
INCREDIBLE LIES

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INTRODUCTION

United States v. Alvarez marked a seminal moment in the jurisprudence of free speech and falsehoods, and yet, it left at least as many questions unanswered as it resolved.¹ In *Alvarez*, the Supreme Court stated unequivocally for the first time that factual falsehoods enjoy First Amendment protection. As with all protected speech, false representations of fact cannot be regulated unless the government can show the requisite interest.² Six justices agreed that the government had failed to

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1. 567 U.S. 709 (2012).

2. The standard is “requisite” because a majority did not agree on the standard of review. *Id.* at 724 (plurality opinion). The plurality opinion by Justice Kennedy uses the terms “exacting” and “most exacting.” *Id.* (citing *Turner Broad.*

demonstrate that interest in *Alvarez* because it had not established that it acted to prevent actual harms to third parties or unwarranted enrichment for the untruthful speaker.³ Beyond that, the Court provided little guidance.

This Article considers several questions that *Alvarez* did not resolve, including: What kind of harms to private parties establish a powerful enough government interest to justify infringement of knowing falsehoods? And, what factors characterize the kinds of lies that lack First Amendment protection, rendering them susceptible to criminal or civil sanctions, and on what theory?

I analyze aspects of these puzzles through the narrow lens of lies that are too preposterous to be believed—lies that are simply not credible or what I call “incredible lies.”⁴ It seems that the more believable a lie is, the greater its potential to harm. Conversely, some lies are inherently so unbelievable—so literally incredible—that they are stripped of the power to harm. If falsehoods are rendered harmless (or would not create any material advantage for the speaker), the government will be unlikely to demonstrate even a legitimate interest in regulating them, much less the compelling state interest required before the state can regulate protected expression.

This insight leads to a previously unexplored paradox: it may become harder to justify inhibitions on expression containing lies as the untruthful claims become more outrageous, and thus less credible. A statement no one believes presumably cannot mislead. If the statement fails to mislead, to provoke reliance, or otherwise expose a listener to harm, it is also not likely to result in unjustifiable benefit to the speaker. Therefore, on a continuum of falsehood, as an untruth becomes

Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 47 U.S. 557, 566 (1980) (citing cases that applied strict scrutiny). Justice Breyer’s concurrence would apply intermediate scrutiny, requiring only a “legitimate” government interest. *Alvarez*, 567 U.S. at 730 (Breyer, J., concurring).

3. In *Alvarez*, there was no showing that false representations about receiving high military honors caused financial, property, or reputational loss. 567 U.S. at 720–21 (plurality opinion). Nor was there any showing that the statute aimed at preventing fraud or receipt of “valuable considerations.” *Id.* at 723. *Cf. id.* at 734–37 (Breyer, J., concurring) (discussing the harms caused by lies the government is permitted to regulate in other areas of law such as fraud, torts, and perjury).

4. This Article is part of a larger project in which I am exploring the relationship between lies and freedom of expression.

so preposterous that no one would believe it, it may be rendered legally harmless and immune to government infringement. I examine this phenomenon in two domains: the speech of fortune-tellers and other hucksters, and unbelievable statements of fact in defamation cases.

Falsehood that is incredible on its face or in context falls within the category I label “incredible lies”—lies that no one should believe. For reasons explained below, the First Amendment protects such falsehoods. The factors courts examine in assessing the scope of that protection help explain why incredible lies deserve protection. The incredible lies doctrine I unveil here may prove applicable to other kinds of falsehoods.

Part I briefly analyzes the constitutional status of lies before and after *Alvarez*, which clarified that falsehood alone does not bring speech outside the realm of protected speech. Part II explores the legal treatment of prognostication by fortune-tellers and others who claim special predictive gifts; whether the fortune-teller is engaging in protected speech largely turns on the soothsayer’s own intentions and beliefs (“it’s a con” or “I was born with a special gift”), the beliefs and expectations of her⁵ audience, and whether a large amount of money changes hands, resulting in social harms or amounting to fraud.

In Part III, I return to realms more familiar to readers of law journals, analyzing the status of defamatory exaggerations found in hyperbole, parody, and satire, where it is argued that a reasonable listener should be aware that the speaker does not pretend to present any actual facts. When there are no verifiable facts (facts that can be shown to be true or false) the usual approach to defamation law—that truth is a complete defense—is upended. Once again, we start with the absence of a state interest in regulating hyperbolic speech. Language, context, and more warn audience members that they should not believe the speaker’s assertions; statements no one should believe cannot cause the harms to reputation that defamation actions are designed to discourage and mitigate. As with fortune-tellers, responsibility for decoding the truthfulness of

5. I intentionally use the feminine pronoun throughout when discussing fortune-tellers because, although I have not found statistical data, the overwhelming majority of fortune-tellers in the caselaw and news accounts are women.

hyperbolic speech is shared between speakers who must offer signals that they are not to be taken entirely at face value, and the listener who the law expects to exercise a reasonable degree of judgment after reflecting on the allegedly defamatory expression. Part III concludes with a discussion of the law's presumptions about the reasonable audience member. Finally, the Conclusion briefly discusses the implications of recent developments, including the concept of "fake news."

I. THE EMERGING DOCTRINE GOVERNING FALSE STATEMENTS OF FACT

United States v. Alvarez is the starting point for contemporary discussions of falsehood's constitutional status. Xavier Alvarez, a habitual liar, was convicted under the Stolen Valor Act after he falsely claimed he had been awarded the Congressional Medal of Honor.⁶ The Supreme Court overturned his conviction and, further, invalidated the provision of the Act that imposed an enhanced penalty for falsely claiming to be a recipient of one of the government's highest military honors.⁷ Though the Court's reasoning was splintered, the opinions clarified that: (i) falsehood is not so lacking in value that it can be categorically stripped of First Amendment protection; (ii) even verifiably false statements cannot be targeted for suppression and penalty based on "falsity and nothing more"; and (iii) "exacting scrutiny" applies to content-based regulation of falsehood.⁸

Before *Alvarez*, the constitutional status of noncommercial false statements of fact seemed to be distinguished by a "lack of total clarity,"⁹ as Frederick Schauer put it, or perhaps more aptly, a total lack of clarity. Absent any caselaw on point, the government's position in *Alvarez* that "false statements receive no First Amendment protection"¹⁰ as a categorical matter did not seem entirely farfetched at first glance.¹¹ Indeed, Justice

6. *Alvarez*, 567 U.S. at 713–14 (plurality opinion).

7. *Id.* at 715.

8. *Id.* at 715, 719. *But see id.* at 730–31 (Breyer, J., concurring) (recommending a form of intermediate scrutiny or "proportionality" rather than strict scrutiny).

9. Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 915 n.101 (2010).

10. *Alvarez*, 567 U.S. at 719 (plurality opinion).

11. However, concurring with denial of a petition for rehearing en banc in

Breyer, concurring in *Alvarez*, acknowledged the strength of the government's position.¹² So widespread was the belief that "inherently deceptive speech is without First Amendment protection"¹³ that the purported doctrine encouraged legislators to pass "at least 100 federal false statement statutes."¹⁴

However, Justice Kennedy's plurality opinion in *Alvarez* revealed that this approach oversimplified prior law. Falsehoods are constitutionally protected, the opinion explained, unless common law or First Amendment principles permit the state to regulate them. Certain falsehoods were traditionally treated as unprotected because, for example, they were an integral part of a crime, such as fraud¹⁵ or conspiracy.¹⁶ Perjury was understood to pervert justice and undermine the integrity of the legal system. Consistent with common law, other falsehoods, such as libelous statements, fell within categorical exceptions to the Speech Clause.¹⁷

Justice Kennedy explained that if false statements were

United States v. Alvarez, a Ninth Circuit judge cogently analyzed the Supreme Court precedents on false statements, concluding that "false speech is *not* subject to a blanket exemption from constitutional protection." 638 F.3d 666, 668 (9th Cir. 2011) (Smith, J., concurring) (emphasis in original). *But see id.* at 684 (O'Scannlain, J., dissenting).

12. *Alvarez*, 567 U.S. at 732–33 (Breyer, J., concurring) ("I must concede . . . this Court has frequently said or implied that false factual statements enjoy little First Amendment protection" but that does not mean "no protection at all.>").

13. *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 567 (4th Cir. 2013).

14. *Alvarez*, 567 U.S. at 748 (Alito, J., dissenting) (quoting *United States v. Wells*, 519 U.S. 482, 505–07 (1997) (Stevens, J., dissenting)).

15. RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977) (noting that a civil claim for fraud requires reliance on misrepresentation of a material fact and actual injury). There is no simple criminal definition of fraud. Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 738 (1999) (discussing how the criminal definition of fraud "may change depending upon the statute in which the word appears" and "can also be reflective of particular precedent in a jurisdiction").

16. RESTATEMENT (SECOND) OF TORTS § 876 (AM. LAW INST. 1977) (defining a civil claim for conspiracy to require knowledge that the other's conduct constitutes a breach of duty). Verbal statements in furtherance of conspiracy are not protected speech because they are an element of the crime. *See, e.g., United States v. Vascular Sols., Inc.*, 181 F. Supp. 3d 342, 345 (W.D. Tex. 2016) ("[C]onstitutionally protected speech may nevertheless be an overt act in a conspiracy charge.") (citing *United States ex rel. Epton v. Nenna*, 446 F.2d 363, 368 (2d Cir. 1971), *cert. denied*, 404 U.S. 948); *United States v. Lanier*, 920 F.2d 887, 893 n.48 (11th Cir. 1991) (citing *United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974)); *see also Alvarez*, 567 U.S. at 717 (plurality opinion) (noting that "speech integral to criminal conduct" is outside the scope of First Amendment protection) (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949)).

17. *Alvarez*, 567 U.S. at 717–18.

“punishable” for falsehood alone there would be “no clear limiting principle.”¹⁸ Our constitutional tradition, Kennedy continued, referencing George Orwell’s *Nineteen Eighty-Four*, “stands against the idea that we need Oceania’s Ministry of Truth.”¹⁹

The hypothetical construct of a marketplace of ideas, on which so much of First Amendment jurisprudence rests, presumes a rational citizenry equipped to engage in critical thinking. The Founders, men of the Enlightenment, valued rationality. They believed in verifiable facts; George Washington measured metes and bounds. They also assumed an informed citizenry (at least among voters, restricted at that time to men of property). That approach to the world suggests that rational citizens would not fall prey to easily identified falsehoods that could be unmasked in the marketplace of ideas.²⁰

Falsehoods that hold out no pretense of being factual or truthful don’t need to be unmasked. The marketplace they enter immediately discounts their contribution, at least as far as facts are concerned. If the speaker has no concern about the truth or falsehood of what she is saying, as Harry Frankfurt has pointed out, she may not be lying at all.²¹ Rather, Frankfurt argues, the “lack of concern with truth—[an] indifference to how things really are—[is] of the essence of bullshit.”²²

Bullshit, if recognizable as such, falls within the domain of expression I argue the law protects precisely because it is so out of bounds that no reasonable person would believe it. Its absurdity renders it harmless to the recipient and materially worthless to the speaker (since the listener who is incredulous is unlikely to fall for any self-enrichment scheme the speaker may harbor). Under *Alvarez*, the small risks of either harm or unjustified benefits should render unbelievable speech immune to government regulation.

18. *Id.* at 723.

19. *Id.*

20. The attributes courts ascribe to audiences for falsehoods will be discussed in Parts II and III, *infra*.

21. HARRY G. FRANKFURT, ON BULLSHIT 4 (2005).

22. *Id.* at 10.

II. FORTUNE-TELLERS

The relatively straightforward factual setting of fortune-telling and similar prognostication (including, among other things, palmistry, tarot cards, astrology, prophecy or other alleged clairvoyant gifts) offers an auspicious opening for identifying some of the attributes, issues, and tests applicable to incredible lies. The common law assumed that no one could predict the future, and that anyone who claimed to have that ability was engaging in some form of fraud. But that was not always the case, and it is not the view of contemporary courts.

Prognosticators appear to have been respected in the ancient world, but their reputation for reliability has largely diminished over time. The ancients believed that some people could predict the future. Accurate prophecy is key to the Oedipus legend.²³ Joseph gained prominence and power by predicting famine in Egypt.²⁴ But by the Middle Ages, such powers were widely doubted. English common law banned the practices, at least since the Vagrancy Bill of 1824 in Great Britain, which treated fortune-tellers as disorderly persons subject to imprisonment.²⁵

In the United States, it was common for localities to entirely ban fortune-telling, treat fortune-tellers as disorderly persons, or strictly curtail the practice through licensing and regulation. New York, for example, criminalized fortune-telling beginning in 1788, New Jersey in 1799.²⁶ Even statutes that appeared to merely regulate the activity could amount to an outright ban. For example, a jurisdiction might require fortune-tellers to be licensed but fail to provide any licensing

23. Oedipus fled the city in which he was raised to avoid a prophecy that he would kill his father and have sexual relations with his mother, not knowing that he had been abandoned as an infant after an oracle predicted baby Oedipus would murder his father; the prophesies came true when Oedipus unwittingly killed his biological father and married his biological mother. SOPHOCLES, *THE OEDIPUS CYCLE* (Dudley Fitts & Robert Fitzgerald trans., 1949).

24. *Genesis* 41–47 (by interpreting dreams, Joseph predicted a massive famine and advised the pharaoh to stockpile food, saving the Egyptians and attaining prominence that later allowed him to provide for his extended family—the Israelites—during their years in Egypt).

25. *Davis v. State*, 159 N.E. 575, 576 (Ohio Ct. App. 1927) (citing 5 Geo. IV, c. 83).

26. Act of Feb. 9, 1788, ch. 31, 1788 N.Y. Laws 643, 643–44 (repealed 1828); *State v. Kenilworth*, 54 A. 244, 245 (N.J. Sup. Ct. 1903), *aff'd without opinion*, 56 A. 1133 (N.J. 1903) (upholding the ban on “palmistry or [the] like crafty science”).

procedure.²⁷

Lawmakers “condemned universally” the practice of predicting the future on two grounds.²⁸ First, they assumed it was impossible to predict the future. Anyone who claimed to have that ability was lying: “it is an axiom of common knowledge that in practical affairs coming events can not be foretold.”²⁹ Second, and closely related to the first, fortune-telling was assumed to lead to “the perpetration of fraud, which always results in private or public injury.”³⁰

The New Jersey Supreme Court, upholding the 1799 ban on “crafty science[s]”³¹ in 1903, combined the rationales of impossibility and risks to the vulnerable. Since no “rational evidence” has been discovered indicating that a palm reader can predict when a subject will marry or how long a person will live, the court explained, “palmistry is a crafty science, that is, one by which the simpleminded are apt to be deceived.”³²

The New York State statute in place at about the same time incorporated language from 1788 which included among the “disorderly persons” subject to prosecution: “all persons pretending to have skills in physiognomy, palmistry or like crafty science or pretending to tell fortunes.”³³ The words “pretending to tell” signaled that the legislature discounted the possibility that anyone could predict the future, dooming an unusual defense offered by Maude Malcolm, who the state charged in 1915 with practicing palmistry and astrology.³⁴

Malcolm argued the New York criminal statute only applied to those who “*pretend*” to predict the future, implying deceit or fraud, whereas she used a system based on “science.”³⁵ Malcolm offered precise predictions. She advised an undercover policewoman that the woman would marry twice, for the first time in 1916, that her aunt would die during the same year and, among other things, that she would cross the

27. *Davis*, 159 N.E. at 576, 578 (upholding conviction based on a statute that required fortune-tellers to obtain a license but provided no way of obtaining one).

28. *Id.* at 576.

29. *Id.* (rejecting a religious exercise claim); *see also* *Haas v. State*, 38 Ohio C.C. 1 (Ohio Ct. App. 1917).

30. *Davis*, 159 N.E. at 576.

31. *Kenilworth*, 54 A. at 245.

32. *Id.*

33. Act of June 1, 1881, ch. 442, 1881 N.Y. Laws 220 (amended 1929).

34. *People v. Malcolm*, 154 N.Y.S. 919, 920 (Ct. Gen. Sess. 1915).

35. *Id.*

ocean in 1917.³⁶ Malcolm argued, without success, that the statute could not be enforced until the passage of time revealed whether her prophecy proved false.³⁷ Affirming her conviction, the judge emphasized that the legislature had not entertained the possibility that the predictions were reliable; indeed, it signaled “disbelief in human power to prophesy,” a view the court endorsed.³⁸

Courts continued to accept the premise that one could only pretend to tell fortunes, because it was impossible to predict the future. The aim, one court explained in 1957, “was to prevent the ignorant and the gullible, as well as the curious, from being ensnared by the guiles and the fantasies of those who profess . . . to be able to ‘crystal gaze’ into the future.”³⁹ “Experience,” the court continued, suggests the “soothsayer” is but “the forerunner” to a fraud that will find “very fertile spawning grounds” in those whose fortunes were told.⁴⁰

This legal stance incorporated two seemingly incompatible ideas that can only be reconciled through paternalism. On the one hand, if it is obvious that no one can predict the future—or should be obvious to law’s mythical reasonable person—then the average citizen should be expected to be immune to the importuning of prognosticators. On the other hand, lawmakers and courts were convinced that unregulated fortune-telling placed large numbers of citizens at risk—not only the “ignorant and gullible,” and “simpleminded,” but also the merely “curious” who could be roped into becoming believers.⁴¹

As long as fortune-telling presumptively amounted to fraud, it would not be possible for a soothsayer to argue that victims were so credulous or careless they had it coming. Legal doctrine barred defendants charged with false representation

36. *Id.*

37. *Id.*

38. *Id.* at 920–21.

39. *People v. Rosenberg*, 159 N.Y.S.2d 912, 915 (N.Y. Magis. Ct. 1957).

40. *Id.* There is a substantial gap between words that might be the “forerunner” to fraud and words that constitute an element of fraud. The latter, if they crossed the line established by the civil or criminal codes by causing an “actual injury,” and satisfying all other factors in the code, would no longer be protected speech because the words were an integral part of an illegal act. *See* RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977); *see also* Podgor, *supra* note 15 and accompanying text; *see also infra* notes 91, 92, and accompanying text (discussing the elements of fraud).

41. *Rosenberg*, 159 N.Y.S.2d at 915; *State v. Kenilworth*, 54 A. 244, 245 (N.J. Sup. Ct. 1903).

from relying on caveat emptor as a defense.⁴² By the nineteenth century, courts took the view that the law should “protect the weak and [vulnerable] from being victimized.”⁴³ When it came to fortune-telling, however, it appears that the legislature presumed the prototypical clients were the proverbial hicks who would buy the Brooklyn Bridge rather than the average person who could recognize a whopper of a lie.

Perhaps a sucker was indeed born every minute, as showman and huckster extraordinaire P.T. Barnum was reported to have claimed. The boundaries of misleading and illegal speech were hotly debated during Barnum’s lifetime as the marketplace moved from small towns where seller and merchant knew each other to broader anonymous spheres.⁴⁴ What differentiates fortune-telling from puffery, “permissible ‘white lies,’” and “humbug” so that the former should be banned entirely and the latter permitted?⁴⁵

These boundaries remain difficult to discern, as Ninth Circuit Judge Alex Kozinski observed. Discussing the “terrifying” prospect of an “ever-truthful utopia,” in which the conviction of Xavier Alvarez for lying about his own biography could stand, Kozinski imagined the government prosecuting “the JDater who falsely claims he’s Jewish or the dentist who assures you it won’t hurt a bit,”⁴⁶ as well as the office seeker who claims, “I didn’t inhale.”⁴⁷ A myriad of “white lies, exaggerations and deceptions that are an integral part of human intercourse, would,” Judge Kozinski postulated, “become targets of censorship” and potential prosecution if falsehood was categorically denied First Amendment protection.⁴⁸

42. 3 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 411 (15th ed. 2016). Caveat emptor is “a doctrine holding that a purchaser buys at his or her own risk,” that translates to “let the buyer beware.” *Caveat emptor*, *BLACK’S LAW DICTIONARY* (10th ed. 2014). Exceptions arise only when the seller gives an express warranty, the law or circumstances imply a warranty, or the seller engages in fraud. HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* § 9.4 (Mar. 2017 update).

43. 3 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 411 (15th ed. 2016).

44. EDWARD J. BALLEISEN, *FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF* 45 (2017) (describing disagreements over the boundaries that divided commercial speech from swindles).

45. *Id.* at 100.

46. *United States v. Alvarez*, 638 F.3d 666, 673 (9th Cir. 2011).

47. *Id.*

48. *Id.* (Kozinski, J., concurring in denial of en banc review).

A. Speech Claims

At first glance, it might strike some readers that the speech rights of fortune-tellers and those who consult them are not the weighty stuff generally associated with legal scholarship. But this context, rich in narrative, permits us to isolate some concepts that prove important in every setting involving factual statements that are so absurd, so lacking in basis, that they are simply not credible. The recurrent questions involve the intent of both speaker and listener, the risks that the listener will be harmed, and the expectation that falsehood will generate material benefits for the speaker.⁴⁹ From a modern perspective, bans on fortune-telling implicate the speech rights of both the fortune-teller and the prospective client.

Recent jurisprudence recognizes that “fortune telling is not necessarily fraudulent or inherently deceptive simply because it involves predictive speech.”⁵⁰ While the factors that led to a transformation of the doctrine governing predictive speech are not transparent, at a minimum the common law that banned fortune-telling predated any robust theory of First Amendment rights. The Supreme Court did not begin to consider freedom of expression until the First World War and, when it did, it was largely unresponsive to the speech claims of individuals until 1931.⁵¹ Whether the speakers won or lost, all of the early cases involved political speech or the rights of journalists,⁵² nothing so frivolous as psychic speech.

Fortune-tellers asserted that regulation of their prognostications violated their speech rights as early as 1928, just as Justices Holmes and Brandeis were beginning to craft modern speech doctrine in their separate opinions, and while

49. *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”).

50. *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 566 (4th Cir. 2013) (citing *Spiritual Psychic Sci. Church of Truth v. City of Azusa*, 703 P.2d 1119, 1126 (Cal. 1985)).

51. *Stromberg v. California*, 283 U.S. 359 (1931). See discussion of the evolution of Speech Clause doctrine in CATHERINE J. ROSS, *LESSONS IN CENSORSHIP: HOW COURTS AND SCHOOLS SUBVERT FIRST AMENDMENT RIGHTS* 13–16 (2015).

52. *Near v. Minnesota*, 283 U.S. 697 (1931).

the Supreme Court had yet to sustain a federal claim grounded in freedom of expression.⁵³ Initially, as the analysis above indicates, courts uniformly accepted the legislative determination that fortune-telling was inherently fraudulent.⁵⁴ And judges rejected any notion that predicting the future and similar expression implicated constitutional rights.⁵⁵

As speech rights broadened to encompass personal autonomy and the right to receive information, it became possible to see the parameters of liberty as it might apply to fortune-telling more clearly. Two groups involved with fortune-telling have distinct claims under the Speech Clause. First, the speakers themselves, including all varieties of clairvoyants. Speakers have long been held to have expressive rights no matter how worthless or silly their speech may appear to others, so long as their expression does not fall within the narrow categorical exceptions to the Speech Clause.⁵⁶ The second group consists of those who wish to consult clairvoyants whatever their purpose; they possess reciprocal rights to

53. *Davis v. State*, 160 N.E. 473, 474 (Ohio 1928) (rejecting without discussion a claim that fortune-telling conviction unlawfully abridges “the liberty of speech”); *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

54. *See, e.g.*, *Ballard v. Walker*, 772 F. Supp. 1335, 1341 (E.D.N.Y. 1991); *see also White v. Adams*, 343 S.W.2d 793, 793–94 (Ark. 1961); *Rodgers v. Southland Racing Corp.*, 450 S.W.2d 3, 5 (Ark. 1970); *Mitchell v. City of Birmingham*, 133 So. 13, 14 (Ala. 1931).

55. Although the Free Exercise Clause had not yet been applied to the states when these early cases were decided, state courts considered, and rejected, claims that fortune-tellers were practicing their religion. *See, e.g.*, *People v. Rosenberg*, 159 N.Y.S.2d 912, 915, 916 (N.Y. Magis. Ct. 1957); *see also Davis v. State*, 159 N.E. 575, 577 (Ohio Ct. App. 1927). Courts continue to reject religious exercise claims in this context. *Moore-King*, 708 F.3d at 570–72 (noting that fortune-telling is a philosophy or way of life, not a religion). One court took the assertion seriously enough to provide a detailed refutation, distinguishing “the seers and prophets” of Biblical times. *People v. Ashley*, 172 N.Y.S. 282, 283 (N.Y. App. Div. 1918). Writing in 1918, before the emergence of modern Exercise Clause jurisprudence, the judge relied on Judeo-Christian doctrine. He cited Deuteronomy for the proposition that soothsayers, observers of dreams or omens, wizards, charmers, fortune-tellers and those who seek “the truth from the dead” are all “abominations.” *Id.* at 283 (further discussing the Apostle Paul’s condemnation of fortune-telling and of women acting as ministers). Since the activities amounted to abominations under biblical law, the judge concluded that practicing such skills could not be part of any religious exercise, and that the state could regulate or forbid such heinous activities. *Id.*

56. *Cohen v. California*, 403 U.S. 15, 22 (1971) (quoting *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944)).

receive communications.⁵⁷

Before *Alvarez*, if legislators and judges thought that lying stripped speakers of rights, a fortune-teller who asserted rights under the Speech Clause might have been required to show she was not lying. Prognostication may not be deceptive at all because fortune-tellers may not satisfy any definition of lying. Subjective beliefs prove significant. Lies, after all, require that the speaker “says something she does not believe to be true.”⁵⁸ Most definitions add that the speaker wants the listener to believe the falsehood she proposes as truth.⁵⁹ These requirements are also integral to criminal fraud,⁶⁰ where falsehood is not sufficient to establish culpability: the defendant must know that his or her representations are false, and must intend to defraud his or her victim.⁶¹

If the fortune-teller indeed believes she has special powers, the crucial element of *mens rea* for lying (and fraud) is missing. Contemporary jurisprudence holds that deceptive intent is lacking where fortune-tellers believe they have special powers to predict the future, however “dubious” their convictions might be.⁶²

If prognostication could be prohibited without violating the speaker’s right to express opinions protected by the First Amendment, then all sorts of occupations might be affected: doctors offering a prognosis or treatment plan, lawyers assessing the likelihood of success in litigation,⁶³ accountants

57. On the right to receive information generally, see Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999); see also *Stanley v. Georgia*, 394 U.S. 557 (1969) for a discussion on the right to possess and enjoy pornography in the privacy of one’s home.

58. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 13 (2014); see also SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 13 (1989).

59. *E.g.*, BOK, *supra* note 58.

60. See *infra* notes 91, 92, 108, 109, and accompanying text.

61. 3 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 411 (15th ed. 2016).

62. *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 566 (4th Cir. 2013); see, *e.g.*, *Nefedro v. Montgomery Cty.*, 996 A.2d 850, 857–58 (Md. 2010) (holding that fortune-telling is protected by the First Amendment if it is not fraudulent; people who believe they can tell the future act without intent to deceive, however “dubious” their opinions); see also *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1998); *Angeline v. Mahoning Cty. Agric. Soc’y*, 993 F. Supp. 627, 633 (N.D. Ohio 1998) (rejecting the legislative finding that fortune-telling is “inherently deceptive” and rejecting holding of *Davis v. State*, 160 N.E. 473, 474 (Ohio 1928)).

63. *Moore-King*, 708 F.3d at 566 (“[M]uch professional intercourse depends on predictions about . . . the future . . .”).

gauging the risk of an audit and the outcome if an audit took place, and perhaps even law professors who reassure students, "I'm confident you will get a job and pass the bar exam." The licensed professionals who offer these opinions surely believe they have the capacity and knowledge to offer more reliable predictions than those who lack their training and experience. And those who consult them presumably share that confidence. No reasonable (i.e., well-informed) patient, client, or student takes the proffered advice as a guarantee of what will happen.

The expectations of those who seek out a fortune-teller's predictions matter. Many aren't looking for advice. They may lack any faith in what the soothsayer reports because consulting fortune-tellers has long been a source of amusement and frivolity. In 1939, for example, the *New York Times* social pages included an article on the Barnard College German Club's Spring dance, where an undergraduate entertained in the guise of a "German fortuneteller."⁶⁴ The law barring the "crafty sciences" in New York did not provide any exception for those who merely intended to entertain and did not accept fees.⁶⁵ But no one seems to have been arrested even after the fortune-telling that evening became public knowledge. Apparently, the assembled guests were considered sophisticated enough to be safe in this fortune-teller's hands. Some years later, New York enacted a statutory change that created exactly the exception the Barnard student masquerading as a psychic might have needed: "a magician[] or mentalist[]" who tells fortunes for the purpose of amusement or "entertainment . . . and without personal fee" no longer risked prosecution.⁶⁶

In 1957 a New York court discounted that reform effort. Focusing on the importance of protecting the gullible, a judge upheld the conviction of a tearoom proprietor who offered: "Free readings for entertainment and amusement."⁶⁷ Instead of relying on evidence that undermined her "only for amusement" defense (she encouraged contributions, and offered specific predictions to an undercover police officer that belied any

64. *Barnard Club Has Dance: 100 Present at Party Given by Undergraduate German Group*, N.Y. TIMES, Apr. 6, 1939 (reproduced by ProQuest Historical Newspapers at p. 32) (on file with author).

65. Act of Apr. 6, 1929, ch. 344, 1929 N.Y. Laws 809 (amended 1959).

66. Act of Apr. 25, 1949, ch. 803, 1949 N.Y. Laws 1781 (repealed 1967).

67. *People v. Rosenberg*, 159 N.Y.S.2d 912, 915, 914 (N.Y. Magis. Ct. 1957).

pretense of “entertainment”), the judge rejected the very notion that soothsaying could be a harmless pastime.⁶⁸ The dangers the legislature sought to prevent were, the court scolded, inherent in the activity “be it for amusement or otherwise.”⁶⁹

Other courts, however, took a different view, entertaining the possibility that some fortune-telling was just for fun. As early as 1904, an appellate court in Ohio confronted a case with “curious features,” including what it meant to “represent” oneself as a fortune-teller.⁷⁰ Lena Wolf sat at a table, took the hand of James Dolan, appeared to go into a trance, and told him a number of things, but never said she could or would tell his fortune.⁷¹ Finally, she said: “I see a gold field; lots of gold. . . . You are going there but Big Squaw does not want you to. I am a little rosebud in the spirit land that is talking. You are the Big Chief.”⁷²

The judges declared they were “unable to see” any grounds for criminal charges in these facts because:

It is too ridiculous a thing to found a charge of crime upon . . . how anyone would care to talk with an ignorant Indian girl [Big Squaw] because she is dead and can not use either English or any known Indian dialect, how it should deceive any one, is a very strange thing.⁷³

As the court viewed it, the propositions were “ridiculous.” Wolf represented to Dolan that “she was a little rosebud.”⁷⁴ Even “excellent people,” the court observed, may value “[s]pirit communications . . . but certainly not, I take it, the trash given out here about a rosebud, big chief and big squaw.”⁷⁵ The sheer audacity of the performance got Wolf off the hook—no rational person could be expected to base future actions on her

68. *Id.* at 915.

69. *Id.*; *see also* *Mitchell v. City of Birmingham*, 133 So. 13, 14 (Ala. 1931) (noting condemnation of fortune-telling as far back as “Mosaic law” and upholding an absolute ban despite “common knowledge that many persons consult fortune-tellers as mere matter of amusement or pastime”).

70. *Wolf v. State*, 24 Ohio C.C. (n.s.) 526 (Ohio Cir. Ct. 1904).

71. *Id.* at 527.

72. *Id.* at 527–28.

73. *Id.* at 527.

74. *Id.* at 528.

75. *Id.* (stating that the indictment should have been quashed).

reading.⁷⁶

Some statutes (like the New York law discussed above) distinguish between readings intended to be taken seriously, such as offers to help interpret “past events,” analyze “character or personality,” or “reveal the future,” on the one hand, and entertainment on the other. For example, Roseburg, Oregon, banned all paid practice of the occult that offered advice, while expressly allowing charitable organizations to use “occult arts” for fundraising so long as all payments were donated to the charity.⁷⁷ Presumably, the legislature doubted that people attending a church or school fair would take the fortune-tellers they encountered there seriously.

Laws banning fortune-telling also intrude on the rights of listeners—inherent in the Speech Clause—to receive information or be entertained.⁷⁸ Audience rights and expectations came into play in a 2012 decision overturning on First Amendment grounds a complete ban on all fortune-telling, whether free or for a fee, in the city of Alexandria, Louisiana. Rejecting the city’s argument that tarot reading and fortune-telling are “inherently deceptive,” the court accused the state of “[i]gnoring the possibility that, for many people, engaging a fortuneteller could be just for fun—a novelty and a form of entertainment like casino gambling or trying to throw the softball through the rings to win the big bear on the top shelf at the fair,” noting that “[i]n such cases, if there’s a fraudulent element, it is one that people who choose to engage in those activities are willing to accept . . . as a cost of entertainment.”⁷⁹

The analogy to games of skill at fairs is a good one—any

76. *Id.*

77. *Marks v. City of Roseburg*, 670 P.2d 201, 202 (Or. Ct. App. 1984) (overturning the ordinance as violating speech rights under the Oregon constitution because it restrained speech that was protected and not fraudulent).

78. I have not found any cases involving an asserted right to receive “readings.” However, at least one court has noted that such a right may be implicated. *Nefedro v. Montgomery Cty.*, 996 A.2d 850, 856 n.9 (Md. 2010) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1978) (the First Amendment is implicated where speech is restricted “because it restricts the recipient’s right to hear”); see *supra* note 57 (discussing the right to receive information and right to possess pornography at home).

79. *Adams v. City of Alexandria*, 878 F. Supp. 2d 685, 690 n.6 (W.D. La. 2012) (overturning the ordinance on First Amendment grounds); see also *Nefedro*, 996 A.2d at 858 (observing that “like magicians,” fortune-tellers entertain, providing a “benefit that does not deceive those who receive their speech”).

statistician will tell you that the chances of winning are small, and savvy consumers know they are paying more than any of the prizes is worth—but it’s a great way to pass the time, eat less fried dough, and impress a date or a child. It’s a cost the consumer understands.

Moreover, the federal court that overturned the Louisiana town’s statute in 2012 observed that fortune-tellers “should be able to share their dreams, imaginations and visions with others free of government interference.”⁸⁰ On its face, the ordinance would bar the use of Ouija boards in the family room, and would “outlaw every ‘amateur psychiatrist, parlor sage and barstool philosopher’ . . . who dares to suggest to another what the future may hold.”⁸¹ Clearly, “a decision in favor of the City [was] not in the cards.”⁸²

Other contemporary observers share that judge’s tongue-in-cheek appreciation of soothsayers. No less a social commentator than Bruce Springsteen honored Madame Marie, a fortune-teller who entertained visitors to the shore on the Asbury Park, New Jersey boardwalk from the 1930s until she died in 2008. Springsteen recalled watching her “as she led the day trippers into the small back room where she would unlock a few of the mysteries of their future.”⁸³ He added, “[s]he always told me mine looked pretty good – she was right.”⁸⁴

B. *Factors in Assessing Culpability*

Three factors appear to bear on whether soothsayers can be held accountable for misleading those who follow their advice and instructions. Culpability depends at base on: (i) the speaker’s belief and intent; (ii) the recipient’s frame of mind; and (iii) the risk of criminal fraud resulting in material harm to the recipient and unwarranted gain to the speaker. All of these

80. *Adams*, 878 F. Supp. 2d at 691.

81. *Id.* (quoting JOHN D. MACDONALD, *THE DEEP BLUE GOODBYE* (1964)).

82. *Id.*

83. Patricia Cohen, *The Boss Recalls a Fortuneteller*, N.Y. TIMES (July 4, 2008), http://www.nytimes.com/2008/07/04/arts/04arts-THEBOSSRECAL_BRF.html [<https://perma.cc/FBJ9-UF97>]; see also Associated Press, *Madam Marie, Jersey Shore Psychic, Is Dead*, N.Y. TIMES (July 2, 2008), <http://www.nytimes.com/2008/07/02/arts/music/02marie.html> [<https://perma.cc/QT47-J3MC>] (immortalized in “4th of July, Asbury Park (Sandy),” with the lyric “Did you hear the cops finally busted Madam Marie for tellin’ fortunes better than they do”).

84. Cohen, *supra* note 83.

likely transcend the setting of psychic readings as we consider incredible lies in other domains.⁸⁵

1. The Fortune-Teller's Intent

We start with the speaker's intent. As discussed above, if a fortune-teller believes she has the gift of prognostication, she has no intent to deceive. If, in contrast, she shares the common perception that no one can divine the future, she may have formulated an intent to deceive. If she holds herself out as possessing powers she herself does not think she has, and expects the audience to believe her, she is nothing more than a charlatan.

Put in more general terms, confronted with statements that seem too incredible to be believed, we should ask whether the speaker believes her statements to be truthful. If she does, then she is not intentionally voicing untruths. If the speaker does not believe her own statement or prediction, and nonetheless holds it out as truthful, we must also ask whether she expects others to believe it and whether they are likely to do so.

2. The Listener's Frame of Mind

This brings us more directly to the listeners. Those who consult fortune-tellers fall very broadly into two classes: those who genuinely thirst for guidance and those who dismiss the fortune-teller's claims as mere theater. The risk of harm appears to vary with the listener's expectations. The more credulous the recipient of the soothsayer's offering, the more vulnerable he or she is likely to be. There is at least one more possibility: a permeable line may divide those who temporarily suspend disbelief in the service of recreation and those who are too lacking in judgment or so overwhelmed by personal circumstances that they fail to see what is obvious to others, making themselves vulnerable to fraud. A particular individual may, under the right conditions, slide from the first impervious group into the subset of the vulnerable.

Distinctions between the most vulnerable audience member and the representative or most analytical audience

85. *See supra* Part II.

member prove significant to the application of laws restricting fortune-telling. Should the law aim at protecting those who the courts view as “ignorant and gullible,” or emotionally vulnerable, or should the law be premised on the average rational person, who is presumed to know enough about the world to approach the fortune-teller’s claims skeptically or discount the representations altogether? The modern doctrine respecting fortune-telling has not expressly addressed these issues. However, defamation jurisprudence—to which I turn in Part III—examines the normative listener more closely and provides guidance as to this element of the incredible lies analysis.

Fortune-telling is most likely to be protected as an exercise of the clairvoyant’s expressive rights where the recipients of the forecast are deemed unlikely to believe what they are being told. If the person whose palm is being read seeks amusement, the potential risks of harm are minimized because a merry-maker is unlikely to fall prey to a fraudulent scheme.⁸⁶

3. Risks of Harm, Especially Criminal Fraud

The risk and depth of harm to listeners at the hands of unscrupulous fortune-tellers also seems to turn on the client’s expectations and beliefs. There is, to be sure, a grave risk that some people will turn over large sums to fraudulent fortune-tellers running scams. But others, who only seek to be amused, are less vulnerable to criminal schemes at the hands of psychics.

Reining in the unscrupulous fortune-teller could be justified under *Alvarez*, which suggests that unwarranted gains may justify limitations on falsehood.⁸⁷ The speaker’s unwarranted gain based on falsehood complements the listener’s loss, but it must be substantial enough to support infringements on speech. The large sums some fortune-tellers extract from clients do not require or justify restrictions on

86. The risk remains that some merry-makers will be converted into believers. See James McKinley, Jr., *Psychic Found Guilty of Stealing \$138,000 From Clients*, N.Y. TIMES (Oct. 11, 2013), <http://www.nytimes.com/2013/10/12/nyregion/greenwich-village-psychic-found-guilty-of-stealing-thousands-from-clients.html> [<https://perma.cc/VJT5-LZCP>] (psychic’s attorney argued the customers were “deeply skeptical” and “were never tricked into thinking” the psychic had “power,” but paid her anyway).

87. *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion).

prognosticating expression because fraud statutes already provide remedies without restraining speech that the Constitution protects.⁸⁸ It appears that the collection of small fees or gifts from those who consult practitioners of the occult and the like would rarely, if ever, lead to prosecution. But, under *Alvarez*, “it is well established that the Government may restrict speech without affronting the First Amendment” where “false claims are made to effect a fraud or secure moneys or other valuable considerations.”⁸⁹ Reports suggest that fortune-teller fraudsters request items of value beyond cash, such as jewelry or designer handbags worth thousands of dollars.⁹⁰

The argument that fortune-telling is not inherently fraudulent should not be misconstrued as an argument that fortune-telling is incompatible with fraud. If fortune-telling is the vehicle for defrauding consumers, it may be prosecuted, as it was under common law. The match between a dishonest clairvoyant and a susceptible listener may create circumstances ripe for fraud, removing the prognostication from the realm of incredible lies. However, it may prove difficult to identify the line that divides fraudulent prognostication (intended to deceive and to generate a windfall to the soothsayer) from fortune-telling that remains within the boundaries of protected speech.

The distinction may be particularly elusive because fraud itself resists clear definitions. According to commentators on criminal law, fraud does not stand as “a crime in itself,” and “is

88. *Id.* at 719.

89. *Id.* at 723. This also suggests that there is no cause of action for a client who follows the soothsayer’s advice in a way that does not benefit the soothsayer by, for example, ending a romantic relationship, burying a ring in her own backyard, etc.

90. Hilary George-Parkin, *When is Fortune-Telling a Crime?*, ATLANTIC (Nov. 14 2014), <https://www.theatlantic.com/business/archive/2014/11/when-is-fortunetelling-a-crime/382738/> [<https://perma.cc/Q3XE-2ALC>]. One such report was about a college educated woman “at a low point” in life who paid Peaches Stevens to remove a curse from her family by, among other things, placing cash and relatives’ names under her mattress and a grapefruit on top of her bed—she “wanted to believe it would help.” Susan Jacobson, *Psychics to Refund Woman’s \$50,000*, ORLANDO SENTINEL, Mar. 8, 2013, 2013 WLNR 5768853. Another report concerned a woman holding an M.B.A. who consulted a psychic after losing her job in 2008 and a bad end to a romantic relationship; she handed over funds for “supplies,” including candles, and services, including meditations and rituals. The psychic was convicted of larceny despite arguing that she provided all the services contracted for. McKinley, Jr., *supra* note 86.

not a crime with prescribed elements.”⁹¹ In all of its guises, however, the common law of fraud focuses on deception, as do criminal and civil fraud statutes.⁹² Without deception there can be no fraud.

If the common law too glibly assumed that fortune-tellers’ representations were inherently fraudulent and that citizens/clients were inherently gullible, contemporary courts may be too quick to dismiss the possibility that some people are poised to be taken in by soothsayers’ false promises. Polls indicate that a remarkable number of Americans believe that it is possible to communicate with the dead and to predict the future.⁹³ Fifteen percent of respondents to a 2009 Pew survey said they had consulted fortune-tellers.⁹⁴ Do reports about Americans’ beliefs demolish the legislative presumption about psychics and fortune-tellers, merely undermine the presumption, or prove irrelevant to it? Should the law protect those believers from themselves, honor their inclinations by permitting them to access the services of clairvoyants, or intervene only when all the elements of criminal fraud are in place?

P.T. Barnum famously claimed that “the American people like to be humbugged,”⁹⁵ and perhaps that remains true today. People from all walks of life get scammed, turning over large sums of money in hopes of fulfilling improbable promises. “Psychic scams,” one newspaper claims, “are nothing new in New York, where fortunetellers’ storefronts are nearly as ubiquitous as Starbucks.”⁹⁶ A New York psychic drew national attention after she assured the “professionally successful” but lonely Niall Rice that if he moved to Los Angeles from New

91. Podgor, *supra* note 15, at 730, 740 (noting that the ninety-two separate statutes in the U.S. Code addressing fraud do not have a “consistent definition . . . of what is encompassed within the term”).

92. *Id.* at 737.

93. *Many Americans Mix Multiple Faiths*, PEW RESEARCH CTR. (Dec. 9, 2009), <http://www.pewforum.org/2009/12/09/many-americans-mix-multiple-faiths/> [<https://perma.cc/9BKQ-QGMX>] (15 percent of those surveyed had consulted a fortune-teller or psychic, nearly 30 percent felt they had been “in touch with someone who has died,” 25 percent believed in astrology and 24 percent in reincarnation).

94. *Id.*

95. BALLEISEN, *supra* note 44, at 142.

96. Tina Susman, *Psychic Admits Lost Fortune*, L.A. TIMES, Nov. 19, 2015, 2015 WLNR 34341283. Fortune-telling for pay remains illegal in New York as in many other jurisdictions. N.Y. PENAL LAW § 165.35 (MCKINNEY 2017).

York he would reunite with his estranged (and subsequently deceased) girlfriend, or at least with her “spirit, albeit in another woman’s body.”⁹⁷ These representations and others—equally incredible in the literal sense—cost Rice his life savings of over half a million dollars.⁹⁸ Many people who have been bilked are “embarrassed to go public,” according to a private investigator who handles such cases all over the United States.⁹⁹ Others, reported to have seemed “skeptical” at first are embarrassed that they later succumbed to the fortune-teller’s importuning for money or jewelry.¹⁰⁰

The risks of fraud might be mitigated by regulations on how fortune-telling is marketed rather than by regulations on the expressive content of the consultation itself. Advertisements, including placards outside the fortune-teller’s parlor, meet the definition of commercial speech and are subject to government regulation where a substantial state interest, such as “preventing deception of consumers,” is at stake.¹⁰¹

Jurisdictions and entities that are not bound by the Speech Clause have limited advertisements for psychic services. Ireland, for example, promulgated new rules governing broadcast advertisements in 2017, including one aimed at “Fortune Tellers and Psychic Services,” which states that such ads are “only acceptable where the service is evidently for entertainment purposes only.”¹⁰² AOL, a private media platform, has a similar provision, and further indicates that

97. Susman, *supra* note 96.

98. *Id.* (the fortune-teller also requested money for a time machine, and to “build a bridge of gold” to fight the evil spirits separating the man from his lost love); *see also, e.g.*, Jacobson, *supra* note 90; McKinley, Jr., *supra* note 86.

99. Jacobson, *supra* note 90.

100. McKinley, Jr., *supra* note 86.

101. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (discussed in *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 21 (D.C. Cir. 2014) (en banc). Commercial speech cases are subject to intermediate review, as set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Commercial speech may be regulated, at a minimum, to “protect consumers from fraudulent, misleading, or coercive sales techniques.” *Id.* at 574 (Blackmun, J., concurring). Coercive sales techniques may be found where fortune-tellers threaten that a curse will harm the client’s loved ones unless the client continues to pay for services. *See* George-Parkin, *supra* note 90.

102. Kirsty Blake Knox, *Psychics Caught Out by Watchdog’s New Rules on Predictions*, INDEP. (Mar. 29, 2017), <http://www.independent/media/psychics-caught-out-by-watchdogs-new-trules-on-predictions-35574284.html> [<https://perma.cc/3K67-TN8A>].

such ads “should not state or imply that [the services] have any scientific basis or validity.”¹⁰³

In the United States, the government may regulate false advertising and, under certain circumstances, it may also require commercial speakers to make disclosures that are “purely factual and uncontroversial.” Both requirements—“factual” and “uncontroversial”—could prove hard to satisfy in the context of prognostication. Prognostication may rest in cultural tradition (e.g., Chinese *kau cim* predictions using sticks or consultation of astrologers by Indians)¹⁰⁴ or the practitioner may believe she has gifts for other reasons, as discussed above. In either instance, the practitioner who is a true believer would likely challenge a warning label that the service is offered purely for amusement. When practitioners claim to believe in their own powers, it can be, in the words of one reporter, “a Sisyphean task” to prove they do not.¹⁰⁵

Along the same lines, practitioners would likely challenge any compelled warnings about the limits of their services as not being based in “purely factual and uncontroversial” presumptions. The lack of scientific studies of prognostication distinguishes it from one of the leading examples of constitutionally permissible compelled disclosure: health warnings about tobacco products. The federal government has gathered voluminous proof about the harmful effects of tobacco (“more than 4,000 findings of fact detailing . . . [a] ‘pervasive scheme to defraud consumers’” and the adverse impact of smoking) that supports compelled warnings on cigarette packages.¹⁰⁶

Would a Federal Trade Commission requirement that fortune-tellers post the notice “WARNING: CONTACT THE DEAD AT YOUR OWN RISK, YOU MIGHT FALL PREY TO FRAUDSTERS” be supportable? The hypothetical seems to discourage use of a service that is “legally offered” in many jurisdictions, striking “at the heart of the First Amendment.”¹⁰⁷

103. *Psychics, Tarot Readings, Fortune Tellers*, OATH, <http://advertising.aol.com/advertising-policies/advertising-categories/psychics-tarot-readings-fortune-tellers> (last visited Sept. 28, 2017) [<https://perma.cc/R592-G859>].

104. George-Parkin, *supra* note 90.

105. *Id.*

106. *United States v. Philip Morris USA, Inc.*, 801 F.3d 250, 253, 255 (D.C. Cir. 2015).

107. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 574 (1980) (Blackmun, J., concurring).

To the extent that fortune-tellers' predictions are simply unbelievable, consumers are already protected, and the incredible lies doctrine should immunize the prognosticators. However, some fortune-tellers are clearly fraudsters. They engage in "a long and highly orchestrated con designed to sap huge sums of money from trusting victims."¹⁰⁸ If the claims are not transparently incredible to all comers, and the fortune-teller does not believe her own representations, fraud prosecutions remain available if victims and prosecutors are willing to pursue them.¹⁰⁹

The doctrine of incredible lies is not triggered when fortune-telling crosses the line to fraud. The match between a fraudster and a gullible target undercuts any defense based on the argument that the lies were not credible. If fraudsters take victims as they find them (a subjective standard), that seems fair because criminals may be said to seek out vulnerable prey.

However, as the next Part argues, an objective standard should apply outside the context of criminal fraud when the state seeks to prevent or punish expression that the Constitution protects. Part III takes a closer look at what the law expects of those exposed to lies that are not credible.

III. DEFAMATORY EXAGGERATIONS

A defamatory statement must, at a minimum, be false in order for it to give rise to a cause of action.¹¹⁰ Truth has always offered a complete defense against a suit for defamation.¹¹¹

Alvarez specifically instructed that even within categories of speech that are generally unprotected, such as "some instances of defamation and fraud . . . falsity alone may not suffice to bring the speech outside the First Amendment."¹¹² Among other things, before a speaker can be held liable for defamation the speaker's statement must "reasonably impl[y] false and defamatory facts."¹¹³ And the statement must be "reasonably capable of defamatory meaning" that would harm

108. George-Parkin, *supra* note 90.

109. *Id.* (explaining that victims are embarrassed, and police and prosecutors resist bringing charges in light of the many obstacles to obtaining a conviction, including that the "victims look stupid").

110. RESTATEMENT (SECOND) OF TORTS § 558 (AM. LAW INST. 1977).

111. *Id.*

112. *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion).

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

the subject's reputation.¹¹⁴

Additional prerequisites to a libel action require that the statement “must be a knowing or reckless falsehood.”¹¹⁵ And the falsehood must cause a “legally cognizable harm,” such as reputational or material loss.¹¹⁶ Moreover, the falsehood must cause an injury that cannot be redressed by the usual mechanism of more and better speech correcting the record.¹¹⁷

Many forms of expression that are untethered from facts are common in conversation and literature—including exaggeration, hyperbole, parody, and satire. All of them fall into the category of incredible speech that is my focus here. Speech that no one proposes is credible immediately disposes of several of the factors I identified above based on my analysis of fortune-telling. First, the speakers themselves do not believe what they are saying and do not offer the content as truthful. Second, they do not intend or anticipate that any reasonable recipient of their statements would conclude the content in context was truthful or rely on it in any way. These premises set the starting point for my discussion of “facts” no one would believe in the context of defamation, where incredibility provides a complete defense to liability because allegations no one could believe cannot harm their target.

Hustler Magazine v. Falwell provides the seminal statement about facts no one would believe.¹¹⁸ In 1983, *Hustler* published a now-famous parody of the Campari ads, a series that shows celebrities recounting the “first time” they The ads titillated, hinting they might be about the first time the celebrity engaged in sex, but they culminated in the memorable first time the person tasted the aperitif, Campari. The *Hustler* parody depicted preacher Jerry Falwell talking about his “first time” tasting Campari, which involved an “incestuous rendezvous with his mother in an outhouse.”¹¹⁹ When Falwell attempted to recover for intentional infliction of emotional distress, he faced an insurmountable problem: the satirical Campari ad, though “doubtless gross and repugnant in the eyes

114. *Weyrich v. New Republic*, 235 F.3d 617, 620, 623 (D.C. Cir. 2001) (citing *Milkovich*, 497 U.S. at 12, 20 (defamation actions allow “an individual to vindicate his good name” and receive “redress for harm caused by such statements”)).

115. *Alvarez*, 567 U.S. at 719.

116. *Id.*

117. *Id.* at 726.

118. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

119. *Id.* at 47.

of most,” the Supreme Court held, “could not reasonably have been interpreted as stating actual facts.”¹²⁰

Indeed, as this doctrine has been applied to defamation actions, it seems the more exaggerated the speech and the more untethered it is from fact, the less susceptible it will be to penalty. The Supreme Court of Wyoming bemoaned: the “development of the law of defamation has moved along a strange path to a place where we now say that the more outrageous, vile, vulgar, humiliating and ridiculous the publication, the more it is protected. . . . [I]f it is outrageous enough, it is ‘all right.’”¹²¹ “No matter,” the court continued, “what the ridicule, hurt and damage,” *Falwell* held that there is no remedy.¹²² The logic of the incredible lies doctrine, however, places the outcome in *Falwell* in a broader perspective of communications that lack credibility, showing that the holding has a sound basis. Since no one was likely to believe that Falwell committed incest with his mother, especially in an outhouse, the parody could not damage his reputation.

A. *Rhetorical Hyperbole*

Hyperbole is a staple of modern discourse. It is, in the words of federal judge Bruce Selya, “very much the coin of the modern realm.”¹²³ No one took President Kennedy to task for lying when he proudly proclaimed “Ich bin ein Berliner.”¹²⁴ His statement, though not strictly true, was an effective use of rhetorical hyperbole designed to show his fellowship with the people trapped behind the Berlin Wall who longed for freedom. Less elevated hyperbole is also part of contemporary speech.

120. *Id.* at 50. This aspect of the analysis is identical for claims alleging libel and intentional infliction of emotional distress. *Id.* at 57 (noting that the jury had correctly rejected Falwell’s defamation claim arising from the same facts, and the appellate court correctly upheld that decision on the basis that the parody “was not reasonably believable”).

121. *Spence v. Flynt*, 816 P.2d 771, 774 (Wyo. 1991) (distinguishing *Falwell*, finding malice based on a hyperbolic *Hustler* Magazine statement about celebrity attorney Gerry Spence naming him “Asshole of the Month,” “shameless shitholes,” and more, reversing summary judgment for *Hustler*).

122. *Id.*

123. *Levinsky’s Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997).

124. *Remarks at the Rudolph Wilde Platz, Berlin*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM (June 26, 1963), https://www.jfklibrary.org/Asset-Viewer/oEX2uqSQGEGIdTYgd_JL_Q.aspx [<https://perma.cc/45FC-4PFK>].

We no longer, Judge Selya observed, expect the word “bastard” to refer to “the target’s lineage,” nor does “the cry, ‘you pig’ . . . prompt a probe for a porcine pedigree.”¹²⁵ A defamation action requires a sounder footing than “loose language that cannot be objectively verified.”¹²⁶

Speakers whose rhetorical hyperbole gives rise to cruder and more wounding stories than *Hustler’s* satirical Campari ad may still escape legal liability because their words were too incredible to be believed. In fact, the cruder and more bizarre the hyperbole, the less likely it is to seem believable. This principle applies even when vulgar hyperbole is aimed at vulnerable private citizens¹²⁷—not public figures—including those who have never sought the limelight. Such targets, who we can safely assume occupy a more vulnerable position than a public figure like Falwell, provoke empathy when they experience the “ridicule, hurt and damage” Wyoming’s Supreme Court lamented.¹²⁸

A particularly egregious instance of the seeming injustice this approach causes is found in the dismissal of a defamation action brought by a high school student who had been the subject of blistering online attacks by her classmates. The court concluded she had no legal claim because the story her peers told about her was so hyperbolic that no one could read it as a factual statement.¹²⁹ In an extreme act of “slut-shaming,” a classmate created a fake private Facebook page recounting that

125. *Levinsky’s*, 127 F.3d at 128, 130 (reversing the trial court’s finding that the term “trashy” was actionable as implying “a provably false fact”; to the contrary, it is “a chameleon that continuously changes . . . shades of meaning”).

126. *Id.* at 130.

127. When the Supreme Court began to place a First Amendment overlay on state defamation law, it required public figures to prove that the speaker acted with actual malice. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (discussing the different standards applied to public and private figures with public officials); *see also, e.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (discussing the different standards for public figures); *Roffman v. Trump*, 754 F. Supp. 411, 415–17 (E.D. Pa. 1990). Private figures suing for defamation bear a lower burden—proving the defamatory statement was false. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1967). These distinctions do not appear to make any difference to the discussion of statements that are so exaggerated they do not pretend to state actual facts. The Supreme Court has not yet expressly addressed the question of whether the same test applies to hyperbole, parody, and the like involving private figures and matters of private concern. *Mink v. Knox*, 552 U.S. 1165 (2008); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988).

128. *Spence v. Flynt*, 816 P.2d 771, 774 (Wyo. 1991).

129. *Finkel v. Dauber*, 906 N.Y.S.2d 697, 702 (N.Y. Sup. Ct. 2010).

the plaintiff contracted AIDS in Africa where “she was seen fucking a horse[,] . . . sharing needles with . . . heroin addicts, . . . screw[ing] a baboon[, and later] hired a male prostitute who came dressed as a sexy fireman.”¹³⁰ The site was perhaps a failed effort at parody, adolescent humor gone awry. But the horse, or the baboon, or the fireman, or all of them together, saved the author from being held accountable for the palpable hurt she caused. No one would be so foolish as to believe that an American high school student had sex with a horse and a baboon in Africa.

How is it possible that such vicious speech escapes liability? The First Amendment, the Supreme Court has held, protects “statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.”¹³¹ This doctrine, Chief Justice Rehnquist wrote in *Milkovich v. Lorrain Journal Co.*, protects “imaginative expression” and “rhetorical hyperbole” in public discourse and sustains a robust marketplace of ideas.¹³² The defendant had published a sports column accusing Michael Milkovich, a high school wrestling coach, of lying under oath in a hearing concerning events at a game that affected his team’s eligibility for the state tournament.¹³³ Applying the doctrine about “actual facts” to Milkovich’s defamation claim, the Court held the column could not be shielded from liability just because it was labeled as “opinion” rather than “fact.” The column, titled in part “the ‘big lie,’” could be read as implying “an assertion of objective fact”: the assertion that Milkovich had perjured himself at the hearing.¹³⁴ That accusation was amenable to verification.¹³⁵ After *Milkovich*, speakers would no longer be able to shelter defamatory statements merely by labeling them “opinion.”¹³⁶

130. *Id.* at 700.

131. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (quoting *Hustler*, 485 U.S. at 50).

132. *Id.* at 20.

133. *Id.* at 4–5.

134. *Id.* at 4, 18–19 (reversing summary judgment for the newspaper).

135. *Id.* at 22–23.

136. The common law doctrine of fair use offered a defense to an allegation that an opinion constituted defamation. The doctrine protected opinion because the defendant would not be able to prove the truth or falsehood of his “honest . . . opinion on matters of legitimate public interest.” *Id.* at 13 (citing RESTATEMENT (SECOND) OF TORTS § 566 cmt. a, f (AM. LAW INST. 1977)); 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 5.28 (1956). Expressly rejecting the “opinion” “fact” dichotomy, the *Milkovich* Court traced it to dicta from *Gertz v.*

Distinguishing the facts in *Milkovich* from the context of its earlier decisions, the majority explained that other kinds of hyperbole did not imply “actual” or verifiable facts. In *Greenbelt Cooperative Publishing Ass’n v. Bresler*, the Court had rejected “the contention that liability could be premised on the notion that the word ‘blackmail’ implied” a real estate developer engaged in aggressive negotiations “had committed the actual crime of blackmail.”¹³⁷ *Greenbelt* indicated there were “constitutional limits on the *type* of speech which may be the subject of state defamation actions.”¹³⁸ The Court concluded “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet” signifying the view that his “negotiating position [was] extremely unreasonable.”¹³⁹

Justice Brennan, dissenting in *Milkovich*, disagreed with the Court’s application of the “actual facts” doctrine to *Milkovich*’s complaint. “The operative question,” Justice Brennan maintained, is “whether reasonable readers would have actually interpreted the statement as implying defamatory facts.”¹⁴⁰ This requires attention to “what statement was actually made,” and “what the statement can reasonably be interpreted to mean.”¹⁴¹ Audiences, Brennan asserted, “can recognize conjecture” and “hyperbole,” neither of which justify inferring that the speaker knows facts hidden from everyone else.¹⁴² Brennan thought the column a clear example of hyperbole.¹⁴³ Taking issue with the majority’s view

Welch, Inc., 418 U.S. 323, 339–40 (1974). *Milkovich*, 497 U.S. at 17–18 (stating that “expressions of ‘opinion’ may often imply an assertion of objective fact” as when “a speaker says ‘In my opinion John Jones is a liar,’” implying “a knowledge of facts” that support his opinion).

137. *Milkovich*, 497 U.S. at 16 (discussing *Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6 (1970)).

138. *Id.* at 16.

139. *Id.* at 16, 17 (quoting *Greenbelt*, 398 U.S. at 13–14); *see also* *Letter Carriers v. Austin*, 418 U.S. 264, 285 (1974) (the “vigorous epithet” of “scab” is not necessarily to be taken literally, even in the context of a labor dispute).

140. *Milkovich*, 497 U.S. at 27 nn.3–4 (Brennan, J., joined by Marshall, J., dissenting).

141. *Id.* at 27 n.4. If the speaker says that someone else said a defamatory thing, which he then quotes, is the statement under review for its truth the claim that X said Y, or does the question center on the truthfulness of the allegation quoted?

142. *Id.* at 30 n.7.

143. *Id.* Of course, some skilled orators, like Donald Trump, take advantage of this stance to make wild accusations they intend for listeners to accept. *See*

of the *Milkovich* allegations, Brennan reasoned that no claim for defamation is sustainable where “[i]t is simply impossible to believe that a reader” who knew the context would think a publication using “rhetorical hyperbole” was charging, for example, that someone committed a crime.¹⁴⁴

In context, a “killing” may not be an accusation that the subject committed murder but may merely suggest a great financial deal, profit, or good price.¹⁴⁵ Where statements cannot be reasonably interpreted as stating “actual facts,” lower courts have dismissed actions for defamation on the basis that no one would have believed hyperbole or other figures of speech suggesting that: (i) renowned beat poet Harold Norse was “unpublished”;¹⁴⁶ (ii) stuntman Evel Knievel was a “pimp” and his wife implicitly a prostitute (referencing a photograph of a hip-looking Knievel framed by his wife and a younger woman, captioned “you’re never too old to be a pimp”);¹⁴⁷ or (iii) Geraldo Rivera was actually accusing the person who set up the anti-abortion website known as the Nuremberg files of “aiding and abetting a homicide” or being an “accomplice to homicide,” after the murder of Dr. Bernard Slepian, when Rivera engaged in “animated, non-literal” hyperbole.¹⁴⁸ The audience was no more expected to believe that the website operator was a murderer than to believe the truth of the classic example of hyperbole: “This bag weighs a ton.” Anyone purchasing a commodity priced by the pound should be well aware that the said bag is

Interview by Erin Burnett with Donald Trump, *Erin Burnett Outfront* (CNN television broadcast Nov. 12, 2015) (where Trump accused Ben Carson of being “pathological” and compared him to a child molester); *Presidential Candidates Debates: Republican Candidates Debate in Greenville, South Carolina*, AM. PRES. PROJECT (Feb. 13, 2016), <http://www.presidency.ucsb.edu/ws/index.php?pid=111500> [<https://perma.cc/HB56-5HHT>] (where Ted Cruz mentioned accusations Donald Trump had previously made on CNN about Cruz’s father being involved in the assassination of President Kennedy).

144. *Greenbelt*, 398 U.S. at 14 (“blackmail” referred to a tough negotiation stance, not a crime).

145. *Troy Grp. v. Tilson*, 364 F. Supp. 2d 1149, 1156 (C.D. Cal. 2005) (discussing hypotheticals and holding “crook,” in context to be “colloquial, exaggerated and non-literal”).

146. *Norse v. Henry Holt & Co.*, 991 F.2d 563 (9th Cir. 1993).

147. *Knievel v. ESPN*, 393 F.3d 1068, 1070 (9th Cir. 2005).

148. *Horsley v. Rivera*, 292 F.3d 695, 698–99, 702 (11th Cir. 2002). Neal Horsley founded the Creator’s Rights Party and operated The Christian Gallery website. The court concluded Rivera meant Horsley was morally accountable, and that no viewers would conclude Rivera possessed facts showing that Horsley had committed a felony.

unlikely to hold a ton of anything.

The jurisprudence governing treatment of hyperbole and other literary devices in the context of defamation actions resolves a question the cases about fortune-tellers failed to address: whether the audience for incredible speech is held to an objective standard.¹⁴⁹ It is, at least in defamation actions. The audience consists of “reasonable readers” who are capable of making reasonable distinctions about the meaning of language. If the clients of clairvoyants had been deemed persons of ordinary sophistication and rationality instead of the most vulnerable members of society, the presumption that fortune-telling inevitably led to successful fraud would have been much harder to maintain.

In *Pring v. Penthouse International*, an opinion widely followed in other jurisdictions, the Tenth Circuit framed the dispositive question for defamation cases: “[W]hether the [speech] must reasonably be understood as describing actual facts or events” about the person alleging defamation.¹⁵⁰ *Pring* reversed a jury verdict for a Miss America contestant who was concededly recognizable as the central figure in a work of fiction about a woman who could levitate the men upon whom she performed fellatio.¹⁵¹ As the story ends, the contestant performs fellatio on her coach to the side of the stage while the new Miss America is being crowned center stage; on national television, our heroine and her coach levitate “into the air.”¹⁵²

The court dismissively pointed to the lack of any “actual facts” that could be actionable: “We have impossibility and fantasy within a fanciful story.”¹⁵³ Impossibility permeated the story, which, the court emphasized:

described something physically impossible in an impossible setting. In these circumstances . . . it is simply impossible to believe that a reader would not have understood the charged portions were pure fantasy It is impossible to

149. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 27 nn.3–4 (1990) (Brennan, J., dissenting); see also *Greenbelt*, 398 U.S. at 14 (discussing what “even the most careless” reader should be expected to discern).

150. *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438, 439 (10th Cir. 1982); see *New Times, Inc. v. Isaacks*, 146 S.W. 3d 144, 156 (Tex. 2004) (discussing jurisdictions following *Pring*).

151. *Pring*, 695 F.2d at 441, 443.

152. *Id.* at 441.

153. *Id.*

believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible.¹⁵⁴

Referencing the least discerning reader alluded to in *Greenbelt*, the court concluded that “even the most careless reader” must have been able to perceive that the work was fantasy, and the claims impossible.¹⁵⁵

But the defense of incredibility does not demand that even the most careless reader would understand that the statement did not imply actual facts: the Supreme Court standard only requires that it would be “reasonably understood” that the statement did not describe “actual facts.”¹⁵⁶ In defamation cases, the reasonable reader is presumed to be “a person of ordinary intelligence” who “knows the surrounding circumstances.”¹⁵⁷ The audience is presumed to know the context of the speaker’s comments, to grasp the speaker’s signals about whether the hyperbole is to be taken literally, and to have “some feel for the nuances of law and language.”¹⁵⁸

B. Humor: Parody, Satire, and the Reasonable Reader

Distinctions between fact and fiction are even starker when we turn from hyperbole to parody and satire, distinct forms that have long played a role in political and social commentary.¹⁵⁹ Here, “literal falsity,” built into the artistic

154. *Id.* at 443.

155. *Id.* (quoting *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970)). *Contra Pring*, 695 F.2d at 443 (Breitenstein, J., dissenting) (“The article [mixes] fact and fiction. . . . [L]evitation, dreams, and public performance [are] fiction. Fellatio is not.”).

156. “[T]he *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990) (alteration in original) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)).

157. *New Times, Inc. v. Isaacks*, 146 S.W. 3d 144, 154 (Tex. 2004); see also ROBERT D. SACK, *SACK ON DEFAMATION* § 5.5.2.7.1 (3d ed. 2004).

158. *Isaacks*, 146 S.W. 3d at 158 (quoting *Patrick v. Super. Ct.*, 27 Cal. Rptr. 2d 883, 887 (Cal. Ct. App. 1994)).

159. A parody is a work that uses “some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994). Satire is “a work ‘in which prevalent follies or vices are assailed with ridicule’ or are ‘attacked through irony, derision, or wit.’” *Id.* at 581 n.15 (citations omitted).

form, poses no obstacle to First Amendment protection. Quite the contrary¹⁶⁰: if recognizable as humor, satire may be immune from liability.

All of the factors considered in defamation actions generally are fleshed out in greater detail in the jurisprudence of alleged defamation within parody and satire. Satire often rests on actual facts taken to an extreme with the same sorts of exaggerations that make up hyperbole. As one federal appellate court explained, “satire is effective as social commentary precisely because it is often grounded in truth.”¹⁶¹ As a general rule, the reasonable reader recognizes that although prompted by actual facts the author wants to comment on, satire and parody do not purport to offer “actual facts” once they depart from the events that inspired the humorous work.

Consider comedian and social commentator John Oliver’s challenge to a former congressman who had demanded that scientists prove a negative—that vaccines do not harm children.¹⁶² Many aspects of Oliver’s segment on vaccines were true: statistics on the percentage of parents who refuse to vaccinate their children, the resulting spike in polio arising in geographic clusters, and the clip of the congressman demanding proof positive that vaccines are safe.

Oliver explained the fundamental principle that it is impossible to prove a negative by challenging the politician to disprove a hyperbolic accusation. Oliver showed a photo of the congressman standing behind a donkey who was dressed in cheerleading garb and taunted: You can’t prove that you do not have sex with donkeys who you dress as cheerleaders.¹⁶³ Unlike levitating oral sex, sex with donkeys is physically possible, but it seems highly implausible that anyone would go to the trouble of dressing the donkey in a costume. No matter, because the truth or falsity of the proposition, even if taken seriously, is likely immune to proof and, presumably, to a

160. See *Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013). It is often said that defamation, on the one hand, and parody and satire, on the other, are mutually exclusive under *Falwell* if “[the] statement of fact is clearly a spoof . . . no one would believe” the fact to be true. *Mink v. Knox*, 613 F. 3d 995, 1007 (2010); see also *Hoppe v. Hearst Corp.*, 770 P.2d 203, 206 (Wash. Ct. App. 1989) (noting parody is only actionable if it implies defamatory facts).

161. *Farah*, 736 F.3d at 537.

162. *Last Week Tonight with John Oliver: Vaccines* (HBO television broadcast June 2, 2017) (discussing former Congressman Dan Burton).

163. *Id.*

defamation suit.

Sorting out the component parts of fact and fiction may prove difficult, as shown by Oliver's statement about sex with donkeys dressed as cheerleaders. The verifiable truths that prompted Oliver to take the congressman on—and that were interwoven in his story—give bite to Oliver's satire aimed at proving a negative; they are why the ridiculous accusation matters.

Now we can take a closer look at the test for whether satire can give rise to a defamation action. Under the *Hustler* and *Milkovich* line of cases, the test for whether satire is protected is: "whether the hypothetical reasonable reader could be (after time for reflection)" misled into thinking the expression stated "actual facts about an individual."¹⁶⁴ "After careful reflection" signifies awareness that humor may be dry and subtle, so that readers may initially be taken in. Indeed, as the D.C. Circuit observed, "it is in the nature of satire that not everyone 'gets it' immediately."¹⁶⁵ The law assumes it will ultimately dawn on the reasonable reader that the statement is not intended to be factual.

Historical examples abound of satire that readers took too seriously at first glance. Jonathan Swift's *A Modest Proposal* that Irish children be sold as meat to alleviate poverty and starvation was initially condemned in 1729 as a genuine recommendation.¹⁶⁶ Now it is taught as a classic example of satire. Misunderstandings also arose in response to pointed wit in works by other famous authors. When Daniel Defoe, who wrote *Robinson Crusoe*, offered *The Shortest Way with the Dissenters* as an anonymous pamphlet in the voice of a high church zealot calling for even more punitive treatment of religious nonconformists, the church leadership adopted it until Defoe revealed the hoax.¹⁶⁷ So too, Benjamin Franklin's fictional "'Speech of Miss Polly Baker,' . . . mocking New England's harsh treatment of unwed mothers," generated headlines in England and the United States, where

164. *Farah*, 736 F.3d at 537 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (Brennan, J., & Marshall, J., dissenting in part) (dismissing complaint)).

165. *Id.* at 536.

166. JONATHAN SWIFT, *A MODEST PROPOSAL* (1729).

167. *Farah*, 736 F.3d at 537. Defoe, himself a nonconformist, was convicted of seditious libel and jailed. LOUIS E. INGELHART, *PRESS AND SPEECH FREEDOMS IN THE WORLD, FROM ANTIQUITY UNTIL 1988: A CHRONOLOGY* 82 (1998).

newspapers treated the speech as an actual event.¹⁶⁸

Less gifted writers tackling satire may be even more likely to be misunderstood as they layer fiction over fact.¹⁶⁹ Different approaches to humor carry greater or lesser risks of misunderstanding. As one commentator warns, “[d]ry irony . . . creates a greater risk of being misunderstood as an assertion of fact than slapstick.”¹⁷⁰

These risks help us understand why authors and publishers are expected to signal, or provide flags, to help readers distinguish satire from news. The indicators include placement,¹⁷¹ the substance or content of the piece itself,¹⁷² “outlandish details,”¹⁷³ elements of style,¹⁷⁴ and express disclaimers.¹⁷⁵

The Court of Appeals for the District of Columbia explored these issues in *Farah v. Esquire Magazine*, a defamation suit brought by Joseph Farah against *Esquire’s* commentary website.¹⁷⁶ Farah owns and operates the website WorldNetDaily, as well as WND Books, an affiliated conservative publishing house described in *The Guardian* as “a niche producer of rightwing conspiracy theories.”¹⁷⁷ Among

168. *Farah*, 736 F.3d at 537 (citing MAX HALL ET AL., *THE HISTORY OF A LITERARY DECEPTION* 33–35, 87–88 (1960)).

169. *Id.* at 538–39 (rejecting plaintiff’s allegation that the article was “a very poorly executed” parody that should be stripped of protection on that count; “poorly executed or not, the reasonable reader would have to suspend virtually all that he or she knew to be true . . . to conclude the story was reporting true facts”).

170. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 158 (Tex. 2004) (quoting BRUCE W. SANFORD, *LIBEL & PRIVACY* 193–94 (2d ed. 1991) (this is not an argument for favoring low humor in libel law)).

171. *Walko v. Kean Coll. of N.J.*, 561 A.2d 680, 682 (N.J. Super. Ct. Law Div. 1988) (discussing a “spoof” edition of the campus paper entitled “Incredible”). Indeed, one line of cases indicates that anyone who believes a statement in cyberspace—at least on social media sites—is a fool. *Matot v. CH*, 975 F. Supp. 2d 1191 (D. Or. 2013).

172. *Farah*, 736 F.3d at 537 (the essence of the report was an abrupt about-face on core issues).

173. *Id.* at 538 (references to nonexistent sources and conspiracies no one had ever discussed).

174. *Id.*

175. *See, e.g.*, *Mink v. Knox*, 613 F.3d 995, 1008 (10th Cir. 2010) (noting that the protected parody included an “express disclaimer”); *see also Falwell v. Flynt*, 805 F. 2d 484, 486–87 (4th Cir. 1986) (Wilkinson, J., dissenting) (the *Hustler* ad was labeled “Parody—Not to be Taken Seriously”); *see also Isaacks*, 146 S.W.3d at 160–61.

176. 736 F.3d at 530.

177. Paul Harris, *The Born-Again Birther Debate*, *GUARDIAN* (Apr. 21, 2011), <https://www.theguardian.com/commentisfree/cifamerica/2011/apr/21/barack->

other things, the site actively promoted the rumor that President Barack Obama was not born in the United States and demanded his birth certificate (a cluster of accusations known as “birtherism”).¹⁷⁸ In 2012, WND published and WorldNetDaily promoted a book by Jerome Corsi, one of the site’s contributing writers, entitled *Where’s the Birth Certificate? The Case that Barack Obama is not Eligible to Be President*.¹⁷⁹

The day after Corsi’s book was released, *Esquire*’s online *Politics Blog* published a satire titled “BREAKING: Jerome Corsi’s Birther Book Pulled from Shelves[.]”¹⁸⁰ The article reported that the publisher had decided to shred all copies of Corsi’s book, released just the day before.¹⁸¹ The “stunning development[s],” the article continued, included “an offer to refund the purchase price to anyone who has already bought” the book.¹⁸² To avoid any misunderstanding, about ninety minutes later the *Esquire* site added an “update” directed to “those who didn’t figure it out,” stating that the earlier article was not true and providing links to “serious” discussions of the birther controversy.¹⁸³

Farah brought a suit for defamation, among other claims, which the district court dismissed because “the blog post was fully protected political satire,” as well as protected opinion.¹⁸⁴ The Court of Appeals for the District of Columbia affirmed.

The circuit court began by reminding readers of the Supreme Court’s instruction that defamation actions are limited to statements that “reasonably impl[y] false and defamatory facts.”¹⁸⁵ Logically, if a statement cannot reasonably be interpreted as implying facts at all there is nothing to prove false.¹⁸⁶

It found both allegedly defamatory statements incredible:

obama-us-elections-2012 [<https://perma.cc/QF7M-64E5>] (discussing forthcoming publication of the book at the heart of the suit against *Esquire*).

178. *Id.*

179. *Farah*, 736 F.3d at 530.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 531.

185. *Id.* at 533.

186. *Id.* at 534–35 (citing *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 623 (D.C. Cir. 2001)) (the statement in context must be capable of defamatory meaning).

that the publisher would pull the book and that it would refund the purchase price. The court was unimpressed that some readers apparently took the article at face value. Yes, some bookstores pulled the book and some customers asked for their money back.¹⁸⁷ However, “[i]t defies common sense,” the court opined, that readers of that blog “were unaware of the birth certificate controversy or the heated debate it had provoked.”¹⁸⁸ How could they think that a leader of the movement to challenge President Obama’s eligibility for office would “reverse course so abruptly” on the day after the book appeared?¹⁸⁹

Such a path was “totally inconsistent” with the broader context, that is, everything known about the controversy, the author, and the publisher. In addition, the article was laden with “incredible counter-factual statements”¹⁹⁰ such as attributing to the same group a non-existent book about the first moon landing being a fake—a conspiracy no one had ever heard of before. Another giveaway: “quotes that are highly unorthodox for a real news story, such as Farah was ‘rip-shit,’ . . . and ‘we don’t want to look like fucking idiots, you know?’”¹⁹¹

In gauging whether the speaker was trying to convey humor or facts, reasonable readers are presumed to have the capacity, on reflection, to place humorous or “outrageous” information in context, not only the context in which it appears, but of all the other information available to them on the subject.¹⁹²

Setting a reasonable reader standard does not resolve all the issues. Who are the “reasonable readers” who set the legal standard? What if “fucking idiots” does not describe the authors, but rather a substantial portion of the readership? Are they dedicated news junkies, average well-informed voters (who actually register and vote), or the vulnerable and gullible who were presumed to be at risk of scamming by fortune-tellers?

Farah provides some answers. Digging down, the opinion

187. *Id.* at 532.

188. *Id.* at 537.

189. *Id.* at 538.

190. *Id.*

191. *Id.*

192. *Id.* at 535.

explains that the test “is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection).”¹⁹³ The reasonable reader does not exist. He or she rides the Clapham bus of common law whose passengers stand for the reasonable citizen who is likely to serve on a jury. While referring to this non-existent person as one of “ordinary intelligence,”¹⁹⁴ the law sometimes attributes more wisdom, judgment, and knowledge to the reader than the average citizen possesses. This legal fiction has much in common with Justice O’Connor’s theory of endorsement in the context of the Establishment Clause, which presumes community members who are fully informed about the background of every incident.¹⁹⁵

The Supreme Court of Texas expanded on the importance and meaning of an objective standard in *New Times, Inc. v. Isaacks*, dismissing as insignificant the fact that “some actual readers . . . inevitably will be” misled.¹⁹⁶ “The question,” the court held, “[is] whether the hypothetical reasonable reader could be.”¹⁹⁷ The hypothetical reasonable reader in defamation law, also known as a “careful reader,” unlike even the most “intelligent well-read people,” the court explained, never acts unreasonably. The careful reader always considers the entire article, in context, “with detachment and dispassion.”¹⁹⁸ He or she “is a prototype of a person who exercises care and prudence, but not omniscience.”¹⁹⁹

Isaacks held that a satirical article in an alternative newspaper which lampooned a judge and district attorney was protected parody. The two officials, who had in fact recently sent a 13-year-old boy to a juvenile detention facility after he wrote a fictional story that described a school shooting, lacked grounds for a defamation suit because no reasonable person

193. *Id.* at 537 (citing *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438, 442–43 (10th Cir. 1982)).

194. *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004).

195. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring) (“[T]he reasonable observer in [an] endorsement inquiry must be deemed aware of the history and context of the community and forum.”); *see also* SACK, *supra* note 157.

196. *Isaacks*, 146 S.W.3d at 157.

197. *Id.* (citing *San Francisco Bay Guardian v. Super. Ct.*, 21 Cal. Rptr. 2d 464, 467 (Cal. Ct. App. 1993)); BRUCE W. SANFORD, *LIBEL & PRIVACY* 193–94 (2d ed. 1991)).

198. *Isaacks*, 146 S.W.3d at 158.

199. *Id.* at 157.

would believe the preposterous newspaper article that upset them.²⁰⁰ The parody, titled “Stop the Madness,” portrayed the arrest during story hour of “diminutive 6 year-old” Cindy Bradley for discussing cannibalism and other shocking concepts in a book report about Maurice Sendak’s *Where the Wild Things Are*.²⁰¹

The court expressly found that the lower courts had given too little credit to the reasonable reader when they allowed the lawsuit to move forward. That “reasonable person—the mythic Cheshire cat who darts about the pages of the tort law”—is, the court admonished, “no dullard.”²⁰² The reader should have been expected to catch the warnings inherent in “Stop the Madness.” The caption under a photo of little Cindy in shackles holding a stuffed animal warned readers to “be afraid;” fear, the story claimed, was justified by Cindy’s disciplinary record which included such acts as “spraying a boy with pineapple juice and sitting on her feet.”²⁰³ Preposterous quotes in the article included one attributed to the judge stating, “[I]t’s time for us to stop treating [children] like children”;²⁰⁴ another to the prosecutor, explaining the decision not to prosecute Cindy as an adult because “even in Texas there are some limits”;²⁰⁵ and one from six-year-old Cindy herself, criticizing adults who censor the works of Salinger and Twain: “Give me a break, for Christ’s sake,”²⁰⁶ followed by “Excuse my French.”²⁰⁷ The article also discussed protests by a purported religious group bearing “a ridiculous acronym: God-Fearing Opponents of Freedom (GOOF).”²⁰⁸

“Stop the Madness,” the court reasoned, “contains such a procession of improbable quotes and unlikely events that a reasonable reader could only conclude that the article was satirical,” even though it had “a superficial degree of plausibility.”²⁰⁹ Superficial plausibility is not inconsistent with

200. *Id.* at 167.

201. *Id.* at 148.

202. *Id.* at 157 (quoting *Patrick v. Super. Ct.*, 27 Cal. Rptr. 2d 883, 887 (Cal. Ct. App. 1994)).

203. *Id.* at 148.

204. *Id.*

205. *Id.* at 149.

206. *Id.*

207. *Id.*

208. *Id.* at 158.

209. *Id.* at 161.

satire, indeed it is “the hallmark of satire.”²¹⁰ It is, the court held, reversible error to find that reasonable readers might not understand the “obvious clues” that “Stop the Madness” did not state actual facts, and therefore could not be the subject of a defamation suit.²¹¹

In case the embedded clues proved insufficient, and in response to legal demands from the judge and prosecutor, the next edition of the paper offered: “a clue for our cerebrally challenged readers who thought the story was real: It wasn’t. It was a joke. We made it up. Not even Judge Whitten, we hope, would throw a 6-year-old girl in the slammer for writing a book report.”²¹² Presumably such after-the-fact disclaimers fall within the window for reflection envisioned for the reasonable reader.

Incredible speech could cause actionable harm if people believed it, but the very outrageousness of the claim insulates the speaker as a matter of legal doctrine. The jurisprudence perhaps encourages purveyors of defamatory accusations to make their statements look less fact-based and ever more satirical, in order to hide behind the curtain of “it wasn’t meant to be taken seriously.” Indeed, lawyers who advise media clients have told me they help clients find the precise point where comedic intent is clear.

Discounting the non-credible untruth does not always adequately account for harm. Judge Whitten’s feelings may have been hurt and her reputation may have taken a hit but, as a matter of legal doctrine, her reputation could not suffer unwarranted damage because no reasonable reader would believe she had sent a six-year-old to jail based on a book report.

Hurt feelings are not the key to gauging First Amendment protections. To the extent Judge Whitten correctly feared harm to her reputation, the damage was attributable to the verifiable fact that she had committed a 13-year-old boy to detention in a juvenile facility for a work of fiction that complied with his

210. *Id.* (citing *San Francisco Bay Guardian v. Superior Court*, 21 Cal. Rptr. 2d 464, 466 (Cal. Ct. App. 1993)); Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 *CARDOZO ARTS & ENT. L.J.* 491, 557 (1999).

211. *Isaacks*, 146 S.W.3d. at 161.

212. *Id.* at 149 (“Unfortunately, some people—commonly known as ‘clueless’ or ‘Judge Darlene Whitten’—did not get . . . the joke.”).

homework assignment, the act that gave rise to the reporter's decision to parody her. The resulting untruths—whether framed as exaggeration, hyperbole, distortion, or pure fiction—are part of the long tradition of using satire and parody as weapons for criticizing the powerful. Those untruths lie at the heart of the First Amendment.

CONCLUSION

Much has changed in the short time since the D.C. Circuit issued its opinion in *Farah*. Those who fall for so-called fake news today seem to lack the capacity the D.C. Circuit attributed to reasonable readers only four years ago. For example, the judges on the *Farah* panel surely would not have predicted that in 2016 internet readers would believe Pope Francis had endorsed Donald Trump for President.²¹³

Training audiences to be more critical offers one avenue for promoting reasonable readership. Fake News Finders, an afterschool group in Philadelphia, teaches elementary school children how to spot fake news. The main message of the training is not so different from the D.C. Circuit's in *Farah*: use common sense. Children in the group recognize that comedian Kevin Hart could not have blocked Golden State Warrior Kevin Durant's shot because, at 5'4", Hart is too short.²¹⁴

A second change involves the nature of the "actual facts" in play. As the verifiable news becomes more improbable, entering what commentators call "uncharted territory" weekly, if not daily,²¹⁵ comedians face mounting challenges when they

213. Dan Eyon, *Nope Francis*, SNOPE (July 10, 2016), <http://www.snopes.com/pope-francis-donald-trump-endorsement/> [<https://perma.cc/6FG8-3ESW>] (fake website goes viral).

214. Paige Williams, *Public-School Students Take on Fake News*, NEW YORKER (Apr. 3, 2017), <http://www.newyorker.com/magazine/2017/04/03/public-school-students-take-on-fake-news> [<https://perma.cc/K64P-LL3W>]. Other groups, including the Newseum, have developed similar materials. Heather Bien, *Teaching Students to Fight Fake News*, NEWSEUM (Apr. 14, 2017), <http://www.newseum.org/2017/04/14/teaching-students-to-fight-fake-news/> [<https://perma.cc/ZHP2-SU23>].

215. See Andy Ostroy, *The Media's Existential Crisis*, HUFFPOST (Jan. 19, 2017, 1:12 PM), http://www.huffingtonpost.com/entry/the-medias-existential-cr_b_14224822.html [<https://perma.cc/XCS4-AX3U>]; Eric Boehlert, *The Media's Not Being Honest About Its Trump Obsession*, HUFFPOST (Mar. 7, 2016, 9:29 AM), http://www.huffingtonpost.com/eric-boehlert/the-medias-not-being-hone_b_9398680.html [<https://perma.cc/3GGM-WDGA>]; Evan Romano, *The Intercept and BuzzFeed News Team Up for Northside Report*, BROOKLYN (May 1, 2017),

attempt to distinguish parody from reality.²¹⁶

This problem seems to have intensified since 2016, but is not entirely new. The satirical news source, *The Onion*, reported in 2004, “People every day think *The Onion* stories are real.”²¹⁷ That same year, the *Beijing Evening News*, citing *The Onion*, reported that the U.S. Congress was threatening to move out of the District of Columbia unless it received “a new, modern Capitol building, complete with retractable roof.”²¹⁸ Apologizing for its mistake, the Chinese paper blamed “small American newspapers . . . [that] fabricate offbeat news.”²¹⁹ Even worse, “Deborah Norville reported on MSNBC that more than half of all exercise done in the United States happens in TV infomercials for workout machines, a ‘statistic’ obtained from an *Onion* article.”²²⁰ So much for the reasonable reader.

These lapses do not really change anything because the doctrine acknowledges with an implied shrug that some readers will be misled. If the purveyor of falsehoods concedes, or even proclaims, that the incredible statement is a fabrication, then the speaker is not lying. The absence of an intent to deceive mitigates the state’s asserted interest in regulating the protected expression (a risk of harm to others or unwarranted gain to a liar).

The doctrine of incredible lies developed here in the context of fortune-tellers and defamation can be reduced to three factors that help courts determine whether a speaker who puts forth a manifest untruth can be held to account without impinging on free expression.

First, we should consider whether the speaker intends to

<http://www.bkmag.com/2017/05/01/the-intercept-buzzfeed-news-team-up-northside-report-trump-2017/> [<https://perma.cc/6BGB-BB6H>].

216. See Tamara Ikenberg, *Co-Founder of The Onion Talks Fake News and Satire at UAA*, ALASKA DISPATCH NEWS (May 4, 2016), <https://www.adn.com/arts/2017/05/04/satirist-will-unpeel-the-onion-at-uaa/> [<https://perma.cc/VAL2-WEYH>] (*Onion* co-founder Scott Dikkers observes that it can be “harder these days to distinguish *Onion* headlines from all the other headlines”); see also Stephen Marche, Op-Ed, *The Left Has a Post-Truth Problem Too. It’s Called Comedy*, L.A. TIMES (Jan. 6, 2017), <http://www.latimes.com/opinion/op-ed/la-oe-marche-left-fake-news-problem-comedy-20170106-story.html> [<https://perma.cc/F3T2-H478>]; see also Liam McLoughlin, *How Donald Trump Killed Satire (Again)*, NEW MATILDA (Aug. 3, 2016), <https://newmatilda.com/2016/08/03/how-donald-trump-killed-satire-again/> [<https://perma.cc/W8X0-FTH2>].

217. *Isaacks*, 146 S.W.3d at 157 n.7.

218. *Id.*

219. *Id.*

220. *Id.*

deceive. Two radically disparate findings compel the conclusion that the speaker lacks the intent to deceive that is essential to lying: the speaker may believe what she says is true, or, alternatively, the speaker acknowledges she is sharing a falsehood but has no reason to anticipate that listeners would believe something so patently false as to be literally incredible. In the latter case, appropriate signals to the audience will support the speaker's argument that his or her expression is constitutionally protected.

Second, we should ask whether the reasonable listener or reader could, after reflection, reasonably believe the falsehood to be a truthful statement about actual facts. Those facts may have already occurred in the case of defamation or, in the context of clairvoyance, may be expected to occur in the future. The reasonable recipient of a falsehood whose author seeks to defend under the incredible lies doctrine I propose is presumed to be well-informed about the immediate and broader context surrounding the subject matter, and is also presumed to be a careful, thoughtful consumer of information.

Third, we should examine whether the falsehood is likely to harm a third party or unjustly enrich the speaker. The potential for harm distinguishes fortune-telling (where individuals may suffer substantial material loss) from defamation (where, as a matter of law, an allegation no one would believe cannot harm a person's reputation). The clairvoyant who tries to relieve clients of their savings can no longer be said to be dealing in incredible lies. A fraudster who strives to make the incredible seem trustworthy loses the shelter of the incredible lies doctrine I have proposed.

Freedom of expression, including the speaker's choice about the most effective way to convey ideas, is too important to water down in order to protect the most sensitive listeners in any context.²²¹ The theory of incredible lies presumes the gullible should learn to be more discerning so that robust forms of protected expression are not inhibited. Absent fraud or other crimes, some gullible recipients who are no more reasonable than the unbelievable statement is credible may be misled or taken in. That is, as the Supreme Court has instructed about

221. *Cohen v. California*, 403 U.S. 15, 25 (1971). *But see FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (allowing restrictions on choice of words over the public airwaves at times when children might be caught unaware in the audience).

the potential price of free speech in another context, a risk we must take.²²²

This constitutional culture of embedded risk that protects vibrant speech places the onus on the recipient of an incredible lie. When the lie is incredible, the proverb should take the abbreviated form: “Fool me once, shame on me.”²²³

222. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1968) (“Any word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”) (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

223. FRED R. SHAPIRO, *THE YALE BOOK OF QUOTATIONS* 527 (2006) (quoting *N.Y. TIMES*, Nov. 6, 1947) (“Fool me once, shame on you. Fool me twice, shame on me.”).