawing lines here may not be easy, I see no reason to believe that courts will be incapable of crafting workable doctrinal boundaries through common law development.<sup>223</sup>

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me a meaningful difference between the purely psychological "harm" resulting from the "Godfather" example discussed above—which causes no perceivable material loss—and a clearly material harm such as the loss of money. I certainly agree that distinguishing between "material" and "immaterial" harm outside of these extremes will likely be difficult, but as I note below, I see no reason to doubt courts' general ability to craft workable boundaries here.

<sup>220</sup> As Martin Redish observed, for all of the criticisms often leveled against balancing analyses, such analyses are widely accepted within First Amendment jurisprudence, since "any general rule of first amendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing." Redish, *supra* note 99, at 624. And while "such an analysis places a good deal of faith in the ability of judges to exercise their authority with wisdom and discretion, . . . that is what they are there for, and in any event we appear to have little choice." *Id.* at 625.

<sup>221</sup> See *STONE ET AL.*, *supra* note 77, at 6–7 ("Scholars have long puzzled over the actual intentions of the framers of the first amendment. . . . The framers themselves were unsure what a constitutional guarantee of 'freedom of the speech or of the press' would mean.").

<sup>222</sup> See *KEETON ET AL.*, *supra* note 215, § 30, at 164–65.

<sup>223</sup> I don't mean to imply that the line between "material" and "immaterial" harm here should be identical to the line used to differentiate actionable harms in, say, fraud or negligence cases; there may be good reasons to draw significantly different boundaries in this

### 3. *Impersonation Versus Mere Deception*

Some autobiographical lies involve simple deception—that is, merely making factual claims about oneself that are not true (like the “Godfather” example above). Others, however, involve *impersonation*—taking on another person’s identity and making statements on that person’s behalf.<sup>224</sup> Many jurisdictions have passed laws criminalizing impersonation. For example, New York criminalizes “impersonat[ing] another . . . with intent to obtain a benefit or to injure or defraud another,”<sup>225</sup> and California prohibits “credibly impersonat[ing] another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person.”<sup>226</sup> Thus, one question courts will likely confront in delineating the scope of the self-definition interest is whether it should matter, for constitutional purposes, whether the autobiographical lies subject to regulation involve impersonation as opposed to mere deception.

I see a significant First Amendment distinction between the government’s regulation of impersonation and its regulation of mere deception. While the First Amendment interest in individual self-definition might be implicated in cases of simple autobiographical deception, it is difficult to see how the interest extends to impersonation cases. The self-definition interest is rooted in one’s freedom, as an autonomous individual, to dictate the contours of one’s own public personas, and the First Amendment protects this interest to the extent that its exercise does not result in material harm to others. Impersonation, however, causes significant harm to *others’* self-definition interests in a way that simple deception does not. By claiming to be someone else, the false speaker commandeers that person’s persona and exploits it for his own ends, thereby robbing that person of his

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particular context. I only mean to emphasize that courts have undertaken analytically similar line-drawing exercises in other contexts.

<sup>224</sup> By “impersonation,” I refer specifically to taking on the identity of a specific, real-life individual, rather than, say, pretending to be an architect or a marine biologist. Many jurisdictions, including the federal government, have passed laws criminalizing the impersonation of, for example, government employees, *see, e.g.*, 18 U.S.C. § 912 (2006); N.Y. PENAL LAW § 190.25(3) (2000), or doctors, *see, e.g.*, N.Y. PENAL LAW § 190.26(3) (2000). The constitutionality of these regulations is not usually called into question, given the government’s compelling interests in, for example, ensuring the integrity of its own institutions, *see supra* notes 209–12 and accompanying text, or preventing the illegal distribution of prescription drugs, *see, e.g.*, N.Y. PENAL LAW § 190.26(3) (2000) (criminalizing impersonating a doctor by “communicat[ing] to a pharmacist an oral prescription which is required to be reduced to writing”).

<sup>225</sup> N.Y. PENAL LAW § 190.25(1) (2000).

<sup>226</sup> CAL. PENAL CODE § 528.5(a) (Supp. 2011).

ability to shape his own persona in the way he sees fit.<sup>227</sup> Indeed, this observation helps explain why defamatory autobiographical lies—for example, “I did drugs with Bill last week”—are not protected under the First Amendment;<sup>228</sup> one cannot constitutionally craft one’s own public persona by commandeering or falsely distorting someone else’s persona.<sup>229</sup>

Thus, to the extent an autobiographical lie can be characterized as impersonation rather than mere deception,<sup>230</sup> such a lie is not entitled to First Amendment protection. A person cannot promote his interest in developing his own persona by adopting and crafting another person’s persona. Such activity defeats, rather than advances, the general interest in self-definition.<sup>231</sup> Of course, situations may arise where the line between mere deception and impersonation is difficult to draw, but a person’s interest in self-definition does not include the right to violate another person’s similar interests by falsely assuming that person’s identity and speaking in his voice.

#### 4. *Structure of Regulation and Prophylaxis*

Another issue likely to arise in evaluating the constitutionality of regulations proscribing autobiographical lies is the extent to which such regulations must, in order to pass constitutional muster, require elements such as intent, causation, or harm. For example, the Ninth Circuit, in striking down the Stolen Valor Act, emphasized that it “lacks the critical materiality, intent to defraud, and injury elements.”<sup>232</sup> To what extent can the government regulate autobiograph-

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<sup>227</sup> This situation can be analogized to the compelled speech cases discussed above, where the government similarly commandeered the speaker’s public identity to broadcast its own message. See *supra* notes 172–76 and accompanying text.

<sup>228</sup> See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

<sup>229</sup> Of course, one is usually free to craft another person’s persona through *true* statements. For example, if you really did take drugs with Bill, then generally speaking, you can tell anyone about it, regardless of its negative effects on Bill’s public persona. When true statements are involved, the entrenched First Amendment principle of promoting the discovery of truth trumps other people’s self-definition interests.

<sup>230</sup> This does not include parody or satire; insofar as such speech cannot “reasonably be understood as describing actual facts,” it is generally protected under the First Amendment. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988).

<sup>231</sup> This observation resonates with the “right of publicity” in tort law, under which one can recover for unauthorized use of one’s name or likeness for commercial purposes. See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 *STAN. L. REV.* 1161, 1162 (2006); McKenna, *supra* note 3, at 279–93 (describing the infringement of publicity rights as a violation of “autonomous self-definition”).

<sup>232</sup> *United States v. Alvarez*, 617 F.3d 1198, 1212 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3141 (U.S. Oct. 17, 2011) (No. 11-210). As a doctrinal matter, these issues probably fit most naturally within the “tailoring” analysis associated with the application of the First Amendment, see, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009)

ical lies without explicitly requiring that the speech caused a material, cognizable harm, or that the speaker intended to cause such harm?

As discussed above, the interest in self-determination carries some degree of constitutional weight that can only be overcome by the government's regulatory interests in avoiding material harm. Thus, any regulation of autobiographical lies must have *some* nexus to the prevention of material harm in order to pass constitutional muster. The most direct way to establish such a nexus, of course, is to premise liability expressly on some form of actual or threatened material harm. The common law definition of fraud, for example, meets this description, since it requires plaintiffs to prove fraudulent intent, reliance, and damages.<sup>233</sup> The same can be said of criminal fraud statutes like the federal mail fraud statute, which requires "having devised or intending to devise any scheme or artifice to defraud."<sup>234</sup> Expressly requiring intent to cause material harm represents a sufficient nexus to justify imposition on the self-definition interest, even if no actual harm may be present.

But what if the regulation does *not* expressly require that the speech caused material harm or that the speaker intended to cause such harm? Can the requisite nexus between the regulation and a constitutionally regulable material harm be established without such express language? Again, the Stolen Valor Act is a clear example of this sort of regulation: In its current form,<sup>235</sup> the Act penalizes the mere act of lying without any express intent or harm requirement.

This question is ultimately tied to the First Amendment's overbreadth doctrine. The government is constitutionally entitled, to some extent, to develop bright-line prophylactic speech regulations that may cover some amount of protected speech, especially where a more targeted regulation might entail analyses that are difficult to administer.<sup>236</sup> These sorts of prophylactic speech regulations, however, may

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(content-based speech restrictions must be "narrowly tailored to serve a compelling government interest"), although the *Alvarez* majority notably discussed this issue in the context of the First Amendment boundary analysis, 617 F.3d at 1212.

<sup>233</sup> See RESTATEMENT (SECOND) OF TORTS § 525 (1977).

<sup>234</sup> 18 U.S.C. § 1341 (2006). The Supreme Court has interpreted this language to require a "scheme[ ] to deprive [people] of their money or property." *McNally v. United States*, 483 U.S. 350, 356 (1987).

<sup>235</sup> Representative Joseph Heck has recently proposed an amendment to the Act that would, among other things, add intent and scienter requirements. See H.R. 1775, 112th Cong. § 2(a) (2011) ("Whoever, with intent to obtain anything of value, knowingly makes a misrepresentation regarding his or her military service . . .").

<sup>236</sup> See *Hill v. Colorado*, 530 U.S. 703, 707–08, 729–30 (2000) (upholding a prophylactic regulation, applying within 100 feet of a health care facility, that forbids any person from "knowingly approach[ing]" within eight feet of another person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or

be deemed facially unconstitutional if their overbreadth is “real” and “substantial” in comparison to “the statute’s plainly legitimate sweep.”<sup>237</sup> In other words, such regulations may be deemed constitutionally overbroad if there is “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.”<sup>238</sup>

Thus, if the government regulates autobiographical lies without any express connection to material harm, the constitutionality of its regulation likely rests on the extent to which the speech in question is naturally tied to actual or threatened material harm. In other words, is the regulated speech, by nature, so closely related to such harm that the requisite nexus between speech and regulable harm can be presumed? For example, imagine that the government criminalizes intentional lies about one’s educational background without any sort of requirement that the speaker cause or intend to cause material harm. Such a regulation would likely be unconstitutional: One can imagine a wide range of circumstances under which such lies would cause no material harm, such as pretending to have a graduate degree simply to impress a stranger. Under such circumstances, there is an insufficient nexus to a particular material harm to justify trumping speakers’ interest in self-definition, and the regulation’s overbreadth should likely be deemed substantial.

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counseling with such other person” absent the listener’s consent (internal quotation marks omitted)).

<sup>237</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The Supreme Court has provided little guidance regarding the overbreadth doctrine beyond this vague standard, and overbreadth analyses remain highly indeterminate in nature. *See, e.g., id.* at 630 (Brennan, J., dissenting) (“[T]he Court makes no effort to define what it means by ‘substantial overbreadth.’”); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 *YALE L.J.* 853, 894–95 (1991) (suggesting contours for the overbreadth analysis but observing that “analysis of this kind has an irreducibly ad hoc quality” and an “irreducible component of policy”); Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 *WM. MITCHELL L. REV.* 773, 964 (2008) (“The terms ‘real’ and ‘substantial’ can fairly be described as themselves indeterminate, which not surprisingly explains why [post-*Broadrick*] overbreadth cases are so hard to reconcile with one another.”).

<sup>238</sup> *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800–01 (1984); *see also* Fallon, *supra* note 237, at 868 (describing the overbreadth doctrine’s role in combating the chilling effect on third-party speech rights). The overbreadth doctrine allows parties to challenge the facial validity of overbroad speech regulations even if their own conduct may be constitutionally regulated on an as-applied basis. *See, e.g., Broadrick*, 413 U.S. at 612 (discussing litigants’ ability to challenge a statute based on the potential that it may cause “others not before the court to refrain from constitutionally protected speech or expression”). It is therefore “an exception both to the traditional ‘as applied’ mode of judicial review and to the general rule that an individual has no standing to litigate the rights of third persons.” *STONE ET AL., supra* note 77, at 117.

Now, however, imagine that the government criminalizes intentionally lying about one's educational credentials to a prospective employer in the course of a job interview. Here, the particular speech and context identified are tailored in such a manner as to clearly implicate a particular material harm: deceiving an employer into hiring someone under false pretenses. Even without an express intent or harm element, a substantial nexus exists between the regulated speech and material harm. Of course, any government regulation that lacks a specific harm or intent requirement is still likely to cover some protected speech.<sup>239</sup> Not every lie to a potential employer about educational credentials will cause or is likely to cause harm: Maybe the speaker intentionally lied without intending to affect the hiring decision, and maybe the lie was so minor or so clearly outrageous that it could not have reasonably influenced the decision. But given the close connection between the regulated speech and the material harm in question, such a targeted regulation would likely pass constitutional muster.<sup>240</sup>

Thus, government regulation of autobiographical lies need not include an express connection to actual or threatened material harm to pass constitutional muster. The government has some constitutional flexibility to develop bright-line prophylactic speech regulations. Under the First Amendment's overbreadth doctrine, however, such regulations risk invalidation if the regulated speech is not, by its very nature, closely and directly tied to a particular material harm.

### B. *The Stolen Valor Act Revisited*

So how might the general principles outlined above apply to the Stolen Valor Act? Again, the statute prohibits any false

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<sup>239</sup> Perjury statutes, which generally do not include a causation or damages component, present a unique situation. It is well established that the government has a special interest in preserving the integrity of judicial proceedings. *See, e.g.,* *United States v. Mandujano*, 425 U.S. 564, 576 (1976) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative."). Such an interest would be harmed by the mere fact of the lie itself—even if, say, nobody reasonably could have believed what the speaker was saying. Thus, no causation or damages component is necessary, nor are any overbreadth concerns implicated; in this context, the lie itself constitutes the regulable harm. It is doubtful, however, whether the same principle could apply in situations outside of the unique context of the government policing its own institutions.

<sup>240</sup> A similar idea informs the common law concept of "slander per se." Under this doctrine, plaintiffs need not prove tangible harm if the slanderous statement imputed to them "a criminal offense"; "a loathsome disease"; a "matter incompatible with [their] business, trade, profession, or office"; or "serious sexual misconduct," since these sorts of slanderous statements, by their very nature, can be assumed to have caused material harm to the plaintiff's reputation. *RESTATEMENT (SECOND) OF TORTS* § 570 (1977).

representation that one has “been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States” or any other military honor.<sup>241</sup> As discussed above, the *Stevens* Court’s “historical” inquiry for determining the boundaries of the First Amendment is unhelpful, since one could locate some historical basis for protecting or not protecting this sort of speech based on the level of generality one chooses to define the interest and draw analogies.<sup>242</sup> Thus, despite the Court’s rhetoric to the contrary, determining whether the speech proscribed under the Act is covered by the First Amendment rests on weighing its constitutional value against the government’s regulatory interest. And for the reasons stated above, the only constitutional value such speech significantly promotes is the interest in individual self-definition—the interest in controlling the contours of one’s own public personas.<sup>243</sup>

It is clear that the proscribed speech implicates the self-definition interest: By forbidding people to lie about having received military honors, the government limits the extent to which they are able to define themselves to others.<sup>244</sup> Of course, this may seem silly on its face: Is it really a big deal if people can no longer lie about having received military medals? In evaluating speech regulations, however, one must not fall into the trap of evaluating the strength of the First Amendment concerns solely in terms of the perceived triviality of the speech in question.<sup>245</sup> The interest in telling *any* particular autobiographical lie, when viewed in isolation, is likely to appear trivial and unimportant. Collectively, however, these lies represent an important aspect of the constitutional interest in self-definition.

We now turn to the harm implicated by the statute. In both *Alvarez* and *Strandlof*, the government argued that the Act protects the reputation and meaning associated with military medals. As the district court in *Strandlof* observed, however, it is difficult to see how the government’s interest in preserving the significance of a particular

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<sup>241</sup> 18 U.S.C. 704(b) (2006).

<sup>242</sup> See *supra* note 83 and accompanying text (discussing the malleability of the historical record).

<sup>243</sup> See *supra* Part II.B (rejecting other rationales for protecting autobiographical lies).

<sup>244</sup> Furthermore, the Act proscribes mere deception, not impersonation. Although one could argue that the speakers here are impersonating war heroes, this is not the sort of direct impersonation that undermines the self-definition interest of others; the speaker is not commandeering and shaping a particular person’s public persona. See *supra* note 224 and accompanying text (distinguishing impersonation from simple deception).

<sup>245</sup> See *Cohen v. California*, 403 U.S. 15, 25 (1971) (“We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a [First Amendment] privilege, these fundamental societal values are truly implicated.”).



symbol represents a cognizable basis for restricting speech.<sup>246</sup> The government further argued that false claims of receiving military medals could undermine soldiers' motivation on the battlefield by "[d]iluting the meaning or significance of medals of honor."<sup>247</sup> Both the district court in *Strandlof* and the Ninth Circuit in *Alvarez*, however, found this assertion to lack any evidentiary support.<sup>248</sup>

The government could conceivably analogize its interest here to its interest in criminalizing perjury and false statements to federal officials, on the premise that regulating false speech concerning military medals is similarly a means of protecting the integrity of its own institutions. If one were to accept this characterization, then the absence of any express nexus to a material harm in the statute likely would not matter, since the lie itself—rather than a consequence of the lie—could be deemed the regulable harm.<sup>249</sup> Ultimately, however, I don't think this analogy holds. Perjury and lies to federal officials undermine the integrity of government institutions in a clear and direct manner, and these lies are made specifically by people in *direct interaction* with the institutions in question. The Stolen Valor Act, however, covers false military medal claims made by *anyone*, in any possible context, and any categorical assumption that these lies directly undermine the integrity of the military seems far too attenuated to be persuasive.

I think the government's strongest potential argument, identified by Mark Tushnet, is that the Act is "a prophylactic against the use of false assertions of having received military honors as part of a criminal

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<sup>246</sup> The court relied heavily on the Supreme Court's opinion in *Texas v. Johnson*, where the Court rejected the idea that "the government may permit designated symbols to be used to communicate only a limited set of messages." *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189–90 (D. Colo. 2010) (quoting *Texas v. Johnson*, 491 U.S. 397, 417 (1989)), *rev'd*, No. 10-1358, 2012 WL 247995 (10th Cir. Jan. 27, 2012). In reversing the district court, the Tenth Circuit referenced the government's "important—perhaps compelling—interest in preventing individuals from falsely claiming to have received military awards" and its "strong . . . interest in protecting the value of military honors." *United States v. Strandlof*, No. 10-1358, 2012 WL 247995, at \*17–18 (10th Cir. Jan. 27, 2012). Beyond that, however, the court did not discuss the government's interests in much detail, given its view that "the Stolen Valor Act simply does not encroach on any protected speech." *Id.* at \*17.

<sup>247</sup> *Strandlof*, 746 F. Supp. 2d at 1190.

<sup>248</sup> *Id.*; *United States v. Alvarez*, 617 F.3d 1198, 1217 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3141 (U.S. Oct. 17, 2011) (No. 11-210). The Tenth Circuit in *Strandlof* did not directly address this argument, which the government had abandoned on appeal. *Strandlof*, No. 10-1358, 2012 WL 247995, at \*39 n.21 (Holmes, J., dissenting).

<sup>249</sup> See *supra* note 239 (discussing the lack of causation or damages requirements in perjury statutes).

scheme to defraud or otherwise obtain material advantage.”<sup>250</sup> Based on this characterization, the government could argue that a sufficient nexus exists between the false speech delineated in the Act and clear material harms—such as, for example, fraudulent schemes to collect money from veteran organizations. In the end, however, I don’t think this characterization passes constitutional muster. There is, at best, a very loose fit between the broad category of speech regulated by the statute—lies about having received military honors—and tangible, material harms. While it is certainly possible that some will tell these lies in order to defraud people of money, many will lie simply to gain purely psychological benefits, such as being perceived by others in a more positive manner. Thus, given the extent to which the statute would compromise the protected First Amendment interest in self-definition, its overbreadth is substantial, and the Act should be deemed unconstitutionally overbroad.

The Supreme Court, of course, will soon have its say on the issue, but I am inclined to conclude that the Stolen Valor Act is an unconstitutional imposition on the protected First Amendment interest in individual self-definition.<sup>251</sup> The speech proscribed under the Act strongly implicates this interest, and it is difficult to identify any particular material harm naturally resulting from the speech that would trump the interest. It bears noting, however, that an amendment to the Act has recently been proposed that would, among other things, expressly limit liability to those who intended to “obtain anything of value”

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<sup>250</sup> Tushnet, *supra* note 90, at 14 n.67. As noted above, however, the Act’s legislative history indicates that Congress’s primary concern was preserving the “reputation and meaning” of military honors. *See supra* note 42. Although some of the Act’s sponsors referred to the risks of material harm associated with false claims regarding military honors, such concerns appeared to play only a secondary role in their arguments supporting the Act. For example, Representative John Salazar stated,

These frauds and these phonies have diminished the meaning and the honor of the recognitions received by our military heroes. In addition to diminishing the meaning, on several occasions phonies have used their stature as a decorated war hero to gain credibility that allows them to commit more serious frauds.

152 CONG. REC. H22,575 (daily ed. Dec. 6, 2006) (statement of Rep. John Salazar).

<sup>251</sup> If the proscribed speech is deemed to fall within the scope of the First Amendment, then the Act, as a content-based restriction on protected speech, would be subject to strict scrutiny. *See, e.g.,* Perry Ed. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45–46 (1983) (describing the stringent standards for content-based restrictions on expression). Under strict scrutiny, the Act would be upheld only if it were deemed narrowly tailored to advance a compelling government interest. *Id.* Given the observations above and the extremely high bar set by this standard, it appears highly unlikely that the Act would survive strict scrutiny.

through their misrepresentation.<sup>252</sup> Such an amendment would, in my view, greatly bolster the government's case for constitutionality.

### C. *Some Parting Observations Regarding the Self-Definition Interest*

One might question the ultimate value of identifying individual self-definition as a distinct interest protected under the First Amendment. After all, the self-definition interest recedes into the background in most cases, dominated by more robust, traditional First Amendment interests such as the pursuit of truth or the advancement of democratic self-government. Outside of the specific context of false statements of fact—in particular, the sorts of knowing, factual, autobiographical lies proscribed by the Stolen Valor Act—it is difficult to imagine many scenarios in which the weak gravitational force of the self-definition interest might play an outcome-determinative role in First Amendment analysis.

But cases like the Stolen Valor Act litigation provide a valuable perspective on First Amendment jurisprudence. They uniquely isolate the autonomy-based self-definition interest from other First Amendment interests, thus giving courts a rare opportunity to determine concretely, beyond mere rhetoric, the extent to which the preservation of individual autonomy is a meaningful First Amendment value. Regulations of autobiographical lies test the intuition that individuals are constitutionally entitled to some limited space within which they can dictate, without government interference, how they define themselves to others—a space that encompasses, to a certain extent, the freedom to lie about themselves. On a broader level, these regulations test the extent to which the First Amendment's protection of speech is meant to preserve autonomous self-expression, self-actualization, and self-fulfillment.

And if we take a step back and look at the Constitution as a whole, it makes sense to say that the interest in defining one's own persona merits constitutional protection. The Bill of Rights generally protects certain aspects of people's lives that are deemed essential to the idea of individual "personhood."<sup>253</sup> Thus, for example, the Free

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<sup>252</sup> H.R. 1775, 112th Cong. § 2(a) (2011). Along with adding express intent and scienter requirements, the proposed amendment would significantly broaden the statute's coverage to reach any "misrepresentation regarding . . . military service." H.R. 1775 § 2(a).

<sup>253</sup> See TRIBE, *supra* note 144, at 889 (defining "rights of privacy and personhood" as those concerned with the "preservation of those attributes of an individual which are irreducible in his selfhood" (internal quotation marks omitted)); *id.* at 886–990 (surveying the broad array of constitutional protections falling within this description); *cf.* Fallon, *supra* note 4, at 902 ("[R]ecognition of autonomy as a First Amendment value promotes coherence between the First Amendment and other constitutional provisions. As recent commentators have shown, autonomy concerns underlie constitutional doctrines involving

Exercise Clause dictates that, at least to a certain extent, the government cannot prohibit people from acting in conjunction with their religious beliefs;<sup>254</sup> an essential component of being an autonomous individual is the freedom to choose what to believe and to live one's life in accordance with such beliefs.<sup>255</sup> The Fourth Amendment dictates that individuals are entitled to a certain degree of physical privacy that the government can invade only under certain conditions; being an autonomous individual means having some personal space that is safe from unjustified government interference.<sup>256</sup> And under the Court's substantive due process jurisprudence, the government cannot constitutionally interfere with certain "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," since such decisions "involv[e] the most intimate and personal choices a person may make in a lifetime."<sup>257</sup> Such choices are "central to personal dignity and autonomy" because they involve "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."<sup>258</sup>

Having some degree of freedom to craft our public personas is just as essential to the idea of individual personhood as being able to choose and practice our fundamental beliefs, to maintain a private space free from unwarranted government intrusion, or to make

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privacy rights, equal protection, religious liberty, due process, and criminal procedure."); Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 175–76 (1982) (attributing expanded constitutional protection in the areas of free speech, due process, and religious liberty to "[t]he rise of autonomy as a fundamental value").

<sup>254</sup> Although current Supreme Court jurisprudence has significantly limited the scope of the Free Exercise Clause, see *Emp't Div. of Or. v. Smith*, 494 U.S. 872, 878–82 (1990) (generally denying Free Exercise Clause challenges to "neutral law[s] of general applicability" (internal quotation marks omitted)), certain contexts still exist in which the government cannot constitutionally penalize people for acting in a manner dictated by their religious beliefs. See *id.* at 881 (recognizing Free Exercise Clause challenges where "other constitutional protections" are in play); *id.* at 883–85 ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

<sup>255</sup> See, e.g., Alan E. Brownstein, *The Right Not To Be John Garvey*, 83 CORNELL L. REV. 767, 807 (1998) (reviewing JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996)) ("For serious believers, religion is one of the most self-defining and transformative decisions of human existence. Religious beliefs affect virtually all of the defining decisions of personhood.").

<sup>256</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 996–1002 (1982) (describing the Fourth Amendment as protecting the individual's "personhood" interest); Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 923 (2010) ("Much case law and commentary presumes . . . that the Fourth Amendment safeguards the 'personhood' property of the domicile.").

<sup>257</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>258</sup> *Id.*

intimate personal decisions.<sup>259</sup> Who we are as individuals cannot, by nature, be separated from who we portray ourselves to be. We cannot interact with each other *except* through the intermediary of constructed personas; to invoke a common metaphor, we wear a different mask for each particular person with whom we interact. These constantly changing personas are the product of a complicated combination of truth and lies, perception and reality, and fears and aspirations. And this includes the personas we create for ourselves: Like our public personas, our self-perception shifts and changes constantly—sometimes we lie to ourselves, sometimes we measure ourselves by our aspirations and perceptions rather than by reality, and so forth.<sup>260</sup> In fact, one could argue that no person possesses an “objectively true” identity or persona. That is, there is no “objective” face under all of the masks that we wear; rather, our very personhood is composed of *all of these disparate personas*—who we portray ourselves to be to different people and to ourselves. If this is the case, then one cannot conceive of an interest as essential to individual identity and autonomy as our interest in defining our various personas; these personas are, in a very real sense, *who we are*, even if they might be, to a certain extent, premised on deception.

### CONCLUSION

The Stolen Valor Act litigation represents an important test case for clarifying our basic understanding of the First Amendment. There is no strong reason why a First Amendment concerned solely with the discovery of truth or the promotion of democratic self-government would protect the sorts of autobiographical lies proscribed under the Act. But if we take the Supreme Court at its word and recognize that the First Amendment is designed, at least in part, to preserve individual autonomy, then it follows that such lies merit at least some degree of constitutional protection, since they represent a significant means by which we craft and calibrate the personas we present to others. Who we are as autonomous individuals vitally rests on how we present ourselves to the world, and how we present ourselves to the

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<sup>259</sup> See TRIBE, *supra* note 144, at 888 (“[F]reedom to have impact on others—to make the ‘statement’ implicit in a public identity—is central to any adequate conception of the self.”). As noted above, the self-definition interest may be classified as part of what Tribe calls the “outward-looking dimension of selfhood or personality,” which includes “such seemingly disparate matters as the protection of one’s good name, the selection of one’s appearance or apparel, the choice of symbols one publicly endorses, and the choice of one’s companions.” *Id.*

<sup>260</sup> See SMITH, *supra* note 155, at 21 (“Not only do we find it all too easy to deceive others, but also we are equally adept at deceiving *ourselves*.”).

world rests, to a significant extent, on what we choose to tell others about ourselves.

Although I have made some observations regarding the practical role the self-definition interest might play in First Amendment analyses, the exact contours of this interest—like all First Amendment interests—will admittedly be difficult to pin down. There may be multiple areas in which line-drawing could be difficult, such as identifying which speech strongly implicates the interest or determining which regulatory interests suffice to trump the interest. But courts are well acquainted with crafting workable structures to address First Amendment concerns through common law development. There is no reason to doubt their ability to craft such structures here, where Supreme Court jurisprudence and the Constitution's general protection of interests essential to individual personhood point to recognition of the self-definition interest as a protected First Amendment value.