

Why Protect Falsity?

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Frederick Schauer, *Facts and the First Amendment*, [57 UCLA L. Rev. 897](#) (2010).

Free speech theory has neglected – to the point where it is almost an embarrassment – the treatment of false statements of fact as such (that is, where they do not injure reputation). The Supreme Court has declared that no First Amendment value attaches to false statements of fact – and that there is no such thing, under the First Amendment, as a false idea. One reason for the theoretical neglect of false statements of fact may be that the examples that come to mind blend questions of fact and “ideas” (think of global warming and evolution). Another reason may lie in the chilling-effect argument – that the First Amendment requires that statements themselves lacking First Amendment value, such as false statements of fact, sometimes be immunized from liability out of fear that imperfections in the system of imposing liability will lead speakers to refrain from making *true* statements because they are worried that a decision-maker might wrongly conclude that the statements were false.

Frederick Schauer’s Nimmer Lecture does some essential ground-clearing on the basic theoretical questions. With his usual analytic care and clarity, Schauer distinguishes between basic facts and opinions, and defends the sensible anti-post-modern proposition that not all facts are socially constructed. The latter is particularly important because there is an understandable tendency to pose questions about regulation of false statements of fact by imagining when the government might want to impose liability, and the usual answers, at least in the United States, do touch on issues where post-modern anxieties might be well-placed (again, think global warming and evolution and even Holocaust denial, though Schauer contends otherwise as to the last).

Concerns about the chilling effect seem to be absent, or at least much weaker, when liability is imposed for lying – that is, for making false statements that the speaker believes to be false. (Weaker, perhaps, because there may be imperfections in determining whether the speaker had the required intent to lie.) One is hard-pressed to explain how the utterance of factual statements known to be false contributes to the discovery of truth, or to a well-functioning system of democratic self-governance. One can struggle to make Mill’s argument, that the very effort to refute false statements will strengthen a person’s commitment to the true statement, coherent: Maybe a person who believes something because she read it on Wikipedia will believe it “more” or “better” if, after being challenged by someone knowing the facts to be as the target believes them to be, she goes to three or four other confirmatory sources – but there’s some cost to “strengthening” the truth in the face of lies in that manner.

Personal autonomy is another matter. Everyone lies about something (“What were you doing before you came home at midnight last night?”), and giving the government the power to impose liability for such daily lies raises the specter of “1984.” This, which I call the “Don Draper” scenario (or, for an older version, the “Huck Finn” scenario on lighting out for the territories), is perhaps a better case for protecting deliberate untruths about oneself. Whether the best doctrinal home for this concern is the First Amendment is, I think, questionable; doctrines directly responsive to personal autonomy and privacy are more suitable, in my view.

Schauer shows that the government actually does impose liability for false statements of fact more often than the subject’s theoretical neglect might suggest. False statements under oath can be perjury;

false advertising is prohibited; as Schauer has insisted again and again, false statements made in connection with the issuance of securities are criminalized; and nobody thinks that people should have a First Amendment defense to resume fraud. We can wave our hands about some of these, saying that they involve commercial speech, which is subject to lower standards of First Amendment review, and we can deal with perjury by saying that imposing liability for perjury satisfies whatever high standard of review we might want to invoke. The anti-paternalism theme in recent commercial speech doctrine, coupled with the idea that the preferred remedy for “bad” – here, false – speech is more speech, suggest to me that there’s more hand-waving going on than serious analytic inquiry.

Schauer exposes another reason for the neglect of false statements of fact in free speech theory. Regulation typically occurs in contexts where doctrine offers easy answers: commercial speech, or political campaigns where the line between fact and opinion may be exceedingly thin. So, to frame the problem clearly we need to think about situations in which a reasonable government might want to regulate false factual statements as such. Here’s one possibility: A board of education wants to encourage the children in its schools to aspire to academic excellence, and adopts a program that uses exemplars of academic achievement to encourage those aspirations – well-known figures who were Rhodes Scholars or members of Phi Beta Kappa. A civic activist in town, well-known as someone who rarely has much to contribute to public discourse, falsely states that he was a Rhodes Scholar. Prodded by the school board, the city council makes it a misdemeanor to (intentionally) falsely represent that you have won one of a list of academic honors. Should the civic activist have a First Amendment defense?

The example is not entirely hypothetical. Two federal courts of appeals have held unconstitutional the Stolen Valor Act, which makes it a federal crime to state, falsely, that you have won a Congressional Medal of Honor and some other military honors. I expect that the Supreme Court will take up the question soon. Schauer’s essay shows that the question the statute poses is genuinely novel within First Amendment theory and doctrine. It will provide the Justices – or at least their law clerks – with some important conceptual tools to apply to the problem.

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