

Independent Appellate Review of Knowledge of Falsity in Defamation and False Statements Cases By Tung Yin[†]

Abstract: Although we are used to thinking that criminal defendants receive more procedural protections than civil defendants do (in the form of a higher burden of proof and the right not to testify, among others), this notion turns out to be incorrect when it comes to appellate review of civil defamation verdicts versus criminal convictions for false statements, where the key issue is the defendant's knowledge of the falsity of the statement in question. The civil defendant gets the benefit of what the Supreme Court calls "independent appellate review" of the existence of actual malice in a defamation case, which is to say an aggressive standard exhibiting little to no deference toward the factfinder's determination. The criminal defendant, on the other hand, is saddled with a standard of review that is highly deferential toward the factfinder; the criminal defendant must show that no reasonable jury could have found that he knew the statement to be false. A person who is sued successfully for slander and convicted of making a false statement for the same utterance could therefore find himself in the odd situation of winning the appeal in the civil case and losing it in the criminal case, simply because in the former instance,

[†] Professor of Law, Lewis & Clark Law School. J.D., 1995, University of California, Berkeley (Boalt Hall). Thanks to Randy Bezanson, Regina Burch, Ozan Varol, and participants at faculty workshops at the Lewis & Clark Law School and the 19th Annual Midwestern People of Color Legal Scholarship Conference for helpful conversations and feedback, and to Paul Stempel (Iowa '09) for research assistance.

the appellate court could more freely reject the jury's knowledge of falsity finding, whereas in the latter instance, the appellate court would be essentially bound to the jury's determination. In this Article, I ask whether the same duty of independent appellate review of the knowledge of falsity should apply in criminal cases that involve false statements. Answering that question requires an examination of the First Amendment principles underlying the actual malice rule and the independent appellate review doctrine to see if the same concerns arise in the criminal context. Ultimately, I conclude that in at least some instances, First Amendment values call for extending the independent appellate review doctrine to criminal cases.

INTRODUCTION

As children, we learn the difference between white lies and harmful ones. American society tolerates, if not encourages, white lies (“Thanks for the fruitcake. It was delicious!”) but provides serious legal recourse for victims of harmful lies. A person who suffers reputational harm due to someone else’s lies can sue that person for defamation and recover damages awards running into the millions of dollars.¹ On the criminal side, as a number of high-profile celebrities and politicians have discovered,² lying to federal agents—even while not under oath—can lead to felony convictions carrying prison sentences under 18 U.S.C. § 1001, the False Statements Act.

Common law defamation and § 1001 share a number of similarities when one examines their respective elements:

¹ See, e.g., Robert Lindsey, *Carol Burnett Given \$1.6 Million in Suit Against National Enquirer*, N.Y. TIMES, Mar. 27, 1981, at A1; *Wayne Newton Libel Award Is Cut to \$5 Million by Judge*, N.Y. TIMES, Nov. 20, 1987, at A16; *Jury Awards \$11.3 Million over Alleged Defamation on Internet*, ST. LOUIS POST-DISPATCH, Oct. 12, 2006, at A 11 (describing defamatory blog postings and plaintiff’s verdict).

² See *infra* notes 19-22.

Comparison of False Statements with Defamation

	18 U.S.C. § 1001	Defamation (public figure plaintiff)
Act	Making a statement to a federal government official ³	Publication of statement to a third party
Nature of Statement	False ⁴	False ⁵
Significance	Material ⁶	Defamatory ⁷
Mental State	Knowledge and intent ⁸	Actual malice ⁹ (actual knowledge of falsity or reckless disregard for the truth)

³ See, e.g., *United States v. Rodgers*, 466 U.S. 475 (1984). Cf. *United States v. Herring*, 916 F.2d 1543 (11th Cir. 1990) (upholding § 1001 conviction based on false statements made to state unemployment agency, which received federal funding).

⁴ See, e.g., *United States v. Diogo*, 320 F.2d 898, 905-09 (2d Cir. 1963).

⁵ See, e.g., *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

⁶ See, e.g., *United States v. Gaudin*, 515 U.S. 506 (1995).

⁷ The statement at issue must harm the plaintiff's reputation. See, e.g., *Jackson v. Longcope*, 476 N.E.2d 617 (Mass. 1985) (discussing "libel-proof" plaintiff); *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298 (2d Cir. 1986) (holding *Penthouse* publisher Guccione to be "libel-proof" with regard to a notorious relationship with his live-in girlfriend). A related tort, false light, addresses instances where the statement portrays the plaintiff inaccurately but not necessarily defamatorily. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974).

⁸ See, e.g., *United States v. Yermian*, 468 U.S. 63, 69 (1984).

⁹ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

In both of these examples, it is the government that is punishing defendants for speech that was false (but not under oath).¹⁰ Because state action is involved, the First Amendment limits the government's ability to impose damages or punishment for false speech. However, the similarities between defamation and false statements end here.

In *New York Times Co. v. Sullivan*,¹¹ the Supreme Court imposed the constitutional requirement that a public figure plaintiff prove "actual malice" (i.e., knowledge of falsity or reckless disregard for the truth) in order to prevail on a defamation claim; proof of falsity is necessary but not sufficient. Since it would be odd for a civil defendant to be entitled to more constitutional protection than a criminal defendant,¹² § 1001 presumably must require at least as much as "actual malice." At first glance, the statute appears to satisfy this requirement: the elements of a false statements claim include "knowingly and willfully," which must be proven beyond a reasonable doubt.¹³

But there is a critical difference. In public figure defamation cases, appellate courts have a duty of independent review of certain facts,¹⁴ meaning that they exercise something akin to de novo review over whether the challenged speech falls outside constitutionally protected categories.¹⁵ Specifically, the Court held in *Bose Corp. v. Consumers Union* that appellate courts had to review the record

¹⁰ On the connection between tort law and criminal law, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 215 (7th ed. 2007) (arguing that tort law and criminal law operate in parallel, one regulating those with assets, the other those without).

¹¹ 376 U.S. 254.

¹² Consider, for example, the different burdens of proof (preponderance of the evidence versus beyond a reasonable doubt), as well as an indigent criminal defendant's entitlement to appointed counsel.

¹³ See *In re Winship*, 397 U.S. 358 (1970).

¹⁴ *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501, 514 (1984).

¹⁵ See David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 495 (1991) ("Lower courts sometimes refer to this as 'de novo' review, but the Supreme Court has never used that term and it is clear that jury findings are not to be disregarded entirely."). See generally *infra* Part II.C.

independently to determine that there was adequate evidence to support a finding of actual malice.¹⁶ In ordinary criminal cases, on the other hand, a convicted defendant who appeals on insufficiency of evidence grounds has his case reviewed under the highly deferential standard from *Jackson v. Virginia*: “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”¹⁷

Moreover, courts have brushed aside First Amendment challenges to § 1001 (and analogous statutes) on the ground that there is no First Amendment right to lie.¹⁸ Some of these cases have even cited *New York Times Co. v. Sullivan* to support this position. Thus, we have an incongruous situation where a civil defendant appears to be entitled to more free speech review than a criminal defendant.

This Article questions whether a § 1001 defendant should be entitled to de novo review of the jury’s finding of knowledge and intent. The possibilities are: (1) there should be at least a similar kind of independent review of the knowledge of falsity in § 1001 cases; (2) the independent review doctrine should be abandoned altogether for First Amendment cases; or (3) the current structure should be kept because there is a meaningful distinction between defamation cases and § 1001 cases. Although there have been strong arguments made in favor of outcome (2), for the purposes of this Article, I will assume that the independent appellate review doctrine is here to stay.

¹⁶ 466 U.S. 485.

¹⁷ 443 U.S. 307, 319 (1979).

¹⁸ See *Bryson v. United States*, 396 U.S. 64, 72 (1969) (“A citizen may decline to answer the question, or may answer honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.”); *Clipper Express v. Rocky Mountain Motor Tariff*, 690 F.2d 1240, 1261 (9th Cir. 1982) (“The first amendment has not been interpreted to preclude liability for false statements.”); *United States v. Finley*, 705 F. Supp. 1272, 1294 (N.D. Ill. 1988); *United States v. Stewart*, No. 03 CR 717 (MGC), 2004 WL 113506, at *2 (S.D.N.Y. Jan. 26, 2004) (“[T]he First Amendment does not protect false statements of fact that are part of a course of criminal conduct.”); *United States v. Chan*, No. 94 CR 150 (PKL), 1995 WL 29460, at *1 (S.D.N.Y. Jan. 26, 1995).

Part I of this Article provides an overview of the false statements statute, starting with its roots as an anti-false-claims statute to its current incarnation and continuing with a discussion of its justifications in the face of recent criticism. It then explains the standard of review for appeals based on claims of insufficient evidence and concludes with a case study of a § 1001 conviction in which a different standard of review might well have led to a different result on appeal. Part II then examines the constitutional rules of defamation, primarily the actual malice standard set forth in *Sullivan* and the duty of independent appellate review in *Bose Corp.*

Part III then considers whether the same duty of independent review should apply in sufficiency of the evidence appeals of § 1001 cases. First, the Article refutes the simplistic argument, given by numerous courts, that false statements are not protected by the First Amendment. Second, it discusses whether the need to clarify and enunciate legal principles—*Bose Corp.*'s justification for the independent appellate review duty—is equally necessary in the criminal context. Third, given the actual malice rule's basis in public official/public figure litigation, it considers whether the government can and need be analogized to a public figure. Finally, this Part asks whether the difference between volunteered and induced statements calls for independent review in one context but not the other.

I. FALSE STATEMENTS AND CRIMINAL PROSECUTIONS

Under 18 U.S.C. § 1001, it is a federal crime to lie knowingly to federal agents, even if one is not under oath. Recent high-profile examples of defendants convicted of § 1001 violations include I. Lewis “Scooter” Libby, formerly Vice President Cheney’s Chief of Staff;¹⁹ businesswoman Martha Stewart;²⁰ U.S. Olympic athlete

¹⁹ See Neil A. Lewis, *Libby Given 30 Months for Lying in C.I.A. Leak Case*, N.Y. TIMES, June 6, 2007, at A1. President Bush commuted Libby’s sentence before Libby was required to report to federal prison. See Jim Rutenberg & Scott Shane, *Libby Pays Fine; Judge Poses Probation Query*, N.Y. TIMES, July 6, 2007, at A20.

Marion Jones;²¹ and movie director John McTiernan.²² This Part reviews the substantive content of § 1001, its evolution from early roots to current form, criticisms of its broad reach, and the justifications for criminalizing false statements not made under oath. Then this Part studies a number of appeals of convictions under § 1001 where *Bose Corp.*-type independent review of the sufficiency of the evidence demonstrating knowledge of falsity arguably would have led to a different result.

A. Primer on § 1001

In full, § 1001 reads:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.²³

²⁰ See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006). Although Stewart was granted bail pending appeal, she opted to serve her split sentence (five months in a federal prison and five months of home detention) before the appellate court rendered its decision. See Michael Barbaro, *Court Rejects Appeal by Martha Stewart*, N.Y. TIMES, Jan. 7, 2006, at C3.

²¹ Lynn Zinser & Michael S. Schmidt, *Jones Admits to Doping and Enters Guilty Plea*, N.Y. TIMES, Oct. 6, 2007, at D1.

²² David M. Halbfinger & Allison Hope Weiner, *Movie Director Given 4 Months for Lying About Hiring Detective*, N.Y. TIMES, Sept. 24, 2007, at C4.

²³ 18 U.S.C. § 1001 (2006).

Section 1001 evolved from the 1863 False Claims Act, which prohibited persons from “present[ing] or caus[ing] to be presented for payment or approval . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent.”²⁴ As the Supreme Court has noted, the existence of a false statement then was a necessary but not sufficient component of conviction under this statute; the text made clear that the false statement had to be made for the purpose of inducing the government to honor a fraudulent claim for money.²⁵ In this form, the 1863 Act more closely resembled today’s False Claims Act.²⁶

Congress made what appeared to be a technical change in 1918 by adding a category of prohibited conduct—“for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States . . . or any corporation in which the United States of America is a stockholder . . . knowingly and willfully . . . mak[ing] or caus[ing] to be made any false or fraudulent statements or representations.”²⁷ The focus of the statute therefore remained on stealing from the federal government, with new emphasis on protecting government corporations.²⁸

In 1934, Congress deleted the elements in the statute relating to stealing from the government, leaving intact the prohibitions against making false statements or representations.²⁹ Congress also added a requirement that the government prove the false statement was made

²⁴ Act of Mar. 2, 1863, 12 Stat. 696 (1863).

²⁵ See *Hubbard v. United States*, 514 U.S. 695, 705 (1995).

²⁶ 18 U.S.C. § 287 (2006) (“Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.”).

²⁷ Act of Oct. 23, 1918, 40 Stat. 1015-16 (1918).

²⁸ *Hubbard*, 514 U.S. at 706.

²⁹ *Id.*

“in any matter within the jurisdiction of any department or agency of the United States.”³⁰

Section 1001 has long been subject to criticism about its broad reach.³¹ Various lower courts have held that conviction under § 1001 does not require the prosecution to prove that government officials were in fact deceived, misled, or even influenced by the false statement,³² or that government officials ever saw it.³³ As a result, one persistent complaint about § 1001 is that prosecutors can essentially “manufacture” crimes by inducing suspects to lie to federal investigators about matters for which the investigators already have evidence of guilt.³⁴ For example, in one case, a notary public violated Florida law by notarizing a deed without having the signatories appear personally before her. An Internal Revenue Service agent discovered

³⁰ *Id.*; 18 U.S.C. § 1001 (2006).

³¹ See Peter W. Morgan, *The Underfined Crime of Lying to Congress: Ethics Reform and the Rule of Law*, 86 NW. U. L. REV. 177, 191 (1992) (“Civil-liberties and criminal-law-reform groups for years have criticized section 1001, as interpreted, for its irrationality and overcriminalization.”); Michael Gomez, Comment, *Re-Examining the False Statements Accountability Act*, 37 HOUS. L. REV. 515, 556-57 (2000) (suggesting that “Congress should re-examine the False Statements Act and . . . requir[e] a warning provision or codifying the ‘exculpatory no’ doctrine.”). An Eighth Circuit panel once held that Congress could not have intended to criminalize unsworn false statements made to FBI agents, as this would lead to “patently absurd results.” *Friedman v. United States*, 374 F.2d 363, 366 (8th Cir. 1967). Interestingly, *Friedman* created a Circuit split on the issue that was subsequently resolved in *United States v. Rodgers*, 466 U.S. 475 (1984), which is discussed below in the main text. For a discussion of whether *Rodgers*’s rejection of the Eighth Circuit precedent in that particular case violated the fair warning requirement of the Due Process Clause, see Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455 (2001).

³² See, e.g., *United States v. LeMaster*, 54 F.3d 1224, 1231 (6th Cir. 1995); *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992); *United States v. Service Deli Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *United States v. Calhoun*, 97 F.3d 518, 530 (11th Cir. 1996).

³³ See *United States v. Cochran*, 109 F.3d 660, 668-69 (10th Cir. 1997); *Calhoun*, 97 F.3d at 530.

³⁴ See, e.g., William J. Schwartz, Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316, 325-26 (1977).

this violation, asked the notary public about it, and elicited a denial of wrongdoing, upon which the government indicted her for violating § 1001.³⁵ As Justice Ginsburg observed, the federal government was able to “turn[] a violation of state law into a federal felony by eliciting a lie that misled no one.”³⁶ A number of lower courts had responded to this concern by judicially interpreting § 1001 as not applicable to false denials of guilt under the “exculpatory no” doctrine,³⁷ but the Supreme Court overturned those decisions in *United States v. Brogan*.³⁸

Even more outrage about § 1001 erupted in the aftermath of Martha Stewart’s trial and conviction in early 2004. Stewart and Samuel Waksal, the CEO of the biotechnology company ImClone, shared the same personal stockbroker at Merrill Lynch, Peter Bacanovic. In late 2001, when Waksal attempted to dump his (and his family’s) entire stock holdings in ImClone the day before the Food and Drug Administration was to announce its rejection of ImClone’s cancer-treatment drug, Bacanovic directed his assistant to tell Stewart that he thought ImClone’s stock was going to drop and to ask whether she wanted to sell her approximately \$230,000 stake. Stewart ordered that her shares of ImClone be sold immediately, averting about a \$40,000 loss when the FDA’s announcement became public the next day. There was evidence that Stewart and Bacanovic then conspired to lie to FBI agents and SEC lawyers about the reasons for her ImClone stock sale. They first falsely attributed the sale to tax loss planning and then later to a pre-agreed stop-loss order, rather than to the confidential information that an insider (Waksal) had tried to sell his stock.³⁹ The government indicted Stewart and Bacanovic for false

³⁵ See *United States v. Tabor*, 788 F.2d 714 (11th Cir. 1986).

³⁶ *United States v. Brogan*, 522 U.S. 398, 410 (1998) (Ginsburg, J., concurring).

³⁷ See Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001).

³⁸ 522 U.S. 398 (1998).

³⁹ The information about Waksal was probably not “inside information” for the purposes of the securities laws, and the government did not charge Stewart with

statements, obstruction of justice, and conspiracy.⁴⁰ While the government also indicted Stewart for securities fraud, this charge was not based on the ImClone stock sale; rather, the government contended that Stewart's public proclamations of innocence misled and deceived investors in the Martha Stewart Omnimedia Corporation, whose future was thought to be heavily dependent on Stewart herself.⁴¹ In other words, the actions that Stewart and Bacanovic covered up—her sale of ImClone based on the information from her broker that Waksal had tried to sell his entire stake—did not directly make up any substantive charge against her. Critics of § 1001 complained loudly that Martha Stewart had been convicted of lying about something that was not a crime.⁴²

insider trading. It was, however, confidential and proprietary to Merrill Lynch, which had a corporate rule against trading for one client based on confidential information from another client.

⁴⁰ See Superseding Indictment, *United States v. Stewart*, 287 F. Supp. 2d 461 (S.D.N.Y. 2003) (No. 03 Cr. 717), available at <http://news.findlaw.com/hdocs/docs/mstewart/usmspb10504sind.html>.

⁴¹ This charge was novel and controversial, and the district judge dismissed it after the prosecution rested. Jonathan D. Glater, *Most Serious Charge Against Stewart Is Dismissed*, N.Y. TIMES, Feb. 28, 2004, at A1.

⁴² See, e.g., Harvey Silverglate, *Spitzer's Legal Minefield*, BOSTON GLOBE, Mar. 15, 2008, at 11A ("Stewart was convicted not for insider trading, but for lying to investigators about sales that almost certainly did not constitute insider trades."); Brian Boyd & Galia Garcia-Palafox, *Hopelessly Devoted: Martha Fans Gather at Courthouse to Show Their Support for Woman They Say Made Their Lives Better*, NEWSDAY, July 17, 2004, at A05 (quoting store manager as saying that "Stewart essentially was punished for 'lying about a crime that didn't exist,' since authorities did not charge her with insider trading."); Editorial, *What Goes With Stripes?*, ST. LOUIS POST-DISPATCH, Mar. 8, 2004, at B6 ("It seems odd to be jailed for lying about something that may not have been a crime."); see also Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 421 (2008) ("[P]rosecutors were never forced to prove the underlying crime that they asserted was being illegally obscured."). Similar outrage followed the conviction of Scooter Libby. See, e.g., Silverglate, *supra*, at 11A ("Scooter Libby was convicted not for revealing the identity of CIA agent Valerie Plame Wilson – not likely a federal crime under the circumstances – but for lying about his noncrime.").

Why should the government punish false statements made to it when those statements were not made under oath? Punishment for perjury, by contrast, is justified by the need to enforce the legitimacy of the oath.⁴³ Perhaps the best argument in favor of criminalizing unsworn statements can be found in *United States v. Rodgers*.⁴⁴ There, the defendant called the local office of the Federal Bureau of Investigation on his own volition and falsely claimed that his wife had been kidnapped. As a result, the “FBI spent over 100 agent hours investigating . . . only to determine that Rodgers’ wife had left him voluntarily.”⁴⁵ Undeterred, Rodgers called the local office of the Secret Service a few weeks later, this time falsely claiming that his girlfriend was part of a conspiracy to kill President Reagan. This false claim wasted 150 Secret Service agent-hours.⁴⁶ Significantly, Rodgers admitted that “he made the false reports to induce the federal agencies to locate his wife.”⁴⁷

The lower courts agreed with Rodgers that § 1001 addressed only false statements directed at federal agencies with “the power to make final or binding determinations,” based on the statute’s historic roots in prohibiting false claims.⁴⁸ The Supreme Court unanimously reversed, holding that the FBI and Secret Service were charged with investigating the potential crimes implicated by Rodgers’ false reports (kidnapping and assassination) and that it was “a perversion of these authorized functions to turn either agency into a Missing Person’s Bureau for domestic squabbles.”⁴⁹

Rodgers thus identified two potential victims of false statements made to the federal government: the government itself, and

⁴³ *United States v. Mandujano*, 425 U.S. 564, 576 (1976).

⁴⁴ 466 U.S. 475 (1984).

⁴⁵ *Id.* at 477.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (discussing *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967)).

⁴⁹ *Id.* at 481. The Court also noted that the filing of a false report could “have grave consequences for the individuals accused of crime.” *Id.* (citing *United States v. Adler*, 380 F.2d 917, 922 (2d Cir. 1967); *Friedman*, 374 F.2d at 377).

any third parties wrongly accused of criminal conduct by the false statement(s).⁵⁰ The goal of protecting these victims was reasonable enough that the Court would not second-guess the plain language of the statute.⁵¹ In *Rodgers*, it is hard to argue against the view that the government was victimized by the defendant's two false statements; more than 250 agent-hours (six weeks of a government agent's time) were diverted from legitimate law-enforcement activities toward the defendant's domestic squabbles. In addition, the false statement that his wife was involved in a plot to assassinate the President could have exposed her to a criminal investigation, if not indictment.⁵²

Under this reasoning, the government's decision to prosecute Martha Stewart was arguably defensible, notwithstanding her lack of guilt for insider trading. The government had a basis for investigating Samuel Waksal for insider trading, and at the time of the investigation, federal investigators may have believed that Stewart had inculpatory information about Waksal, given the shared financial consultant. Stewart's and Bacanovic's false statements about the pre-agreed stop-loss sale could have thus diverted investigators down a false trail and wasted resources.⁵³

Of course, a high-profile prosecution and conviction under § 1001, such as Martha Stewart's, undoubtedly generates significant deterrent value and educates the public about an otherwise obscure statute.⁵⁴ Yet, aggressive use of § 1001 is not without costs to the

⁵⁰ Of course, not all § 1001 cases involve statements that falsely implicate others. See Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 22 (2005) ("Section 1001 can involve wrongful inculpation, wrongful exculpation, or neither.").

⁵¹ *Rodgers*, 466 U.S. at 484.

⁵² See 18 U.S.C. § 871 (2006).

⁵³ Some argue, however, that the government had already zeroed in on her as a potential target when federal agents asked to interview her. See Michael L. Siegel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1111 (2005).

⁵⁴ See, e.g., Nancy Armour, *It's Not a Good Idea to Lie to the Feds*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 16, 2008, at 1B; Alan Reynolds, *Martha Stewart Is Off the Streets, but Her Case Will Live in Infamy*, INVESTOR'S BUSINESS DAILY,

government. Following Stewart's conviction, numerous commentators in the mass media drew a different lesson than "tell the truth to federal agents," expressed succinctly by one as: "Don't ever, under any circumstances, answer questions put to you by the FBI or any other federal agent unless you have a competent criminal lawyer at your side. And it would be better if it were a very good criminal lawyer."⁵⁵

Thus, while § 1001 serves the undeniably important purpose of deterring resource-wasting lies by people who speak to the government, it may also chill others from speaking due to fear of prosecution.

B. Sufficiency of the Evidence Review

Because knowledge of falsity is an element of § 1001, the prosecution must prove its existence beyond a reasonable doubt under the rule of *In re Winship*.⁵⁶ If there were absolutely no evidence to support a finding of knowledge, a conviction under § 1001 would be unconstitutional.⁵⁷ A more challenging question is presented when there is *some* evidence to support the finding of knowledge but the defendant argues that it is insufficient to prove that element beyond a reasonable doubt.

Sept. 20, 2004, at A21; *Not Above the Law - The Disgrace of Martha Stewart Et Al. Proves a Point*, PITTSBURGH POST-GAZETTE, July 19, 2004, at A12; Alex Berenson, *Stewart's Folly; There's a Reason Your Mother Told You Not to Lie*, N.Y. TIMES, Mar. 7, 2004, at 4.

⁵⁵ Donald Kaul, *Martha's Lesson - Don't Talk to the FBI*, TOPEKA CAPITAL-JOURNAL, Mar. 22, 2004, http://www.cjonline.com/stories/032204/opi_kaul.shtml. See also Timothy Lynch, *Is It Becoming a Crime to Keep Quiet? Court Will Decide; A Nevada Rancher Was Prosecuted for Refusing to Speak with an Officer*, CHI. SUN-TIMES, Mar. 22, 2004, at 35 (arguing that the Martha Stewart conviction teaches citizens not to talk to government investigators but that remaining silent may not be consequence-free); Charles Adams, *What Nat King Cole Would Have Told Martha Stewart*, LEWROCKWELL.COM, Mar. 12, 2004, <http://www.lewrockwell.com/orig2/adams4.html>.

⁵⁶ 397 U.S. 358 (1970).

⁵⁷ See *Thompson v. Louisiana*, 362 U.S. 199 (1960).

In *Jackson v. Virginia*, the Court held that an appellate court reviewing a conviction had to do more than simply determine whether the jury had been instructed correctly; rather, the court had a duty “to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.”⁵⁸ However, this is not *de novo* review.⁵⁹ Given the factfinder’s duty “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts,” appellate review supposedly warrants a deferential standard: “[W]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁶⁰

Where the established facts allow “conflicting inferences,” the appellate court “must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.”⁶¹

At the time it was decided, *Jackson* represented an increase in the stringency of appellate review on habeas relative to the “no evidence” standard that was the only prior basis for evaluating

⁵⁸ 443 U.S. 307, 318 (1979). *Jackson* arose on a petition for habeas corpus under 28 U.S.C. § 2254, with the petitioner having been convicted of a state crime in state court. The case was therefore complicated by the federalism issues inherent in federal habeas corpus review. Nevertheless, federal appellate courts have used *Jackson* as the standard for direct review of sufficiency of the evidence of federal convictions. *But see* *Stewart v. Coalter*, 48 F.3d 610, 613 (1st Cir. 1995) (questioning whether *Jackson* “reflect[s] the current thinking of the Supreme Court,” though suggesting an even more deferential “some evidence” standard). The Court later overruled *Jackson* insofar as it required application of this standard of review to habeas petitions by state prisoners challenging the sufficiency of evidence supporting their convictions, *see* *Wright v. West*, 505 U.S. 277, 291 (1992), but left intact its application on direct review.

⁵⁹ *Jackson*, 443 U.S. at 318-19 (quoting *Woodby v. INS*, 385 U.S. 276 (1967)) (“But this inquiry does not require a court to ‘ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt.’”).

⁶⁰ *Id.* at 319.

⁶¹ *Id.* at 326.

sufficiency of the evidence claims. Instead of having to show that there was no evidence at all to support the jury verdict, the defendant would now have the relatively easier burden of demonstrating that while there was *some* evidence to support the verdict no rational jury could have relied on that evidence to convict the defendant. Three Justices disagreed with the *Jackson* majority's standard, calling it "a new rule of law—one that has never prevailed in our jurisprudence."⁶² They warned that it would potentially burden federal judges enormously by inviting more habeas petitions challenging the sufficiency of the evidence and by requiring detailed review of entire trial transcripts: "[The *Jackson* standard] will surely impose countless additional hours of unproductive labor on federal judges and their assistants."⁶³ In actual practice, however, the *Jackson* standard has had little impact. As Professor Ronald Allen noted, "If there is any evidence of guilt, it will almost always meet the *Jackson* standard."⁶⁴ Professor George Thomas described the test as "so flabby that convictions are almost never reversed."⁶⁵ The Ninth Circuit agreed that the *Jackson* standard was "difficult" to overcome.⁶⁶

Indeed, as the next subsection demonstrates, federal appellate review under *Jackson v. Virginia*, especially in the circuit courts, appears sparse, usually with no analysis and a conclusory assertion that a rational jury could have reached the verdict.

C. Why Appellate Review Standards Matter

Those rare cases in which § 1001 defendants have raised First Amendment defenses have been uniformly brushed aside by the courts

⁶² *Id.* (Stevens, J., concurring).

⁶³ *Id.* at 337.

⁶⁴ Ronald J. Allen, *Foreword: Montana v. Egelhoff – Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633, 649 (1997).

⁶⁵ George C. Thomas III, *Through a Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy*, 3 OHIO ST. J. CRIM. L. 1, 8 n.42 (2005).

⁶⁶ *United States v. Benitez-Augustin*, 61 F. App'x 337, 338-39 (9th Cir. 2003).

without anywhere near the scrutiny applied in public figure defamation cases. This subpart demonstrates that a different standard of review of the falsity determination could have resulted in a different outcome in an actual case and, by extension, other cases in which knowledge of falsity was a disputed element.

John Watson was a twenty-year veteran of the U.S. Armed Forces and therefore was entitled to a lifetime military pension. Under the Uniform Code of Military Justice, Watson's surviving spouse would be entitled to draw the pension if she had been married to him for more than a year before his death.⁶⁷ At this point, the story started to reek, in the words of one of the judges, of "ickiness."⁶⁸

In 1983, when Watson was fifty-six years old, he adopted his family friend, eighteen-year-old Darlene Dedman. She later got married and then, while at the funeral of her birthfather, met her first cousin, Nelva Holland. Holland wanted to enroll in nursing school but was unable to obtain the required health insurance coverage. Dedman and her husband agreed to adopt Holland so that she would be covered under their insurance plan. Holland also moved in with the Dedmans.

In 1996, Dedman and Holland had a serious argument that led the Dedmans to kick Holland out of their home. According to Holland, Dedman approached her with an offer: Holland would be allowed to return home if she agreed to marry Watson. Later that year, Holland married Watson in Arkansas, with Dedman in attendance. The location of the marriage was significant, because Arkansas law prohibited marriage between grandparents and grandchildren,⁶⁹ and Holland was, in essence, Watson's adopted granddaughter.⁷⁰

Watson died in late 1997, more than a year after the marriage, so Dedman and Holland began collecting survivor benefits. This continued until 2005, when Dedman and Holland had another fight.

⁶⁷ 10 U.S.C. §§ 1447(7), 1450(a) (2006).

⁶⁸ The facts are drawn from *United States v. Dedman*, 527 F.3d 577, 582-83 (6th Cir. 2008). "Ickiness" comes from the dissent by Judge Gilman. *Id.* at 603 (Gilman, J., dissenting).

⁶⁹ ARK. CODE ANN. § 9-11-106 (West, Westlaw through end of 2010 Fiscal Sess.).

⁷⁰ To be precise, Holland was the adopted daughter of Watson's adopted daughter.

Dedman then reported to the government that Holland was engaging in fraud. According to the government, Dedman falsely told the government investigator that she had learned of the marriage between Watson and Holland in 2004. Dedman argued, and the investigator conceded as possible, that she had misunderstood the question as asking when she first learned that the marriage was illegal.⁷¹ The government subsequently indicted Dedman for conspiracy to defraud the Department of Defense in violation of 18 U.S.C. § 286 and for making false statements.

In denying Dedman's sufficiency of the evidence challenge to her § 1001 conviction, the Sixth Circuit faithfully applied the rule from *Jackson v. Virginia* and concluded simply that "the jury could have decided easily that Dedman understood the question."⁷² However, while the jury could have reasonably decided that, a less deferential standard of review might have led to a different outcome; it certainly would have called for more elaboration than that provided in the opinion. If Dedman were going to lie to the federal agent about when she learned of the Holland-Watson marriage, why would she have chosen 2004? It is difficult to see how that response would have been exculpatory as to a false-claims investigation. The elements of a § 286 claim are that: (1) the defendant made a false claim against a U.S. department or agency; and (2) the defendant knew the claim was false. Dedman had continued to cash her share of Watson's benefits well after 2004, so even if she had not known of the illegality of the marriage before 2004, she was still culpable for the benefits accepted later. As a result, her claim of having misunderstood the question seems more plausible than the theory that she knowingly lied in a way that did not fully exculpate herself. The Sixth Circuit's opinion on this point is devoid of analysis from which one could assess the likelihood that Dedman in fact misunderstood the question asked by the investigator. *Jackson v. Virginia* relieves the court of any need for such searching analysis, but a more stringent standard would not.

⁷¹ *Dedman*, 527 F.3d at 599.

⁷² *Id.*

II. CONSTITUTIONAL RULES OF DEFAMATION

As a species of intentional torts, defamation is a creature of state common law generally consisting of a defendant's publication of a defamatory statement to third parties that harms the plaintiff's reputation.⁷³ Federal law—specifically, the First Amendment—became relevant in 1964, when the Supreme Court's landmark decision in *New York Times Co. v. Sullivan* “constitutionalized” defamation law.⁷⁴ This Part of the Article reviews the scope of and justifications for special First Amendment protections available to defamation defendants so that subsequent Parts can apply those justifications to § 1001 cases.

A. *Sullivan* and the “Actual Malice” Requirement

Justice Brennan, the author of *Sullivan*, described the central issue in the case as “the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.”⁷⁵

The libel plaintiff in the case was L.B. Sullivan, the City of Montgomery, Alabama's Commissioner of Public Affairs in charge of

⁷³ RICHARD E. LABUNSKI, *LIBEL AND THE FIRST AMENDMENT: LEGAL HISTORY AND PRACTICE IN PRINT AND BROADCASTING* 30-33 (1987).

⁷⁴ 376 U.S. 254 (1964). For some recent references to how *Sullivan* “constitutionalized” defamation law, see Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 430 (2008); Thomas C. Galligan, Jr., *U.S. Supreme Court Tort Reform: Limiting State Power to Articulate and Develop Tort Law—Defamation, Preemption, and Punitive Damages*, 74 U. CIN. L. REV. 1189, 1191 (2006); Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.L. SCH. L. REV. 57, 67 (2005-2006); and Justice John Paul Stevens, “*Random Recollections*,” 42 SAN DIEGO L. REV. 269, 275 (2005).

⁷⁵ *Sullivan*, 376 U.S. at 256. A detailed historical account of the events leading up to the case can be found in ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1992).

supervising the police and fire departments. Sullivan complained that a March 29, 1960, paid advertisement in the *New York Times* falsely attributed to him various actions taken by the local police and local residents against African-American civil-rights protesters. According to Sullivan, the advertisement, without mentioning him by name, nevertheless defamed him by imputing to him, based on his status as Commissioner, the following conduct: (1) “ringing” the Alabama State College campus with police; (2) padlocking the dining hall to starve students; (3) arresting Dr. Martin Luther King; and (4) engaging in intimidation and violence. To the extent that these allegations referred to Commissioner Sullivan,⁷⁶ they were indisputably erroneous.⁷⁷ Sullivan prevailed at trial and was awarded \$500,000—the entire amount he sought as damages.

The Supreme Court reversed the libel award on First Amendment grounds. Although earlier cases might have suggested that defamation was completely without First Amendment protection, the Court explained that “libel can claim no talismanic immunity from constitutional limitations.”⁷⁸ Instead, the Court began with a discussion of the principles underlying the First Amendment: “[D]ebate on public issues should be uninhibited, robust, and wide-open, and [] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁷⁹ The Court recognized that errors in this context could not be completely

⁷⁶ See RESTATEMENT (SECOND) OF TORTS § 564 cmt. b (1977) (“It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended.”); *Ruzicka v. Conde Nast Publ’ns, Inc.*, 999 F.2d 1319, 1322 n.6 (8th Cir. 1993) (“The plaintiff need not be cited by name for the defamation to be ‘of and concerning the plaintiff.’”).

⁷⁷ *Sullivan*, 376 U.S. at 258-59. For example, the State Board of Education did expel nine students, but not for leading a protest demonstration. The students who did protest the expulsion skipped class *en masse* for one day, and they did subsequently register for the following semester’s classes. Most importantly, the dining hall was never locked, and the police never “ringed” the campus. *Id.*

⁷⁸ *Id.* at 269.

⁷⁹ *Id.* at 270.

avoided, and that it was therefore important to provide “breathing space” for public debate.⁸⁰

From there, the Court made the insightful connection between libel claims by public officials on the one hand and seditious libel on the other.⁸¹ The Court noted that “the court of history” had adjudged the Sedition Act of 1798, which criminalized criticism of the federal government, to have been unconstitutional.⁸² If a state could not subject a defendant to a criminal prosecution for criticizing a government official, it likewise should not be able to deter such criticism by allowing civil lawsuits, particularly where “[t]he fear of damage[s] awards such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.”⁸³ Although the advertisement at issue in the case contained undisputed falsehoods, the Court nonetheless concluded 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.”⁸⁴ Accordingly, the Court held that a libel plaintiff who is a public official must “prove[] that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁸⁵ *Sullivan* was a landmark case, described by Professor Erwin Chemerinsky as “the seminal case in this area” and “one of the most

⁸⁰ *Id.* at 271-72.

⁸¹ See Harry Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 (1964).

⁸² *Sullivan*, 376 U.S. at 273-76. President Jefferson pardoned numerous persons convicted of seditious libel in part because he believed the Sedition Act to be unconstitutional. See Letter to Abigail Adams (Sept. 11, 1804), in 8 THE WRITINGS OF THOMAS JEFFERSON 310 (Ford ed. 1897).

⁸³ *Sullivan*, 376 U.S. at 277.

⁸⁴ *Id.* at 279.

⁸⁵ *Id.* at 279-80.

important First Amendment decisions in history.”⁸⁶ Writing at the time the decision was issued, Professor Harry Kalven celebrated the demise of the doctrine of seditious libel.⁸⁷ Its influence is such that no discussion of modern libel law can avoid reference to it.⁸⁸

After *Sullivan*, the Court expanded the cases in which actual malice had to be proven. First, public figures—basically, famous people such as celebrities, former politicians, and the like—joined public officials as those bearing the burden of demonstrating actual malice, based on the assumed power that both categories of persons held.⁸⁹ Imposing the burden of proving actual malice on public figures, despite their non-political status, was justified because such persons “often play an influential role in ordering society” and because they “have as ready access as ‘public officials’ to mass media of communication, both to influence policy and to counter criticism of their views and activities.”⁹⁰

In *Gertz v. Welch*,⁹¹ the Court retreated slightly from broad application of the actual malice standard. *Gertz* involved a plaintiff who was neither a public official nor a public figure⁹² but an attorney representing a family whose son had been shot to death by a Chicago

⁸⁶ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1008-09 (2d ed. 2002). On the other hand, *Sullivan* rates only an endnote in BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 427 n.84 (1993).

⁸⁷ Kalven, *supra* note 81, at 191-95, 220-21.

⁸⁸ See RUSSELL WEAVER ET AL., THE RIGHT TO SPEAK ILL: DEFAMATION, REPUTATION AND FREE SPEECH 39-49 (2006); INTERNATIONAL LIBEL & PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS, AND LAWYERS 51 (Charles J. Glasser, Jr., ed. 2006). See generally PETER N. AMPONSAH, LIBEL LAW, POLITICAL CRITICISM, AND DEFAMATION OF PUBLIC FIGURES: THE UNITED STATES, EUROPE, AND AUSTRALIA (2004).

⁸⁹ *Associated Press v. Walker*, 388 U.S. 130, 163 (1967) (“Increasingly, in this country, the distinctions between governmental and private sectors are blurred.”).

⁹⁰ *Id.* at 164.

⁹¹ 418 U.S. 323 (1974).

⁹² Although the lower appellate court was unconvinced that *Gertz* was a purely private figure, the court accepted that status for purposes of the appeal. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972).

police officer. In this capacity, Gertz attended the son's autopsy and filed a civil complaint against the police officer.⁹³ Later, a conservative magazine published an article about an alleged "frame-up" against the police officer and identified Gertz as a "Communist-frontier" and "as an architect of the 'frame-up.'"⁹⁴ Gertz sued for defamation and received a jury award of \$50,000, but the trial court set aside the judgment on the grounds that the *Sullivan* rule applied to any discussion of a public issue.⁹⁵

While initially reiterating the First Amendment's protection of breathing room for factual errors lest the mass media engage in "intolerable self-censorship,"⁹⁶ the Supreme Court drew a distinction between speech about public figures and private figures. The Court forthrightly acknowledged that the actual malice standard "exact[s] a correspondingly high price from the victims of defamatory falsehoods" and that it represented a compromise between the State's interest in libel actions and its interest in the First Amendment.⁹⁷ Having less access to the mass media, private persons "are therefore more vulnerable to injury."⁹⁸ Moreover, a private person has not accepted the consequences of notoriety that come with being a public official or public figure.⁹⁹ Accordingly, the State had greater cause to protect the reputations of private figures, and "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."¹⁰⁰ In other

⁹³ *Gertz*, 418 U.S. at 326.

⁹⁴ *Id.*

⁹⁵ *Id.* at 332. Note that *Rosenbloom* had not yet been decided by the Supreme Court at this time.

⁹⁶ *Id.* at 340-41 ("The First Amendment requires that we protect some falsehood in order to protect speech that matters.").

⁹⁷ *Id.* at 342.

⁹⁸ *Id.* at 344.

⁹⁹ *Id.* at 344-45.

¹⁰⁰ *Id.* at 347.

words, the State could allow a private figure to recover actual damages for defamation on a showing of negligence.¹⁰¹

B. *Dun & Bradstreet* and Private Plaintiffs and Private Matters

Public figures suing about either public or private matters are subject to *Sullivan* and must prove actual malice. Private figures suing about public matters are covered by *Gertz v. Welch* and must prove actual malice to recover punitive damages, but otherwise need only prove negligence. One possible permutation of plaintiff and subject matter type remains: that of a private plaintiff and private matters. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court held that private figures bringing suit over matters of private concern were not constitutionally required to prove actual malice as a prerequisite to recovering presumed or punitive damages.¹⁰²

Dun & Bradstreet, a credit reporting agency, gathered financial information about businesses and sold that information to subscribers; the terms of its sales required that the information be kept confidential.¹⁰³ Due to a mistake by a seventeen-year-old employee, *Dun & Bradstreet* falsely reported to five subscribers that *Greenmoss Builders* had filed for bankruptcy. It was, rather, a *Greenmoss* employee who had personally filed for bankruptcy.¹⁰⁴ *Greenmoss's* president learned of this false credit report when he was exploring future loan financing with a bank and the bank agent raised the bankruptcy filing. When confronted with the error, *Dun & Bradstreet* sent an errata to the subscribers who had received the incorrect report. However, *Dun & Bradstreet* refused to disclose the identity of its subscribers to *Greenmoss*.¹⁰⁵ As a result, *Greenmoss* sued *Dun &*

¹⁰¹ The Court did go on to hold that recovery for presumed or punitive damages would require proof of actual malice.

¹⁰² 472 U.S. 749, 763 (1985).

¹⁰³ *Id.* at 751.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 752.

Bradstreet for defamation, winning a jury verdict of \$50,000 in compensatory damages and \$300,000 in punitive damages.¹⁰⁶

In rejecting Dun & Bradstreet's argument that the *Gertz* rule, requiring proof of actual malice for recovery of presumed or punitive damages, applied to this case, the Court noted that "not all speech is of equal First Amendment importance" and that "[i]t is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" ¹⁰⁷ The information in the credit report was not a matter of public concern, as it was of value only to Dun & Bradstreet and its subscribers.¹⁰⁸ Additionally, the fact that Dun & Bradstreet prohibited its subscribers from disseminating the information in the credit reports further supported the notion that the information was simply not intended to play any role in "debate on public issues."¹⁰⁹ As a result, the Court held that in such private party/private speech cases, state law could permit a plaintiff to win punitive damages upon a lesser showing of fault, such as negligence.¹¹⁰

C. *Bose Corp.* and the "Independent Review" Requirement

As we have seen, whether plaintiffs must prove actual malice depends on their status as public or private figures, as well as the nature of the statement at issue. The scope of appellate review also depends on these factors. Although the Court performed an independent review of the record to ascertain whether actual malice existed in *Sullivan, Bose Corp. v. Consumer Union of United States* is the case that has come to stand for the legal proposition that "in cases raising First Amendment issues [the Court has] repeatedly held that an appellate court has an obligation to 'make an independent examination

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 758-59 (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)).

¹⁰⁸ *Id.* at 762.

¹⁰⁹ *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹¹⁰ *Id.* at 761, 781 (Brennan, J., dissenting).

of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’”¹¹¹

The allegedly false statement at issue in *Bose Corp.* came from a product review of Bose Corporation’s loudspeaker system in *Consumer Reports* magazine. The reviewer wrote that “individual instruments heard through the Bose system seemed to grow to gigantic proportions and tended to wander about the room.”¹¹² Bose brought a product disparagement lawsuit, complaining about a number of aspects of the negative review, but the district court, in a bench trial, focused on the “wander about the room” statement. The court found that this statement was false because, to the average ear, the sound actually wandered “along the wall,” not “about the room.”

At trial, the defendant claimed that when he wrote “about the room,” he meant “about the rear wall, between the speakers.”¹¹³ The district court found this explanation “incredible,” and as a result, stated: “[T]he Court further finds that at the time of the Article’s publication [the defendant] knew that the words ‘individual instruments . . . tended to wander about the room’ did not accurately describe the effects”¹¹⁴

In taking the case, the Supreme Court recognized that there were two competing legal rules at stake.¹¹⁵ Rule 52(a) of the Federal Rules of Civil Procedure calls for deference to factual findings made in the district court,¹¹⁶ which would weigh in favor of affirming the

¹¹¹ 466 U.S. 485, 499 (1985) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)); see also Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2431-32 (1998); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

¹¹² *Bose*, 466 U.S. at 488.

¹¹³ *Id.* at 495 n.11.

¹¹⁴ *Id.* at 497.

¹¹⁵ *Id.* at 498.

¹¹⁶ See FED. R. CIV. P. 52(a) (“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”); see also *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75

verdict based on the trial court's factual finding that the defendant knew the description to have been inaccurate at the time it was published. But there is also the duty of appellate courts to conduct an independent review to ensure that the verdict not intrude "on the field of free expression."¹¹⁷

The Court identified three "characteristics" of the actual malice rule that it found relevant to resolving the apparent conflict between Rule 52(a) and the independent review duty: (1) "the common-law heritage of the rule itself assign[ing] an especially broad role to the judge in applying it to specific factual situations"; (2) the need to give meaning to the rule "through the evolutionary process of common-law adjudication"; and (3) "the constitutional values protected by the rule."¹¹⁸ The combination of these factors weighed in favor of maintaining independent appellate review, even as to matters covered by Rule 52(a). The Court's duty was not just to pronounce constitutional rules but to ensure in appropriate cases "that those principles have been constitutionally applied."¹¹⁹ Thus, "whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact."¹²⁰

The Court then turned to the specific facts at hand and reversed the district court's finding of actual malice. Conceding that the district court had disbelieved the defendant's trial testimony, the Court concluded that this merely established that the defendant realized *during the trial* that he had been inaccurate in his review; it did not prove that he knew this at the time of the publication.¹²¹

(1985) (holding that Rule 52(a) requires deference to trial court's findings of fact, even when based on a paper record, because of the lower court's expertise in fact-finding).

¹¹⁷ *Bose*, 466 U.S. at 499 (internal quotation marks omitted) (quoting *Sullivan*, 376 U.S. at 284-86).

¹¹⁸ *Id.* at 501-02.

¹¹⁹ *Id.* at 508 (quoting *Sullivan*, 376 U.S. at 285).

¹²⁰ *Id.* at 511.

¹²¹ *Id.* at 512.

Academic commentary on *Bose Corp.* was mixed, with some authors praising its defense of First Amendment values¹²² but others criticizing its internal logic and its muddled directive to lower courts.¹²³ Professor Henry Monaghan, for example, expressed skepticism at the Court's argument that the First Amendment warrants special protection above other constitutional (or even non-constitutional) rights.¹²⁴ Why, for example, do appellate courts not conduct independent review of the evidence supporting most constitutional claims?¹²⁵

For the purposes of this Article, the private/public matter distinction turns out to be important because the *Bose Corp.* requirement of independent appellate review of the evidence supporting the finding of fault does not appear to apply in *Dun & Bradstreet* (i.e., private plaintiff/private matter) cases.¹²⁶ It does, however, apply in the *Sullivan* and *Gertz* cases.¹²⁷ Therefore, any argument comparing appellate review of actual malice with that of knowledge in false statements cases must take account of these distinctions.

¹²² J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 531-32 (1985); Frederick Schauer, *Liars, Novelists, and the Law of Defamation*, 51 BROOK. L. REV. 233, 258-63 (1985).

¹²³ Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 765 (1986) (characterizing *Bose* as distrusting juries); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 276 (1985); Marc E. Sorini, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 GEO. L.J. 563, 570-71 (1993).

¹²⁴ Monaghan, *supra* note 123, at 276.

¹²⁵ *See id.* at 243.

¹²⁶ *See, e.g.,* *Lansdowne v. Beacon Journal Publ'g Co.*, 512 N.E.2d 979, 985 (Ohio 1987).

¹²⁷ *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

III. WHY NOT INDEPENDENT REVIEW OF FALSITY IN § 1001 CASES?

At a high level of generality, it would seem that the Court-imposed duty of independent review of actual malice in defamation cases should extend to appeals of § 1001 convictions: both involve government penalties for false speech, with the concomitant danger of punishment for a state of mind less than full knowledge (or reckless disregard). If anything, one would think that a criminal defendant would be entitled to greater procedural protection than a civil defendant receives. This Part considers some factors that bear on the validity of comparing false-statements prosecutions to defamation cases.

A. False Statements and First Amendment Protection

Federal courts have uniformly rejected First Amendment challenges to § 1001 prosecutions with skeletal reasoning, such as that given by the Ninth Circuit in *Clipper Express v. Rocky Mountain Motor Tariff*: “The [F]irst [A]mendment has not been interpreted to preclude liability for false statements.”¹²⁸ The Ninth Circuit thus concluded that false statements fell into a category of speech left unprotected by the First Amendment.

Yet, this simplistic analysis undervalues the scope of First Amendment protection. As *Sullivan* made painstakingly clear, not all false speech is denied First Amendment protection. Apart from the instance of false speech about a private matter relating to a private figure victim, some falsehoods are still protected if uttered without the requisite level of fault. Put another way, the statement that the “[F]irst [A]mendment has not been interpreted to preclude liability for false statements” is clearly incorrect if “liability” includes civil liability in a

¹²⁸ 690 F.2d 1240, 1261 (9th Cir. 1982). See generally *supra* note 18 and accompanying text.

defamation lawsuit involving a public official, public figure, or public matter.¹²⁹

Federal courts have not left § 1001 defendants entirely without free speech defenses. In *United States v. Race*, the Fourth Circuit held that the government must “negativ[e]” all reasonable non-false interpretations of an ambiguous statement in § 1001 cases.¹³⁰ In *Race*, the government prosecuted a Navy contractor for submitting false and fraudulent invoices seeking reimbursement of \$33 per diem per employee, when it in fact sometimes paid less (or even nothing) to its employees. However, the defendant successfully argued that the Navy contract could be interpreted to read that the company would get \$33 per diem regardless of what the company actually paid. In fact, the company had advised the Navy of its interpretation of the contract. The court concluded that the defendant’s interpretation was most likely the correct one; however, it also held that even if the government’s interpretation were correct, “one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract.”¹³¹ *Race* presents a laudable rule that narrows the definition of a “false” statement to one that is unambiguously false, which is certainly consistent with the First Amendment’s protection of free speech. Potential defendants might breathe a sigh of relief knowing that their statements will not be the basis of § 1001 criminal liability if a reasonable interpretation of their statements concludes they are not

¹²⁹ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). A recent Ninth Circuit case struck down the Stolen Valor Act, which criminalized the false claiming of military honors, after applying strict scrutiny notwithstanding the false nature of the defendant’s speech. *United States v. Alvarez*, 617 F.3d 1198, 1203 (9th Cir. 2010) (“It has long been clear that First Amendment protection does not hinge on the truth of the matter expressed.”).

¹³⁰ 632 F.2d 1114, 1120 (4th Cir. 1980); see also *United States v. Dale*, 991 F.2d 819, 832-33 (D.C. Cir. 1993); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978).

¹³¹ *Race*, 632 F.2d at 1120.

false. Still, *Race* does not address undisputedly false statements by defendants who may not have necessarily known of the falsity.

It is unremarkable to assert that the First Amendment imposes no bar to Congress's ability to create criminal liability for knowingly lying to federal agents. An undisputedly known false statement falls, as with obscenity, libel, incitement, and fighting words, outside the scope of the First Amendment.¹³² But that assertion assumes the very element at issue: the reliability of the finding that the false statement was made knowingly. The assertion fails to address whether appellate courts have the same duty of independent review of the evidence showing that a false statement was uttered "knowingly" as they have of reviewing the record supporting a finding of actual malice in a defamation case. Unless civil defamation is materially different from false statements, it simply elides the point to say that a false statement is not protected by the First Amendment.

It is worth pondering whether the sorts of statements that trigger liability under § 1001 even constitute speech for First Amendment purposes. Because these statements are either spoken or written, it would seem apparent that they constitute "speech." But to be precise, as Professor Randall Bezanson explains, speech must exhibit three characteristics to qualify as speech for First Amendment protection: (1) the statements must be "purposeful, not inadvertent or unintended"; (2) they must be "geared to communicating ideas or information to others"; and (3) the "ideas and information must be those of the speaker."¹³³ It is not hard to see that allegedly false statements to government agents will generally satisfy these requirements. Consider, for example, the phone calls that the defendant made in *United States v. Rodgers*.¹³⁴ Specific statements that his wife had been kidnapped or that she was involved in a plot to

¹³² See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (libel).

¹³³ RANDALL BEZANSON, *SPEECH STORIES: HOW FREE CAN SPEECH BE?* 104 (1998).

¹³⁴ 466 U.S. 475, 477 (1984).

assassinate the President could not have been made inadvertently; the entire point of Rodgers's false allegations was to communicate to federal agents the supposed exigency of finding her.

To be sure, speech can purposefully communicate ideas and information yet not qualify for full First Amendment protection. Commercial speech, for example, is speech that proposes a transaction. The classic example of commercial speech is an advertisement, which conveys the message, "I will sell product X for price Y." There is definite information being conveyed in such an advertisement, but the Court has nonetheless extended only limited First Amendment protection to commercial speech.¹³⁵

Whatever categorical distinctions First Amendment doctrine might draw among various forms of speech, it cannot be the case that *no* allegedly false statements in § 1001 prosecutions qualify for full First Amendment protection. The following simple hypothetical illustrates this point. Suppose that Smith accuses public official Jones of wrongdoing by sending a letter to the local newspaper and to the local FBI office. Both the FBI and Jones believe that Smith's statement was false, with the result that Smith must defend himself against both a defamation lawsuit and a § 1001 indictment. The criminal and civil juries both decide against Smith. If Smith's primary ground for both appeals is the insufficiency of evidence that he knew his statement was false, he could end up winning his civil appeal but losing his criminal appeal, solely because the former engages in independent review of the record supporting the finding of actual malice while the latter engages in deferential *Jackson v. Virginia* review.

While American law tolerates inconsistent verdicts,¹³⁶ this result seems exceptionally perverse.¹³⁷ There may be a rational

¹³⁵ See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

¹³⁶ See, e.g., *U.S. v. Powell*, 469 U.S. 57, 63, 69 (1984); *Dunn v. United States*, 284 U.S. 390, 393-94 (1932).

¹³⁷ By contrast, consider the notorious murder/wrongful death cases involving O.J. Simpson, where he was acquitted in the criminal case but was found liable in the

explanation for this inconsistency, but it cannot simply be that the First Amendment does not protect false statements. One might argue that the criminal defendant has already received advantages, relative to the defamation defendant, of not only the “beyond a reasonable doubt” standard of proof but also from the fact that appellate courts are loathe to substitute their own judgment in place of the jury. But in fact, the criminal justice system does not operate in this way—apart, of course, from the *Jackson v. Virginia* standard of review. The “beyond a reasonable doubt” standard is but one of numerous ways in which criminal defendants receive greater procedural protections than civil defendants do. Because of the Fifth Amendment, not only is a criminal defendant not required to testify at his trial but also the prosecution is forbidden from commenting on the defendant’s failure to take the stand.¹³⁸ In a civil case, however, a party is free to ask the jury to draw an adverse inference from the opposing party’s failure to testify.¹³⁹ Further, under the Sixth Amendment, an indigent criminal defendant is entitled to the appointment of counsel at public expense;¹⁴⁰ on the other hand, indigent parties in civil cases are rarely entitled to appointment of counsel.¹⁴¹

This analysis of inconsistent treatment of civil defamation defendants and criminal defendants hinges on the statutory element of knowledge in § 1001. Could Congress delete that requirement?¹⁴² In certain “public welfare” or regulatory areas, legislatures have enacted

civil case. The split verdict could be explained by the difference in proof requirements between the two cases.

¹³⁸ *Griffin v. California*, 380 U.S. 609 (1965).

¹³⁹ *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976).

¹⁴⁰ *Gideon v. Wainwright*, 372 U.S. 335, 339-41 (1963).

¹⁴¹ *See In re Gault*, 387 U.S. 1, 27 (1967) (holding that defendant was entitled to appointment of counsel where juvenile boy faced potential loss of liberty in non-criminal proceeding); *Bothwell v. Republic Tobacco Co.*, 912 F. Supp. 1221, 1225 (D. Neb. 1995) (concluding that district court had inherent power to order a lawyer to take a case on a pro bono basis in appropriate circumstances).

¹⁴² *See generally* Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 *BUFF. CRIM. L. REV.* 859 (1999).

criminal statutes that do not contain any mens rea requirement. If Congress were to eliminate a knowledge element from § 1001, then there would be no finding of knowledge for the appellate courts to review independently. However, as the Court has noted, public welfare statutes generally involve “regulat[ing] potentially harmful or injurious items” which place a defendant “in responsible relation to a public danger,” such that a mental state less than knowledge, including strict liability, is justified.¹⁴³ Activities that fall within this zone include shipment of adulterated or misbranded drugs,¹⁴⁴ storage of food in conditions allowing contamination by rodent droppings,¹⁴⁵ possession of unregistered grenades,¹⁴⁶ and shipment of dangerous chemicals.¹⁴⁷ One can imagine instances in which false statements could fall within a public welfare category—for example, false statements made to the Food and Drug Administration about pharmaceutical drug ingredients. But for that reason, such cases would likely fall within one of the public welfare criminal statutes. This is not to say that the government cannot use a general criminal statute when a more specific one exists, or that it must elect one or the other,¹⁴⁸ but it would be an odd justification for eliminating mens rea from the general false statements statute to address specific situations in which the Court has already given the green light to strict liability crimes. Moreover, it would be exceedingly odd if a civil tort were constitutionally required to include an actual knowledge or reckless disregard of truth element while an analogous criminal statute were free of such a requirement.

In short, unless there is something constitutionally different about false statements made within the jurisdiction of the federal

¹⁴³ *Staples v. United States*, 511 U.S. 600, 607 (1994) (citing *United States v. Dotterweich*, 320 U.S. 277 (1943)).

¹⁴⁴ *Dotterweich*, 320 U.S. at 277.

¹⁴⁵ *United States v. Park*, 421 U.S. 658 (1975).

¹⁴⁶ *United States v. Freed*, 401 U.S. 601, 609 (1971).

¹⁴⁷ *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971).

¹⁴⁸ *See United States v. Olsow*, 836 F.2d 439, 442 (9th Cir. 1987) (allowing government to proceed under 18 U.S.C. §§ 287 and 1001).

government compared to defamatory statements, it seems too simplistic to dismiss First Amendment challenges to § 1001 convictions as inapplicable due to the falsity of the statement. The content of the speech under review and the character of the victim may be different enough to justify different rules of review, but courts need to grapple with those differences and analyze their significance. To date, they have not done so.

B. The Need to Clarify and Enunciate a Legal Principle

A second basis for possibly distinguishing appellate review of false statements convictions from defamation cases may lie in the justification for independent review. As noted above, in *Bose Corp.*, the Court explained that the independent review duty stemmed in part from the fact that “the context of the rule is not revealed simply by its literal text, but rather is given meaning through the evolutionary process of common-law adjudication.”¹⁴⁹ The “reckless disregard” prong of the actual malice standard requires appellate elaboration through case-by-case decision making because of its “elusive constitutional standard[.]”¹⁵⁰

Although *Bose Corp.* did not describe the reckless-disregard prong as a mixed fact-law question, the Court’s justification for independent review is not inconsistent with the general de novo standard of review for such mixed fact-law questions. As the Court has explained, mixed questions occur when “the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard.”¹⁵¹

¹⁴⁹ *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984).

¹⁵⁰ *Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989); *see also* *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (noting that “reckless disregard” cannot be encapsulated in “one infallible definition”).

¹⁵¹ *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

Determining whether the historical facts are admitted or established is an exercise in “recital of external events and the credibility of their narrators.”¹⁵² Because of the trial court’s expertise in fact-finding and its proximity to the witnesses and evidence, questions of fact—including the first step of the mixed question—are reviewed deferentially on appeal.¹⁵³ Determining the appropriate rule of law, on the other hand, is a matter for which appellate courts have an institutional advantage over trial courts. Appellate courts are not burdened with having to hear evidence and find facts, and the panels consist of at least three judges whose “collaborative, deliberative process . . . reduces the risk of judicial error on questions of law.”¹⁵⁴ The last step, determining the correct outcome of application of law to fact, is subject either to deferential, clearly erroneous review or to de novo review, depending on whether “the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition.”¹⁵⁵ Most of the time, the balance of factors will favor de novo review, “because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles.”¹⁵⁶ This is even more applicable to mixed questions involving constitutional rights.¹⁵⁷

¹⁵² See *Brown v. Allen*, 344 U.S. 443, 506 (1953).

¹⁵³ See, e.g., FED. R. CIV. P. 52(a); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (“The authority of an appellate court, when reviewing the findings of a judge, as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.”).

¹⁵⁴ *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (en banc).

¹⁵⁵ *Id.* at 1202.

¹⁵⁶ *Id.* (citing *Pullman-Standard*, 456 U.S. at 289 n.19).

¹⁵⁷ *Id.* at 1203 (discussing de novo review of mixed questions such as probable cause and Fourth Amendment searches).

Bose Corp. did not characterize its analysis as one of mixed questions, and it did not appear to justify de novo review.¹⁵⁸ Nevertheless, the reasoning underlying *Bose Corp.* is strikingly similar to that typically used to explain de novo review of mixed questions, particularly constitutional ones.¹⁵⁹ This conclusion is further reinforced by the Court's actual discussion of other instances of independent review, especially the obscenity cases. For example, whether something appeals to "prurient interest" or whether it is "patently offensive" to the local community are questions, the Court noted, subject to independent appellate review despite being "essentially questions of fact."¹⁶⁰

With the mixed question framework in mind, we can turn to an examination of the type of question presented by a challenge to the sufficiency of evidence of knowledge in a § 1001 case. As discussed earlier, the requisite mental state for conviction under § 1001 is actual knowledge and willfulness. Because actual knowledge is a pure question of historical fact—did the defendant know that the asserted statement was false?—it would not seem to involve an "elusive constitutional standard[]." As one legal scholar, writing after *Sullivan* but before *Bose Corp.*, put it, "[A]ctual knowledge of the falsity of a statement[] is easily applied."¹⁶¹ This is true because "[k]nowledge of

¹⁵⁸ See *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-500 (1984) (noting that the independent review doctrine still "permits [the judge's opportunity to observe witnesses] to be given its due"); *United States v. Anderson*, 579 F.2d 455, 495 (8th Cir. 1978).

¹⁵⁹ For a further example, consider *United States v. General Motors Corp.*, 384 U.S. 127 (1966), where the Court held that whether defendants' conduct violated the Sherman Act was an "ultimate conclusion . . . not to be shielded by the 'clearly erroneous test.'" 384 U.S. 127 n.16. The Court's characterization of the finding as an "ultimate conclusion" is not unlike *Bose Corp.*'s characterization of actual malice as an ultimate fact.

¹⁶⁰ See *Bose*, 466 U.S. at 506 (citing *Miller v. California*, 413 U.S. 15, 30 (1973)).

¹⁶¹ James R. Carpenter, Jr., Note, *Constitutional Law - Defamation Under the First Amendment - The Actual Malice Test and "Public Figures,"* 46 N.C. L. REV. 392, 394 (1968).

falsity, after all, simply put, is lying.”¹⁶² One might therefore conclude that the rationale for the independent appellate review simply does not exist. Whatever difficulties there may be in determining whether the defendant “knew” that his speech was false,¹⁶³ it does not lie with the factfinder’s need for “appellate elaboration” of an “elusive constitutional standard.”

Yet, in *Bose Corp.*, the trier of fact found that the defendant “knew” that his statement was not accurate at the time of publication.¹⁶⁴ Whether the district judge’s finding of fact was correct is a different matter, but any error would not seem to be the result of inadequate guidance from appellate courts as to what actual knowledge of falsity means. What is undeniable is that the Supreme Court accepted the district court’s “purely factual findings”—including the defendant’s knowledge of the inaccuracy of his published statement—yet concluded “as a matter of law” that the defendant did not have “knowledge [of] a false statement.”¹⁶⁵ Had the Court limited its independent review to actual malice cases based on

¹⁶² W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* 136 (1989) (citing Videocassette: Panel Discussion on Anatomy of a Libel Case: Business vs. the Media, held by Columbia University Graduate School of Journalism (1985)).

¹⁶³ The challenge, rather, is to determine the defendant’s mental state—what did the defendant know and believe? The landmark and lengthy defamation case of *Herbert v. Lando*, 441 U.S. 153 (1979), provides an extreme example of the nature of the challenge involved in proving actual knowledge. There, the Supreme Court upheld, against a First Amendment defense, the right of a libel plaintiff to depose the defendant (a television news magazine reporter) concerning not just what the reporter purported to know but also the internal editorial process behind the reporter’s and his editors’ crafting of the story. *Id.* at 170-71. The reporter’s deposition took place on-and-off over an entire year, amounted to more than 2900 transcript pages, and included 240 exhibits. *Id.* at 202 (Stewart, J., dissenting).

¹⁶⁴ See *Bose Corp. v. Consumers Union of U.S., Inc.*, 508 F. Supp. 1249, 1277 (D. Mass. 1981).

¹⁶⁵ *Bose*, 446 U.S. at 513.

reckless disregard only, and not those involving actual knowledge, Justice White would not have dissented in *Bose Corp.*¹⁶⁶

Perhaps *Bose Corp.* can be explained as involving what Professor Randy Bezanson calls “a description of an aesthetic phenomenon, an act of purely aesthetic perception.”¹⁶⁷ The written word, he argues, cannot adequately convey the concept of the quality of sound from the Bose loudspeaker, and thus the Court was able to conclude that “the person who listened to the speakers and wrote the review could not have believed the ‘wandering about the room’ statement to be false.”¹⁶⁸ In short, this would suggest that the loudspeaker review was an opinion, not a provably false statement. But while Professor Bezanson’s analysis might have sufficed to confine *Bose Corp.* to its unusual facts involving a descriptive account of a listener’s impression of musical sounds, lower courts have not so limited the doctrine.¹⁶⁹ Nor should it be surprising that lower courts have not limited the doctrine, given that, as Professor Henry Monaghan notes, “[T]he Supreme Court proceeded on a quite different conception of what is involved, speaking repeatedly of the duty of appellate judges to decide independently whether the facts are sufficient to show that the speech is unprotected.”¹⁷⁰ Having failed to confine its independent review duty to what might be analogized to mixed questions of constitutional law—such as whether something appeals to “prurient interests”¹⁷¹—*Bose Corp.* leaves the door open for criminal defendants to argue for less deferential review of the evidence supporting their actual knowledge of falsity.

¹⁶⁶ See *id.* at 515 (White, J., dissenting) (stating that “reckless disregard” is not “a question of historical fact,” but “actual-knowledge surely is”).

¹⁶⁷ Randall Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 334 (1998).

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 183 (2d Cir. 2000); *Moore v. Vislosky*, 240 F. App’x 457, 464 (3d Cir. 2007); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 230 (2d Cir. 1985).

¹⁷⁰ Monaghan, *supra* note 111, at 241-42.

¹⁷¹ See *Bose*, 446 U.S. at 506; *supra* text accompanying note 160.

Even if one could simply dismiss the lower courts' following of *Bose Corp.* as wrong, further incongruities remain in the appellate review of false statements convictions compared to defamation verdicts. The nearest parallel to the reckless disregard prong of actual malice in criminal law is willful blindness (or deliberate ignorance).¹⁷² A widely used collection of federal jury instructions explains that "[t]he element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him."¹⁷³ The classic example of willful blindness is found in *United States v. Jewell*,¹⁷⁴ in which the defendant was charged with drug trafficking based on his driving a car full of marijuana across the U.S.-Mexico border. The marijuana was hidden in a secret compartment in the car, and it was undisputed that the defendant did not discover this compartment. However, the defendant admitted that he had examined the readily accessible interior portions of the car, including the trunk and glove compartment and noticed a "void" inside the vehicle; he did not investigate the "void" further because he did not want to know what was inside.¹⁷⁵ The Ninth Circuit concluded that the defendant's lack of positive knowledge of the presence of marijuana in the car was offset by his deliberate decision to avoid discovering what he suspected.¹⁷⁶

Willful blindness is therefore analogous to reckless disregard—both allow proof of something other than actual knowledge to satisfy the requirement that the civil or criminal defendant act "knowingly,

¹⁷² *Cf.* *United States v. Hanlon*, 548 F.2d 1096, 1101-02 (2d Cir. 1977) (stating that willful blindness is not based on recklessness).

¹⁷³ 1 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.09 (6th ed. 2010); *see also* *United States v. St. Michael's Credit Union*, 880 F.2d 579, 585 n.1 (1st Cir. 1989) ("Willful blindness may constitute knowledge of a fact only if you should find that the individual to whom knowledge is sought to be attributed was aware of a high probability that that fact existed."); David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957 (1999).

¹⁷⁴ 532 F.2d 697 (9th Cir. 1976).

¹⁷⁵ *Id.* at 698-99 n.2.

¹⁷⁶ *Id.* at 699.

but not on mere negligence or mistake.”¹⁷⁷ Furthermore, the willful blindness instruction can run the risk “of shifting the burden to the defendant to prove his or her innocence,”¹⁷⁸ and thus its use in § 1001 cases can have the same speech-chilling impact that the reckless disregard prong does in defamation cases.

Why, then, do federal appellate courts not perform independent review of findings of willful blindness? Whether a defendant has deliberately ignored learning a fact that she suspects to be true is the type of inquiry that a trier of fact asks when determining whether someone acted in reckless disregard of the truth. In both instances, it is not enough for the factfinder to determine that the defendant took certain actions or failed to take certain actions. Rather, the factfinder has to evaluate whether, in light of those findings, the defendant can be charged with a mental state equivalent to positive knowledge. Just as this evaluation calls for case-by-case decision making in the defamation context, it should call for a similar process when a § 1001 defendant is charged with willful blindness.

Yet, appellate courts have not applied independent review to willful blindness findings, even in cases in which defendants are charged with false statements or fraud. While a number of courts have suggested that the willful blindness instruction be used sparingly,¹⁷⁹ Professor Julie O’Sullivan has noted that appellate courts almost always uphold the instruction.¹⁸⁰ Moreover, this suggestion further distinguishes appellate review of knowledge in false statements cases from that in defamation cases. Willful blindness is supposed to be used infrequently in criminal cases precisely because of the danger that a jury will convict a defendant based on recklessness (or perhaps even

¹⁷⁷ See, e.g., DEVITT & BLACKMAR, *supra* note 173, § 17.09; *United States v. Mancuso*, 42 F.3d 836 (4th Cir. 1994).

¹⁷⁸ *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991).

¹⁷⁹ See, e.g., *United States v. Ruhe*, 191 F.3d 376, 385 (4th Cir. 1999); *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

¹⁸⁰ JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 99 (3d ed. 2003).

negligence).¹⁸¹ Yet, if there is a preference for proving actual knowledge instead of willful blindness in criminal cases, there appears to be an opposite preference in defamation cases. There is a dearth of actual malice cases that turn on knowledge of falsity; in fact, even where the defendant admits to fabricating a statement, courts have proceeded under the “reckless disregard” prong, rather than actual knowledge of falsity.¹⁸² As far as the courtroom verdict goes, it probably does not matter whether one calls it reckless disregard or actual knowledge of falsity when a defendant makes up a statement. But if one were to apply independent appellate review (or not) based on such labeling, then the predilection of courts to use the reckless disregard prong would have great consequences. It seems odd that civil defamation defendants would receive the benefit of judicial preference for proceeding under the reckless disregard prong, whereas the equivalent mental state (willful blindness) is discouraged for criminal defendants.

C. Public Figures vs. the Government

As discussed earlier, the actual malice standard—and hence, independent review by appellate courts—applies only to defamation cases brought by public officials or public figures, or those brought by private figures regarding public matters and seeking presumed or punitive damages. Any argument that § 1001 defendants should also be entitled to independent review of the evidence of their knowledge of falsity may therefore need to demonstrate that the relationship between the federal government and criminal defendant is somehow analogous to that between libel plaintiff and libel defendant.

In determining whether the federal government can be analogized to a traditional public figure, it will be useful to consider when a person acquires public figure status. Such a consideration will help establish whether the same principles that elevate a person to

¹⁸¹ See *Mancuso*, 42 F.3d at 846.

¹⁸² See, e.g., *Carson v. Allied News Co.*, 482 F. Supp. 406 (N.D. Ill. 1979).

public figure status—and therefore impose the requirement of proving the defendant’s actual malice with the attendant duty of independent appellate review—might also call for imposing the same requirement on the government and duty of independent appellate review on appellate courts in § 1001 cases.

At the outset, it is arguable whether the government even needs to be analogized to a public figure in order for appellate courts to have the duty of independent appellate review. The public/private figure distinction matters, at least as to matters of public significance, where the plaintiff does not seek to recover punitive or presumed damages; a private figure who seeks only compensatory damages need not prove actual malice.¹⁸³ Because of the potentially chilling impact of punitive or presumed damages, however, even private figures must prove actual malice. Considering that conviction under § 1001 carries a potential sentence of five years,¹⁸⁴ one can contend that the same considerations that call for actual malice—and hence independent appellate review—in private figure defamation cases would call for similar treatment in § 1001 cases.

Even if the government does need to be analogized to a public figure, that comparison seems plausible. The Court’s usual approach has been to examine whether the person in question has “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”¹⁸⁵ It is not enough that someone is “newsworthy,” nor even that the person can command

¹⁸³ *Gertz v. Welch*, 418 U.S. 323 (1974).

¹⁸⁴ Under the Sentencing Guidelines, a first-time offender would likely receive a sentence in the range of zero to six months. U.S.S.G. § 2B1.1(a)(2) (2007) (base offense level 6).

¹⁸⁵ *Gertz*, 418 U.S. at 345. As Rodney Smolla explains, “The public figure doctrine is heavily grounded in cultural and moral equity—if you can’t stand the heat of the fire, stay out of the kitchen [T]hose who voluntarily seek to influence events and issues may appropriately be forced to accept as part of the bargain a greater risk of defamation.” 1 RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 2:35.50 (2d ed. 2005).

the attention of the press. In *Time, Inc. v. Firestone*,¹⁸⁶ the plaintiff was a wealthy socialite embroiled in a high-profile divorce case that was “of interest to some portion of the reading public”; she even held some press conferences during the trial.¹⁸⁷ Yet, the Court concluded that she was not a public figure, because she was not trying to use her press conferences to affect the result of the trial.¹⁸⁸ Similarly, in *Wolston v. Reader’s Digest Association*,¹⁸⁹ a suspected Soviet spy failed to appear before a grand jury in 1958, earning a subsequent contempt sentence that received widespread news coverage at the time. The news coverage had long faded by 1974, when the plaintiff found himself falsely accused of being a “Soviet agent[] identified in the United States.”¹⁹⁰ The Court held that the plaintiff was not a public figure because he did not try to attract the attention of the press for the purpose of “arous[ing] public sentiment in his favor and against the investigation.”¹⁹¹

Unlike the socialite and the suspected spy, the federal government is in the business not just of influencing the resolution of issues but actually resolving them. In that sense, the government is the ultimate public figure. To be clear, I have been using defamation as a proxy for the harm that the government suffers when provided with a false statement by a § 1001 defendant; I do not mean to suggest, however, that the exact nature of the harm is reputational. Rather, as noted earlier, a false statement made to the government can waste government resources (as in *Rodgers*) and breed disrespect for the law and authority (perhaps as with Martha Stewart’s case). That the nature of the harm is not reputational does not mean, however, that the protections embodied in the actual malice rule and independent appellate review doctrine are inapplicable to § 1001 cases. *Hustler Magazine v. Falwell* suggests as much, for there the harm was

¹⁸⁶ 424 U.S. 448 (1976).

¹⁸⁷ *Id.* at 454-55 & n.3.

¹⁸⁸ *Id.* at 453.

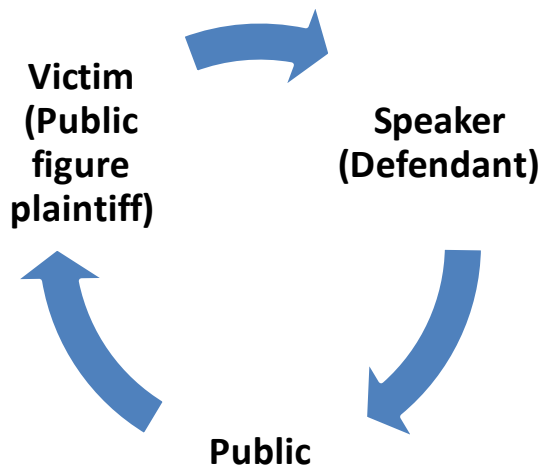
¹⁸⁹ 443 U.S. 157 (1979).

¹⁹⁰ *Id.* at 159.

¹⁹¹ *Id.* at 168.

emotional distress, not lost reputation, yet the Court required proof of actual malice because of the potential chilling impact of such claims on defendant speakers.¹⁹² Similarly, federal appellate courts conduct independent review of the record in free speech cases beyond defamation ones, again due to the need to prevent over-chilling protected speech.¹⁹³

The harm here, however, can be understood as a First Amendment issue only if decreased access to information by the government is like the public's decreased access to information. In a public official defamation case, we can visualize three distinct entities affected by the lawsuit: the plaintiff, the defendant, and the public. The plaintiff's interest is in vindicating her reputation from the defamation and obtaining compensation (and perhaps special damages) from the defendant. The defendant's interest stands in direct opposition to the plaintiff's, which is to prove the truth of the defaming statement. The public's interest is in receiving information relevant to the public official.



¹⁹² See *infra* notes 212–213 and accompanying text.

¹⁹³ See *supra* notes 159–160 and accompanying text.

The more successful that plaintiffs are at winning defamation cases, the less that defendants will speak.¹⁹⁴ As a result, the public will receive less information about public officials and public figures and therefore will be less able to monitor the activities of such persons and to exercise their democratic governance rights. The actual malice rule reduces the likelihood that plaintiffs will win their lawsuit, and the *Bose Corp.* independent review doctrine means that fewer libel judgments will survive appeal. Quite obviously, defendants benefit from these two rules, as the Court intended, with the result that such speakers have “breathing room” for their “freedoms of expression.”¹⁹⁵

Two important axioms undergird this analysis. First, defendants are given this breathing room primarily for the benefit of the public, which would be deprived of valuable political speech were defendants to self-chill out of fear of erroneous defamation verdicts.¹⁹⁶ As Justice Brandeis wrote in *Whitney v. California*, “Those who won our independence believed . . . that public discussion is a political duty . . . that the path of safety lies in the opportunity to discuss supposed grievances and proposed remedies.”¹⁹⁷ We provide breathing room to those who would air “grievance[s] and protest[s] on . . . the major public issues of our time”¹⁹⁸ and benefit when the government is thus exposed to sunlight and thereby disinfected.¹⁹⁹ This is no doubt an instrumental view of libel defendants, and it explains why the Court

¹⁹⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 294 (1964) (Black, J., concurring) (“The half-million-dollar verdict does give dramatic proof . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials.”).

¹⁹⁵ *Id.* at 271-72.

¹⁹⁶ *Id.*; see also *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503-04 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.”).

¹⁹⁷ 274 U.S. 357, 375-76 (1927).

¹⁹⁸ *Sullivan*, 376 U.S. at 271.

¹⁹⁹ See *LOUIS BRANDEIS, OTHER PEOPLE’S MONEY* 92 (1933) (“Sunlight is said to be the best of disinfectants.”).

has less interest in protecting the breathing room of defendants who libel private figures, especially on private matters.²⁰⁰ This view is consistent with the absolute privilege accorded to statements made on the floor of Congress by federal legislators due to the Speech and Debate Clause.²⁰¹ As with the actual malice standard, the Speech and Debate Clause protects even false and defamatory statements—not just for the benefit of the speaker, but for the public good.²⁰² Absent such privilege, legislators might self-chill themselves in regards to defending or criticizing pending legislation, and the public would be deprived of the independence of those legislators.²⁰³

Second, public officials and public figures are made to bear the burden of ensuring that the public hears speech about public matters, because they are presumed to have better access to the mass media; through this access, they can counteract defamatory statements.²⁰⁴ Justice Brennan did dispute the validity of this assumption in *Rosenbloom v. Metromedia, Inc.*,²⁰⁵ but his was only a plurality opinion, and it was rejected by *Gertz v. Welch*.²⁰⁶

²⁰⁰ See *Gertz v. Welch*, 418 U.S. 323 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

²⁰¹ U.S. CONST. art. I, § 6, cl. 1. See generally Robert J. Reinstein & Harvey A. Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973).

²⁰² See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502 (1975) (citing *United States v. Brewster*, 408 U.S. 501, 507 (1972); *United States v. Johnson*, 383 U.S. 169, 181 (1966)).

²⁰³ *Id.* at 502-03.

²⁰⁴ See *Gertz*, 418 U.S. at 344; *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

²⁰⁵ 403 U.S. 29, 43-45 (1971) (challenging the assumption that public officials and public figures can effectively rebut defamatory statements in the media).

²⁰⁶ 418 U.S. 323 (1974). Whether modern developments—particularly the Internet, blogging, and networking websites such as Facebook and Myspace—have upended this assumption is beyond the scope of this Article. For some preliminary thoughts, see Nicole A. Stafford, *Lose the Distinction: Internet Bloggers and First Amendment Protection of Libel Defendants – Citizen Journalism and the Supreme Court's Murky Jurisprudence Blur the Line Between Media and Non-Media Speakers*, 84 U. DET. MERCY L. REV. 597, 615 (2007); Victoria Cioppettini, Note, *Modern Difficulties in*

Do these axioms remain valid when the government is acting as the prosecution? At the most general level, speech by an individual person to federal agents would seem too different from, say, a newspaper article about a government official to make the comparison useful. In the latter situation, the speech in question is disseminated widely; in the former, only the government receives the speech. Moreover, in the latter situation, the speech sheds light on the operation of the government, whereas in the former situation, the speech assists in the operation of the government.

Yet these distinctions, while not insignificant, do not by themselves distinguish defamation from § 1001 cases. The distinction that the subject matter of false statements is not about disclosing the operation of the government is immaterial, given the public figure line of cases. Chief Justice Warren argued in *Associated Press v. Walker* that the influence and power wielded by public figures put them on the same plane as government officials in “ordering society.”²⁰⁷ Whatever validity there may be in that observation, it seemingly has no outer limits, as demonstrated by *Hustler Magazine v. Falwell*.²⁰⁸ There, the Supreme Court held that a public figure plaintiff could not evade the actual malice requirement by claiming intentional infliction of emotional distress rather than defamation.²⁰⁹ Of primary concern to the Court was the possibility that plaintiffs could win damages against cartoonists and satirists without having to prove any false depiction, as

Resolving Old Problems: Does the Actual Malice Standard Apply to Celebrity Gossip Blogs?, 19 SETON HALL J. SPORTS & ENT. L. 221 (2009); *Who’s Exposing John Doe? Distinguishing Between Public and Private Figure Plaintiffs in Subpoenas to ISPs in Anonymous Online Defamation Suits*, 13 J. TECH. L. & POL’Y 229, 246-50 (2008); *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CAL. L. REV. 833, 871 n.114 (2006) (“The public figure doctrine fails to account for access to means of corrective speech so prevalent on the Internet.”); and Amanda Grover Hyland, *The Taming of the Internet: A New Approach to Third-Party Internet Defamation*, 31 HASTINGS COMM. & ENT. L.J. 79, 118-19 (2008).

²⁰⁷ *Butts*, 388 U.S. at 164.

²⁰⁸ 485 U.S. 46 (1988).

²⁰⁹ *Id.* at 56.

falsity was simply not an element of the emotional distress tort.²¹⁰ Surely the Court was correct in recognizing this danger and the consequent need to ensure that the “breathing space” created by *Sullivan* not be crushed by other intentional torts.

Nonetheless, the parody ad published by Larry Flynt that formed the basis of Reverend Falwell’s lawsuit against *Hustler* was hardly comparable in character to the message of political protest embodied in the advertisement in *Sullivan*.²¹¹ The parody was modeled after (and purported to be a part of) a series of advertisements that played upon a sexual double entendre to discuss the “first time” that celebrities tried the advertiser’s liquor, but which could be (mis)interpreted as the first time they had sexual intercourse. In the *Hustler* version, Falwell is depicted as describing his “first time” as being with his mother in an outhouse while both were in a drunken stupor. Not surprisingly, Falwell, a fundamentalist preacher, was not amused and sued for intentional infliction of emotional distress.

The Court conceded that the *Hustler* parody was “at best a distant cousin of the political cartoons described above, and a rather poor relation at that.”²¹² However, the Court could see no “principled standard” for distinguishing the *Hustler* parody from other presumably more legitimate political parodies, and therefore, to preserve public debate, it was necessary to give *Hustler Magazine* the benefit of the actual malice rule.²¹³

One might note that the § 1001 situation does not closely resemble the typical defamation case, in that the § 1001 audience is the “government,” possibly represented by a single federal agent. It might be difficult to see how speech to a single listener can have a sufficiently public character. Yet, a plaintiff can be defamed by a

²¹⁰ *Id.* at 53.

²¹¹ The actual *Hustler* ad is reprinted in RODNEY A. SMOLLA, JERRY FALWELL V. LARRY FLYNT: THE FIRST AMENDMENT ON TRIAL 313 (1988).

²¹² *Falwell*, 485 U.S. at 55.

²¹³ *Id.*

statement published to a single listener,²¹⁴ and more generally, First Amendment rights can be asserted even when the speech in question is uttered in private, rather than in a public setting.²¹⁵

The key is whether the subject matter is of importance to the public, as opposed to speech of interest only to the speaker and the intended audience, and whether the speaker intends to convey his message at large.²¹⁶ Unlike the credit report subscribers in *Dun & Bradstreet*, the federal government is not a mere “specific business audience,”²¹⁷ and the purpose of the § 1001 defendant’s speech is not for profit.²¹⁸

The multitude of instances in which the government might come into possession of information via speech from individuals makes it difficult to state any hard-and-fast rules, but the government is usually seeking information, whether in a criminal investigation, civil investigation, or administrative rulemaking. In § 1001 cases such as *Dedman* and *Rodgers*, the defendant speaks to a federal agent who is investigating potential violations of federal criminal law. In some instances, like *Brogan v. United States*,²¹⁹ the defendant happens to be the target of the criminal investigation, but in others (perhaps Martha

²¹⁴ See RESTATEMENT (SECOND) OF TORTS, § 580A cmt. h (1977) (“Why should one be constitutionally protected if he issues a public statement about the qualifications or character of the mayor of the city and yet not be protected if he makes the same statement in the privacy of his home to his next-door neighbor? Though the issue has not been specifically raised, there would also appear to be little reason to draw a distinction between libel and slander in this regard.”).

²¹⁵ See *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 414 (1979) (holding that “a public employee [does not] forfeit[] his protection against governmental abridgment of freedom of speech if he decides to express his views privately, rather than publicly”).

²¹⁶ ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 170-71 (1995).

²¹⁷ See *Dun & Bradstreet, Inc. v. Greenmoss Buildings, Inc.*, 472 U.S. 749, 762 (1985).

²¹⁸ See POST, *supra* note 216, at 171.

²¹⁹ 522 U.S. 398 (1998).

Stewart's case), the defendant is not targeted until after she makes a false statement.

Such speech should be considered as relating to a public matter. If the investigation bears fruit, the government may obtain an indictment against a criminal defendant based in part on information provided to the federal agents. The indictment may lead to a trial, which would presumptively be open to the mass media and the public.²²⁰ Criminal trials, the Court has explained, have traditionally been open for a number of reasons, among them, "an outlet for community concern, hostility, and emotion," as well as "an opportunity both for understanding the system in general and its workings in a particular case."²²¹ The American tradition was derived from England's open trials, which operated almost as a "town meeting."²²² Civil or administrative proceedings, such as immigration removal hearings, are also open to the public.²²³ As with criminal trials, attempts to close these presumptively open proceedings have met with judicial resistance, due to the perception that the public is entitled to be present.²²⁴ Still, the path from government interviewee to agent of the public is probably too attenuated in all but the most

²²⁰ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

²²¹ *Id.* at 571.

²²² *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984).

²²³ See, e.g., 15 U.S.C. § 77u (2006) ("All hearings shall be public and may be held before the [Securities and Exchange] Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept."); 17 C.F.R. § 201.301 (LEXIS through Sept. 30, 2010 issue of THE FED. REGISTER) ("All hearings, except hearings on applications for confidential treatment filed pursuant to § 201.190, hearings held to consider a motion for a protective order pursuant to § 201.322, and hearings on ex parte application for a temporary cease-and-desist order, shall be public unless otherwise ordered by the Commission on its own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.").

²²⁴ See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (holding that there is a First Amendment right of access to immigration removal proceedings because "[d]emocracies die behind closed doors").

sensational cases to justify First Amendment protection on grounds of informing the public.

On the other hand, as Professor Robert Post explains, the First Amendment exists in large part “to safeguard[] public discourse . . . because it informs government decision-making.”²²⁵ The end goal of criticism of public officials is not mere public humiliation, though that may be a result of the First Amendment protection embodied in *Sullivan*. Rather, criticism of public officials enables the public to monitor their representatives and, if appropriate, to make their displeasure known through polls and voting. The critical point here is that the First Amendment is aimed at working toward *effective governance*.²²⁶ Effective governance can be measured in part by achieving what the voting public wants, but that is not the only measure. As Professor Alexander Meiklejohn noted, “[T]he governors and the governed are not two distinct groups of persons. There is only one group – the self-governing people.”²²⁷ What use is the First Amendment if the voters are able to monitor their representatives but the government is unable to accomplish its mandated function due to lack of information?²²⁸

With respect to the second axiom (access to the media), the essence of the Court’s reasoning in *Sullivan* was that public figures or public officials have the ability to protect themselves from the reputational harm of defamation through means other than lawsuits.²²⁹ Conversely, the public has no way of protecting its access to political speech, because it has no way of reducing the number of lawsuits by libel plaintiffs. Without the actual malice standard, plaintiffs could

²²⁵ POST, *supra* note 216, at 166.

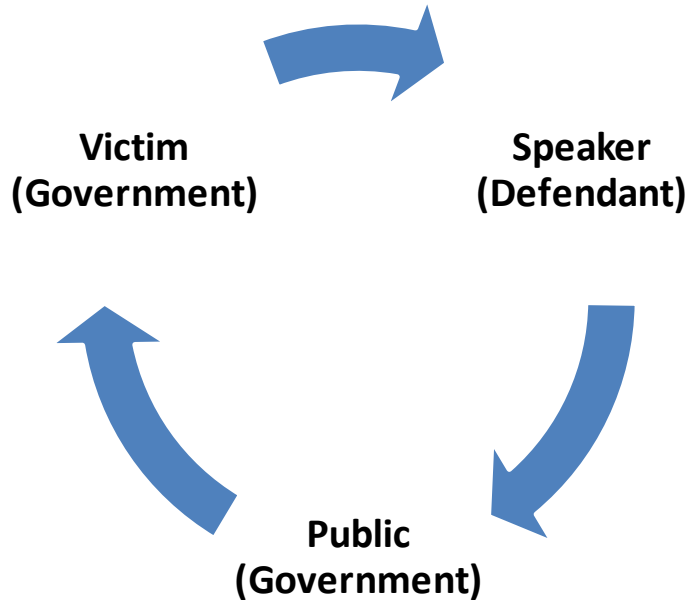
²²⁶ Cf. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971).

²²⁷ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 6 (1948).

²²⁸ See 3 *LETTERS AND WRITINGS OF JAMES MADISON* 276 (William C. Rives & Philip R. Fendall eds., 1865) (“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”).

²²⁹ See *supra* note 205.

oversue, resulting in too much self-censorship by defendants. The actual malice standard manages the previously depicted triangular relationship among plaintiffs, defendants, and the public.



In the § 1001 situation, however, there are typically only two parties: the government and the defendant. Here, the government is both the victim of the false statement as well as the public's representative. In this capacity, the government seeks information so that it can make decisions as part of its governance role. If the government—as victim—becomes over-aggressive in its use of § 1001, thereby chilling potential defendants from speaking, it is the government as seeker of information that is harmed. Consequently, voluntary tips may dry up and those who are interviewed by federal agents may provide minimalist responses, if anything at all.²³⁰ The

²³⁰ Of course, the government would be able to compel information in a variety of areas, such as federal student loan grants, for which § 1001 liability would attach to false statements. *See* *United States v. Javanmard*, 767 F. Supp. 1109 (D. Kan. 1991); *United States v. Hoyle*, 33 F.3d 415, 419 (4th Cir. 1994) (prosecuting for false financial aid application under 18 U.S.C. § 1001); *Kabongo v. I.N.S.*, 837 F.2d 753

value of voluntary tips is perhaps best exemplified by the case of Ted Kaczynski, also known as the Unabomber. During his seventeen-year reign of terror, Kaczynski mailed more than a dozen letter bombs to his victims, killing three and maiming numerous others.²³¹ Despite the intensive efforts of an FBI task force, the government made no headway in identifying the Unabomber. Kaczynski was apprehended only after his brother read his published manifesto and voluntarily alerted the government that Kaczynski was probably the Unabomber.²³²

Unlike the public in the defamation cases, however, the government has the power to redress the problem of over-censorship of speech. If § 1001 turns out to chill individuals from speaking to the government²³³ and the government deems the loss of information significant enough to warrant action, the Executive Branch could prevail upon Congress to amend the statute. It could, for example, ask for codification of the “exculpatory no” defense, which arose in a number of Circuit cases holding that a mere false denial of guilt was not a violation of § 1001. The theory behind this defense was that, when confronted with an accusation of wrongdoing, a person (who is guilty of wrongdoing) is put to an unfair choice of admitting guilt, lying, or remaining silent (and thereby effectively confirming guilt).²³⁴ The natural response to this unpleasant “trilemma” might be to avoid

(6th Cir. 1988) (upholding deportation order on ground that immigrant defendant’s conviction for false financial aid application demonstrated moral turpitude); *see also* *United States v. Ranum*, 96 F.3d 1020, 1027-29 (7th Cir. 1996) (noting similarity between § 1001 and 20 U.S.C. § 1097).

²³¹ *See* Tung Yin, *Can “Death Row Phenomenon” Be Confined to Death Row Inmates?*, in *DEATH PENALTY: NEW DIMENSIONS*, 92, 105 (Arethi Krishna Kumari ed., 2007).

²³² *United States v. Kaczynski*, 239 F.3d 1108, 1120 (9th Cir. 2001) (“Among the readers of the [Unibomber’s] manifesto was David Kaczynski, who came to suspect that its author was his brother Ted David very reluctantly resolved to inform the FBI of his suspicions . . .”).

²³³ *See supra* note 55.

²³⁴ *See, e.g., United States v. Taylor*, 907 F.2d 801, 804-05 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179 (4th Cir. 1988).

getting into the situation in the first place by refusing to speak at all with government agents. This would impair the government's functioning by denying it access to information from the public if everyone—guilty or innocent—adopted this strategy. To avoid this result, lower courts had read § 1001 as not applying to exculpatory no's. However, the Supreme Court held in *Brogan v. United States*²³⁵ that the plain language of § 1001 contained no such exception to criminal liability and therefore eliminated the defense. But since *Brogan* was a decision based purely upon statutory interpretation, Congress could override *Brogan* by amending § 1001 to allow the "exculpatory no" defense.²³⁶ Alternatively, Congress could amend § 1001 to require that prosecutors prove detrimental reliance upon the false statement.

In short, the government has the power to alter the scope of § 1001's coverage to respond to self-censorship by defendants who fear being erroneously convicted. The existence of that power might weigh against applying the independent review doctrine to sufficiency of the evidence appeals in § 1001 cases, because if the government finds its flow of information drying up from would-be speakers, it can amend § 1001. Courts could exercise a modicum of judicial restraint by letting Congress decide whether § 1001 over-chills speech. On the other hand, it is also true that state governments can alter the scope of defamation law by statutorily changing the elements of the tort so as to make it more difficult for plaintiffs to prevail.

State "shield laws" provide a good example. In *Branzburg v. Hayes*,²³⁷ the Supreme Court rejected the claim that, at least in criminal cases, the First Amendment provided journalists with a constitutional privilege to resist subpoenas and other judicial processes seeking the identity of confidential news sources. However, many

²³⁵ 522 U.S. 398 (1998).

²³⁶ Alternatively, Congress could require that federal agents give *Miranda*-like warnings as a necessary predicate for bringing § 1001 charges, at least, in cases where the government initiates contact. See, e.g., Gomez, *supra* note 31, at 557.

²³⁷ 408 U.S. 665 (1972).

states have enacted their own laws that provide such protection to journalists.²³⁸ These shield laws make it generally more difficult for defamation plaintiffs to prevail, because they obstruct plaintiffs' ability to use compulsory process to obtain testimony that they may need to prove their case.²³⁹

Still, there may be legislative inertia toward amending § 1001, as congressional representatives might fear being seen as "soft on crime" if they were to vote to make it more difficult for federal prosecutors to prove § 1001 cases.²⁴⁰ As an example, Congress took no legislative action to reverse the Supreme Court's decision in *United States v. Brogan*,²⁴¹ which eliminated the "exculpatory no" defense that numerous lower courts had recognized for years. Even with potential legislative inertia, federal prosecutors differ from defamation plaintiffs in a key way that could limit overuse of § 1001. Defamation plaintiffs have no interest in balancing their recovery of reputation against the public's access to information. Federal prosecutors who bring cases under § 1001, on the other hand, have an immediate interest in securing the current conviction but also a long-term interest in ensuring that the public continues to offer information freely to government investigators.²⁴² Because the prosecutor must balance these competing concerns, she might exercise prosecutorial discretion not to bring a § 1001 charge despite having legal grounds for doing so. This is not to say that prosecutors will necessarily make the "correct"

²³⁸ See, e.g., CAL. EVID. CODE § 1070 (Lexis Nexis 2009).

²³⁹ See, e.g., *Baker v. F&F Inv.*, 470 F.2d 778 (2d Cir. 1972).

²⁴⁰ See, e.g., Bruce Moyer, *Taking a Crack at Cocaine Sentencing*, FED. LAWYER, July 2007, at 8; Nkechi Taifa, *Reflections from Front Lines*, FED. SENT'G REP., Feb. 1, 1998, at 200 (noting proposal by members of Congress to address the sentencing disparity between crack and powder cocaine not by reducing sentences for crack defendants, but by raising sentences for powder cocaine defendants).

²⁴¹ 522 U.S. 398 (1998).

²⁴² In any given case, of course, a prosecutor may overvalue the known present matter and discount the unknown future ones. But that is a miscalculation of a factor, not outright disregard of the factor.

decision whether to charge a defendant under § 1001²⁴³ but that they may bear the costs of overuse of § 1001.

D. Putting It All Together

To date, no § 1001 defendant appears to have raised the exact argument presented in this Article. Perhaps that is not surprising, given the dismissive response that such defendants have received in general with First Amendment defenses.²⁴⁴ Regardless of whether appellate courts should conduct independent review of the factual finding of knowledge of falsity in § 1001 cases, it is clear that the issue is more complicated than it might first appear.

If § 1001 defendants may be entitled to *some* degree of First Amendment protection, how much should that be? Would all § 1001 defendants be entitled to the same degree of protection as defamation defendants? In answering this question, it is useful to note two different dimensions in which § 1001 cases can be differentiated from one another: the way in which the allegedly false statement comes to the government's attention and the nature of the government's interest in the information covered by the statement.

First, in some instances, the government agent induces the false statement by asking the defendant questions, as was the case in *Brogan*. In other instances, the defendant voluntarily seeks out the government to deliver the statement unprompted, as in *Rodgers*. Perhaps the duty of independent appellate review should be owed in one context but not the other.

Because the primary rationales for the actual malice rule and independent appellate review doctrine lie in protecting society's

²⁴³ Indeed, this is assuming that an objectively valid determination of "correctness" could even be agreed upon.

²⁴⁴ See *supra* Part III.A. In other contexts, defendants appear not to have argued for more stringent appellate review of speech-related conduct, such as sexual harassment. See Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 NW. U. L. REV. 1009 (1996) (arguing for application of *Bose* review in sexual harassment cases).

interests in the free flow of information and robust debate about public matters, the *Rodgers* type of defendant is arguably more deserving of independent appellate review than is the *Brogan* type of defendant. The government has great latitude to seek out and compel persons to give it information, often with great success because of its intimidating authority. A good example is *Florida v. Bostick*,²⁴⁵ in which the Court upheld a trial court's finding that a bus passenger had consented to a search by police officers even though he felt he could not refuse their request by getting off the bus as it was about to leave.²⁴⁶ According to the Court, "[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."²⁴⁷ The dissent saw it differently, noting that these searches "occur within cramped confines, with officers typically placing themselves in between the passenger selected for an interview and the exit of the bus."²⁴⁸ As between the two opinions, the dissent paints a more accurate picture of reality.²⁴⁹ The legal system may assume that a reasonable person would feel free to ignore police officers in non-custodial settings, but the pages of the Federal Reporter are filled with stories of drivers who, after being pulled over by the police, gave consent to vehicle searches that uncovered illegal narcotics.²⁵⁰ Not all of these drivers could have been unlucky enough to have ended up inexplicably with drugs in their cars without their knowledge; therefore, some gave consent to the vehicle searches even though they knew that it would lead to their arrests and prosecution.

²⁴⁵ 501 U.S. 429 (1991).

²⁴⁶ *Id.* at 435-36.

²⁴⁷ *Id.* at 436.

²⁴⁸ *Id.* at 442 (Marshall, J., dissenting).

²⁴⁹ See, e.g., Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093, 2098 (1992) (observing that the *Bostick* majority's articulation of "choices" available to bus passengers during police searches "hardly seems realistic").

²⁵⁰ See, e.g., *United States v. Blanc*, 245 F. App'x 271 (4th Cir. 2007); *United States v. D'Armond*, 80 F. Supp. 2d 157 (D. Kan. 1999); *United States v. Walker*, 922 F. Supp. 724 (N.D.N.Y. 1996).

Foolishness might explain these decisions in some cases, but an equally, if not more, compelling explanation is that law enforcement officials can bear powerful psychological pressure on ordinary persons to “cooperate.”²⁵¹

Beyond such informal questioning, the government can compel persons to give information via official process, such as subpoena. Of course, false statements made under oath can be punished through perjury,²⁵² but the point is that the government can still get information even if § 1001 were to chill people from speaking voluntarily. Where the government does not know that it should seek information, however, it may well lose access to information brought voluntarily. In an extreme situation, such as the Unabomber’s reign of terror,²⁵³ such loss of access to information could be catastrophic.

Second, the purpose for which the government seeks the information may have bearing on the degree of First Amendment protection to be accorded the statement. A criminal investigation is a public matter and may have wide-reaching consequences where there are numerous victims. There may also be indirect effects that go beyond the particular defendant. For example, there may be significant general deterrence resulting from a single prosecution, especially a high-profile case. Moreover, the government has a strong claim to information in criminal matters. In *Branzburg v. Hayes*,²⁵⁴ a prosecutor sought to force a reporter to testify before a grand jury as to the identity of illegal drug manufacturers and drug users described in newspaper accounts. The reporter refused to testify, claiming a First Amendment privilege to protect his newsgathering ability. The Court rejected the reporter’s argument in part because it declined to read the First Amendment as giving a special privilege to journalists to avoid the general duty of appearing before a grand jury. However, the Court

²⁵¹ How many people, for example, answer truthfully when asked by a police officer, “Do you know why I pulled you over?” as opposed to remaining silent?

²⁵² 18 U.S.C. §§ 1621, 1623 (2006).

²⁵³ See *supra* notes 231-232 and accompanying text.

²⁵⁴ 408 U.S. 665 (1972).

also concluded that “[f]air and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government,” so that the grand jury’s need to hear from the journalist as witness would outweigh the assumed, but speculative, impact on newsgathering.²⁵⁵

Even in an isolated criminal case, the government’s interest in obtaining accurate information is quite strong. But there are reasons to think that the government’s same interest would be even stronger in situations where the government seeks the information not for the purpose of prosecution but rather for lawmaking or rulemaking. Before enacting statutes, Congress often holds hearings in which members of the public and policy experts present evidence relevant to the issue at hand.²⁵⁶ Similarly, the Administrative Procedures Act generally requires that federal administrative agencies provide notice of pending rulemaking and an opportunity for public comment.²⁵⁷ Lack of information in such venues can have serious negative societal ramifications by potentially inducing Congress or an agency into making bad laws or rules.²⁵⁸

²⁵⁵ *Id.* at 644-45. *Cf.* *United States v. Nixon*, 418 U.S. 683 (1974) (holding that special prosecutor’s need for evidence to present to the grand jury was sufficient to pierce President’s assumed executive privilege).

²⁵⁶ *See, e.g., United States v. Morrison*, 529 U.S. 598, 629-30 (2000) (Souter, J., dissenting) (noting the “mountain of data assembled by Congress” in the form of “testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business” when debating the Violence Against Women Act of 1994).

²⁵⁷ 5 U.S.C. § 553(b),(c) (2006).

²⁵⁸ For example, in the 1980s, Congress enacted mandatory minimum sentences that resulted in a 100:1 disparity between the treatment of crack (base) cocaine and powder cocaine. Whether the motivation for this disparity was, as some have contended, racism (because African-Americans are disproportionately the defendants in crack prosecutions) or, more benignly, a belief that crack was more dangerous and addictive, *see generally* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998), more recent scientific evidence persuaded the U.S. Sentencing Commission that the 100:1 disparity was unwarranted. *See* U.S. Sentencing Comm’n Pub. Affairs Officer, *U.S. Sentencing Commission Votes to Amend Guidelines for Terrorism, Sex Offenses, Intellectual Property Offenses, and Crack Cocaine Offenses* (Apr. 27,

While a prosecutor could also be misled by absent information, possibly indicting an innocent person, there are at least a host of constitutional protections in place to minimize the miscarriage of justice: the defendant is presumed innocent, the prosecution must prove every element of the crime beyond a reasonable doubt, the defendant has the assistance of legal counsel, and the defendant may appeal the conviction to the court of appeals. The public, on the other hand, has no such protections against legislation that passes because key information is withheld from Congress. Legislation can become entrenched and politically difficult, if not impossible, to alter;²⁵⁹ courts are hardly in a position to help, particularly under the rational basis standard used to assess the constitutional validity of most statutes.

Accordingly, we can identify four basic possible situations in which § 1001 cases might arise, based on whether the allegedly false statement was compelled or volunteered, and whether it was during a criminal or administrative investigation or during lawmaking or rulemaking hearings. One could conclude, consistent with the justification for the *Bose Corp.* independent appellate review doctrine, that each of the four scenarios should result in *Bose Corp.* review. But even if one does not accept that proposition, it would be possible to identify certain § 1001 cases as more deserving of independent appellate scrutiny than they currently receive.

The policy reason underlying § 1001's prohibition of false statements to federal officials is to deter intentional misstatements that can pervert government functions through waste of resources. The policy reason underlying the actual malice rule, on the other hand, is to provide breathing room for free expression, especially that concerning public officials. These interests conflict, because as one weakens §

2007), available at <http://www.ussc.gov/PRESS/re10407.htm>. If Congress had knowledge of this more recent evidence when it debated the original mandatory minimums, it might not have enacted them in light of this disparity.

²⁵⁹ Regarding the 100:1 disparity between crack and powder cocaine, see *supra* note 258. Congress in 2010 has acted to reduce the disparity to 18:1. See Fair Sentencing Act of 2010, 124 Stat. 2372 (2010).

1001 through more liberal appellate review to provide that breathing room, § 1001's deterrent function also weakens.

One solution might be to provide more breathing room where its absence would otherwise most negatively affect the government's access to information but to provide less breathing room where its absence would have less negative impact. This is not the most speaker-friendly regime that one could construct, but it does parallel modern defamation law with its divide between public figure/public official cases on the one hand, and private figure cases on the other hand. As explored earlier,²⁶⁰ the voluntary statement/lawmaking category would be most deserving of such protection because it represents two dimensions in which the chilling of speech due to perceived danger of § 1001 prosecution would cause widespread societal harm.

CONCLUSION

Bose Corp. recognized that it was confronted with a clash of two fundamental doctrines: deference to factual findings by the trier of fact and an appellate duty to safeguard First Amendment freedoms. It elected, not unreasonably, to resolve that clash in favor of First Amendment freedoms. Public officials and public figures bear the major cost of this resolution, having to endure reputational harm to ensure public airing of important information. Strangely, however, criminal defendants in § 1001 cases (or those prosecuted under other statutes in which known falsity is an element, such as mail fraud) do not receive the same degree of First Amendment protection. As demonstrated by the hypothetical involving the person who lies to an FBI agent about a public official, thereby triggering a defamation lawsuit and a § 1001 prosecution, current law could unreasonably result in a situation where a defendant is convicted of a crime but found not liable in a civil case concerning the same general statement.

²⁶⁰ See *supra* Part III.D.

A general solution would be to extend *Bose Corp.*-type independent appellate review of knowledge of falsity to all § 1001 cases (and others involving false statements, such as mail fraud); a more targeted solution would be to extend that kind of appellate review to cases involving voluntary, as opposed to compelled, statements. Either approach would be more consistent with First Amendment values than current doctrine, which pays lip service to the First Amendment but otherwise ignores it.