

# ETHICAL FALSEHOOD: TOWARDS A MORAL VALUES PARADIGM IN FALSE-SPEECH ADJUDICATION

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## *Abstract*

The conflict between the U.S. Supreme Court's vision for the place that ethical norms have in law, and the role that these norms have in the lives of many individuals, "reflects a tension between what is and what might be." Following Robert Cover's argument that "law can be maintained only as long as the two are close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation," this Article proposes a false speech–adjudicatory model that integrates cultural norms regarding truth and falsehood with false-speech law, thereby creating a partial reconciliation between false-speech law and false-speech morality.

This Article argues that values, which can be termed "moral ethics," have a role in First Amendment adjudication. After elucidating the role of moral ethics in First Amendment adjudication, this Article discusses Judaism's nuanced approach to false speech, offering it as a model for a false speech–adjudicatory process in which moral ethics are relevant First Amendment values. Finally, the Article explores how examples of values-based adjudication and innovative jurisprudential proposals offer precedents for adjudication based upon an expanded set of values—ethical, moral, and religiously influenced cultural values.

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## I. INTRODUCTION

*And I can teach thee, coz, to shame the Devil,  
By telling the truth. "Tell truth and shame the Devil."  
If thou have power to raise him, bring him hither,  
And I'll be sworn I have power to shame him hence.  
O while you live tell truth and shame the Devil.<sup>1</sup>*

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1. WILLIAM SHAKESPEARE, THE FIRST PART OF HENRY THE FOURTH act 3, sc. 1.

*Keep far from a false charge . . . .*<sup>2</sup>

Honesty is good, and falsehood should be avoided. This position is generally accepted in Western culture as an ethical norm. The Shakespearean canon and the Bible, by most accounts the two most enduring and influential works of literature in the Western world, profoundly differ with each other regarding a multitude of topics. Yet, for all their differences, they are united in their esteem for truth and contempt for falsehood. Whether Western values concerning truth and falsehood are linked to religious and biblical influences, are traced to the provenance of Shakespearean drama's secular humanism, or are based upon an amalgamation of both traditions, it is safe to venture that Americans largely accept these basic principles as ethical norms, however much individuals may deviate from these ideals in daily life.

While Western ethical norms regarding truth and falsehood may be widely acknowledged in American culture, false-speech adjudication has largely been guided by traditional First Amendment values; scant attention has been paid by the Court to widely held ethical values concerning false speech.<sup>3</sup> The conflict between the Court's vision for the place that these ethical norms have in law, and the role that these norms have in the lives of many individuals, "reflects a tension between what is and what might be."<sup>4</sup> Following Robert Cover's argument that "law can be maintained only as long as the two are close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation,"<sup>5</sup> this Article proposes a false speech–adjudicatory model that integrates widely acknowledged ethical norms regarding truth and falsehood with false-speech adjudicatory norms, thereby creating a partial reconciliation between false-speech law and false-speech morality.

Positing that the underlying values that guide First Amendment adjudication may be described as "civic ethics," the Article argues that values that can be termed "moral ethics" have a role in First Amendment adjudication as well. After explaining the distinction between civic ethics

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2. *Exodus* 23:7.

3. This Article's usage of terms such as "false speech," "false statements," "falsehood," etc. refer to deliberate or knowingly made false statements, unless otherwise noted. In neither American nor Jewish law are unintentional falsehoods (or statements not known to be false at the time of utterance) regarded as objectionable. According to a strain of thought in Jewish mysticism, unintentional sins reflect deficiencies in an individual's soul that are punishable to some extent, but this notion has not been codified in Jewish law; an exploration of this notion would be beyond the scope of this Article.

4. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 39 (1983) [hereinafter Cover, *Nomos and Narrative*].

5. *Id.*

and moral ethics and elucidating their respective roles in First Amendment adjudication, this Article discusses Judaism's nuanced approach to false speech, offering it as a model for a false speech–adjudicatory process in which moral ethics are relevant First Amendment values. Finally, the Article explores how examples of values-based adjudication and innovative jurisprudential proposals offer precedents for adjudication based upon an expanded set of values encompassing ethical, moral,<sup>6</sup> and religiously influenced cultural values.

Part II explores the role of values in First Amendment jurisprudence, and postulates the necessity for a values-based approach to false-speech adjudication that considers the broader ethical dimensions of false speech.

Part III examines false speech in Jewish law (*halakha*) and Jewish thought, and discusses the benefits of constitutionally permissible interchange between law, ethics, and religion.

Part IV presents an adjudicatory model for false-speech adjudication that is ethically conscious; it is based upon prior models of freedom-of-speech adjudication and current freedom-of-speech jurisprudence and explains how moral ethics can serve as relevant First Amendment values.<sup>7</sup> It proposes that law, particularly in the area of speech regulation should, in select cases, be guided by principles that are widely accepted by Americans as ethical norms, provided that judicial recognition of these norms would not be unconstitutional. Part IV also studies how Jewish law and Jewish theology conceive of falsehood, and how Jewish theology and Jewish ethics influence false-speech *halakha*. Additionally, the Article explicates the concept of ethical falsehood, and explains how it is the leitmotif resonating throughout the Jewish *halakhic* (legal) approach to false speech.

## II. THE NEED FOR ETHICAL CONSCIOUSNESS IN FALSE-SPEECH ADJUDICATION

In his important and influential essay *Nomos and Narrative*, Robert Cover memorably distinguished the creative and constrictive interpretations

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6. While ethics and morality are not coeval, this Article uses the terms “ethical” and “ethical balancing,” rather than “moral” or “moral balancing,” because the term “ethics” is colloquially linked to proper practical behavior, and the term “morality” can connote theoretical ideals; the ethical concerns of this Article largely relate to practical matters. At the same time, though, this Article’s use of the term “ethics” is closer to the term “moral” in that the concerns of this Article are those of applied ethics and the balancing of competing values, rather than theoretical ethics.

7. The concepts of moral ethics and civic ethics are distinguished and elaborated upon in *infra* Part I.B, and *infra* note 153 (explaining the distinction between moral ethics and civic ethics in the context of falsehood).

of the Supreme Court as “jurisgenerative” and “jurispathic.”<sup>8</sup> The Court is described as exercising its jurisgenerative prerogative when it engages in the “creation of legal meaning”—when it expands the possible legal meanings that can attach to law in the interest of constructing a normative community upon “a common body of precept and narrative.”<sup>9</sup> When the Court “destroys legal meaning” by constraining the possible legal meanings that can adhere to law “in the interest of social control,” it is said to be exercising its jurispathic capacity.<sup>10</sup> While Cover believes that courts must exercise their jurispathic functions to prevent jurisgenesis from becoming unwieldy, he also believes that jurisgenesis must be used to create and articulate the values around which normative communities base their commitments.<sup>11</sup>

The Supreme Court has, heretofore, exercised its jurispathic function in false-speech adjudication by preventing values other than the traditional First Amendment values from adhering to the Freedom of Speech Clause. This Article contends that the time is ripe for the Court to exercise its jurisgenerative function by adjudicating false-speech cases in a manner that allows ethically conscious American communities to cohere around an ethical First Amendment narrative.

The false-speech case of *United States v. Alvarez* gives warrant to the deleterious proposition that there is a conflict between First Amendment values and moral ethics by fostering the perception that First Amendment law is inimical to normative false-speech ethics.<sup>12</sup> This conflict of values is

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8. See Cover, *Nomos and Narrative*, *supra* note 4, at 11, 40.

9. *Id.* at 12–13, 46.

10. *Id.* at 11, 53.

11. See *id.* at 67–68.

12. *United States v. Alvarez*, 132 S. Ct. 2537 (2012). The further dilemma of a decision like *Alvarez* for values-oriented individuals is that it creates unhealthy perceptions about law as an institution; such perceptions can foster harmful attitudes towards the workings of government as a whole. See *infra* note 13. In addition to the perception that the Court does not value the moral ethic of truth and does not share most Americans’ contempt for deliberate falsehoods, *Alvarez* also creates the perception that preserving the integrity of the Medal of Honor is unimportant in the eyes of the Court. While the bathetic dissent of *Alvarez* is hyperbolic in places—“Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award”—such a perception nonetheless is engendered by the decision. *Id.* at 2556 (Alito, J., dissenting).

Those who lack familiarity with the nuances of constitutional law and First Amendment jurisprudence may not be aware of the distinction between holding that the Stolen Valor Act is unconstitutional in its present form, and holding that Americans have an actual, inalienable right to lie about having received a Congressional Medal of Honor. Justice Alito ascribes a holding to the plurality that appears to overlook the significance of Justice Breyer’s and Justice Kagan’s opinion; their concurrence implies that they would have voted to uphold a more narrowly tailored statute. *Id.* at 2556 (Breyer, J., concurring) (noting that “[s]ome lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes . . .”). Thus, it cannot be

harmful because it can lead to a public perception that the law is isolated from morality. As Robert Cover observed, such “discontinuities between the respective visions, constructions of reality, and norms posited by [religious communities] and by the state’s authoritative legal institutions may be considerable.”<sup>13</sup> However, these discontinuities are by no means insuperable; any apparent dissonances between the judicial and societal ethics can be harmonized by means of a “redemptive constitutionalism” that brings these “sharply different visions of the social order” into accord.<sup>14</sup>

Although American judges have never professed to be moral decision-makers, the United States Supreme Court has been uniquely tasked with ruling upon moral, ethical, or political issues—such as abortion, racial intermarriage, obscene speech, and the shape of legislative districts—that are beyond the purview of judicial adjudication in other judicial systems. Because the Supreme Court’s rulings inevitably affect areas of life in which Americans are also guided by ethical norms that have their origins in secular values, religious values, or both, and because of the Court’s prestige as the United States’ ultimate arbiter of such disparate issues, it is within the Court’s purview to attempt to harmonize these starkly contrasting views of “the social order.”<sup>15</sup>

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said that all Americans possess a constitutional right to lie about having received a Medal of Honor if a more finely crafted statute would have been affirmed by the Court. If the general public is not cognizant of this distinction, the lay perception that will ineluctably follow is the one expressed in the opening *cri de coeur* of Justice Alito’s dissent.

13. Cover, *Nomos and Narrative*, *supra* note 4, at 34.

14. *Id.*

15. The range of societal issues that the Constitution has allowed to fall within the Supreme Court’s jurisdiction had, by the twentieth-century, become so diverse that the historian Daniel Boorstin called the Court America’s “secular papacy.” Daniel J. Boorstin, *Editor’s Foreword to the First Edition* to ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT*, at xi (Daniel J. Boorstin ed., 2d ed. 1960). By virtue of its pronouncements upon a wide spectrum of issues that are not only political, judicial, civil, and criminal, but moral, one role that the Court has come to possess is that of a values-espousing body. Although it uses legal procedures to adjudicate moral and ethical issues, its utilization of legal procedures does not negate the moral and ethical nature of the questions to which the Court’s legal procedure is applied.

The legal rulings of the United States Supreme Court, unlike the drastically more limited jurisdiction of English common law courts, intersect with areas of life that were previously regarded only as moral issues beyond judicial jurisdiction. One of the foremost British jurisprudential thinkers, Lord John McCluskey, described law as a “social instrument” that “embodies and enforces moral, social, political, cultural, and economic choices.” LORD MCCLOSKEY, *LAW, JUSTICE AND DEMOCRACY* 11 (1987).

American law in particular, by virtue of the bewilderingly vast scope of questions upon which the Supreme Court is asked to rule, has become a social instrument that issues pronouncements upon moral matters, according to Lord McCluskey. *Id.* Thus, whether American law and societal morality were intended to intersect, or whether they were envisioned as isolated domains, they have become intertwined. Because of this reality, and because “law must have a moral basis if it is to be respected,” if American law widely diverges from American morality, Americans—in the Garrisonian tradition of St. Augustine, Ralph Waldo Emerson, and Martin

### A. *The Role of Values in First Amendment Adjudication*

The extent to which First Amendment law is a value-laden enterprise is unclear, but the proposition that certain values guide its adjudication is convincing.<sup>16</sup> As Joseph Blocher has noted, while a variety of values have

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Luther King, Jr.—may regard the Court’s rulings on moral questions as unjust, and thus illegitimate and nonbinding. See Charles D. Gonthier, *Law and Morality*, 29 *QUEEN’S L.J.* 408, 408 (2003); *Letter from a Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 293 (James Melvin Washington ed., 1986); see also Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for the Purposes of Equal Protection?*, 87 *GEO. L.J.* 139, 139 (1998) (citing Aquinas for the foundational principle that law is based upon justice; therefore, law that is unjust need not be obeyed); see also Cover, *Nomos and Narrative*, *supra* note 4, at 36. The propagation of contradictory civic norms and moral ethical norms, and the discord between law and morality—disciplines that should ideally be naturally compatible, according to Lord Devlin—can undermine public confidence in the Court’s role as a social instrument that not only adjudicates disputes but embodies moral values as well. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 2 (1965). While civil disobedience targeted against the Court’s rulings upon moral matters may only be slightly conceivable, a disregard for the Court’s decisions on such matters can generate the kind of political apathy that results in disengagement from the civic sphere—the *bête noire* of those for whom the promotion of a vibrant self-governing society is the essential First Amendment value.

16. The “traditional First Amendment values” that have guided First Amendment law include (1) the “marketplace of ideas”; see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 15 (1982); see also T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 *U. PITT. L. REV.* 519, 521 (1979); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 967–74 (1978); see generally Thomas Scanlon, *A Theory of Freedom of Expression*, 1 *PHIL. & PUB. AFF.* 204 (1972), available at <http://philosophyfaculty.ucsd.edu/faculty/rarneson/Courses/SCANLONfreeexpression.pdf>; (2) the goal of promoting a “self-governing society”; see ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 70–75 (1960) (contending that the central value of freedom of speech is the promotion of democracy); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, at ix–x (1948), cited in KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 745 (16th ed. 2007); and (3) “individual autonomy.” See C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 *S. CAL. L. REV.* 293, 333 (1982); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish’s The Value of Free Speech*, 130 *U. PA. L. REV.* 646, 671 (1982); Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591, 611 (1982) (postulating that self-realization is one of the primary underlying values of the Freedom of Speech Clause). Cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988), quoted in *United States v. Strandlof*, 667 F.3d 1146, 1159 (10th Cir. 2012), vacated, 684 F.3d 962 (10th Cir. 2012) (“[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas . . .”).

Other values said to have influenced First Amendment law include (1) “truth”; see JOHN MILTON, *AREOPAGITICA: A SPEECH TO THE PARLIAMENT OF ENGLAND FOR THE LIBERTY OF UNLICENSED PRINTING* 5–6 (C.W. Crook ed., Ralph Holland & Co. 1905) (1644) (a society in search of truth should allow freedom of expression, particularly in the area of print; n.b.: Milton advocates for freedom of the press, but does not insist upon the elimination of censorship—in fact, he appears to advocate for the continuing necessity of censorship in select circumstances); JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* 21 (John Gray ed., Oxford Univ. Press 1991)

guided First Amendment law, this doctrinal area of law lacks one dominant, essential value.<sup>17</sup> And, as Robert Cover observed, the “[o]ne great strength and one great dilemma of the American constitutional order is the multiplicity of the legal meanings created out of the exiled narratives” that lend meaning to the law.<sup>18</sup> The multiple, divergent narratives guiding First Amendment law suggest that ample room exists for other values beyond traditional First Amendment values—what this Article terms “Civic Ethics”<sup>19</sup>—to guide freedom-of-speech law.<sup>20</sup> Because of First Amendment law’s inherent jurisprudential flexibility, moral values—what this Article terms “moral ethics”—may serve as legitimate values for courts to consider in freedom-of-speech adjudication.

*B. Civic Ethics and Moral Ethics: A Philosophical Framework for Understanding the Role of Values in First Amendment Law*

Philosopher Harry Redner’s differentiation of cultural-ethical systems, and his distinction between civic ethics and moral ethics, is instructive in understanding the role that different values have played in First Amendment adjudication.<sup>21</sup> According to Redner, there have been four elemental ethical systems in human history, each of which has shaped a distinct civilization: “civic ethics” formed the values of Greece;<sup>22</sup> “ethics of duty” shaped late Stoicism, Krishnaism and Confucianism;<sup>23</sup> “ethics of honor” guided medieval Christians and still guides Arabs, Turks and Persians;<sup>24</sup> and “morality,” which Redner also refers to as the “ethic of love,” formed the basis of Western Judeo-Christian ethics.<sup>25</sup> While Greek and Roman civic ethics have influenced the course of Western politics,

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(1859) (conflicting opinions must be tolerated if truth is to be ascertained); see generally R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149 (1985); and (2) the value of maintaining a harmonious society. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6–7 (1970); see also Edward J. Bloustein, *The Origin, Validity and Interrelationships of the Political Values Served by Freedom of Expression*, 33 RUTGERS L. REV. 372, 373 (1981); Edward J. Bloustein, *Why Is Freedom of Speech a Problem in Contemporary America?*, 13 RUTGERS L.J. 59, 60 (1981) (discussing freedom of speech in political context).

17. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 397–98 (2009).

18. Cover, *Nomos and Narrative*, *supra* note 4, at 19.

19. See *infra* Part I.B.

20. Blocher, *supra* note 17, at 397–98.

21. HARRY REDNER, *ETHICAL LIFE: THE PAST AND PRESENT OF ETHICAL CULTURES* 33 (2001).

22. *Id.* at 47.

23. *Id.*

24. *Id.* at 47–48.

25. *Id.* at 49–50.



Redner argues that moral ethics (or “the ethics of love”) have had an equally influential role in shaping Western culture. Many of these moral ethics have biblical origins.<sup>26</sup> For example, Western society’s ethic of treating others with the same dignity that one would wish upon oneself can be traced to the influence of the biblical imperative: “[L]ove your neighbour as yourself.”<sup>27</sup> This commandment is a “law of love,” and according to the philosopher Simon May, it formed the basis of the Western conception of love and influenced the Western ethico-legal ideal that all individuals are entitled to equal treatment under the law.<sup>28</sup>

Because the formation of American democracy was based upon the governmental models of Classical Greece and the Roman Republic, the underlying ethical values of freedom of speech (and other rights) are those of civic ethics. First Amendment values, such as “the marketplace of ideas,” self-government, and personal autonomy<sup>29</sup> are values grounded primarily in the Greek and Roman tradition of civic ethics. These values are “civic ethics” because they are concerned solely with the well-being of the civic sphere and the polity, and have little or no regard for private or public morality. Civic ethics are only concerned with individual behavior to the extent that an individual’s autonomy and expression do not detract from the functions of a self-governing society.<sup>30</sup>

Moral ethics largely stem from the religio-moral tradition of the Bible. This tradition generally was only concerned with the intrinsic well-being of the polity to the extent that it provided sufficient law and order.<sup>31</sup> Beyond

26. Redner believes Western moral ethics are based upon the Bible (and based specifically upon the moral ethics of Leviticus and Deuteronomy). *Id.*, cited in Rabbi Lord Jonathan Sacks, *Covenant & Conversation 5772: Ekev—The Morality of Love*, OFF. CHIEF RABBI (Aug. 6, 2012), <http://www.chief Rabbi.org/2012/08/06/covenant-conversation-5772-ekav-the-morality-of-love/#.UhZeiRtJP4U>.

27. *Leviticus* 19:18 (King James).

28. SIMON MAY, *LOVE: A HISTORY* 17, 19–20 (2011), cited in Sacks, *supra* note 26. Equal treatment under the law has long been a principle of Jewish law. See, e.g., *Pirkei Avot—Ethics of the Fathers* 1:8, available at <http://users.ipfw.edu/bartky/Y200Y401%20Judaism/Judaism%20course-Pirkei%20Avot.pdf> (“[W]hen the litigants are standing before [the judge], they should both be viewed as guilty; and when they depart from before [the judge] . . . they should both be viewed as virtuous . . .”).

29. This particular value (and its accompanying concept of self-actualization) in its present incarnation is arguably a post-Renaissance value. See Melissa S. Hung, Comment, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213, 214 (2008).

30. In this regard, civic ethics are also closely interrelated with law’s concerns regarding the well-being of the social order. See ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 5 (Yale Univ. Press 1976) (1922).

31. Cf. MISHNAH, *PIRKEI AVOT* 3:2, translated in *PIRKE ABOTH* (ETHICS OF THE FATHERS) 64 (Schocken Books ed., 1962) (“[R]abbi Hanina the deputy of the priests, said:—Pray for the peace of the government; for, except for the fear of that, we should have swallowed each other alive.”).

providing a modicum of security, the system of moral ethics is not generally concerned with the vibrancy of the polity; it is concerned with the moral behavior of the individual. Civic ethics, by contrast, is an ethical system concerned with the good of the polity, and is rarely concerned with individual moral behavior.<sup>32</sup> Consequently, the ethical norms of civic ethics are applicable to the civic sphere, while the ethical norms of moral ethics are generally applicable to the private sphere, and are rarely applied to the civic sphere. Moral ethics is not a conflation of ethics with morality, and it is not necessarily religious in nature, though its ethical principles have been traced to biblical precepts.<sup>33</sup> It is an ethical system concerned with private morality, and its norms were mostly conceived of before the development of the modern notion of the civic sphere.<sup>34</sup>

While civic ethics have shaped First Amendment values, moral ethics have not been completely absent from freedom-of-speech adjudication. Moral ethics have arguably been the underlying values of Court decisions upholding restrictions upon obscene speech.<sup>35</sup> *Chaplinsky v. New*

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32. This dichotomy was particularly evident in the Roman Empire. The Roman Empire's sense of civic ethics was so strong that it even retained civic institutions like the Senate long after the empire made such institutions obsolete; the historian Greg Woolf describes this phenomenon as representing "the emergence of new ethics of civil conduct." GREG WOOLF, *ROME: AN EMPIRE'S STORY 2* (2012). The Roman Empire also brutally oppressed insurrections, stifled religious freedom, and was more than willing to inflict cruel and unusual punishments upon political opponents—practices against which the Judeo-Christian ethic of love was morally opposed—all while engaging in extensive road building, aqueduct construction, and massive infrastructure works that enabled citizens to reap the rewards of the polity's *Pax Romana*. The historian Greg Woolf notes that while "Rome's gods had issued no detailed code of personal ethics," the Roman ethical sense mandated fealty to civic institutions like the city and Senate. *Id.* at 115.

33. See REDNER, *supra* note 21, at 35; MAY, *supra* note 28, at 19.

34. It is also important to note that while the Hebrew Bible advocates a range of behaviors that today would be termed "moral" or "ethical" behavior, the Hebrew Bible contains no equivalent words for the terms "morality" and "ethics"—terms which are derived from the Greek onomasticon and were later applied by Western ethical philosophers to the Bible. Thus, while it is fair to say that biblically influenced ethical norms can be described as components of the ethical system termed "moral ethics," it would be imprecise to say that the Bible itself contains or constructs an "ethical system" in the Western sense of the term.

35. See *infra* Part III.D.1. The value of maintaining a public sphere that is decent and "moral" is a moral ethic—although the public sphere is at issue in obscenity cases, the predominant ethic at issue centers upon individual moral behavior within the public sphere. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) (discussing the ancient origin of public indecency statutes). Biblical morality is highly concerned with individual moral behavior within the public sphere; the particular moral ethic at issue in *Barnes* has a biblical analogue in *Deuteronomy* 23:15: "[L]et your camp be holy; let Him not find anything unseemly among you and turn away from you."

The reasons that the oft-cited excerpt from *Chaplinsky v. New Hampshire* lists for why certain classes of speech such as obscenity are not constitutionally protected are grounded in moral ethics: Because lewd and obscene speech have "no essential part of any exposition of ideas,

*Hampshire* and other decisions have upheld restrictions on other categories of speech deemed to have “slight social value” or offend accepted notions of “order and morality.”<sup>36</sup> In the case of obscenity, civic ethics would not militate against an unrestricted range of vulgarity and lewdness; on the contrary, if an idea having social utility is expressed through obscenity, restricting obscene speech may prevent the idea from entering the marketplace of ideas.<sup>37</sup> An ethical system utilizing moral ethics contends that obscenity should be restricted because such speech can corrupt and coarsen its listeners, despite such restrictions preventing potentially useful ideas from entering the marketplace of ideas.<sup>38</sup>

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and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1941). In decisions such as *Chaplinsky*, the Court demonstrated a willingness to consider moral ethics as relevant First Amendment values. If the only values that factored into the Court’s criteria in obscenity adjudication were those of civic ethics, the Court should have permitted the speech based upon the value of personal autonomy. That the speech in *Chaplinsky* was nonetheless held to be unprotected by the First Amendment indicates that values that can be linked to the ethical system termed “moral ethics” influenced the Court’s decision in *Chaplinsky*.

36. *Chaplinsky*, 315 U.S. at 572.

37. See *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007) (noting the likelihood of instances in which “the risk [of] content-based distinctions will impermissibly interfere with the marketplace of ideas”).

38. That the moral ethic of preventing obscenity can occasionally outweigh the First Amendment value of upholding individual autonomy seems to confirm Melville Nimmer’s implicit balancing (or definitional balancing) thesis; the Court engaged in implicit balancing in *Chaplinsky* when it held that some categories of speech such as obscenity are unprotected. See *Chaplinsky*, 315 U.S. at 572. If civic ethics such as personal autonomy and unlimited freedom of expression were the preeminent societal values, even lewd and obscene speech should be unrestricted. See Melville G. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 954 (1968) (postulating that the Court engaged in unacknowledged but implicit balancing in libel cases, leading observers to conclude that the value of preventing libel outweighs the value of tolerating such forms of expression). For another instance where moral values have apparently been used to override freedom-of-speech protections, see *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952), where the Court upheld an Illinois libel statute that criminalized the public showing or selling of material which “portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens.”

Other values that are associated with moral ethics have been adduced for not protecting certain categories of speech: the physical and psychological well-being of children was perhaps the most important consideration that led the Court to rule that child pornography is an unprotected category of speech. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982); cf. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (upholding broadcast restrictions of indecent programming due to Government concerns for the “wellbeing of its youth”).

The psychological and physical well-being of those deceived by false speech is by no means comparable to the psychological and physical toll inflicted upon minors utilized in pornography. However, just as fleeting obscenities or lewd televised images have a psychological effect upon children, both *United States v. Strandlof* and the Stolen Valor Act’s legislative history considered the psychological effect that false claimants of military decorations have upon veterans. Legislative history reveals that Congress passed the Stolen Valor Act based in part on

Viewing civic ethics and moral ethics as two distinct realms where never the twain shall meet is more harmful than beneficial to civic values in the long run. It has an alienating effect upon those who do not see their basic normative values about false and deceptive speech acknowledged by the Court. An appearance of a conflict between two systems of ethical values creates the risk of significant numbers of citizens withdrawing from the civic sphere and eschewing public debate and expression.<sup>39</sup> A surfeit of permitted speech could have the ironic effect of inducing a paucity of politically essential speech in the long term.

The Tenth Circuit's discussion in *United States v. Strandlof* outlined the beginnings of an ethically conscious false speech–adjudicatory model that considers moral ethics as relevant First Amendment values. Because false statements, in and of themselves, do not possess complete constitutional protection, if a legislative act that restricts certain forms of falsehood does not chill or impinge upon otherwise protected speech, the act should stand.<sup>40</sup> While the Supreme Court was unwilling to adopt the Tenth Circuit's approach to false speech, a circuit court's consideration of false-speech ethics demonstrates that moral ethics are not beyond the pale of judicial analysis.

The Tenth Circuit viewed the moral ethic of truthfulness as a relevant civic ethic when it found the Stolen Valor Act constitutional.<sup>41</sup> In framing

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findings that false claims regarding military decorations damage the “reputation and meaning of [ ] decorations and medals.” *United States v. Strandlof*, 667 F.3d 1146, 1154 (2012) (alteration in original) (citing Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2(1), 120 Stat. 3266 (2006)) *vacated*, 864 F.3d 962 (10th Cir. 2012). While the civic ethic of maintaining a vibrant self-governing society is doubtless a consideration in obscenity restrictions, child pornography laws, and falsehood statutes, the “ethics of love”—the moral ethics of caring for the well-being of vulnerable children, preventing the innocent from hearing coarsening material, and the imperative to keep far away from falsehood—appear to be the more apposite ethical values in these First Amendment cases.

39. See *supra* notes 15–16. The Court has recognized that free-flowing debate, public expression, and civic participation are the essential components of a vibrant self-governing society. See *New York v. Ferber*, 458 U.S. 747, 772–73 (1982). For self-governing societies to function properly, the government must take pains to ensure that its citizens are participating in public debate. See MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 16, at 75. At the very least, it must seek to prevent the mores of its public sphere from causing citizens to recoil from participation in the civic sphere. *Id.*

40. “As the Supreme Court has repeatedly asserted, the Constitution does not foreclose laws criminalizing knowing falsehoods, so long as the laws allow ‘breathing space’ for core protected speech—as the Supreme Court calls it, ‘speech that matters.’” *Strandlof*, 667 F.3d at 1153 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

41. *Id.* at 1169–70. Although *Strandlof* created a split in the Circuit Courts on the issue of the Act's constitutionality, *Strandlof* in itself did not prompt the Supreme Court to hear *Alvarez*. *Strandlof* was unrelated to *Alvarez*, and the Court had granted certiorari to *Alvarez* before the Tenth Circuit's decision. Compare *United States v. Alvarez*, 132 S. Ct. 457 (2011) (granting

the Stolen Valor Act as a statute that was designed to reflect the culture's disdain of certain types of lying, and by embracing cultural and ethical values regarding truth and falsehood,<sup>42</sup> the Tenth Circuit in *Strandlof* took a step that the Supreme Court has not yet been willing to take. The Supreme Court has never said that false statements enjoy carte blanche First Amendment protection "except to the extent necessary to protect more valuable speech."<sup>43</sup> If the Court wishes to pursue the path taken by *Strandlof* and elevate moral ethics as values meriting First Amendment adjudicatory concern, a few jurisprudential theories, and an instructive example from religious law, are available as building blocks for the Court to utilize in constructing a false speech-adjudicatory model that incorporates moral ethics.<sup>44</sup>

### C. Freedom-of-Speech Categoricalism

Two jurisprudential theories suggest that the Court may uphold restrictions upon false speech based upon moral ethics. According to the approach sometimes referred to as "categoricalism," speech has either "high value," "low value," or "no value."<sup>45</sup> Under categoricalism, speech classified as having either low value or no value can be restricted, as the

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petition for writ of certiorari on Oct. 17, 2011), with *Strandlof*, 667 F.3d at 1146 (issuing opinion on Jan. 27, 2012).

42. *Strandlof*, 667 F.3d at 1167–68.

43. *Id.* at 1151.

44. For another First Amendment adjudicatory model that also incorporates broader moral and ethical concerns, and for an analysis of the capacity of law to synchronize moral ethics with civic ethics, see L.W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION 18 (2004) (studying how Canadian law has addressed regulations upon obscenity, hate speech, and child pornography). Like the Jewish ethico-legal model for regulating false speech, Sumner's analysis of the Canadian obscenity and hate-speech law offers a freedom of expression adjudicatory model that is instructive for United States false-speech law. *Id.* at 89–125. However, Sumner's arguments for the constitutionality of Canadian obscenity and hate-speech regulations are based on Mill's "Harm Principle," which is a civic, and not a moral, ethic. (Mill's values are libertarian, not moral or religious; the underlying values of utilitarianism are those of civic ethics, not moral ethics.) *Id.* at 20–21, 41. Thus, this Article primarily draws upon the Jewish ethical approach towards speech, in which false and obscene speech may be unethical even when the speech causes no physical or monetary harm, because the underlying values of this ethical approach are those of moral ethics. Sumner's theoretical model for the consideration of reasonable obscenity and hate-speech regulations should still be noted, though, when pondering the constitutionality of reasonable false-speech regulations.

45. Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 547 (1989), referencing Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1657–58 (1987); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1203 (1983); see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 920–44 (2d ed. 1988).

Supreme Court has done with pornography<sup>46</sup> and commercial speech.<sup>47</sup> Courts could uphold narrowly tailored false-speech restrictions by classifying false statements of fact as low-value speech, thereby rendering false statements of fact akin to other low-value or no-value speech such as pornography, obscenity, libel, and commercial speech. Scholars, however, have subjected categoricalism to critiques that leave its viability as a stand-alone method of constitutional decision-making in doubt.<sup>48</sup> Other approaches are needed if an ethically conscious false speech-adjudicatory model is to be compelling.

#### D. *The Role of Government as Promoter of Moral Ethics*

A second jurisprudential theory may be more effective in providing conceptual support—and in supplementing categoricalism—for the proposition that moral ethics can function as relevant freedom-of-speech values. According to the *bonos mores* theory of congressional power, legislatures possess the constitutional power to enact laws that promote culturally recognized morality and that discourage *contra bonos mores* (immoral activities).<sup>49</sup> This is a prerogative that has traditionally been ascribed to legislatures, and “[T]he Constitution does not prohibit [such laws] simply because they regulate ‘morality.’”<sup>50</sup> When applied in First

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46. See *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 90 (1976) (classifying pornographic movies and books as “no value” speech); *Miller v. California*, 413 U.S. 15, 18 (1973) (classifying pornographic literature as “obscene”); see also Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 601–04 (1986) (arguing that the government can significantly restrict pornography by virtue of its classification as “low value” speech).

47. See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 567 (1980) (classifying commercial speech as “low value” speech); see generally Daniel Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372 (1979).

48. Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 672 (1983); Alexander, *Low Value Speech*, *supra* note 45, at 552–53; Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 377–78 (2009); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 265 (1981).

49. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) (Scalia, J., concurring).

50. *Id.* (citing *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986)). N.B.: Justice Scalia’s government-as-promoter-of-“bonos mores” theory does not appear to be widely accepted. The fact that he bases it in part on the now-discredited decision of *Bowers* would indicate that it does not carry much support. See *Lawrence v. Texas*, 539 U.S. 558, 563 (2003) (overruling *Bowers* by holding that a statute criminalizing homosexual conduct was unconstitutional). However, while specific morals may evolve as society evolves—such as the morality of homosexuality (at issue in *Bowers*)—the overall principle that Government may pass laws (and the Court may uphold such laws) that attempt to codify societal morality is still intact when one considers the paucity of obscenity laws that have been overturned. *But see* Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 152–56 (2012) (arguing for the legitimacy of bonos mores as a jurisprudential principle).

Amendment adjudication, the *bonos mores* theory necessitates values balancing—the value of promoting morality must be balanced against the value of permitting a broad array of expression.<sup>51</sup> As categoricalism and balancing often work in tandem,<sup>52</sup> a fusion of false-speech categoricalism and *bonos mores* balancing could be effective jurisprudential prongs in a false speech–decision-making process that integrates moral ethics.

Thus, a sound precedential and theoretical basis exists for false-speech restrictions that are rooted in moral ethics. Government, in addition to its traditional role as a promoter of civic ethics, is an institution charged with codifying and promoting moral ethics. If constitutional grounds exist under which the Court can uphold laws that promote moral ethics, such as laws restricting public nudity and indecency,<sup>53</sup> the Court would also be standing upon terra firma in upholding narrowly tailored laws promoting other moral ethics, such as the moral ethic of promoting honesty and discouraging falsehood. In addition to the government’s legitimate interest in preventing public deceit, the government possesses a particular interest in preventing false Congressional Medal of Honor claims and in preventing the distortion of military records. In light of such legitimate governmental interest, narrowly tailored false-statement of fact statutes like the Stolen Valor Act can be justified based in part upon the theory that government may act to foster *bonos mores*.

### III. THE BENEFITS OF CONSTITUTIONALLY PERMISSIBLE INTERCHANGE BETWEEN LAW, ETHICS, AND RELIGION

#### A. *Moral Ethics as a Legitimate Governmental Interest*

Courts, as the previous section discusses, may consider principles that are widely accepted by Americans as ethical norms—what this Article refers to as “moral ethics”—in their decision-making processes. The fact that these ethical norms may be religiously influenced should not vitiate holdings in which these norms factor into judicial analysis.<sup>54</sup> Just as

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51. According to Justice Scalia, the value of promoting cultural moral norms outweighs the value of unlimited free expression. *Barnes*, 501 U.S. at 574–75 (Scalia, J., concurring).

52. Blocher, *supra* note 17, at 397.

53. *Barnes*, 501 U.S. at 575 (Scalia, J., concurring).

54. For instance, if *Roper v. Simmons* was based in part upon religiously-inspired values regarding human dignity, the decision would be no less legitimate were it based upon philosophically-rooted humanitarian values. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (deeming juvenile capital punishment unconstitutional). Many religions express reservations about capital punishment, and some traditions are absolutely opposed to the death penalty. See *Faith Statements on the Death Penalty of the Religious Community*, CAL. PEOPLE FAITH, [http://www.californiapeopleoffaith.org/faith\\_antiDP.pdf](http://www.californiapeopleoffaith.org/faith_antiDP.pdf) (last visited Sept. 2, 2013). Even though

restraints upon sexually explicit speech have been justified by moral ethics<sup>55</sup>—and the religious underpinnings of Western notions of sexual immorality are well-known<sup>56</sup>—upholding restraints upon false speech for reasons that are grounded in moral ethics would be constitutionally sound as well. That such ethical positions can be linked to—or have arguably originated in—religion would enhance, not harm, the case for regulating certain forms of falsity.<sup>57</sup> Just as judicially-upheld restrictions upon certain types of obscenity are implicit recognitions of the moral ethics underlying many Americans' qualms regarding lewd, sexually-explicit speech, decisions upholding restrictions upon certain types of falsehood would be constitutionally permissible recognitions of the moral ethics that inform the culture's contempt of falsity. Ethical norms concerning obscenity and falsity are rooted in the moral ethics of religious values,<sup>58</sup> and these religious values have arguably influenced cultural attitudes concerning the morality of obscenity and falsity.

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it may be self-evident, it should be emphasized that holdings that happen to accord with religious or other ethical values do not ipso facto violate the Establishment Clause.

55. To classify speech as "obscene," it must be determined: whether the speech "appeals to the prurient interest"; whether it "depicts or describes, in a patently offensive way, sexual conduct"; and whether it "lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973). The *Miller* test is redolent of a morality test, and does not appear to be an evaluation of the speech's civic utility.

56. This is especially true for Christians and Jews for whom standards of sexual immorality have their provenance in the Bible (and in passages such as *Leviticus* 19:1–22 and 20:10–21 in particular). For a discussion of the religious roots of Western notions of sexual morality, see JANET R. JAKOBSEN & ANN PELLEGRINI, *LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE* 35–44 (2004), which analyzes the link between sexual morality and religion in the United States in the context of *Bowers v. Hardwick* (1986) and *Romer v. Evans* (1996).

Religion continues to supply the rationale for the state regulation of sexuality. . . .

[R]eligion—specifically Christianity—shapes legislation, public policy, and even jurisprudence around sex. One of the reasons . . . is that *the assumptions that underlie sexual regulation are so deeply embedded that people no longer recognize them as being derived from religious thought.*

*Id.* at 21 (emphasis added); cf. Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 402 (1963) ("[M]orals legislation is a relic in the law of our religious heritage . . .").

57. However, the statutes could not have explicit religious justifications, as improper religious legislative purposes behind statutes are grounds for striking down such statutes on Establishment Clause grounds. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 595 (1987) (invalidating a Louisiana statute mandating the teaching of Creationism with evolution due to improper religious legislative motivations behind the statute). The Court has demonstrated a greater willingness to scrutinize legislative motivation in religion-clause cases than in freedom-of-speech cases. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545–47 (1993) (striking down a municipal law that prohibited ritual slaughter of animals based upon the law's discriminatory motivation).

58. See *infra* note 119.



*B. The Benefits of Utilizing Values Found in Religion to Promote Non-Religious Goals*

If constitutionally viable false-statement statutes—such as a rewritten, more narrowly tailored Stolen Valor Act—are challenged in the future, religious values could assist in their defense by deflecting the charge that regulating false statements of fact would be overly paternalistic. Religions recognize that human beings need paternalism at times because people cannot always be expected to behave in accord with their highest ideals. Religions understand that ideals that one has about oneself are often not lived out in practice. The ethical and moral commands of religion are paternalistic injunctions that are aspirational in nature; they constantly remind their adherents to live in accord with higher principles. According to a contemporary cohort of philosophers who have been attempting to demonstrate how secular society can be enhanced by the integration of religious “technologies” (German philosopher Peter Sloterdijk’s term), such values have often been neglected in Western society’s individualistic, libertarian culture. Alain De Botton, an atheist, contends that non-religious individuals’ lives can be enriched by the adoption of values, attitudes, and behaviors that originate in religion.<sup>59</sup> In the same vein, the law could also

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59. See ALAIN DE BOTTON, *RELIGION FOR ATHEISTS: A NON-BELIEVER’S GUIDE TO THE USES OF RELIGION* 11–12 (2012) (arguing that atheists and secular society can find religious teaching useful and applicable to a wide range of societal and personal issues); cf. PETER SLOTERDIJK, *YOU MUST CHANGE YOUR LIFE* (2013); and RONALD DWORKING, *RELIGION WITHOUT GOD* (2013). De Botton argues that by rejecting religion, secular society has essentially thrown the proverbial baby out with the bathwater: “Secular society has been unfairly impoverished by the loss of an array of practices and themes . . . . We have grown frightened of the word *morality*. . . . We have no mechanisms for expressing gratitude.” *Id.* at 14 (emphasis in original). While some of these claims are exaggerated—even as a religious individual, I recognize that secular culture does have mechanisms for expressing gratitude, and that such a thing does exist as secular morality—his argument that secular society has much to learn from religion parallels this Article’s argument that secular law can learn from and be enriched by a religious law’s approach to false speech.

The religion-without-God philosophers would do well, however, to heed Will Herberg’s warning regarding the perils of living with “cut flower” ethics:

The attempt made in recent decades by secularist thinkers to disengage the moral principles of western civilization from their scripturally based religious context, in the assurance that they could live a life of their own as “humanistic” ethics, has resulted in our “cut flower culture.” Cut flowers retain their original beauty and fragrance, but only so long as they retain the vitality that they have drawn from their now-severed roots; after that is exhausted, they wither and die. So with freedom, brotherhood, justice, and personal dignity—the values that form the moral foundation of our civilization. Without the life-giving power of the faith out of which they have sprung, they possess neither meaning nor vitality.

WILL HERBERG, *JUDAISM AND MODERN MAN: AN INTERPRETATION OF JEWISH RELIGION* 91–92 (1997).

benefit from recognizing that certain values found in religious ethics could be useful for the purpose of promoting a more ethical society. The regulation of falsity because it is regarded by Americans as unethical is an example of a government utilizing a concept recognized by religion as an occasional human need—paternalism—in a constitutionally permissible and societally beneficial manner.

Religious law, according to some, has influenced American law in profound ways.<sup>60</sup> Religious values, such as the moral ethics of speech and the principle of ethical falsehood, can serve as a nonbinding yet persuasive body of wisdom that American law can reference for guidance in difficult false-speech decisions. Religious law and religious values have inspired mankind for thousands of years, and its laws have addressed the gamut of humanity's ethical and moral issues. Technology may have radically changed the external face of the world, but religion recognizes that human nature does not radically change. Its ethically informed law remains available for the Court as another body of legal wisdom, akin to international law, from which to draw upon in crafting decisions.<sup>61</sup> Drawing upon a legal tradition whose law is grounded in moral principles would bolster the moral underpinnings of American law by strengthening the widely acknowledged interrelationship between law and morality.<sup>62</sup>

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60. See, e.g., Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 52–56 (2006) (arguing that U.S. family law has been influenced by biblical principles); Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 *J.L. & RELIGION* 525, 525 (1999–2000) (The Ten Commandments “inform our notions of right and wrong and, as such, have influenced the development of Western law. . . .”); see generally Harold J. Berman, *Religious Foundations of Law in the West: An Historical Perspective*, 1 *J.L. & RELIGION* 3 (1983).

Other biblically-based religious principles that have influenced the development of Western law include the basic distinction between guilt and innocence. See, e.g., *Genesis* 18:22–33 (where Abraham protests God’s proposed destruction of Sodom and Gomorrah because it would “sweep away the innocent along with the guilty”). Biblically-based religious principles have influenced the concept of a hierarchical court system, as well as the overarching ideal of justice in judicial systems; the most difficult cases reach a supreme court, while more numerous lower courts deal with disputes of lesser magnitude. See *Exodus* 18:12–27 (Moses institutes this exact judicial system, based upon Jethro’s advice); see *Deuteronomy* 16:20 (“Justice, justice shall you pursue . . .”). The prior verse contains less well-known, but still influential legal principles, such as the concept of judicial impartiality: “You shall not judge unfairly: you shall show no partiality; you shall not take bribes . . .” *Deuteronomy* 16:19.

61. See, e.g., Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 *HARV. L. REV.* 813, 820–21 (1993) (discussing the American jurisprudential trend of referencing Jewish law). Robert Cover drew upon Jewish law and Jewish thought many times, most prominently in his *Nomos and Narrative*, *supra* note 4, and in *Obligation: A Jewish Jurisprudence of the Social Order*, 5 *J.L. & RELIGION* 65 (1987).

62. See generally D. DON WELCH, *LAW AND MORALITY* 1–2 (1987) (elucidating how both law and morality involve articulations of normative behavior); Charles D. Gonthier, *Law and*

#### IV. AN ETHICALLY CONSCIOUS APPROACH TO FALSE-SPEECH ADJUDICATION

##### A. *Conflicting Values, Bridgeable Gaps: A Workable Synthesis of Constitutional and Ethical Values based upon Justice Breyer's First Amendment Balancing*

In an ethically conscious false speech–adjudicatory model, judges would acknowledge moral ethics as compelling justifications for congressional acts. Decisions would recognize the ethical and moral justifications of statutes in the same fashion that Justice Breyer acknowledged the ethical values and other important considerations undergirding the Stolen Valor Act.<sup>63</sup>

This ethical adjudicatory model would revive the *Sullivan-Garrison-Gertz* breathing space approach to false speech that *Alvarez* questioned.<sup>64</sup> It would incorporate Justice Breyer's balancing and proportionality approach to First Amendment adjudication,<sup>65</sup> and utilize a moral ethics standard that

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*Morality*, 29 QUEEN'S L.J. 408, 408 (2003) (contending that law and morality are systems engaged in the promotion of human dignity); cf. Philip A. Pecorino, *Chapter 4: Professionalism, Elitism and Health Care, Section 2. Social Context*, MED. ETHICS (2002), [http://www.qcc.cuny.edu/socialsciences/ppecorino/MEDICAL\\_ETHICS\\_TEXT/Chapter\\_4\\_Professionalism\\_Elitism\\_Health\\_Care/Social\\_Context.htm](http://www.qcc.cuny.edu/socialsciences/ppecorino/MEDICAL_ETHICS_TEXT/Chapter_4_Professionalism_Elitism_Health_Care/Social_Context.htm). ("Law codifies customs, ideals, beliefs and moral values in society."). Law and morality are even more closely interrelated in Jewish law, as Jewish law postulates that a divine law-giver regulates every aspect of human behavior. Discussing this interrelationship is beyond the scope of this Article. For a view that Jewish law, at least in its biblical phase, represents the codification of the values and underlying morals of Jewish culture, see MOSHE GREENBERG, *STUDIES IN THE BIBLE AND JEWISH THOUGHT* 25–41 (The Jewish Pub. Soc'y 1995); cf. *Baker v. Carr*, 369 U.S. 186, 267 (1962) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

63. See *United States v. Alvarez*, 132 S. Ct. 2537, 2555 (Breyer, J., concurring). The values that the Stolen Valor Act sought to reinforce include human dignity (preserving the honor of those who have received military honors), the love of truth and contempt for deliberate falsehoods (seeking to prevent individuals from lying about military honors), and the civic value of patriotism (striving to preserve the country's methods for recognizing military service and heroic sacrifice). *Id.* Justice Breyer indicated that the Act is ethically and civically meritorious, and would have been upheld if the statute was more narrowly tailored so that it reduced the likelihood of chilling protected speech. *Id.* at 2556.

64. In the breathing space standard of scrutiny, governmental restrictions of false statements of fact are presumed constitutional so long as they satisfy a three-part test: the statute must only regulate knowingly false statements of fact; the statute may not suppress or chill truthful statements and other forms of protected speech; and the statute must be narrowly tailored. See *United States v. Strandlof*, 667 F.3d 1146, 1160 (10th Cir. 2012) *vacated*, 864 F.3d 962 (10th Cir. 2012). A statute regulating knowingly false factual statements would pass the breathing space test "so long as it has some limiting characteristic that prevents it from suppressing constitutionally valuable opinions and true statements." *Id.* at 1161.

65. Justice Breyer does not take a categorical approach when analyzing a proposed speech regulation; instead, he adopts an intermediate scrutiny standard, or "proportionality" approach,

draws upon the *bonos mores* theory of legislative power and upon comparative legal approaches that integrate moral ethics into adjudication. Under this tripartite model, restrictions on false statements of fact would be justified by virtue of the government's prerogative to promote a more ethical society, and by its ability to codify shared ethical norms regarding truth and falsehood.<sup>66</sup> An ethics-based false speech–adjudicatory model would also apply a *Miller*-like test in evaluating whether the false speech is protectable. As in obscenity cases, contemporary community standards would be used to judge whether a particular false statement of fact is ethically offensive, and whether the lie advances any significant scientific, artistic, political, or literary value.<sup>67</sup> Just as First Amendment decisions are grounded in the civic ethics of First Amendment values,<sup>68</sup> false-speech decisions applying this standard would be partially based upon moral ethics. Freedom-of-speech jurisprudence would thus recognize normative-speech ethics as relevant First Amendment values meriting consideration as factors in First Amendment balancing. Finally, an ethically sensitive First Amendment adjudicatory process would draw upon the comparative legal model of “ethical falsehood.”<sup>69</sup>

*B. False Speech in Jewish Law: the Concept of Ethical Falsehood*

Comparing the Constitutional and *halakhic* methods of false-speech adjudication, and understanding the role of values in these legal systems, is helpful in envisioning how ethical values can impart ethical consciousness to false-speech adjudication.<sup>70</sup>

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which looks at “whether the statute works speech-related harm that is out of proportion to its justifications.” *Alvarez*, 132 S. Ct. at 2551–52 (Breyer, J., concurring). For more on Breyer’s method of First Amendment jurisprudence, see his concurring opinion in *Alvarez*. *Id.* at 2551–56.

66. The common cultural abhorrence of certain repugnant falsehoods, such as deliberately false claims of having received military decorations, would constitute a shared moral ethic that is ripe for codification.

67. See SUMNER, *supra* note 44, at 88–125 (discussing how such contemporary community standards may be utilized in obscene speech and false speech constitutional balancing, and critiquing the community standards concept).

68. See *supra* Part I.B.

69. Justice Breyer has acknowledged the value of comparative legal approaches, noting that they may “cast an empirical light on the consequences of different solutions to a common legal problem . . .” *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

70. The focus of this Article’s Jewish law and Jewish ethics section is false speech, and a proper treatment of Jewish approaches to other forms of problematic speech (such as hate speech and obscene speech) would be beyond the scope of this Article. See generally Jonathan K. Crane, *Defining the Unspeakable: Incitement in Halakhah and Anglo-American Jurisprudence*, 25 J.L. & RELIGION 329 (2009–2010) (examining other categories of speech through a comparative legal analysis that employs Jewish and American law).

In contrast to American law, Jewish law dictates that any speech that is not completely precise is presumptively unlawful and cannot be uttered without compelling reasons. In contrast to other religious and philosophical approaches to lying,<sup>71</sup> Jewish law contains no categorical imperative concerning falsehood. While Jewish law prohibits falsehood, it also recognizes the complex nature of truth and falsehood and provides a number of exceptions to falsehood laws. Even more strikingly, its legal system indicates that there are not only cases where falsehood would be permitted, but that there are circumstances in which uttering falsehoods would be more ethical than speaking truthfully.

Jewish law contains numerous exceptions to the prohibition of false speech while simultaneously idealizing truth. Jewish false-speech law is ethically conscious, as it recognizes the range of ethical considerations surrounding speech. This ethical consciousness is reflected in talmudic false-speech law, which is informed by an implicit concept described as “ethical falsehood.”<sup>72</sup> It is one of Jewish law’s most innovative concepts, and, as will be discussed, it can be instructive in a freedom-of-speech

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71. According to Kantian ethics, one may not lie, even concerning matters of self-preservation. See Immanuel Kant, *On a Supposed Right to Lie from Benevolent Motives*, in KANT’S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 362–64 (Thomas Kingsmill Abbott trans., 6th ed. 1909); see also ST. AUGUSTINE, *Lying & Against Lying*, in TREATISES ON VARIOUS SUBJECTS, reprinted in 16 THE FATHERS OF THE CHURCH: A NEW TRANSLATION 47, 113 (Roy J. Defarrari ed., Mary Sarah Muldowney et al. trans., 1952); 1 JOSEPH TELUSHKIN, A CODE OF JEWISH ETHICS: YOU SHALL BE HOLY 422–23, 428–29 (2006) (comparing the modern Catholic legal concept of “mental reservation” which permits lying in extreme cases with traditional Jewish legal concepts); cf. SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE (1978) (thoroughly analyzing the secular ethics of lying, and reviewing Kantian, Catholic, religious, and other ethical views on the subject).

Western literary fiction’s multivalent attitude towards truth and falsehood is arguably much closer to Jewish law’s complex, non-doctrinaire view of truth and falsehood than other philosophical and religious approaches. Like Jewish law, literary fiction recognizes that “[t]ruth is various; truth comes to us in different guises; it is not with the intellect alone that we perceive it.” Virginia Woolf, *On Not Knowing Greek*, in THE COMMON READER 32 (Andrew McNeille ed., 1984); fiction can more accurately reveal truth than can fact; cf. *id.* at 230, 92–93; and PHILIP ROTH, *Defender of the Faith*, in GOODBYE COLUMBUS 139 (1959): “only lies can get to the truth.” Furthermore, like Jewish law, literary fiction also recognizes a multitude of occasions in which false statements may contain more truth than factually correct statements; both Twain’s Huck and Shakespeare’s Falstaff maintain “the consistency of true lying.” HAROLD BLOOM, GENIUS: A MOSAIC OF ONE HUNDRED EXEMPLARY CREATIVE MINDS 559 (2002). Cf. *id.* at 561 (observing that *Huckleberry Finn* is a book in which “everyone of any deep interest is a shrewd liar, a concealer of truth”).

72. See Erika Falk, *Jewish Laws of Speech: Toward Multicultural Rhetoric*, 10 HOW. J. COMM. 15, 17–18 (1999) (applying rhetorical theory to Jewish law to show that Judaism employs an ethical, non-utilitarian framework for evaluating speech); cf. Alyssa M. Gray, *Jewish Ethics of Speech*, in THE OXFORD HANDBOOK OF JEWISH ETHICS AND MORALITY 433–44 (Elliot N. Dorff & Jonathan K. Crane eds., 2013).

adjudicatory paradigm in which moral ethics are factored into decision making.

### 1. *Falsehood and Other Proscribed Speech*

The *halakhic* prohibition of false speech (*sheker*) is part of a larger body of law in which many forms of speech are prohibited, such as slander (*lashon hara*),<sup>73</sup> hate speech (*ona'at devarim*),<sup>74</sup> and profanity (*nivul peh*).<sup>75</sup> Jewish speech law also proscribes flattery (*chanifut*),<sup>76</sup> mockery (*leitzanut*),<sup>77</sup> embarrassing others (*halbanat panim*),<sup>78</sup> haughty speech,<sup>79</sup> and overly contentious speech.<sup>80</sup> Jewish ethics, if not Jewish law, also

73. *Leviticus* 19:16 (King James) ("Do not go about spreading slander among your father's kin . . ."). This verse also prohibits libel and defamation (*rekhlut*). Jewish law prohibits the spreading of defamatory rumors, regardless of the truth or falsity of the rumors, when such rumors have no redeeming factors, i.e., when no benefits would accrue as a result of the dissemination of the rumors. See Maimonides, *Hilchot De'ot* (the Laws of Personality Development), in *Mishneh Torah* 30 (Za'ev Abramson et al. eds., 1989); Maimonides, *MISHNEH TORAH* [CODE OF LAW], *Hilchot De'ot* (lit., "Laws of Opinions" or "Laws of Ethics") 7:3; *Lesson 10: N301*, in 1 *SEFER HAMITZVOS OF THE RAMBAM* 42–43 (Berel Bell Trans., Sichos in English 2013).; RABBEINU YONAH, *SHAAREI TESHUVAH* (GATES OF REPENTANCE) 3:222; see generally ISRAEL KAGAN, *Rekhlut*, *CHAFETZ CHAYIM* (D. Marchant, trans., Feldheim Publishers 1998) (discussing how spreading truthful damaging information about others falls under the prohibition of "*motzi shem rah*," a Jewish legal prohibition of slander).

74. Unless otherwise noted, translations from the original Hebrew or Aramaic in this Article are my own. See *Leviticus* 25:17 ("Do not wrong one another . . ."); *Exodus* 22:21 (King James) ("Thou shalt neither vex a stranger, nor oppress him . . ."). But see BABYLONIAN TALMUD, *Bava Metzia* 58b, where the Talmud rejects the possibility that the latter verse (*Exodus* 22:21) refers to monetary oppression; it instead interprets the verse as referring to verbal oppression, and it derives the prohibition against monetary oppression from other verses. In Maimonides' codification of biblical commandments (*SEFER HAMITZVOT*), the prohibition against verbally wronging one another is negative commandment no. 251.

75. BABYLONIAN TALMUD, *Shabbat* 33a ("As a punishment for obscenity, troubles multiply, cruel decrees are proclaimed afresh . . ."). The Talmud derives a prohibition against "*nivul peh*" from the verse "*lo tenabel et picha*" ("Do not profane your lips."). "Profane lips" is interpreted as a reference to lewd or sexually explicit speech.

76. See *Proverbs* 17:7 ("Lofty words are not fitting for a villain; Much less lying words for a great man."); *Deuteronomy* 1:17 ("You shall not be partial in judgment: hear out low and high alike. Fear no man, for judgment is God's. And any matter that is too difficult for you, you shall bring to me and I will hear it."); see also YONAH, *supra* note 73, at 3:187.

77. The Talmud interprets *leitzanut* as a kind of cynicism or inappropriate levity. See BABYLONIAN TALMUD, *'Avodah Zarah* 18b ("He who scoffs, affliction will befall him, as it is said, *Now therefore do ye not scoff, lest your punishment be made severe.*"); BABYLONIAN TALMUD, *Megillah* 25b ("All gibing is forbidden save gibing at idolatry, which is permitted, as it is written . . .").

78. This may be a component of verbal oppression and hate speech (*ona'at devarim*), though Rabbi Kagan explains that the prohibition is derived from the following verse: "*hochei'ach tochiach et amitecha v'lo tisa alav chet.*" Translated, this verse reads: "You shall reprove your fellow and shall not bear sin on account of him." *Leviticus* 19:17; KAGAN, *supra* note 73, at ch. 9.

79. YONAH, *supra* note 73, at 3:34; KAGAN, *supra* note 73, at ch. 14.

80. KAGAN, *supra* note 73, at ch. 9.

discourages idle speech (*sicha b'teilah*),<sup>81</sup> giving inappropriate or misleading advice,<sup>82</sup> and contradicting the words of one's parents.<sup>83</sup>

The sources of Jewish law's prohibition of false speech are two biblical verses: "Keep far from a false charge . . ."<sup>84</sup> and "You shall not steal; you shall not deal deceitfully or falsely with one another."<sup>85</sup> The latter prohibition refers to monetary deception and lying for financial gain.<sup>86</sup> The former verse prohibits falsehood in any area of life, even when the falsehood causes no tangible harm.<sup>87</sup> The prohibitions against falsehood are not absolute; they do not state "*lo teshaker*" ("thou shalt not lie"), but "*midvar sheker tirschak*" ("distance yourself from falsehood"). On the one hand, it is an ostensibly more severe formulation to imply that one may not even come *close* to lying.<sup>88</sup> But on the other hand, this formulation can also

81. Idle speech is discouraged in certain circumstances, such as on the Sabbath (*Shabbat*). BABYLONIAN TALMUD, Shabbat 113a ("[T]hy speech [conversation] on the Sabbath should not be like thy speech on weekdays."); MISHNAH BERURAH § 307:1 ("[Y]our talk on Shabbos should not be like your talk on weekdays. It is therefore forbidden to say on Shabbos 'I shall do this work tomorrow' . . .").

82. SHULKHAN ARUKAH, Choshen Mispat 228:6 (codifying a legal prohibition against inappropriate advice [*lifnei iveir*] based upon *Leviticus* 19:14's prohibition against placing "a stumbling block before the blind").

83. BABYLONIAN TALMUD, Kiddushin 30b ("*Honour thy father and thy mother . . .*"); 4 SOLOMON GANZFRIED, CODE OF JEWISH LAW (KITZUR SHULKHAN ARUKH): A COMPILATION OF JEWISH LAWS AND CUSTOMS 1 (Hyman E. Goldin trans., Hebrew Publ'g Co. 1961); compare *Leviticus* 19:3 (not contradicting one's parents is a fulfillment of the commandment to fear one's parents) with *Exodus* 20:12 ("*Honor your father and your mother . . .*").

84. *Exodus* 23:7 (in Hebrew, "*midvar sheker tirschak*").

85. *Leviticus* 19:11 ("*lo tignovu, v'lo t'chachashu v'lo t'shakru ish ba'amito*").

86. See RASHI, *loc. cit.*, s.v. "*lo tignovu, v'lo t'chachashu v'lo t'shakru ish ba'amito*," citing TORAT COHANIM 2:5. Maimonides contextualizes the verse, stating that its proscription against lying is a specific prohibition against false oaths. *Lesson 107: N249*, in 1 SEFER HAMITZVOS OF THE RAMBAM 284–85 (Berel Bell trans., Sichos in English 2013).

87. See YONAH, *supra* note 73, at 3:178–79, which prohibits lies that cause no monetary harm, including: (1) lies for which the motive is garnering the undeserved confidence or goodwill of others; (2) lies that are designed to prevent justified benefit, credit, or goodwill from reaching those who deserve it; (3) lying for no reason whatsoever; and (4) promising gifts which one does not intend to deliver. However, one who truly intends to fulfill his promise at the time of making the promise and only later changes one's mind does not violate the prohibition of falsehood (*sheker*), but does violate certain ethical principles, such as the principle of good faith. *Id.* at 179–80.

Eliezer—son of Samuel of Metz, an important 12<sup>th</sup> century halakhist—adduces talmudic sources in the attempt to demonstrate that this verse only relates to falsehood which could cause monetary damage. He understands the prohibition of deception (*g'neivat da'at*) in the same fashion. SEFER YERE'IM, ch. 235. However, he is the sole major halakhist who believes there is no biblical prohibition against falsehood that does not cause tangible harm.

88. The Hasidic master Reb Bunism of P'shis'cha, who is known for his pithy aphorisms, explains that the wording "stay far away," a formulation seldom seen in Torah, is ethically and theologically instructive: God hates falsehood so much that He commands His followers to "stay far away" from it. NOSSON SCHERMAN, THE CHUMASH 435 (The Stone ed., Mesorah Publ'ns, 1993), *loc. cit.*, s.v. "*tirschak*."

be interpreted more leniently: Although one must *distance* oneself from falsehood, falsehood may be permitted for compelling reasons.

A closely related prohibition to falsehood (*sheker*) is the proscription against deception (*g'neivat da'at*).<sup>89</sup> The Talmud states that it is prohibited to “steal the mind,” or knowledge of one’s fellows.<sup>90</sup> According to Maimonides, this is meant as an admonition against creating a false impression of oneself with the intent of accruing undeserved honor, goodwill, or monetary favors.<sup>91</sup> Accordingly, inviting a friend to a meal when one knows that the friend cannot come is a violation of the prohibition of *g'neivat da'at* because one has deceptively acted upon knowledge about one’s friend with the intention of accruing that friend’s undeserved goodwill.<sup>92</sup>

Thus, Jewish law recognizes two basic categories of prohibited falsehoods: falsehoods that lead to monetary harm, which Maimonides and other Jewish legal codes equate to theft,<sup>93</sup> and falsehoods that are objectionable by virtue of the intrinsic ethical principle which they transgress—though not necessarily by virtue of the monetary or cognizable harm they wreak. The former conception of falsehood is reflected in First Amendment law, insofar as First Amendment precedent has only upheld speech restrictions upon falsehood that lead to legally cognizable harm. While the latter view of falsehood is not very prominent in constitutional jurisprudence, it is evident in the Stolen Valor Act’s legislative history,<sup>94</sup> in the circuit court’s decision to uphold the Stolen Valor Act in *Strandlof*,<sup>95</sup>

89. Halakhic authorities debate whether this prohibition is biblical in nature (*mid'oraisa*) or rabbinic (*mid'rabbanan*). Maimonides also discusses whether this prohibition is based upon the prohibition of lying (*issur sheker*) or based upon the prohibition of theft (*issur g'neivah*). This bifurcation is reflected in Maimonides’ own work: in MAIMONIDES, M. T., *Hilkhoh De'ot* (the Laws of Personality Development), in MISHNEH TORAH 30 (Za'ev Abrason et al. eds., 1989), he bases the prohibition upon *sheker*; in *Hilkhoh G'neivah* (Laws of Theft), and in his COMMENTARY ON THE MISHNAH (PEIRUSH HAMISHNAH), he bases the prohibition of *g'neivat da'at* upon the *issur g'neivah*.

90. BABYLONIAN TALMUD, Chullin 94a (*asur lignov da'at hab'riot*, which is interpreted as a “prohibition against deception”).

91. MAIMONIDES, MISHNEH TORAH, Laws of De'ot 2:6.

92. *Id.*

93. *Id.*; see also SHULKHAN ARUKH, Choshen Mishpat 228:6 (codifying the prohibition of *g'neivat da'at* in a code of monetary—not ritual or ethical—law).

94. See *United States v. Alvarez*, 132 S. Ct. 2537, 2553–55 (2012) (Breyer, J., concurring) (noting that the Stolen Valor Act sought to promote truth and prohibit deliberate falsehoods).

95. False claims of having earned military honors result in harms that are not only economic in nature. See *United States v. Strandlof*, 667 F.3d 1146, 1154 (10th Cir. 2012) *vacated*, 864 F.3d 962 (10th Cir. 2012).



and in First Amendment decisions that uphold speech restrictions on profanity and obscenity.<sup>96</sup>

## 2. *Ethico-Legal Balancing in Jewish False-Speech Law*

Recognizing that conflicting values are inevitable when applying ethical and religious ideals to the complexities of life, Jewish law and Jewish ethics have developed decision-making models to address internal and external values-based conflicts. Jewish values may conflict with other internal Jewish values<sup>97</sup> and may conflict with external values.<sup>98</sup> Classical Jewish law does not articulate an explicit values-balancing formula; however, a methodology for grappling with conflicts between truth and peace is implicit in ethical and legal primary sources.<sup>99</sup> An examination of

96. See *supra* notes 35 & 38. That profanity and obscenity can be harmful regardless of whether the speech causes monetary harm parallels the view that falsehood can be problematic regardless of whether it causes monetary harm.

97. For example, conflicts between truth (*emet*) and peace (*shalom*). See *infra* text accompanying notes 113–18.

98. I.e., values not historically recognized as, or interpreted to be, “Jewish” values. For example, conflicts between “democracy’s respect for the autonomy of the individual conscience” and the “[r]eligious compulsion” to defer to authority figures (clergy, authoritative texts, communal practices) who claim to represent God,” NORMAN SOLOMON, *TORAH FROM HEAVEN: THE RECONSTRUCTION OF FAITH* 319 (2012) (postulating that when such a values-conflict occurs, democratic values should outweigh authoritarian religious values), constitutes one such external values-based conflict.

99. Modern Jewish law and modern Jewish ethics have articulated several explicit values-balancing methodologies. See generally Eugene B. Borowitz, *The Autonomous Jewish Self*, 4 MOD. JUDAISM 39, 44–46 (1984) (discussing values-balancing between the competing meta-values of freedom and obedience, while outlining an “autonomous Jewish self” standard of ethical balancing in which obeisance to God takes priority over communal obligations or traditional mores, except when national Jewish survival is at stake); Irving Greenberg, *Toward a Covenantal Ethic of Medicine*, in JEWISH VALUES IN BIOETHICS 137 (Levi Meier ed., 1986) (considering the “ethical trade-off” between quality of life versus quantity of life in medical ethics balancing); David Hartman, *Moral Uncertainties in the Practice of Medicine: The Dynamics of Interdependency from a Halakhic Perspective*, 4 J. MED. & PHIL. 98, 100–01 (1979) (balancing between the competing values of individual autonomy and obedience to God); cf. SUMNER, *supra* note 44, at 18 (discussing values-balancing in Canadian hate speech and obscene speech law, such as balancing the harm caused by the speech with the value of freedom of expression).

In *Jewish Choices, Jewish Voices*, Elliot Dorff and Louis Newman present thoughtful, multi-denominational ethical-balancing approaches from a variety of Jewish writers and thinkers. See 1 JEWISH CHOICES, JEWISH VOICES: BODY xiv, xvi (Elliot N. Dorff & Louis E. Newman eds., 2008). American Jews would benefit, they write, from ethical-balancing methodologies that address conflicts between American values and Jewish values. *Id.* These conflicts may not always manifest themselves as conflicts between competing values but as challenges in making ethical choices that incorporate the values of both traditions into ethical behavior, thereby honoring both traditions. *Id.* Jews must also balance the conflicting and competing values within Judaism itself; because of the non-systematic and multivalent nature of classical Jewish law, a certain value may override other values, according to some sources, but the reverse scenario may be the case according to other sources. *Id.* This Article’s approach to ethical balancing is based upon an

these sources demonstrates that the Talmud engaged in implicit values balancing. While this implicit values balancing is not systematic, it reveals a recurrent Jewish ethico-legal principle: When the values of truth and peace conflict, truth—doubtless a preeminent value in Jewish thought<sup>100</sup>—may be outweighed by the value of peace.

One of the paradigmatic talmudic discussions of conflicts between truth and other values appears in tractate *Bava Metzia*: “In the following three matters learned men do conceal the truth (מילי עבידי רבנן דמשנו במלייהו) (בהגני תלת): In matters of tractate (במסכת), bed (ובפריא), and hospitality (ובאושפיזא).”<sup>101</sup> Rabbis, when asked whether they mastered a “tractate”—i.e., a certain body of learning—permitted themselves to answer in the negative (even when they had in fact mastered the tractate in question) for the sake of humility.<sup>102</sup> When asked whether they had used their beds for sexual relations, they declined to answer for the sake of modesty.<sup>103</sup> And scholars concealed the extent to which certain hosts were generous to their “guests” when asked by unscrupulous people (*bnei adam sh’einam mehuganim*) so that such people would not take unfair advantage of generous hosts.<sup>104</sup> This talmudic discussion strongly implies that when the value of truth conflicts with the values of humility, modesty, or peace,<sup>105</sup> the latter three values assume priority.

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independent analysis of the classical rabbinic primary sources relating to truth and peace, and was later supplemented with pertinent secondary scholarship.

100. Reflected in statements such as “*chotamo shel hakadosh baruch hu emet*,” which translates to “God’s seal is truth.” See BABYLONIAN TALMUD, Shabbat 55a; see also BABYLONIAN TALMUD, Pesachim 113b (“[God] hates . . . [one] who speaks one thing with his mouth and another thing in his heart . . .”); BABYLONIAN TALMUD, Sotah 42a (liars will not receive the Divine Presence); *Proverbs* 12:22 (“*to’ avat Hashem siftef sheker*,” which translates to “false lips are an abomination to God”). “[T]he sin of deception (*g’neivat da’at*) is very grave . . . because false lips bear great iniquity. We have been commanded regarding truth, for it is one of the foundations of the soul.” YONAH, *supra* note 73, at 3:184.

101. BABYLONIAN TALMUD, *Bava Metzia* 23b–24a.

102. RASHI, *ad. loc.*, s.v. “*masekhet*.” Cf. TOSAFOT, *id.* (arguing that scholars are only permitted to minimize the extent of their learning when asked whether they have learnt a particular tractate, not when asked direct questions about scholarly matters).

103. RASHI, *ibid.*, s.v. “*b’furiah*.” Cf. TOSAFOT, *id.* (interpreting “*b’furiah*” to mean situations when rabbis were asked whether they had been absent from the study hall because they had experienced nocturnal seminal emissions (“*keri*”) and gave misleading answers, e.g., that they had experienced some other kind of accident, or had become ill).

104. RASHI 24a, s.v. “*b’ushpiza*.” Cf. TOSAFOT 23b, s.v. “*b’ushpiza*” (appearing to dissent from Rashi’s interpretation based upon other talmudic cases (BABYLONIAN TALMUD, Arakhin 16a; BABYLONIAN TALMUD, Berakhot 58a), but reaching the same conclusion).

105. TOSAFOT, *id.*, claims that the real reason falsehood is permitted in all of these cases is for the sake of “the ways of peace” (*darkei shalom*), based upon the principle in BABYLONIAN TALMUD, Yebamoth 65b. RASHI 24a, s.v. “*b’ushpiza*,” indicates that the reason falsehood is permitted in the case of unscrupulous “guests” is to prevent the occurrence of unjust financial loss.

Other talmudic legal discussions are more explicit in permitting falsehood for ethical reasons. The Talmud states that one is “permitted to lie (lit., ‘change one’s speech’) for the sake of peace (לאדם לשנות בדבר השלום) (מותר לו).”<sup>106</sup> According to Rav Nathan, “[i]t is a *commandment (mitzvah)* [to do so,] . . . [s]eeing that for its sake even the Holy One, blessed be He, modified a statement . . .”<sup>107</sup> Maimonides upheld this talmudic precedent,<sup>108</sup> as did Rabbi Yosef Karo.<sup>109</sup> What is seen from these sources is that in certain cases—especially when the value of peace conflicts with the value of truth—uttering falsehoods is more ethical than uttering factually correct statements.<sup>110</sup>

The theological significance of this position should not be overlooked. God abhors falsehood so much so that rabbinic sages believe “God’s seal is truth.”<sup>111</sup> Nonetheless, Jewish law permits falsehood for the sake of peace, thereby demonstrating that peace not only outweighs truth in law and ethics, but from a theological perspective, as well. This is evident in B.T. *Yevamot* 65b, “*Gadol hashalom, she’af hakadosh baruch shinah bo*” (translated, “peace is so great that even God lied for its sake”).<sup>112</sup> Embedded in this non-legal (*aggadic*) statement is a rather weighty theological position whose implications are seen in Jewish law’s treatment of false speech. If peace is so great that even God—whose “seal is truth”—lied for

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106. BABYLONIAN TALMUD, *Yebamoth* 65b (also translated as, “[o]ne may modify a statement in the interests of peace”).

107. *Id.* (emphasis added).

108. Maimonides, *Hilchot Gezeilah va’Avedah (Robbery and Lost Property)* 14:13, at 143.

109. SHULKHAN ARUKH, *Choshen Mishpat*, 262:21. Rabbi Moshe Isserles (often referred to by his Hebrew acronym, the “Rama”) states that falsehood is only permitted in the case of “*ushpiza*” in order to spare ungenerous hosts from being taken advantage of unfairly by “*bnei adam sh’einam mehuganim*,” *id.*, which is the reason given by Rashi. Yet, curiously, the Rama cites Tosafot (who said the reason is based on “*darkei shalom*”) as his source, not Rashi.

110. Other cases of permitted “ethical falsehoods” are found in the following: JERUSALEM TALMUD, *Sotah* 1:4; MIDRASH LEVITICUS RABBAH 9:9 (Rabbi Meir altered truth for the sake of promoting “*shalom bayit*,” domestic peace); BABYLONIAN TALMUD, *Nedarim* 50a (falsehood permitted for the sake of comforting others); BABYLONIAN TALMUD, *Sanhedrin* 11a (in order to spare others from embarrassment); BABYLONIAN TALMUD, ‘*Abodah Zarah* 28a (in order to prevent imminent bodily harm or loss of life); BABYLONIAN TALMUD, *Kethuboth* 77b; BABYLONIAN TALMUD, *Ta’anith* 23b; JERUSALEM TALMUD, *Makot* 2:6 (falsehood permitted for the sake of modesty); BABYLONIAN TALMUD, *Sanhedrin* 97a (for the sake of privacy); SHULKHAN ARUKH, *Choshen Mishpat* 333:5 (citing BABYLONIAN TALMUD, *Bava Metziah* 75b (to prevent unjust economic loss)).

111. Maimonides, *MISHNEH TORAH*, *supra* note 91.

112. See BABYLONIAN TALMUD, *Yevamot* 65b (referencing the story in *Genesis* 18:12–15). God “altered [his speech] for the sake of peace,” according to the Talmud. When Sarah laughed at God’s promise of a child in her old age; she exclaimed, “Now that I am withered, am I to have enjoyment—with my husband so old?” *Genesis* 18:12. When repeating her words to Abraham, God says that she called *herself* old, and made no reference to her having described Abraham as old: “Why did Sarah laugh, saying: ‘Shall I in truth bear a child, old as I am?’” *Genesis* 18:13.

its sake, Jewish legalists are impelled to hold that falsehood is ethical when peace is at stake, regardless of their personal inhibitions about lying. The overriding value of peace led Jewish legalists to accept peace as a legitimate legal justification for permitted falsehoods.

In addition to the talmudic legal discussions regarding conflicts between truth and peace, Jewish law's ethico-legal balancing is evident in the rabbinic teaching that one should "be as the students of Aaron: love peace and pursue peace" ("*hevei mitalmidav shel aharon: ohev shalom v'rodef shalom*").<sup>113</sup> In a homiletic that is important in considering the narrative background behind Jewish law's false-speech jurisgenesis,<sup>114</sup> the rabbis imagined that Aaron, the High Priest, pursued peace by means of a ruse. They imagined he would tell Friend *A*, who is in the midst of a dispute with a Friend *B*, that Friend *B* really loved him, and he would tell Friend *B* the same about Friend *A*, so that they would reconcile and make peace. Because Aaron's falsehoods were uttered for the sake of peace, the falsehoods were not only permitted, but ethically meritorious.<sup>115</sup>

Furthermore, Maimonides states that peace (*shalom*) is a legitimate value to consider in adjudicating conflicts in ritual law.<sup>116</sup> The thrust of the foregoing rabbinic discussions and codifications of falsehood laws is that peace outweighs truth; consequently, the ethical values of peace, modesty, and privacy are necessarily relevant *halakhic* values that merit consideration in Jewish false-speech adjudication.

Despite the seemingly numerous cases where falsehood is permitted, Jewish legal authorities take pains to emphasize that the truth must still be pursued as the ideal state of discourse.<sup>117</sup> These exceptions to the command of "you shall not lie"<sup>118</sup> only prove the rule that lying is generally unethical. The nuances of these exceptions, along with the concept of ethical

113. PIRKEI AVOT (ETHICS OF THE FATHERS) 1:12.

114. Cover, *Nomos and Narrative*, *supra* note 4, at 11.

115. AVOT D'RABBI NATAN (FATHERS OF RABBI NATAN) 12:3.

116. MISHNEH TORAH, *Laws of Megillah and Hannukah* 4:14:

If one had in front of him a candle for Hannukah, or a candle for lighting one's home (i.e., Sabbath candles), or a candle for one's home or [the means for attaining wine for] the sanctification of the day (*Kiddush*), the candle for one's home is granted priority, for the name of God is erased to make peace between man and wife. Great is peace, for the Torah was given to make peace in the world, as it says, "Its ways are ways of pleasantness, and all its paths are peace."

117. TELUSHKIN, *supra* note 71, at 450 ("[A]lthough the Sages allowed a person on some occasions to deviate from the truth, one should 'place the fear of the Lord before oneself so as not to be excessively lenient.' In other words, we should be guided not only by those instances in which lying is permitted, but also by the general biblical and talmudic abhorrence of lying."); *see also supra* note 100.

118. *Leviticus* 19:11 ("[Y]ou shall not deal deceitfully or falsely with one another.").

falsehood, create a legal presumption in Jewish law that falsehoods are only permitted if compelling ethical reasons exist to justify the falsehoods.

### 3. *Ethical Falsehood as a Model for an Ethical False-Speech Adjudication*

False-speech cases rarely reach the Supreme Court and would be an ideal doctrinal area in which an ethically conscious adjudicatory model could be applied. The ethical supposition that falsehoods should be avoided is a normative ethical position in both religious and secular thought,<sup>119</sup> and acknowledging these ethical norms would not constitute “moralizing.” As Justice Breyer observed, “[t]he dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts.”<sup>120</sup> As long as proposed regulations targeting false statements of fact do not unduly threaten constitutionally protected speech, Justice Breyer’s approach, fused with the breathing-space standard, the *bonos mores* theory, and the concept of ethical falsehood, suggests that such

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119. According to Kantian ethics, one may not lie, even concerning matters of self-preservation. See Kant, *supra* note 71, at 361–65 (explaining that there are no legitimate reasons to permit lying; falsehood is always ethically wrong); see also ST. AUGUSTINE, *supra* note 71, at 47, 113 (traditional Catholic doctrine affirms Augustinian teachings that lying is always sinful). Lying is also unethical in Buddhist thought; one of the Five Precepts of Buddhism is “to abstain from false speech.” PHILIP NOVAK, *THE WORLD’S WISDOM: SACRED TEXTS OF THE WORLD’S RELIGIONS* 70 (1994).

As this Article shows, ascertaining whether it is more ethical to lie than to tell the truth in any one particular circumstance can be quite complicated. Nuances in this area extend from the mundane to the serious. See BOK, *supra* note 71, at 28–31; see also TELUSHKIN, *supra* note 71, at 423–24.

While there may be ethical and religious consensus that lying is generally wrong, there may not be philosophic consensus on what is considered a lie and what is considered a truthful statement—that is, how do we know what is “true” and what is “false”? This question is related to the time-honored philosophical question regarding the problem of determining objective truth: “how do I know that what is red to me is also red to you?” Similarly, what is “true” to one person may not be “true” to another person. See YAROSLAV SHRAMKO & HEINRICH WANSING, *TRUTH AND FALSEHOOD: AN INQUIRY INTO GENERALIZED LOGICAL VALUES* 5–6 (2011) (discussing the concepts of “truth values” and “the categorical status of truth and falsehood”); see also BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY* 1–2 (2002) (comparing modern culture’s “demand for truthfulness” and “passion for truthfulness” with the philosophical dilemma relating to the question of objective truth). The literature on the philosophy of truth and falsehood is vast; this sampling is presented here merely to underscore the complexity of this topic. What should be noted is the difficulty of this issue in disciplines other than law and religion, as indicated by the number of thinkers from Diderot to Kant, and continuing with the work of modern philosophers such as Rorty and Williams, who have grappled with the philosophical and ethical dimensions of truth and falsehood.

120. *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012) (Breyer, J., concurring) (“Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech.”).

regulations should be upheld.<sup>121</sup> However, even if false-speech statutes are upheld, the kinds of falsehoods that the statutes are designed to restrict are still protected speech under the First Amendment, if the falsehoods possess ethical merit.<sup>122</sup> Alternatively, when an insufficient degree of legally cognizable harm dictates that the false-statements-of-fact statute is stricken down, this ethical model strongly suggests that, at the minimum, the adjudicatory process acknowledges the ethical considerations which factored into the statute's legislative intent.

C. *Jewish Law's Ethical Balancing as an Analogue to Justice Breyer's First Amendment Balancing*

Because *aggadic* sources occasionally shed light upon the underlying values that guide *halakhic* decision making, an understanding of the interplay between Jewish law (*halakha*) and *aggada*—the non-legal homiletics and narratives in which values, theology, and ethics are embedded—is crucial to understanding the role of values in guiding Jewish law.<sup>123</sup>

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121. False statement of fact statutes that utilize this paradigm would still have to be sufficiently narrowly tailored to survive First Amendment scrutiny, even if the standard of scrutiny applied is Justice Breyer's brand of intermediate scrutiny. Congressional legislation that is carefully crafted to prevent certain types of particularly objectionable falsehoods, as opposed to satirical, rhetorical, theatrical, literary, ironic, or hyperbolic falsehoods, could be constitutional. See *id.* at 2560–65 (Alito, J., dissenting).

122. If a false-statement-of-fact statute passes constitutional muster and false-speech cases are adjudicated, falsehoods would still be protected by the First Amendment if the false speech bears any ethical merit. The doctrine of ethical falsehood would suggest that the ethical merit of false speech should be a factor in false-speech adjudication, similar to how the literary, artistic, and scientific merit of obscene speech must be considered in obscenity adjudication. For instance, if the Stolen Valor Act is rewritten so that it is more narrowly tailored, an individual charged under the Act would be acquitted if significant ethical reasons could be adduced to justify his false claim of having received the Medal of Honor. One could imagine a scenario where an individual is believed to be a Medal of Honor recipient and lies about having received the Medal in order to spare him and his family embarrassment. If the individual played no part in having created the impression of being a Medal of Honor recipient, the lie would have ethical value and would thus not be unprotected speech under a revised Act. Applying the doctrine of ethical falsehood would mean that the mere existence of a federal false-statement-of-fact statute would not guarantee that an individual charged under the statute would be convicted. And because ethical falsehoods would be permitted even in the context of lying about military honors, the statute would not unduly chill permitted speech.

123. See Cover, *Nomos and Narrative*, *supra* note 4, at 12–13 (illustrating how narrative gives meaning to law in “paeideic” communities, and discussing how law itself can be used to create meaningful nomos around which normative communities can cohere).

The now-classic, oft-cited, and highly influential treatment on the topic, *Nomos and Narrative*, has spawned its own corpus of commentary: Samuel J. Levine, *Halacha and Aggada: Translating Robert Cover's Nomos and Narrative*, 1998 UTAH L. R. 465, 466 n.2 (1998) (“The breadth of Cover's influence on the academy is apparent in the diversity of journals which have

The modes of ethical analysis engaged in by talmudic and midrashic “legal storytelling”<sup>124</sup> are “jurisgenerative,” in that the narratives lead to “the creation of legal meaning.”<sup>125</sup> While these homiletic narratives may lack precedential legal value, they are critical for developing an understanding of how law is formed and how meaning adheres to law in normative communities. As Robert Cover illustrates, Jewish law is shaped by the values embedded in its narrative tradition.<sup>126</sup> *Midrash* and *aggada* are Judaism’s cultural narratives—its “mythos.”<sup>127</sup> Understanding the narrative context in which laws are embedded is crucial in the understanding of law’s proper meaning;<sup>128</sup> this understanding can greatly assist in the crafting of an ethically conscious model of false-speech adjudication. Only by understanding a law’s “legal DNA” can one hope to know how to properly apply the law and how to balance competing values in legal decision making.<sup>129</sup>

Thus, understanding the *aggadic*, narrative context in which Jewish speech law was crafted is crucial in appreciating why *halakha* adopts nuanced positions regarding false speech. The following Midrash was part of the narrative context in which talmudic speech law was formulated, and

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published tribute volumes to him . . . .”); see also Part II, exploring how Cover’s concepts can be understood by examining the interplay between *halakha* and *aggada* in the Jewish tradition, as Cover’s *Nomos and Narrative* is “a conscious translation of the conceptions of *halacha* and *aggada*.” *Id.* at 485 n.102 (quoting Joseph Lukinsky & Robert Abramson, *Robert Cover, A Jewish Life*, 45 CONSERVATIVE JUDAISM 4, 11 (1993)); see generally Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover’s Nomos and Narrative*, 96 YALE L.J. 1836 (1987) (reflecting upon *Nomos and Narrative* as a pedagogical tool); Robert C. Post, *Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 YALE J.L. & HUMAN. 9 (2005) (assessing *Nomos and Narrative*’s possible waning influence); Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15 (1996) (utilizing *Nomos and Narrative* to analyze *Bob Jones University v. United States*, 461 U.S. 574 (1983)); Nickolai G. Levin, *The Nomos and Narrative of Matsushita*, 73 FORDHAM L. REV. 1627, 1635–46 (2005) (describing *Nomos and Narrative* as instructive in analyzing summary judgment procedure in antitrust law); and Steven D. Fraade, *Nomos and Narrative Before Nomos and Narrative*, 17 YALE J.L. & HUMAN. 81 (2005) (discussing, among other things, the interconnection between law and narrative in biblical and rabbinic literature).

Societal values embedded in cultural and fictional narratives influence non-legal factual enterprises as well. Cf. DAVID FOSTER WALLACE, *The Empty Plenum: David Markson’s Wittgenstein’s Mistress*, in BOTH FLESH AND NOT: ESSAYS 106 (2012) (“[M]yth enriches facts [and] history [in a] Positivist and factual function.”).

124. Levine, *Halacha and Aggada*, *supra* note 123, at 467.

125. Cover, *Nomos and Narrative*, *supra* note 4, at 44.

126. See *id.* at 11–12.

127. *Id.* at 9; see also *id.* at 15 n.39, 23 n.66.

128. *Id.* at 4–5.

129. *Id.* at 46.

reveals the sui generis place that truth holds in Jewish ethico-theological thought:

Rabbi Shimon said: When God was about to create Adam, the ministering angels split into contending groups. Some said, 'Let him be created.' Others said, 'Let him not be created.' That is why it is written: 'Mercy and truth collided, righteousness and peace clashed' (Psalms 85:11).

Mercy said, 'Let him be created, because he will do merciful deeds.'

Truth said, 'Let him not be created, for he will be full of falsehood.'

Righteousness said, 'Let him be created, for he will do righteous deeds.'

Peace said, 'Let him not be created, for he will never cease quarrelling.'

What did the Holy One, blessed be He, do? He took truth and threw it to the ground.

The angels said, 'Sovereign of the universe, why do You do thus to Your own seal, truth? Let truth arise from the ground.'

Thus it is written, 'Let truth spring up from the earth' (Psalms 85:12).<sup>130</sup>

This Midrash is not only an etiological tale; it is a profoundly important statement about priorities in Jewish ethical balancing. According to the rabbinic authors of this Midrash, the question of whether to create man posed an ethical dilemma to God and impelled God to engage in a mode of values balancing in order to make an ethical choice. The rabbis portrayed the angels as arguing against man's creation not because they were jealous or potentially fearful of human beings, but because they were concerned that man would not act ethically.<sup>131</sup> God is then depicted as engaging in a form of ethical balancing. Since the scales were even—two values favored man's creation, and two opposed it—God "tosse[d] Truth down to earth to tip the scales," so that the balancing resulted in favor of the creation of man.<sup>132</sup> This imaginative narrative, in which values are

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130. *Genesis Rabbah* 8:5. Translation in JONATHAN SACKS, *THE DIGNITY OF DIFFERENCE: HOW TO AVOID THE CLASH OF CIVILIZATIONS* 63–64 (2002).

131. See DAVID HOWARD AARON, *POLEMICS AND MYTHOLOGY: A COMMENTARY ON CHAPTERS 1 AND 8 OF BERESHIT RABBA* 333–34 (1994) ("Man's future wickedness and lack of moral integrity are seen as the primary motivating factors behind the angels' aversion to man's creation . . .").

132. *Id.* at 337. According to other scholars of this Midrash, the angels cloaked their "pure enmity towards man" in disingenuous ethical arguments. *Id.* at 334–36; see also Alexander Altmann, *The Gnostic Background of the Rabbinic Adam Legends*, 35 *JEWISH Q. REV.* 371, 372–73 (1945) (applying an inter-textual midrashic reading to demonstrate that the angels' ethical arguments against man's creation concealed deeper malevolent motivations). In Gnostic readings



personified and then judged as if they were litigants, is a jurisgenetive, interpretive narrative. It lends meaning as well as content to Jewish false-speech law.<sup>133</sup>

This midrash helps explain why the values of peace, mercy, and righteousness outweigh truth in Jewish law. The values of mercy and righteousness outweigh the value of truth, for if mankind were only judged by his devotion to truth, he would not deserve to be created. Although truth and peace appear equally defeated by mercy and righteousness, it is truth that gets “thrown to the ground,” not peace. Although “God’s seal is truth,” God chooses righteousness and mercy over truth, and then chooses peace over truth as well.<sup>134</sup> That truth can be outweighed by other values is a

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of this Midrash, *Emet*’s (the personification of truth) downfall is compared to the fall of Satan; Satan’s hatred for man originates from the expulsion of Satan from heaven (an expulsion that made room for man). AARON, *supra* note 131, at 334–35. The equation of Satan with *Emet*, though, is problematic. *Id.* at 336–37.

In contrast to Altmann’s interpretation of the Midrash—which places it in the context of the corpus of rabbinic Adam legends which contained implicit Gnostic motifs—Louis Ginzberg interpreted the Midrash as a polemic against Philo-Gnostic views that other powers, such as angels, had a role in man’s creation. This reading also serves as an explanation of the plural form used in *Genesis*. See *Genesis* 1:26 (“Let us make man . . .”). The angels tried to prevent man’s creation, and God overruled the angels who tried to prevent man’s creation. According to this reading, God only consulted with the angels on the question of whether to create man, and did not involve the angels in the physical creation of man. AARON, *supra* note 131 at 335–36 (citing 5 LOUIS GINZBERG, *LEGENDS OF THE JEWS* 69 n.12 (Henrietta Szold trans., 1909)).

133. See Cover, *Nomos and Narrative*, *supra* note 4, at 7–8.

134. This midrash can also be read several ways: (1) thematically, as a component of a broader midrashic metaphysical narrative in which angels and men are perennially at odds with each other; see Haggai Ben-Shammai, Shaul Shaked & Sarah Stroumsa, Lecturers at *Exchange and Transmission Across Cultural Boundaries: Philosophy, Mysticism and Science in the Mediterranean World*, a Workshop at the Institute for Advanced Studies at the Hebrew University of Jerusalem (Feb. 28–Mar. 2, 2005) (comparing rabbinic, Islamic, and Christian imaginings of *Genesis*’ creation of man narrative); (2) linguistically and literarily, as a statement that God’s approval of creation “applies specifically to humanity”; Howard Eilberg-Schwartz, *Who’s Kidding Whom?: A Serious Reading of Rabbinic Word Plays*, 55 J. AM. ACAD. RELIGION 765, 766 (1987) (applying literary theory to midrash); (3) homiletically; see NORMAN LAMM, *THE RELIGIOUS THOUGHT OF HASIDISM: TEXT AND COMMENTARY* 315–16 (1999) (where Rabbi Elimelekh of Lizhensk interpreted this midrash as a commentary of *Psalms* 40:10; 85:12, arguing that God created man for the sake of righteous individuals who can help liars rise from their state of foolishness and reach a state of truth); (4) theologically; SACKS, *supra* note 130, at 63–64 (explaining that absolute, metaphysical religious “Truth” only exists in heaven, and human beings only have access to scattered, fragmented religious “truths”); and (5) legally, as a model for dispute resolution. See Yitzchok Adlerstein, *Lawyers, Faith, and Peacemaking: Jewish Perspectives on Peace*, 7 PEPP. DISP. RESOL. L.J. 177, 182 (2007) (describing how courts should only intervene “when people are stuck in a dispute mode,” just as God in His heavenly court only intervenes to adjudicate angelic disputes when angels cannot resolve conflicts on their own accord).

For a rigorous scholarly treatment of this Midrash, see AARON, *supra* note 131, at 332–42, which analyzes this Midrash in the context of the other *midrashim* of *Genesis Rabbah* 1 and 8. According to Aaron, the *midrashim* in these chapters are not arbitrary collections of rabbinic

motif that appears in other *aggadic* statements, such as the striking talmudic saying, “[g]reat is . . . peace. Seeing that for its sake . . . [God] . . . modified [the truth].”<sup>135</sup> Since Jewish tradition accepts midrash and *aggadah* as “established materials for interpretation,”<sup>136</sup> their narrative roles as interpreters of Jewish *nomoi* merit attention.

God’s ethical balancing, as described by this midrash, bears resemblance to Justice Breyer’s First Amendment balancing. Justice Breyer acknowledges that falsehood is objectionable in the abstract, but articulates a range of circumstances where even false statements of fact should be tolerated based on ethical and moral considerations.<sup>137</sup> This is rather reminiscent of the Jewish legal and narrative approach to balancing false speech, in that it also weighs the relative merits of conflicting values and advocates for the merits of one value over the other. Justice Breyer and the Jewish tradition both emphasize the importance of truth while concomitantly recognizing that even false statements of fact may possess ethical value. Under an ethical false speech–adjudicatory model that utilizes Justice Breyer’s approach to First Amendment balancing, truth would be judicially recognized as a preeminent ethical value which merits consideration in First Amendment balancing—with the caveat that even

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homilies that were later anthologized into *Genesis Rabbah*, but were all specifically selected because they thematically relate to the issues which the editor of *Genesis Rabbah* wished to expound upon.

135. BABYLONIAN TALMUD, Yebamoth 65b.

136. Cover, *Nomos and Narrative*, *supra* note 4, at 25.

137. See *United States v. Alvarez*, 132 S. Ct. 2537, 2553 (2012) (Breyer, J., concurring). Such circumstances include lying to “prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence . . .” *Id.* Jewish law also permits lying based upon these justifications with the caveat that each circumstance is *sui generis* and must be judged on its own terms. See discussion *supra* Part II.B. In every case where a lie would ostensibly be permitted, the ethical individual must nonetheless engage in a form of balancing akin to Justice Breyer’s proportionality approach to speech regulation statutes; for instance, the ethical harm of telling a terminally ill person unaware of his condition that he “will get better soon” must be balanced with the ethical value of providing the sick person with comfort. The abstract question requires an evaluation of which ethical value is greater: the value of telling the truth or the value of comforting the sick? Then, the particular circumstances of this case—e.g., the psyche of the sick individual, how deceptive the lie is, the nature of the illness—would guide an individual towards the most ethical choice. It is also important to note that this type of ethical balancing is not formulaic or scientific; it is not a matter of inserting factors into an equation so that they dictate a certain result. Instead, it is a process that involves the cultivation of an ethical consciousness that allows an individual to make an ethically sensitive choice based upon an informed awareness of the complex, nuanced nature of ethical behavior.

Justice Alito characterizes these falsehoods as “white lies,” but the term “white lie” carries a more casual connotation that does not reflect the more gravid nature of lying in a circumstance such as this one, and does not reflect the at-times paradoxical ethical imperative of lying. See *Alvarez*, 132 S. Ct. at 2562 (Alito, J., dissenting).

truth must occasionally be “thrown to the ground” for the sake of mercy, righteousness, and peace.<sup>138</sup>

*D. The Precedential and Jurisprudential Bases for Integrating Moral Ethics into False-Speech Law*

*1. Obscenity Adjudication*

Utilizing moral ethics in First Amendment balancing would not be unprecedented. First Amendment law takes moral ethics into account in obscenity adjudication,<sup>139</sup> and it is not too far-fetched to propose that it

138. See generally DAVID A. TEUTSCH, *ETHICS OF SPEECH: A GUIDE TO JEWISH PRACTICE* (2006) (presenting an alternative values-based decision-making model in Jewish speech ethics).

139. See generally David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974) (applying a moral theory in order to clarify constitutional obscenity adjudication); see also Arnold H. Loewy, *Obscenity, Pornography, and First Amendment Theory*, 2 WM. & MARY BILL RTS. J. 471, 477 (1993) (mentioning that Justice Scalia upheld the statute at issue in *Barnes v. Glen Theatres* because of “the perceived immorality of public nudity”). See also sources cited *supra* note 50 for critiques of speech categoricism.

Although obscenity is not the focus of this Article, it is important to note significant instances where non-First Amendment values—in the case of commonly shared moral values over obscenity—influenced both First Amendment jurisprudence and obscenity adjudication. Cultural moral ethics, this Article posits, ostensibly influenced obscenity adjudication. This Article further contends that just as moral ethics appear to have influenced cultural attitudes regarding falsehood, they have evidently impacted cultural views regarding obscenity as well. See *infra* notes 138, 146; see also JAKOBSEN & PELLEGRINI, *supra* note 56, *passim* (discussing the religious roots of Western notions of sexual morality). The majority of Americans still adhere to Abrahamic religions whose teachings contain a multitude of admonitions against verbal and physical vulgarity, sexual immorality, immodesty, and profanity. See, e.g., *Proverbs* 10:32 (King James) (“The righteous suit words to the occasion; the wicked know only subversive talk.”); *Romans* 12:14 (King James) (“Call down blessings on your persecutors—blessings, not curses.”); *Ephesians* 5:4 (Revised English Bible) (Oxford Univ. Press & Cambridge Univ. Press 1989) (“No coarse, stupid, or flippant talk: these things are out of place; you should rather be thanking God.”). The cultural value that lewd imagery and vulgar language should not be given free reign at all times, especially if children could be exposed to it, appears to be so deeply ingrained that not even the First Amendment value of personal autonomy (a civic ethic) always outweighs the moral value of preventing obscenity (a moral ethic).

Recognizing that words, like obscenity, can inflict real harm (and can therefore be construed as unethical or immoral), others have argued that additional forms of protected speech should be treated like obscenity. See Thomas C. Grey, *Responding to Abusive Speech on Campus: A Model Statute*, 1 RECONSTRUCTION 50, 52–53 (1990) (averring that the moral value of preventing emotionally distressful hate speech should override freedom-of-speech values); see generally Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL’Y 81, 81 (1991); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134–35, 177 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2321–22, 2380 (1989); see also SUMNER, *supra* note 44, at 50–51 (postulating that the moral harms caused by hate speech and obscenity may provide constitutional grounds for limited Canadian obscenity regulations).

should take moral ethics into account in false-speech decisions, as well. Both obscenity and falsity are culturally regarded as normatively unethical speech, even when the speech causes no monetary harm.<sup>140</sup> Additionally, the danger that habituation to untruth can lead to callousness, and perhaps even to mendacity, is analogous to the concern that overexposure to obscenity has an invidious, vulgarizing effect upon individuals.<sup>141</sup> Recently,

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For a non-academic overview of Jewish ethical views concerning speech, see generally JOSEPH TELUSHKIN, *WORDS THAT HURT, WORDS THAT HEAL: HOW TO CHOOSE WORDS WISELY AND WELL* (First Quill ed. 1998), discussing the importance of ethical, fair, and honest speech. While a complete discussion of the voluminous Jewish literature on this topic is beyond the scope of this Article, further mention should be made of the “Chafetz Chaim” (alternative spellings include “Hafetz Hayyim,” “Chafetz Chayim,” and “Chofetz Chaim”; lit., “He who desires life”), Rabbi Israel Meir haKohen Kagan, an early twentieth-century scholar who pioneered the field of Jewish ethical speech literature. In his terminology, ethical speech constitutes “guarding the tongue” (*shemirat halashon*). He wrote with a particular piquancy on the importance of refraining from “the evil tongue” (*lashon hara*), or gossip and other hurtful speech spoken about an absent individual. See generally Israel Meir haKohen Kagan, *SEFER CHAFETZ CHAYIM* (Yedidya Levy trans., Mazal Press 2008) (complete English translation of his writings on speech ethics accompanied by the original Hebrew); see also SHIMON FINKELMAN & YITZCHAK BERKOWITZ, *CHOFETZ CHAIM—A LESSON A DAY: THE CONCEPTS AND LAWS OF PROPER SPEECH ARRANGED FOR DAILY STUDY* xvii–xxx (Artscroll Mesorah 1995) (non-scholarly reformulation of Chafetz Chaim’s ethical writings); see generally CHOFETZ CHAIM, *LESSONS IN TRUTH: DAILY STUDIES IN HONESTY AND FUNDAMENTALS OF JEWISH FAITH* (Shimon Finkelman trans., Artscroll Mesorah 2001) (surveying traditional Jewish ethics relating to honesty and truth).

140. See *supra* note 119. That even obscene speech that causes no monetary harm is proscribable parallels the religious view that words have intrinsic power, and is comparable to the Jewish legal concept of “speech acts.” The Bible equates speech with action. In the biblical worldview, speech itself is an action that can be inherently good or bad. Hence, biblical prohibitions against many forms of speech exist (e.g., taking God’s name in vain, spreading gossip, insulting or verbally oppressing others, lying, etc.). See *supra* Part III.B. There are also biblical commands to speak. Compare *Deuteronomy* 26:1–15 (discussing the declaration upon bringing first fruits to the temple), with the constitutional doctrine that there can be no compelled speech. Jewish law has largely adopted the biblical notion that speech alone can have tangible legal effects (e.g., the binding force of vows in Jewish law is based upon *Numbers* 30:2–16).

This view of speech also informed the Talmudic principle of “*dibur k’m’a’aseh*” (“speech is like action”). This principle—roughly analogous to philosopher J. L. Austin’s idea of speech acts—applies in select circumstances (such as witness testimony). See generally J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (J. O. Urmson & Marina Sbisd eds., 2d ed. 1962) (explaining his general theory of speech acts). Jewish law contains many more examples of “speech acts.” Although many of these applications are found in the context of ritual law (e.g., the command to confess sins to God or the command to pray), many are found the context of Jewish civil law as well (e.g., betrothal declarations that serve to create binding marriages). That First Amendment law appears to equate obscene speech with action on a conceptual level indicates that the religious notion wherein speech may be an “act” (and thus may be a good act or wrong act, or a permitted or proscribable act) resonates in American culture, and may even occasionally influence legal reasoning.

141. See HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY: CENSORSHIP IN A LEGAL SOCIETY* 171, 174 (1969). For a more recent analysis of the interrelationship between obscenity law and morality, see generally Mark Edward Gammon, *Free Speech and the Protection of Children*, in 2 *CHURCH-STATE ISSUES IN AMERICA TODAY: RELIGION, FAMILY, AND EDUCATION*

Andrew Koppelman argued that the harms which obscenity law seeks to prevent are not only these aforementioned societal harms, or the harms inflicted upon unwilling viewers, but are “moral harm[s].”<sup>142</sup> First Amendment obscenity decisions and jurisprudence demonstrate that the societal, political, and utilitarian values of civic ethics are not the only values that guide First Amendment law.<sup>143</sup> Obscenity adjudication, an area of law that demands a “deep intellectual need for a satisfactory fusion of constitutional law and moral theory,”<sup>144</sup> illustrates how some of the underlying values guiding First Amendment law have been the values of moral ethics as well.<sup>145</sup>

Even if upholding false-statement-of-fact statutes is characterized as crafting a new category of unprotected speech, the creation of a new category of unprotected speech would not *ipso facto* violate First Amendment precedents. On the contrary, it would be in accordance with precedential views that the Court’s list of unprotected speech is an organic, rather than static, list. As the Tenth Circuit stated in *Strandlof*, there may be “some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”<sup>146</sup> According to this jurisgenerative conception of freedom of speech, if false statements of fact are identified by the law as a category of historically unprotected speech, it would be constitutionally permissible to

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(Ann W. Duncan & Steven L. Jones eds., 2008). See also Raymond D. Gastil, *The Moral Right of the Majority to Restriction Obscenity and Pornography Through Law*, 86 ETHICS 231 (1976); cf. Richard L. Johannesen, *Diversity, Freedom, and Responsibility in Tension*, in COMMUNICATION ETHICS IN AN AGE OF DIVERSITY 166 (Josina M. Makau & Ronald C. Arnett eds., 1997) (“Obscenity law is concerned with morality . . .”).

142. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1636 (2005) (arguing that the concept of moral harm is a “coherent one,” and that “obscenity law tries to prevent a genuine evil,” but judicial tools are ill-suited to address this harm).

143. See *supra* Part I.B. If civic ethics were the only values taken into consideration in obscenity jurisprudence, moral harm would be an insufficient justification for obscenity regulations; broader political and societal justification—such as the harm obscenity causes to the polity, or how it corrupts the marketplace of ideas—would have to be demonstrated in order for the regulations to be deemed constitutional.

144. See Richards, *supra* note 139, at 45–46 (arguing for the incorporation of moral norms into obscenity adjudication based upon the premise that “in America written and state federal constitutions literally incorporate substantive moral criteria”). For a discussion on the implicit underlying moral values in obscenity law, see Ratna Kapur, Book Note, 32 J.L. & SOC’Y 317, 323 (2005) (reviewing MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* (2002)).

145. On moral ethics, see *supra* Part I.B.

146. *United States v. Strandlof*, 667 F.3d 1146, 1163 (10th Cir. 2012) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)) *vacated*, 684 F.3d 962 (10th Cir. 2012).

hold that falsehoods can become a category of legally unprotected speech, as well.<sup>147</sup>

## 2. *Hate-Speech Jurisprudence*

False speech is not the only subset of First Amendment adjudication in which jurisprudence indicates that moral ethics may be incorporated into an ethically conscious adjudicatory process. Jeremy Waldron has introduced a highly controversial values-based decision-making model in hate-speech adjudication. Waldron proposes that narrowly tailored hate-speech regulations should be constitutional under the First Amendment based on the values of maintaining social peace and supporting the public good.<sup>148</sup> Such values are ostensibly rooted in civic ethics, but it may be more suitable to construe them as being rooted in moral ethics.<sup>149</sup>

Waldron envisages social peace, inclusiveness, human dignity, and the public good becoming relevant First Amendment values.<sup>150</sup> First Amendment adjudication, he argues, should take these values into account

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147. Cf. *id.* at 1164–65.

148. JEREMY WALDRON, *THE HARM IN HATE SPEECH* 3–4 (2012) (arguing that the value of inclusiveness—e.g., the importance of preventing the social harm that hate speech can wreak upon society—suggests that hate-speech regulations should be constitutional). “Hate speech undermines this public good . . . [I]t creates something like an environmental threat to social peace, a sort of slow-acting poison, accumulating here and there, word by word . . .” *Id.* at 4. The acknowledgment that words are not just “sticks and stones,” but can actually cause real harm, corresponds to the biblical notion that words have significance beyond the immediate effects of their utterance, and accords with the religious value that discourages hateful speech. See *supra* note 140. In Jewish law, the utterance of oppressive speech, or hate speech (*ona'at devarim*), is ethically wrong; this law is based upon *Leviticus* 25:17 (“You must not wrong one another . . .”); see also *supra* note 78. But see NICHOLAS WOLFSON, *HATE SPEECH, SEX SPEECH, FREE SPEECH* 47–82 (1997) (arguing against regulating even the most offensive and obscene varieties of hate speech and obscene speech, and favoring the countervailing position that religious values point towards broad toleration of such speech).

149. The value of preventing hate speech may be rooted in the religious ethic of preventing verbal oppression (*ona'at devarim*) and thus can be characterized as a “moral ethic”. On the distinction between civic ethics and moral ethics, see *supra* Part I.B. Viewing speech as innocuous unless it causes cognizable harm is a relatively new ethical position in human history. For centuries, speech ethics hewed to the moralistic view that false, obscene, and hateful speech was intrinsically bad, regardless of whether it caused tangible harm. That many Americans still regard such speech as ethically objectionable (and the introduction of a new adjudicatory model from a prominent jurisprudential thinker that would effectively revive the older notion of hate speech as normatively unethical) demonstrates that American culture still reflects the influence of prior centuries in which the religiously-rooted moral ethics of speech were pervasive. That American society still regards falsehood as an ethical lapse reveals the extent to which it still adheres to religiously-inspired moral ethics concerning speech. Like Americans’ notions of sexual morality, Americans may also be unaware of the deeply ingrained religious roots of their speech morality. See JAKOBSEN & PELLEGRINI, *supra* note 56, at 20–21.

150. WALDRON, *supra* note 148, at 4, 11–15.

so that the Court is not seen as out of step with Americans on such matters.<sup>151</sup> As society grew to adopt values that departed from the libertarian values of Milton, Locke, and John Stuart Mill, constitutional values began to diverge from Americans' social values.<sup>152</sup> According to Waldron, the fact that hate-speech laws have been ruled unconstitutional represents a failure of freedom-of-speech law to embrace Americans' new social morality.<sup>153</sup>

Following Waldron's argument, the absence of significant false-statement-of-fact statutes likewise represents the failure of freedom-of-speech jurisprudence to embrace normative American falsity ethics. The moral ethics relating to speech appear to resonate as deeply with Americans as do civic ethics relating to speech.<sup>154</sup> If First Amendment values encompass civic ethics, moral ethics should also be contemplated as relevant First Amendment values. Falsehood regulations would be justified by similar arguments that have justified obscenity regulations. According to Waldron: just as hate speech inflicts harm upon the social fabric, false speech undermines the public good; a pervasive aura of dishonesty undermines the possibility of honest, transparent, public discourse.<sup>155</sup> Waldron's jurisprudential proposal suggests that the promotion of a more tolerant, inclusive, dignified society can be a substantive First Amendment value.<sup>156</sup> In an ethically conscious false speech–adjudicatory process, the value of advancing a more honest, ethical society stands to be a relevant First Amendment value as well.

*E. The Societal Benefits of Integrating Moral Ethics into False-Speech Law*

As Owen Fiss has shown, the Court has been influenced by First Amendment values, and its freedom-of-speech decisions have in turn

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151. *Id.* at 11–15.

152. *Id.* at 211–18.

153. *Id.* at 3–6.

154. A criterion for judging when falsehood is viewed as morally unethical or civilly unethical is a standard of personal discomfort: if one is lied to in a fashion that results in no monetary harm, and one is nonetheless offended at having been lied to, one's sense of ethical offense is rooted in moral ethics. If falsehoods only offend an individual when they cause the individual monetary harm, one's sense of ethical offense is grounded in civic ethics.

155. WALDRON, *supra* note 148, at 92–96. False statements of fact can also lead to cognizable harms, such as fraud, albeit less directly than statements uttered with the specific intent of committing fraud. *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2558–59 (2012) (Alito, J., dissenting) (detailing the ways in which false Medal of Honor claims precipitated fraud).

156. Waldron, *supra* note 148, at 82–83.

shaped American morals.<sup>157</sup> A jurisgenerative elevation of the moral ethic of valuing honest speech for its own sake<sup>158</sup> to the level of relevant First Amendment values would be a statement that honesty, ethics, and integrity are common values around which a normative American community can cohere.<sup>159</sup> It would also reflect the ethical position that these values may be just as consequential, in different ways, as the values of personal autonomy, the promotion of a vibrant democracy, and the marketplace of ideas. Furthermore, integrating some of the culture's most basic ethical principles into false-speech adjudication would assure values-oriented Americans that civic ethics and moral ethics are not diametrically opposed; such an integration would have the secondary effect of promoting the civic ethic of maintaining a vibrant, participatory self-governing society.<sup>160</sup>

If the Court acknowledged that the value of advancing a more honest, moral, and ethical society is a legitimate governmental interest, it would significantly enhance the uncontroversial and vitally important effort of working towards creating a more ethically conscious society.<sup>161</sup> Moreover,

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157. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1405 (1986) (discussing how Supreme Court freedom-of-speech decisions helped define how Americans view the values associated with freedom of speech and how these decisions, in Harry Kalven's term, helped Americans develop a "Free Speech Tradition").

158. And simultaneously discouraging false speech in any of its incarnations—both the false speech that causes legally cognizable harm and the false speech that only generates ethical and moral offense.

159. The Court's historical prestige and current role as arbiter upon a kaleidoscopic range of societal moral questions indicates that such a judicial statement would merit attention for its ethical import. See *supra* note 15 and accompanying text. Such a judicial acknowledgment would constitute an exercise of the Court's jurisgenerative prerogative to create legal meanings like the American "Free Speech Tradition" that unite divergent American paideic communities around common civic narratives. See *supra* note 146 and accompanying text.

160. See *supra* note 15 and accompanying text.

161. Promoting a more ethically conscious society should not be conflated with promoting a more religious society; neither should the goal of promoting a more ethical society be branded as a religious Trojan horse. While this Article presents a model for drawing upon religious values (specifically those pertaining to the issue of falsity) and argues in favor of recognizing the influence of religion on societal ethics and morality, the "promotion of a more ethical society" should not be read as code-language for promoting a more religious society. Rather, this language is intended to convey the supposition that normative societal ethics—including speech ethics, which have their roots in religious values—can have salutary effects upon freedom of speech decision making. Such a purpose is not strictly religious (though religions would presumably support this purpose) and would thus not constitute an impermissibly religious governmental purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). And while it is not the role of the Supreme Court to attempt to create a more ethical society, their legal decisions do carry symbolic import. See *supra* notes 16, 144 and accompanying text.

Similarly, while it is not the Supreme Court's prerogative to create a more diverse society, their decision in *Grutter v. Bollinger* was jurisgenerative. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (stating that promoting diversity in higher education is a legitimate government interest). The Court maintains that diversity is an important societal value, lending an ethical and



a concurrence between First Amendment values and the moral ethics of false speech would be beneficial not only because such a harmonization would be heartening for those who concomitantly embrace constitutional and religious values,<sup>162</sup> but because, as Robert Cover observed, “it is a great advantage to the community to have such principles resonate with the sacred stories of other communities that establish overlapping or conflicting normative worlds.”<sup>163</sup> The “great advantage” of such a harmonization would inhere in the unification of diverse normative American communities around a constitutional narrative that embraces both civic and moral ethics. And such harmony is ultimately necessary because “[n]either religious [communities], however small and dedicated, nor utopian communities, however isolated, nor cadres of judges, however independent, can ever manage a total break from other groups with other understandings of law.”<sup>164</sup> A jurisgenesis that integrates the dual narratives of moral ethics and civic ethics into an ethically conscious false speech–adjudicatory praxis would enable these occasionally conflicting normative worlds to converge around a common constitutional narrative, and, thus, to move law a step closer towards realizing Cover’s vision of a redemptive constitutionalism.

## V. CONCLUSION

Utilizing an ethically conscious false speech–adjudicatory model would be a powerful demonstration that the values gap between the Court and American citizens is highly exaggerated. Demonstrating a modicum of agreement between constitutional and moral values on the issue of honest speech could encourage citizens who live according to religiously-inspired ethical values to participate in the civic sphere. Harvard sociologist Robert

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moral narrative to equal protection law and becoming part of the American tradition of justice and equality that has its roots in the Declaration of Independence, the Thirteenth Amendment, *Brown v. Board of Education*, and other decisions that have promoted the causes of equality, justice, and freedom. See *id.* at 328–29.

162. Additionally, demonstrating that the gap between the values of the civic and religious spheres is not unbridgeable would open new avenues for constitutionally permissible and mutually beneficial interchange between the two spheres. Each sphere is filled with an abundance of wisdom, and they suffer in isolation, as does any discipline. According to Nobel-Prize winning neuroscientist Eric Kandel, the benefits of interdisciplinary “cross-fertilization” have been confirmed by neurobiological studies; disciplines benefit when they are enriched by the thought of other disciplines, just as flowers benefit from bees’ pollination. See ERIC R. KANDEL, *IN SEARCH OF MEMORY: THE EMERGENCE OF A NEW SCIENCE OF MIND* 310 (2006) (“Few things are more exhilarating than bringing a new way of thinking to another discipline.”). In an ethically conscious false speech–adjudicatory process, an old yet enduring way of thinking would be brought to a related, slightly newer discipline.

163. Cover, *Nomos and Narrative*, *supra* note 4, at 33.

164. *Id.*

Putnam and others have shown that religious Americans are more likely to be more active citizens than non-religious Americans.<sup>165</sup> A values-based conflict between religion and law raises the specter of dampening the enthusiasm of religious Americans towards civic engagement and risks a “Garrisonian move” in which “religious sectarians” veer “toward nomian insularity—the rejection of participation in the creation of a general and public *nomos*.”<sup>166</sup> Reducing the perception of a values-based conflict by recognizing the “interdependence of legal meanings” would constitute a fulfillment of a democratic society’s duty to ensure the widest possible participation of its citizens in its civic affairs.<sup>167</sup>

While “[t]ruth needs neither handcuffs nor a badge for its vindication,”<sup>168</sup> neither would it be harmed by a Court imprimatur indicating that it is a value worthy of serious judicial attention. And, while the First Amendment guarantees freedom for “the speech we detest as well as the speech we embrace,”<sup>169</sup> there is ample room, as discussed in this Article, in First Amendment adjudication for regulations upon certain particularly objectionable forms of speech. Precedential analogues for an ethically sensitive false speech–adjudicatory process can be observed in the Supreme Court’s obscenity adjudication and in current hate-speech jurisprudence. Additionally, the Jewish legal concept of ethical falsehood provides a workable framework that can assist American jurisprudence in conceptualizing how law could integrate moral speech values into false-speech adjudication. Judicial acknowledgment that American false-speech ethics are ethically normative would thus not only be consistent with Court precedents and current jurisprudential thinking, but could encourage religious communities to integrate the constitutional norms of civic ethics into their own nomian communities. Moving towards a model of false speech adjudication that integrates the values of truth, honesty and integrity into judicial decision making would be a salubrious jurisgenerative act that, by harmonizing the nomian worlds of civic ethics and moral ethics, would comprise an element of a redemptive constitutionalism that creates new worlds.<sup>170</sup>

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165. See generally ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* (2010) (discussing how religious Americans participate in local elections, town meetings, community organizations, and engage in a variety of forms of political activism with greater frequency than non-religious Americans).

166. Cover, *Nomos and Narrative*, *supra* note 4, at 36.

167. *Id.* at 33. According to the Garrisonians, it would also serve as a prophylactic against the “withdrawal of perfectionists to their enclosed nomian island,” which “would ultimately cause the dissolution of government.” *Id.* at 36.

168. *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012).

169. *Id.*

170. See Cover, *Nomos and Narrative*, *supra* note 4, at 34, 68.