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LIES, HONOR, & THE GOVERNMENT'S GOOD NAME: SEDITIONOUS LIBEL & THE STOLEN VALOR ACT

*Christina E. Wells**

INTRODUCTION

The crime of seditious libel “is a quintessentially political crime; its purpose is to protect the special veneration . . . due to those who rule.”¹ As such, it is anathema to democratic government, undermining informed public opinion, chilling public debate on political issues and eroding the connections between government officials and those whom they serve. So inimical is the crime of seditious libel to liberty that when *New York Times v. Sullivan* finally declared it “inconsistent with the First Amendment,”² Professor Harry Kalven called the opinion “the best and most important” free speech decision the Supreme Court had ever produced.³ Yet Congress has revived something very like that crime in the Stolen Valor Act, which punishes anyone who “falsely represents himself or herself . . . to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”⁴

Admittedly, the connection between lying about receipt of a medal and seditious libel is not immediately obvious. The first involves the crime of lying about one’s credentials while the second involves the crime of criticizing the government, often (but not always) accompanied by a falsehood.⁵ Nevertheless, the Stolen Valor Act raises issues paralleling the punishment of seditious libel. Historically, government officials justified seditious libel prosecutions by claiming criticism undermined the government’s honor and authority and reduced the public’s respect for it, ultimately threatening national security; thus, government could punish criticism no matter how unlikely it was to incite insurrection.⁶ The government’s justifications for the Stolen Valor

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¹ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2359 (2000) (citations omitted).

² 376 U.S. 254, 276 (1964).

³ Harry Kalven, *The New York Times Case: A Note on the “Central Meaning” of the First Amendment*, 1965 S. CT. REV. 191, 194.

⁴ 18 U.S.C. § 704(b). The Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat. 3266 (2006), amended portions of section 704, adding section 704(b), in particular.

⁵ See, e.g., James Morton Smith, *The Sedition Law, Free Speech, and the American Political Process*, 9 WM. & MARY Q. 497, 499 n.7 (1952); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 816 (1984).

⁶ Smith, *supra* note 5, at 499; Ronald J. Krotoszynski & Clint Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1247 (2008).

Act are eerily similar. The government seeks to punish all intentional lies about receiving a military honor because they “misappropriate the prestige and honor associated with the medal.”⁷ Furthermore, government officials link preservation of that prestige to national security, arguing that awards “are an integral element of the armed services’ personnel and readiness efforts[.]. . . [F]alse claims to have won a medal dilute the meaning of military awards, [and further] undermin[e] their ability to serve their intended purposes.”⁸ Much like the crime of seditious libel, the Stolen Valor Act punishes lies because they arguably undermine respect for government or government personnel.

In *United States v. Alvarez*,⁹ the Supreme Court will decide whether the Stolen Valor Act violates the First Amendment, an issue on which lower courts have split. Courts upholding the Act rely on the Supreme Court’s numerous declarations that intentional “false statements of fact are particularly valueless.”¹⁰ They conclude that intentional falsehoods are unprotected “low value” speech unless they involve “speech that matters,” such as criticism of public officials.¹¹ Courts striking down the Act view the Court’s low value speech categories as more circumscribed. Existing categories such as defamation and fraud, these courts reason, require concrete and identifiable harms – e.g., monetary damage or individual reputational damage – in addition to false statements of fact.¹² The Act’s interest in protecting the honor and dignity of military awards, these courts conclude, does not meet the requirements of existing low-value categories. The government’s reputational interest also does not justify punishing speech when less draconian measures can protect the reputation of military awards.¹³

Superficially, *Alvarez* involves a question of which equally applicable (if contestable) Court precedents will prevail in this dispute. In reality though, our history with seditious libel informs the very precedents on which the courts rely and highlights why the arguments *against* the Act’s constitutionality are so strong. For example, seditious libel prosecutions involved vague and self-serving standards to

⁷ Pet. for Writ of Certiorari at 14, *United States v. Alvarez*, No. 11-210 (U.S., Oct. 17, 2011).

⁸ *Id.* at 14.

⁹ *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), reh’g denied 638 F.3d 666 (2011), cert. granted 132 S. Ct. 437, No. 11-210 (U.S., Oct. 17, 2011).

¹⁰ *Hustler Magazine, Inc. v. Falwell, Inc.*, 485 U.S. 46, 52 (1988); *see also infra* note 46. Although there is some question as to the requisite scienter, this article assumes, as did the courts, that the Act punishes only intentional false statements of fact. *See, e.g., Alvarez*, 617 F.3d at 1209.

¹¹ *United States v. Strandlof*, 2012 WL 247995 at *7 (10th Cir., Jan. 27, 2012); *United States v. Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011); *Alvarez*, 617 F.3d at 1220-21 (Bybee, J. dissenting); *Alvarez*, 638 F.3d at 681-82 (O’Scannlain, J. dissenting from denial of rehearing en banc).

¹² *Alvarez*, 617 F.3d at 1207-09; *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1187-89 (D. Colo. 2010), rev’d *Strandlof*, 2012 WL 247995.

¹³ *Strandlof*, 746 F. Supp. 2d at 1188-90; *Alvarez*, 617 F.3d at 1210-17.

determine whether speech was “dangerous” or had a “bad tendency.” A decision that false statements of fact are unprotected unless they involve “speech that matters” invites officials to make similarly arbitrary and self-serving determinations. In effect, that standard is no standard at all and cannot aid in identifying a category of low value speech. Furthermore, the Court evolved a requirement of tangible, external harm in its low value speech categories in response to government repression of criticism. That harm requirement is critical to distinguishing unprotected low value speech from protected offensive speech.¹⁴ History thus supports those judges who found that false statements of fact standing alone do not constitute a category of low value speech.

The history of seditious libel also explains lower courts’ skepticism about the interest underlying the Act. Although government officials posit numerous potential interests for regulating lies about the receipt of military awards, the only truly viable interest is the damage lies cause to the “prestige and honor” of such awards. But *New York Times* flatly rejected the concept of libel against the government and any accompanying government interest in protecting its honor.¹⁵ Later cases similarly rebuffed attempts to punish flag desecration in order to protect the symbolic value of the American flag. Prosecutions of government libel or flag desecration amount to imposition of government orthodoxy, or compelled respect for government ideas.¹⁶ Absent an independent, particularized harm beyond damage to the dignity and honor of military awards, the Stolen Valor Act engages in the same sort of compelled respect that the Court’s previous decisions have rejected.

Part I of this essay examines the Stolen Valor Act, its origins and purposes. It also briefly explains the split among the lower courts regarding First Amendment challenges to the Act. Part II discusses the historical crime of seditious libel. Part III examines the Stolen Valor prosecutions through the lens of seditious libel and explains why the Act is unconstitutional.

I. THE STOLEN VALOR ACT & ITS AFTERMATH

A. *The Stolen Valor Act*

Congress adopted the Stolen Valor Act in 2006 because previous laws did not sufficiently deter the problem of false claims about receipt

¹⁴ See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 480 (1996); Christina E. Wells, *Regulating Offensiveness: Snyder v. Phelps, Emotion & the First Amendment*, 1 CAL. L. REV. CIRCUIT 71, 79-80 (2010).

¹⁵ *New York Times*, 376 U.S. at 291-92.

¹⁶ *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990).

of military medals.¹⁷ “[T]he ‘phony war hero phenomenon,’” officials noted, “plagues the American landscape[.]”¹⁸ As a result, the Stolen Valor Act criminalizes “falsely represent[ing] [oneself] . . . to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”¹⁹ Punishment includes a fine or up to six months in jail with a penalty enhancement of up to a year in jail if one falsely claims receipt of the Medal of Honor.²⁰

According to Congress, “[f]raudulent claims surrounding the receipt of [military medals] . . . damage [their] reputation and meaning.”²¹ One of the Act’s sponsors characterized it as necessary to protect “the honor and integrity of our veterans, to make sure the memory of their heroism is not tarnished.”²² Department of Justice attorneys defending the Act in court reiterated these themes, arguing that a “false claim to have been awarded a military medal misappropriates the prestige and honor associated with that medal.”²³ The cumulative effect of such falsehoods “diminishes the awards’ effectiveness in conferring prestige and honor on those who actually have been awarded medals.”²⁴ In effect, “false representations threaten to make the public skeptical of any claim to have been awarded a medal.”²⁵

Furthermore, Department of Justice attorneys link such prestige and honor to the operation of the armed forces:

Medals acknowledge acts of military heroism and sacrifice, and express the Nation’s gratitude for the patriotism and courage of those who have acted heroically in the face of danger; they inform the public about acts of valor during armed conflicts; and within armed services, they foster morale and core military values. False claims to have won a medal dilute the meaning of military awards, thereby undermining their ability serve their intended purposes.²⁶

¹⁷ See Pet. for Writ of Cert., *supra* note 7, at 6-7.

¹⁸ Press Release, U.S. Dep’t of Justice, *Northwest Crackdown on Fake Veterans in “Operation Stolen Valor,”* Sept. 21, 2007, <http://www.justice.gov/usao/waw/press/2007/sep/operationstolenvalor.html> (quoting Douglas Carver, special agent in charge of Veteran’s Affairs Office). One survey found that 219 residents of a state claimed to have been awarded the Medal of Honor when only four people had actually received it. Brief for the U.S. at 44 n.10, *United States v. Alvarez*, No. 11-210 (U.S., Dec. 1, 2011).

¹⁹ 18 U.S.C. § 704(b).

²⁰ *Id.* § 704(c). The statute also provides for penalty enhancements for false representations about other specific medals. *Id.* § 704(d).

²¹ Pub. L. No. 109-437, § 2, 120 Stat. 3266 (2006).

²² Bradford L. Miner, *Purple Heart Reference Decried; Some Say Film Belittles Medal*, TELEGRAM & GAZETTE (Mass.), July 29, 2005, at B1 (quoting then-Colorado Representative John Salazar).

²³ Pet. for Writ of Cert., *supra* note 7, at 24 (quotations omitted); see also Brief for the United States, *supra* note 18, at 42.

²⁴ *Id.*; Brief for the United States, *supra* note 18, at 42.

²⁵ Pet. for Writ of Cert., *supra* note 7, at 24; Brief for the U.S., *supra* note 18, at 42.

²⁶ Pet. for Writ of Cert., *supra* note 7, at 15; *id.* at 26; Brief for United States, *supra* note 18 at 37-42.

Such awards, the Department of Justice noted, are “particularly important during wartime” when they can “sustain morale and fighting spirit in the face of continuous operations and severe losses.”²⁷

B. The Stolen Valor Act in the Courts

Federal officials have indicted or prosecuted several individuals under the Act. Xavier Alvarez was convicted after introducing himself as “a retired marine of 25 years” who “was awarded the Congressional Medal of Honor” at a meeting of the water district to which he had recently been elected a director.²⁸ Rick Glen Strandlof was indicted for lying about receipt of the Purple Heart and Silver Star while raising money for his charity, the Colorado Veterans Alliance.²⁹ Ronnie Robbins was indicted after claiming to have received the Vietnam Service Medal and Vietnam Campaign Medal during a campaign for a local political office in Virginia.³⁰ Although the defendants did not dispute that they lied about receiving military honors, they asserted First Amendment challenges to their indictments. Lower courts have split over the Act’s constitutionality.

1. Courts finding the Stolen Valor Act unconstitutional

The Ninth Circuit in *Alvarez* and the district court in *Strandlof* initially noted that the Act involved a content-based regulation of speech,³¹ an uncontroversial finding given that it criminalizes only lies about military awards. Typically such regulations are subject to strict scrutiny – i.e., the government must show the law is necessary to meet a compelling interest.³² There are, however, exceptions to the Court’s antipathy to content-based regulations if speech involved falls into one of the Court’s recognized categories of “unprotected” or “low value” speech. Such categories include incitement, threats, fighting words, obscenity, defamation, fraud, child pornography, and speech integral to

²⁷ Pet. for Writ of Cert., *supra* note 7, at 25 (quoting CHARLES P. MCDOWELL, MILITARY AND NAVAL DECORATIONS OF THE UNITED STATES 171 (1984)); *see also* Brief for the U.S., *supra* note 18, at 38-39.

²⁸ *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), reh’g denied 638 F.3d 666 (2011), cert. granted 132 S. Ct. 457 (2011). According to the Ninth Circuit, Alvarez apparently made a “hobby” of frequent and grandiose lies, including that he rescued the American Ambassador during the Iranian Hostage crisis and played hockey for the Detroit Red Wings. *Alvarez*, 617 F.3d at 1201.

²⁹ *United States v. Strandlof*, 2012 WL 247995 at *1 (10th Cir. Jan. 27, 2012). Strandlof also lied about ever having been in the military and having been wounded in Iraq. *Id.*

³⁰ *United States v. Robbins*, 759 F. Supp. 2d 815, 817 (W.D. Va. 2011). Additional prosecutions and challenges are pending in the federal courts. *See* Brief for Respondent in Opposition at 12 n.4, *United States v. Alvarez*, No. 11-210 (U.S. Oct. 17, 2011).

³¹ *Alvarez*, 617 F.3d at 1202; *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189 (D. Colo. 2010), rev’d *Strandlof*, 2012 WL 247995.

³² *See, e.g.*, *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2378 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988).

criminal conduct.³³ As long as a law complies with the Court’s rules for its low value categories, regulation of content is permissible because it is “no essential part of any exposition of ideas.”³⁴

Both courts rejected the government’s attempt to characterize the Stolen Valor Act as a regulation of “low value” speech.³⁵ Turning first to existing low value categories, defamation and fraud, the courts observed that these categories required specific concrete harms such as monetary or reputational damage in addition to false statements of fact.³⁶ Both found that the Act did not regulate speech within the fraud category because it punished all lies about receipt of awards, not simply lies designed to obtain monetary gain.³⁷ The defamation category was similarly inapplicable because the “right against defamation belongs to natural persons, not to governmental institutions or symbols.”³⁸

Both courts also refused to create a new low value category for false statements of fact. Such a move “turned customary First Amendment analysis on its head” by inviting government “to determine what topics of speech ‘matter’ enough for the citizenry to hear” and “would give it license to interfere significantly with our private and public conversations.”³⁹ Referring to our history with seditious libel, *Alvarez* further opined that many intentional false statements of fact – e.g., those made during satirical speech – were not valueless.⁴⁰ Citing the Supreme Court’s recent decision in *United States v. Stevens*, both courts refused to exercise “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.”⁴¹

The courts then turned to whether the Stolen Valor Act survived strict scrutiny, ultimately finding that it did not. The district court in *Strandlof* rejected the government’s reputational interest, noting that “the government’s interest in preserving the symbolic meaning of military awards is [not] sufficiently compelling to withstand First

³³ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Brown*, 131 S. Ct. at 2733-34.

³⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

³⁵ *Strandlof*, 746 F. Supp. 2d at 1186; *Alvarez*, 617 F.3d at 1202-03.

³⁶ *Strandlof*, 746 F. Supp. 2d at 1187-89; *Alvarez*, 617 F.3d at 1207-09. *Alvarez* further noted that most regulations of lying – e.g., perjury, false light invasion of privacy and fraudulent administrative filings – contained similar harm requirements. *Id.* at 1208 n.10, 1211-1212.

³⁷ *Strandlof*, 746 F. Supp. 2d at 1188-89; *Alvarez*, 617 F.3d at 1212.

³⁸ *Alvarez*, 617 F.3d at 1210 (citing *New York Times v. Sullivan*, 376 U.S. 254, 291 (1964)); *Strandlof*, 746 F. Supp. 2d at 1188 n.7 (noting that reputational damage to military honors or “group libels” are not cognizable “except in circumstances clearly inapplicable here”).

³⁹ *Strandlof*, 746 F. Supp. 2d at 1186; *Alvarez*, 617 F.3d at 1204. Judge Kozinzki described the “ever-truthful utopia” created by the law as “terrifying” because “the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship.” *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011) (Kozinzki, J. concurring in the denial of rehearing en banc).

⁴⁰ *Alvarez*, 617 F.3d at 1213. *See also Alvarez*, 638 F.3d at 672 (Smith, J. concurring in the denial of rehearing en banc) (noting that the “clearest precedent” supporting the dissenters’ argument for broad regulation of false statements of fact “would be the much-maligned Alien and Sedition Act of 1798”).

⁴¹ *United States v. Stevens* 130 S. Ct. 1577, 1586 (2010). *See Strandlof*, 746 F. Supp. 2d at 1187; *Alvarez*, 617 F. 3d at 1204-05.

Amendment scrutiny.”⁴² The Ninth Circuit in *Alvarez* conceded the legitimacy of Congress’s interest in protecting “the integrity of its system honoring military men and women” but found that criminal penalties were not necessary to serve that interest.⁴³

2. Courts finding the Stolen Valor Act constitutional

The Tenth Circuit in *Strandlof*, the *Robbins* district court and judges dissenting in the *Alvarez* proceedings argued that the Act did not violate the First Amendment.⁴⁴ Relying on the Court’s frequent recognition that “false statements of fact are particularly valueless”⁴⁵ and that “[c]alculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas,”⁴⁶ they concluded that “false statements of fact” are among the Court’s recognized categories of low value speech.⁴⁷ Courts finding the Act unconstitutional had presumed false speech was protected unless it fell into a recognized low-value speech category. Drawing on different Supreme Court rhetoric, judges finding the Act constitutional saw the opposite presumption: “[T]he general rule is that false statements of fact are not protected by the First Amendment [unless] . . . protecting a false statement of fact is necessary ‘in order to protect speech that matters.’”⁴⁸ As long as the law leaves adequate “breathing space” for speech that matters, it satisfies the First Amendment.⁴⁹

According to these courts, the Stolen Valor Act does not involve “speech that matters” and further leaves adequate “breathing space” for speech that does. First, it punishes only lies about one’s own credentials

⁴² *Strandlof*, 746 F. Supp. 2d at 1190 (citing *Texas v. Johnson*, 491 U.S. 397, 417 (1989) (rejecting the proposition that “designated symbols” may be “used to communicate only a limited set of messages”)). The district court also found “unsubstantiated” and “unintentionally insulting” the notion that such awards were necessary to motivate military personnel. *Id.* at 1191.

⁴³ *Alvarez*, 617 F.3d at 1216-17.

⁴⁴ *United States v. Strandlof*, 2012 WL 247995 (10th Cir. Jan. 27, 2012); *United States v. Robbins*, 759 F. Supp. 2d 815 (W.D. Va. 2011); *Alvarez*, 617 F.3d at 1218 (Bybee, J. dissenting); *United States v. Alvarez*, 638 F.3d 666, 677 (2011) (O’Scannlain, J. dissenting from denial of rehearing en banc) (joined by Gould, J., Bybee, J., Callahan, J., Bea, J., Ikuta, J., and Smith, J.).

⁴⁵ *Hustler Magazine, Inc. v. Falwell, Inc.*, 485 U.S. 46, 52 (1988).

⁴⁶ *Garrison v. Louisiana*, 379 U.S. 64 (1964); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact,” because such statements do not “materially advance[] society’s interest in uninhibited, robust, and wide-open debate.”); *id.* (“[T]he erroneous statement of fact is not worthy of constitutional protection.”); *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech.”); *BE&K Constr. Co. v. NLRB*, 536 US 516, 531 (2002) (“False statements of fact are unprotected for their own sake.”).

⁴⁷ *Strandlof*, 2012 WL 247995 at *9; *Robbins*, 759 F. Supp. 2d at 817-18; *Alvarez*, 617 F.3d at 1218-19 (Bybee, J. dissenting); *Alvarez*, 638 F.3d at 678-80 (O’Scannlain, J. dissenting).

⁴⁸ *Alvarez*, 617 F.3d at 1220-21 (Bybee, J. dissenting) (quoting *Gertz*, 418 U.S. at 341); *Strandlof*, 2012 WL 247995 at *7 (quoting similar rhetoric in *BE&K Constr.*, 536 US at 531); *see also Robbins*, 759 F. Supp. 2d at 818; *Alvarez*, 638 F.3d at 681-82 (O’Scannlain, J. dissenting).

⁴⁹ *Strandlof*, 2012 WL 247995 at *7, *9. The government’s Supreme Court brief also advocates the breathing space theory in substantially similar form. Brief for the U.S., *supra* note 18, at 20-28.

and is unlikely to “chill” the kind of speech on public debate that was at issue in *New York Times*. Second, because such lies do not involve political content, they do not promote the search for truth in the marketplace of ideas. Finally, there appeared to be little chance that the government would use the law to suppress viewpoints, as lies about one’s credentials do not involve political content.⁵⁰ Accordingly, the Act was a legitimate regulation of unprotected expression that did not unreasonably reach into the realm of protected speech.

It is not immediately obvious which of these courts is right about the Act’s constitutionality. The answer apparently turns on whether intentional false statements of fact are unprotected speech and both sides can marshal precedent to support their reasoning. If anything, those arguing in favor the law are in a stronger position than with recent unsuccessful attempts to cast content-based laws as regulations of low value speech.⁵¹ Ample rhetoric supports the argument that false statements of fact are unprotected. Independent observers posit that the Court could uphold the Act.⁵² Respected scholars argue in support of the law.⁵³

Nevertheless, our history with seditious libel argues strongly against the Stolen Valor Act’s constitutionality. The lower court decisions finding the Act unconstitutional are grounded in doctrines designed to quell seditious libel prosecutions (or something very like them). That history further undermines the arguments raised in favor of the Act, revealing just how insidious those arguments are.

II. SEDITIOUS LIBEL

A. *English Roots*

The roots of seditious libel lie in the English crime of treason, which punished overt acts “against the person or government of the King,” such as plotting his death, declaring war on him, or aiding his enemies.⁵⁴ Treason law was thus designed to preserve the physical security of the King and the loyalty of his subjects. Over time, however, officials attempted to extend treason prosecutions to “any discussion in a sense

⁵⁰ *Strandlof*, 2012 WL 247995 at *16-17; *Robbins*, 759 F. Supp. 2d at 820-21; *see also Alvarez*, 617 F.3d at 1233, 1240 (Bybee, J. dissenting).

⁵¹ *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729 (2011) (violent video games); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (IIED tort); *Stevens*, 130 S. Ct. at 1586 (depictions of animal cruelty).

⁵² Tony Mauro, *Stolen Valor Case: False Speech May Leave Some Justices Cold*, Oct. 18, 2011, <http://www.firstamendmentcenter.org/stolen-valor-case-false-speech-may-leave-some-justices-cold>.

⁵³ Brief of Professors Eugene Volokh and James Weinstein as Amici Curiae in Support of Petitioner, *United States v. Alvarez*, No. 11-210 (U.S., Dec. 6, 2011).

⁵⁴ 1 Matthew Hale, *The History of the Pleas of the Crown* *59.

hostile to the government . . . [on] questions of political importance,” which effectively broadened the overt act requirement to include dissident expression.⁵⁵ Because such “constructive” treason prosecutions proved burdensome and less effective at suppressing dissent than officials hoped,⁵⁶ seditious libel emerged in the seventeenth and eighteenth centuries as a method of regulating dissent.

Seditious libel prosecutions originally looked much like prosecution of private libel claims; they simply involved government officials as the victims. The law eventually distinguished between the effect of libels on private versus government victims. Attorney General Edward Coke wrote that while a private libel might cause a breach of the peace, libel of a “public person . . . is a greater offence; for it concerneth not only the breach of the peace but also the scandal of the government[.]”⁵⁷ Such scandal caused disrespect of government officials and was inconsistent with royal infallibility, which viewed rulers as “wise and good guides of the country” who were to be “approached with proper decorum.”⁵⁸ Prosecution of seditious libel thus protected the honor and status of government officials by “punish[ing] as a crime any speech ‘that may tend to lessen the King in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.’”⁵⁹

This concept of seditious libel continued into the next century when prosecutions began to include *any* writing against the government not simply individual defamations. In a libel prosecution involving generalized accusations of government corruption, Lord Chief Justice Holt rejected the notion that libel required statements about particular people.⁶⁰ He justified this expansion of the law by noting:

If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; for it is very necessary for all governments that the people should have a good opinion of it. . . . This has been always looked upon as a crime, and no government can be safe without it be punished.⁶¹

⁵⁵ William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 99-100 (1984) (quoting 2 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 303 (1883); see also Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 717-19 (1985).

⁵⁶ For a discussion of hurdles facing treason prosecutions, see Hamburger, *supra* note 53, at 720-22; Mayton, *supra* note 55 at 104-05.

⁵⁷ Case de Libellis Famosis, 5 Coke 125a, 125a (1605).

⁵⁸ Smith, *supra* note 5, at 499.

⁵⁹ Robert Post, *The Social Foundations of Reputation Law: Defamation and the Constitution*, 74 CAL. L. REV. 691, 702 (1986) (citations omitted).

⁶⁰ *Queen v. Tutchin*, 90 Eng. Rep. 1133, Holt 424 (Q.B. 1704) (“[E]ndeavouring to possess the people that the government is maladministered by corrupt persons . . . is certainly a reflection on the government.”).

⁶¹ *Id.*

Although individual reputations were no longer obviously at stake, Holt's reasoning similarly sought to protect the honor and status of government by maintaining people's "good opinion" of it. Holt also linked the maintenance of good opinion to national security, which became another common justification for punishing seditious libel.⁶² The danger to security was assumed even if the criticism was true and regardless of whether the speaker lacked "malicious" intent. It was enough that true but critical statements had a "bad tendency" – disrespect for government was itself a harm that could eventually destabilize government.⁶³

B. *Seditious Libel in the United States*

The United States' history with seditious libel is more checkered. The notion of seditious libel, with its underlying desire to preserve honor and status roles, seems utterly foreign to our representative form of government. It is unsurprising then, that a thriving tradition of intellectual dissent existed in the colonies arguing that government "as servants of the people, could not be libeled by criticism of their performance, even by false statements."⁶⁴ Nevertheless, the Sedition Act of 1798, enacted within a decade of the First Amendment, punished "any false, scandalous, and malicious . . . writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame [them]; or to bring them . . . into contempt or disrepute."⁶⁵ The Act's Federalist supporters proffered arguments nearly identical to those raised in England. Skeptical of the common man's ability to govern, Federalists viewed the "power and the danger of public opinion" as a threat to security and a strong centralized government.⁶⁶ Federalist supporters of the law further argued that maintaining public esteem of government

⁶² Koffler & Gershman, *supra* note 5, 822-23 (noting that seditious libel prosecutions operated on the theory that "political protest and criticism of officials undermined the basic safety of government [and] . . . threatened the legitimacy of power"); Krotoszynski & Carpenter, *supra* note 6, at 1247 ("[S]editious libel worked . . . ostensibly to enhance the security of the government and to ensure that elected officers could implement the people's will.")

⁶³ Smith, *supra* note 5, at 499 ("The 'bad tendency' test . . . presumed that criticism tended to overthrow the state.")

⁶⁴ David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 816 (1985).

⁶⁵ Act of July 14, 1798, 1 Stat. 596. Congress passed the Act amid growing hostilities with France although there was significant controversy about its constitutionality given that Framers of the First Amendment did not clarify whether it protected speech from seditious libel prosecutions or merely abolished the much-maligned English licensing systems. Compare LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985) (arguing that the First Amendment incorporated the common law of seditious libel) with Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 947 (1919) (arguing that the First Amendment was "intended to wipe out the common law of sedition").

⁶⁶ GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 25, 34 (2004).

officials was *more* necessary in a representative government than in a monarchy because misleading citizens with the power to vote could destabilize government even more than in a monarchy.⁶⁷

Federalist officials believed that the Sedition Act avoided the abuses of English law.⁶⁸ The Act provided that truth was a defense, that malicious intent was a required element of the crime, and that juries, rather than judges, were to decide whether a writing was defamatory.⁶⁹ But these reforms provided no real protection for defendants accused of seditious libel. Courts required defendants to prove the truth of their statements, which was usually beyond the capacity of the accused.⁷⁰ Furthermore, judges incorporated the English approach by finding malicious intent from the “bad tendency” of the words themselves. Defendants were convicted for publishing articles critical of elected officials because the words showed a “tendency . . . to undermine public confidence in the elected officials and . . . render it less likely that they might be re-elected.”⁷¹ Accordingly, the rationale for punishing seditious libel in the early Republic was identical to that in England - i.e., punishment was necessary to maintaining the status and honor of lawmakers, and to the stability of the nation.⁷² Such reasoning turned the Act into a powerful political tool in the hands of Federalist officials who silenced speech critical of the incumbent administration.⁷³

Many came to understand the Sedition Act as a misguided exercise of power.⁷⁴ Nevertheless, government officials resuscitated the crime of seditious libel with some regularity during national security crises.⁷⁵ Congress thus punished seditious speech under the auspices of Espionage Act of 1917, which prohibited willful interference with the military draft,⁷⁶ and the Sedition Act of 1918, which prohibited willfully

⁶⁷ RICHARD BUEL, *SECURING THE REVOLUTION* 256 (1972) (“To mislead the judgment of the people when they have *all* the power . . . must produce the greatest possible mischief.”); *see also* Smith, *supra* note 5, at 500.

⁶⁸ Smith, *supra* note 5, at 501-02.

⁶⁹ Krotoszynski & Carpenter, *supra* note 6, at 1291-92.

⁷⁰ The mixture of fact and opinion in criticism made it difficult to prove truth. STONE, *supra* note 66, at 39; Mayton, *supra* note 55, at 129. Requiring defendants to prove the truth of their statements also “reversed the normal criminal law presumption of innocence.” Smith, *supra* note 5, at 501.

⁷¹ Smith, *supra* note 5, at 502-503. Juries provided little protection as judicial constructions regarding truth and intent “left nothing for honest jurors to do but return verdicts of guilty.” 2 HENRY SCHOFIELD, *Freedom of the Press in the United States*, in *ESSAYS ON CONSTITUTIONAL LAW AND EQUITY* 534 (1921).

⁷² Smith, *supra* note 5, at 500.

⁷³ STONE, *supra* note 66, at 67 (noting use of Act as a political weapon).

⁷⁴ The law expired in 1791 and President Jefferson pardoned those convicted. Congress eventually repaid the fines under the Act while a congressional report declared the Act “null and void.” *Id.* at 73.

⁷⁵ For discussions of the government’s pursuit of seditious libel prosecutions during the Civil War, World War II and Cold War, see Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY B. RT. J. 105, 119-20 (1998) (Civil War); STONE, *supra* note 66, at 94-126 (Civil War); *id.* at 258-75 (World War II); Koffler & Gershman, *supra* note 5, at 840, 842 (Cold War); Mayton, *supra* note 55, at 91 (Cold War).

⁷⁶ Act of June 15, 1917, ch. 30, tit I, §3, 40 Stat. 217, 219.

publishing disloyal, profane or abusive language about the United States government, the flag, or the military.⁷⁷ Law enforcement officials arrested and prosecuted thousands of individuals simply for criticizing the war effort and/or President Wilson.⁷⁸ Courts, applying a combination of constructive intent and the “bad tendency” test, convicted hundreds of them.⁷⁹ Thus officials successfully convicted speakers for obstructing the draft based on statements such as “[t]he war itself is wrong. Its prosecution will be a crime.”⁸⁰ Courts upheld convictions reasoning that criticism could “undermin[e] the spirit of loyalty” that inspired men to enlist or to register for the draft: “The greatest inspiration for entering into such service is patriotism, the love of country. To teach that . . . the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist.”⁸¹ As with seditious libel, the courts reasoned that government had the power to punish speech critical of its initiatives because such speech might undermine the love of country necessary to carry them on.

III. THE STOLEN VALOR ACT AND SEDITIOUS LIBEL

The history of seditious libel permeates the Stolen Valor prosecutions and reveals that the arguments in favor of the Act suffer from the same infirmities as did seditious libel prosecutions.

A. Are “False Statements of Fact” Low Value Speech?

At their core the Stolen Valor prosecutions involve disagreement over the appropriate standard for finding false statements of facts unprotected. The history of seditious libel suggests that the “speech that matters”⁸² standard adopted by lower courts is too malleable to identify a category of unprotected speech or constrain official discretion. In fact, the Court developed its modern low value speech framework largely in response to problems arising from similarly malleable standards associated with seditious libel prosecutions.

During the seditious libel era, government officials used the “bad tendency” test to judge whether speech *might* lead to harm by causing bad opinions of the government or government initiatives. Such malleable tests gave officials enormous discretion to silence speech arbitrarily by claiming it might harm national security. Allowing

⁷⁷ Act of May 16, 1918, ch. 75, § 1, 40 Stat. 553.

⁷⁸ Christina E. Wells, *Discussing the First Amendment*, 101 MICH. L. REV. 1566, 1581-83 (2003).

⁷⁹ DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 279-98* (1997).

⁸⁰ *Shaffer v. United States*, 355 F. 886, 886 (9th Cir. 1919).

⁸¹ *Id.* at 888.

⁸² See *supra* note 48 and accompanying text.

officials to punish false statements of fact except when speech “matters” is similarly subject to abuse. Such a standard assumes that only government officials are in the best position to make determinations regarding the value of speech. That assumption violates the notion that the First Amendment was “intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands” of the public.⁸³

The flexible standards associated with seditious libel prosecutions led the Court to adopt requirements of concrete harm for its low value categories. The Supreme Court initially adopted something akin to the “bad tendency” test when developing its modern free speech jurisprudence. Thus, in *Schenck v. United States*, Justice Holmes found speech unprotected when made in circumstances that “create a clear and present danger that [the speech] will bring about the substantive evils Congress has a right to prevent.”⁸⁴ As had earlier jurists, Holmes presumed speakers intended to cause harm from the sheer fact of their speech.⁸⁵ Hence a circular that criticized the draft became intentional interference with the draft in violation of the Espionage Act.⁸⁶

Within a year of *Schenck*, Justice Holmes had second thoughts. Dissenting in *Abrams v. United States*,⁸⁷ he flatly rejected the Government’s argument “that the First Amendment left the common law as to seditious libel in force.”⁸⁸ Rather, Holmes argued that only an *immediate* harm justified punishment of speech.⁸⁹ Holmes’ formulation tightened the nexus between speech and harm, which protected criticism of government while also allowing punishment of truly dangerous speech.⁹⁰ In *Brandenburg v. Ohio*, the Court eventually adopted Holmes’ approach, allowing punishment of “incitement” only if it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁹¹

⁸³ *Cohen v. California*, 403 U.S. 15, 24-25 (1971); *see also Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“[A] state may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.”).

⁸⁴ *Schenck v. United States*, 249 U.S. 47 (1919); *see also Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

⁸⁵ *Schenck*, 249 U.S. at 51 (noting that the circular at issue “would not have been sent unless it had been intended to have some effect”).

⁸⁶ The defendants circulated a leaflet to conscripted men that criticized the war, opposed the draft and urged them to assert their rights. *Schenck*, 249 U.S. at 51.

⁸⁷ 250 U.S. 616 (1919).

⁸⁸ *Id.* at 630 (Holmes, J. dissenting).

⁸⁹ *Id.* at 630-31 (“Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the [First Amendment].”).

⁹⁰ *See Post, supra* note 1, at 2362.

⁹¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

Alvarez notes that the line of cases culminating in *Brandenburg* lays the foundation for the Supreme Court's approach to other low value speech categories.⁹² The Court's fighting words, threats, fraud and defamation categories, for example, contain independent harm requirements substantially curbing the government's ability to punish speech because of its political content.⁹³ The exceptions for child pornography and speech integral to criminal conduct involve speech that includes independently proscribable harm as an integral part of the speech.⁹⁴ The harm requirement is integral to creating low value speech categories. It allows the Court to create *narrow* categories that do not punish speech because of its disfavored content but because that speech in a particular context makes no contribution to the exchange of ideas as evidenced by external indicia of harm.⁹⁵ A standard presuming that false statements of fact are unprotected unless they involve "speech that matters" does not fit within this framework. Unlike existing areas of low value speech, that standard identifies no concrete harm and allows officials to determine the value of speech on an ad hoc basis. This is the opposite of a narrowly defined category.

Adding a "breathing space" requirement does not improve the "speech that matters" approach. "Breathing space" is a concept. It is not a standard by which to judge whether or when false statements of fact are unprotected. The Tenth Circuit did not elaborate on this concept other than to list cases in which the Supreme Court found false

⁹² *Alvarez*, 617 F.3d at 1215. See also Brief of Professor Jonathan D. Varat as Amicus Curiae In Support of Respondent at 8-10, *United States v. Alvarez*, No. 11-210 (U.S., Jan. __, 2012) (discussing evolution of Court's increasingly narrow categories of low value speech).

⁹³ See, e.g., *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (government can punish fighting words only if they "have a direct tendency to cause acts of violence by the person to whom, individually" they are addressed); *Virginia v. Black*, 538 U.S. 343, 363 (2003) (noting that "constitutionally proscribable" true threats do not involve hyperbole but involve a speaker who "directs a threat to a person ... with the intent of placing the victim in fear of bodily harm or death"); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (Public officials must show that statements made of and concerning them caused actual damage to their reputation and that they were made with actual malice.).

⁹⁴ In *New York v. Ferber*, 458 U.S. 747, 758-59 (1982) the Court observed that child pornography was "intrinsicly related" to child abuse and that using children to create such pornography was harmful to them. Solicitation, the act of seeking to engage another to commit a crime, involves speech integral to a crime that has long been recognized as punishable. *United States v. Williams*, 553 U.S. 285 (2008).

Obscenity does not appear to follow this pattern of requiring a concrete external harm. See *Alvarez*, 617 F.3d at 1228-1229 (Bybee, J., dissenting). It is not entirely clear why the Court approaches obscenity in this manner although a possible answer may be that once speech amounts to obscenity as currently defined, the Court effectively views it as having the quality of a sex act rather than speech. See, e.g., Frederick Schauer, *Speech and "Speech" – Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979). Importantly, the definition of obscenity, which asks if speech (1) appeals to the prurient interest as a whole, (2) portrays patently offensive sexual conduct as described by state law, and (3) lacks serious literary, artistic, scientific or political value, attempts to prevent officials from prosecuting obscenity because of its expressive content. *Miller v. California*, 413 U.S. 15, 24 (1973).

⁹⁵ Wells, *supra* note 14, at 79; see also Daniel Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND L.J. 917, 933 (2009) ("[T]he large majority of proscribed speech adds little or nothing to public discourse . . . partly because the [Court's] 'narrow tailoring' requirement . . . [forces] the state to focus on speech that has little function except to threaten the government's compelling interest.").

statements of fact unprotected.⁹⁶ But all of its examples involve objective external indicia of harm.⁹⁷ Thus, the Tenth Circuit’s “breathing space” analysis is either no standard at all or implicitly adopts the traditional low value speech analysis discussed above. Yet it is hard to imagine how it could have done the latter while upholding the Stolen Valor Act. Without additional elaboration, the concept is too malleable and amorphous to be of any real use.⁹⁸ Ultimately, adoption of the “speech that matters” and “breath space” approaches radically alter the existing First Amendment landscape notwithstanding the Supreme Court’s use of similar isolated rhetoric. These approaches conflict with the Court’s carefully crafted unprotected speech categories and inject arbitrariness where the Court has been careful to reject it. The First Amendment does not allow “the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.”⁹⁹

B. The Government Interests Underlying the Stolen Valor Act

If false statements of fact do not constitute a category of low value speech, the Stolen Valor Act might nevertheless survive constitutional scrutiny if it applies to speech falling within a different low value category or if it survives the strict scrutiny associated with content-based regulations. To make these determinations, identifying the interests underlying the statute is critical. Regardless of the approach used, the Court’s free speech methodology demands that the government have valid reasons for its actions. Impermissible reasons for acting are alone enough to strike down the law.¹⁰⁰

⁹⁶ The Tenth Circuit relied on Court cases upholding regulation of defamation, false light torts, perjury, baseless litigation, and intentional infliction of emotional distress as evidence of the historical grounding for its breathing space framework. *United States v. Strandlof*, 2012 WL 247995 at *11 (10th Cir. Jan. 27, 2012).

⁹⁷ As *Alvarez* noted, the court’s examples involve specific, injurious harms – e.g., damage to reputation, severe emotional distress, obstruction of justice. *See supra* note 36. *See also* Brief of Professor Jonathan D. Varat, *supra* note __, at 10 (discussing narrow nature of Court rulings upholding regulation of false statements of fact). Similarly, the numerous statutes to which the Tenth Circuit pointed, *United States v. Strandlof*, 2012 WL 247995 at *14-15 (10th Cir. Jan. 27, 2012), involved a harm that is obvious from the definition of the crime punishing false statements of fact – e.g., lying in connection with assignment of a loan, willful use of a false social security number, knowingly false statements to immigration officials, and knowingly false statements about exports of arms. *See* Brief of the First Amendment Lawyers Association as Amicus Curiae in Support of Respondent at 27-28, *United States v. Alvarez*, No. 11-210 (U.S., Jan. __, 2012) (elaborating on harm associated with various statutes).

⁹⁸ The Tenth Circuit apparently recognized that the “breathing space” framework needed definition when it characterized the Supreme Court’s decisions as requiring “some limiting characteristic that prevents [the law] from suppressing constitutionally valuable opinions and true statements.” *Strandlof*, 2012 WL 247995 at *10. Yet the court upheld the Act because it punished only knowing lies about oneself, which did not involve likely suppression of viewpoints or valuable political speech. *Id.* at *16-17.

⁹⁹ *United States v. Stevens* 130 S. Ct. 1577, 1586 (2010).

¹⁰⁰ Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1255 (1995) (“[O]ur First Amendment jurisprudence is concerned not merely with what is regulated, but also with why the state seeks to impose regulations Laws enacted to serve improper interests are unconstitutional for that

As the lower courts noted, the government may have a legitimate interest in preventing use of its awards in fraudulent schemes or trademark misappropriation but it did not assert those interests.¹⁰¹ Rather the government asserted three related interests: (1) damage to the “dignity and honor” and “reputation and meaning” of military awards, (2) which in turn damages the reputations of military personnel who have been awarded such medals, and (3) potentially harms military readiness by undermining morale.¹⁰²

In some circumstances, two of these interests – protection of individual reputation and military readiness – are generally valid First Amendment interests. However, the government does not claim direct damage to these interests. Rather, it claims indirect harm resulting from the aggregate damage caused by lies about having received military awards. Thus, a showing of “particularized injury from individual misrepresentations” is unnecessary because the “cumulative force of all such misrepresentations” causes the true harm of dilution to the meaning and value of medals.¹⁰³ This aggregate dilution harms the reputations of military personnel by making people “skeptical of any claim to have been awarded a medal,” and by diminishing an awards’ “effectiveness in conferring prestige and honor on those who actually have been awarded medals.”¹⁰⁴ Dilution also undermines military readiness by damaging morale, diminishing prestige and causing confusion about the awards.¹⁰⁵

The Court has categorically rejected the reasoning on which the government relies. The crime of seditious libel asserted a similarly ill-defined chain of harms – i.e., criticism of government causes unspecified damage to official reputations, which might undermine government stability by causing disrespect. As noted above, *Brandenburg* rejected the loose causal reasoning of seditious libel and now requires a close nexus between speech and resulting harm.¹⁰⁶ Similarly, *New York Times v. Sullivan* refused to allow a city official to pursue a common law libel claim against the *New York Times* on the theory that certain generalized

reason.”); see also 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, 173-75 (1997) (discussing disfavored state interests).

¹⁰¹ See *supra* notes 36-37 and accompanying text (discussing the fraud exception); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987) (discussing U.S. interest in trademark protection).

¹⁰² See *supra* notes 21-27 and accompanying text.

¹⁰³ Brief for the United States, *supra* note 18, at 49; see also *id.* (The “aggregate effect is the harm that Congress sought to remedy.”).

¹⁰⁴ *Id.* at 42.

¹⁰⁵ *Id.*; see also *supra* note 27 and accompanying text.

¹⁰⁶ See *supra* note 91; see also *Texas v. Johnson*, 491 U.S. 397, 408 (1989) (rejecting government’s “claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace, and that the expression may be prohibited on this basis”).

criticisms could be imputed to him.¹⁰⁷ Allowing the lawsuit to proceed, the Court reasoned, would “transmut[e] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.”¹⁰⁸ Accordingly, the government’s attempt in the Stolen Valor prosecutions to assert indirect and unproven harm is inconsistent with the Court’s modern doctrine.

The government is thus left with only one possible interest – damage to the “reputation and meaning” and/or “prestige and honor” of military awards as a result of lying about having received them. This interest is impermissible, at least for First Amendment purposes.¹⁰⁹ *New York Times* made clear that the government *qua* government could not impose substantial penalties to protect its reputational interest, declaring “that prosecutions for libel on government have [no] place in the American system of jurisprudence.”¹¹⁰ By requiring that the false statements be made about an actual person, the Supreme Court does not countenance the generalized protection of “honor or prestige” that was at the core of seditious libel prosecutions.¹¹¹ The flag desecration cases further support this conclusion.

Striking down a state law that prohibited desecrating a flag in an offensive manner, the Court in *Texas v. Johnson* found that the state’s interest in preserving the flag as a symbol of national unity did not support the law.¹¹² Characterizing this interest as a desire to preserve the flag from doubt cast on its meaning by offensive treatment, the Court stated that

[i]f we were to hold that a State may forbid flag burning wherever it is

¹⁰⁷ 376 U.S. 254 (1964). The *New York Times* published a paid, full-page editorial advertisement criticizing the police and stating that the civil rights of southern black students in Montgomery, Alabama were being violated. City Commissioner Sullivan claimed the criticism could be attributed to him as commissioner responsible for the police although he was never named in the advertisement. Due to factual errors in the advertisement he sued for libel. *Id.* at 256-59.

¹⁰⁸ *Id.* at 291-92; *see also* *Rosenblatt v. Baer*, 383 U.S. 75, 83 (rejecting county officials’ defamation lawsuit against newspaper because “[a] theory that the column cast indiscriminate suspicion on the members of the group responsible for the conduct of this governmental operation is tantamount to a demand for recovery based on libel of government, and therefore is constitutionally insufficient”).

¹⁰⁹ Lower courts striking down the Act differed on this issue with the one finding the government’s interest sufficient and the other disagreeing. *See supra* notes 42-43 and accompanying text. In a sense both were right. The government can have legitimate reasons for acting although those reasons may not be permissible First Amendment interests. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1505 (1975). Thus, the government can legitimately want to preserve the “integrity of its system honoring military men and women” but it cannot preserve the symbolic effect of such awards through criminal penalties. Other less draconian means, such as publishing websites containing awardees names, better serve the government’s interests without implicating the First Amendment.

¹¹⁰ 376 U.S. at 291-92.

¹¹¹ *See Post*, *supra* note 59, at 724.

¹¹² 491 U.S. 397 (1989).

likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role – as where, for example, a person ceremoniously burns a dirty flag – we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol . . . only in one direction. We would be permitting a State to “prescribe what shall be orthodox”

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents.¹¹³

Just as *New York Times* rejected punishment of speech to protect the government's reputation from dishonor, *Johnson* rejected punishment of speech to protect the meaning of important symbols.¹¹⁴ The reasoning of these decisions suggests that protecting the “meaning” or “prestige” of military awards through criminal penalties is also forbidden.

This holds true even though the Stolen Valor Act arguably punishes only a narrow category of lies, leaving open other avenues of expression, including criticism of government.¹¹⁵ Flag desecration laws also left open other opportunities to communicate the same message. Their problem was not that they singled out specific messages for proscription. Instead, they singled out specific symbolic messages associated with the flag for protection and prescribed “what shall be orthodox.” Punishing lies about having received military awards because they sully the awards' “meaning” and “prestige,” similarly carves those awards out for special protection. This form of compelled respect for the flag or military awards is its own form of content discrimination.¹¹⁶ If one law is allowed to compel such respect, other laws can as well. This is how orthodoxy spreads. Accordingly, the Court should be suspicious of the government's purpose regardless of the Act's arguably minimal effect on speech.

Of course, the assumption that the Act will not lead to suppression of valuable speech is entirely questionable. One could imagine a group like the *Yes Men* – a “dynamic prankster art duo” that engages in political activism by impersonating businesses and fooling journalists – making false statements prohibited by the Act.¹¹⁷ For example, they might call a

¹¹³ *Id.* at 413, 416-17. The Court relied heavily on *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

¹¹⁴ See also *United States v. Eichman*, 496 U.S. 310 (1990) (striking down federal flag desecration law); *Schacht v. United States*, 398 U.S. 58 (1970) (striking down law allowing wearing of military uniform only in theatrical productions that did not discredit the United States).

¹¹⁵ Brief for the United States, *supra* note 18, at 45-46 (arguing that the Act leaves open other avenues for expression); see *supra* note 49 and accompanying text (discussing similar lower court reasoning).

¹¹⁶ Ely, *supra* note 109, at 1506-07.

¹¹⁷ David Montgomery, *Occupy Wall Street Takes Lessons From The Yes Men*, WASH. POST, Oct. 20,

press conference posing as veterans and claiming to have won the Purple Heart while exposing perceived wrongs committed by the military against other countries or possibly military personnel.¹¹⁸ Their lies would violate the Stolen Valor Act, even with the lower courts' limitation requiring that the speaker have an "intent to deceive."¹¹⁹ Such lies also qualify as protected satire under the First Amendment.¹²⁰ Officials acknowledge this protection and claim that the government will not prosecute satirical false statements. But the statute itself makes no such distinction and risks chilling speech. If anything, the humiliating and barbed nature of satire, combined with the interest in protecting the "honor" of military awards suggests that officials have stronger incentives to punish satiric lies than they do "real" lies.¹²¹ A law that allows the government to punish lies without any concrete, external harm simply cannot guarantee that valuable speech will be protected. And the First Amendment "does not leave us at the mercy of *noblesse oblige*."¹²²

CONCLUSION

Lying is wrong. We learn this lesson in childhood. But the Stolen Valor prosecutions involve a question considerably more complicated than whether one should be allowed to lie about having received a military award. Given the absence of harm other than damage to the reputation and meaning of such awards, we should ask a different question: Why should the government be allowed to punish such lies?

2011, available at http://www.washingtonpost.com/lifestyle/style/the-yes-men-use-humor-to-attack-corporate-greed/2011/09/28/gIQACyJg0L_print.html. The Yes Men's Motto is "Sometimes it takes a lie to expose the truth." *Id.*

¹¹⁸ The Yes Men have engaged in such tactics with businesses, posing as (1) representatives of the Chamber of Commerce and announcing that it had changed its stance on the validity of climate change, (2) representatives of Dow Chemical and claiming full responsibility for the Union Carbide chemical spill in India, and (3) representatives of Exxon and claiming to have prototype candles made from the body fat of victims of climate change. Montgomery, *supra* note 117. Their point with such deceptions, which they correct soon after the conferences, is to challenge the status quo and "keep[] the ideas alive that things can be different, and that there's something dramatically wrong with the world." *Id.*

¹¹⁹ See, e.g., *Strandlof*, 2012 WL 247995 at *4.

¹²⁰ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Satire is "particularly well-suited for political critique because it tears down facades, deflates stuffed shirts, and unmask[s] hypocrisy. . . . Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed." Leslie Kim Trieger, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 YALE L.J. 1215, 1215 (1989).

¹²¹ Although officials are unlikely to punish famous personalities such as Steven Colbert and John Stewart for their barbed comments, "the most realistic, [and] . . . often the sharpest satire" may not enjoy such immunity. Trieger, *supra* note 120, at 1216. For example, the Yes Men have been sued for commercial identity theft after holding their press conference posing as the Chamber of Commerce. Montgomery, *supra* note 117. The duo revealed their real identities and political purpose during the conference when confronted by Chamber representatives, who burst into the room, created a scene and "guaranteed widespread, snickering media coverage" about the event. Despite – or perhaps because of – the confrontation, the Chamber proceeded to sue for identity theft. *Id.*

¹²² *Stevens*, 130 S. Ct. at 1591.

The Stolen Valor Act creates a political crime that does not punish harm but instead tries to enforce respect for the military and its awards. There are many reasons why we should respect the valor and bravery that these awards represent. But the government has no business telling us who or what we must revere on pain of criminal penalties. A Supreme Court decision allowing the government to be in this business would not only allow it to establish an orthodoxy but give it the power to determine the value of speech in a manner utterly inconsistent with the Court's existing jurisprudence.