REGULATORY RESPONSES TO THE MENACE OF FAKE NEWS-PART 2

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Although the catastrophic effects fake news has on democracy are greatly acknowledged, there had been some major hindrances in curtailing them, which if not addressed with utmost care could lead to graver evils in the future. All of the majorly enacted regulations to curtail fake news have been criticized due to their ancillary effect on free speech. Thus a twofold discussion has erupted as to what is more important for free and healthy governance; the right of speaker's to practice free speech without any fear, or the listener's right to be protected from the menace of fake news and to form well-informed decisions. This part thus analyzes the role of fake news in the public discourse and the problems it leads to in regulating them, with a special reference to the scrutiny of speech regulations in the case of United States v. Alvarez.

The role of fake news in public discourse vis a vis free speech

Since a well-informed public is crucial to a healthy democratic self-governance,[1] the basic purpose of global protection of free speech is to promote public debate which cultivates public opinion.[2] Arguments for freedom of expression have relied on three lines of thought;[3] increased democratic legitimacy through increased participation and decision making,[4] arguments for promoting individual autonomy,[5] and arguments for allowing maximum self-expression.[6] Scholars arguing for justification of free press have only concentrated on the first two lines of

[1]Alexander Meiklejohn, *FREE SPEECH AND ITS RELATION TO SELFGOVERNMENT* (1948), reprinted in IDEAS OF THE FIRST AMENDMENT 788, 793 (Vincent Blasi ed., 2d ed. 2012);*see also* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth,* 1984 DUKE L.J. 1, 15.
[2]*See* Post, *supra* note 36, at 14.
[3]*See* Butler, supra note 26, at 424.
[4] Alexander Meiklejohn, *POLITICAL FREEDOM* 79 (1960), *see also id.*
[5]*See e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972);*see also* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991);*see also*Butler, *supra* note 26, at 424.
[6]*See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 909–10 (2010),*see also*Butler, *supra* note 26, at 424.

argument and have neglected the very last one.[7] As postulated by democratic self-governance theory, an extension of free speech to the press increases democratic legitimacy by allowing the press, without any restrictions, in informing citizens better which further facilitates them to make well-reasoned decisions for self-governance and keep a check on the government.[8] On the other hand, individual autonomy theory postulates that democracy legitimacy increases when free press and free expression enables the citizens to act as individual autonomous agents who first seek information from the press and then apply it to their own self-governance.[9] Thus it can be summarized that democratic self-governance is basically consequentialist, while individual autonomy theory holds significance for free speech at its center.[10]

Both of these theories recognizing how crucial free speech is sets out two different lines of argument for how interrelatedness of freedom of press and freedom of expression increase democratic legitimacy.[11] Therefore the law of most countries prohibits any law which curtails citizen's right of freedom of expression,[12] because free and open discourse leads to the formation of public opinion which is crucial to ensure democratic legitimacy.[13] Freedom of expression is also the most basic human rights of the Universal Declaration of Human Rights.[14] Based on Millian Principles, these broad protections thrives to ensure that "everything which is worth saying shall be said without any fear or threat" so that knowledge can grow free and untethered from government censorship or suppression and people are enabled to stress their collective will over their chosen leaders.[15] However, in protecting freedom of expression, incidental protection is also received by hate speeches and falsehoods.[16]

[7] *Seegenerally* Adam Cohen, *The Media That Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 24–41 (2011).
[8] *See*Blasi, *supra* note 30, at 359.
[9] *See* Scanlon, *supra* note 100, at 214
[10] *See id*. at 204-05, *see also*Butler, *supra* note 26, at 424.
[11] *See* Ingber, *supra* note 96.
[12] U.S. Const. amend. I; Indian Const. art. 19; New Zealand Bill of Rights Act 1990 (BoRA). S 14; GRJNDGESETZ FOR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] [Constitution] art. 5 (Germany) etc.
[13] *See*Manzi, *supra* note 38 at 2633.
[14] UDHR. art. 19.
[15] *See* Post, *supra* note 36, at 14-16.
[16] *See* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1160 (2003).

United States v. Alvarez

The decision of the Supreme Court of the United States had broken new grounds in demonstrating how protection for freedom of expression leads to hurdles in regulating fake news and how although fake news is considered to be worthless needs protection to ensure the constant growth of the marketplace of ideas.[17]The court in *Alvarez* struck down the Stolen Valor Act, which criminalized stating of false claims of receiving military honors.[18] The majority opined two justifications. *Firstly*, the act was unjustified due to the government's failure to establish that false claims about military valor could cause verifiable harm.[19] However, in defending the act the government relied on the premise that it was common knowledge that any misrepresentation of receiving military honors would demean the celebrated value of the awards.[20]The court, in order to abstain from setting a precedent which would have allowed the government to curtail false speech without illustrating any substantial harm, declared the statute annulled.[21] The concurring justices opined that the Act could have been drafted with a narrower scope, encompassing illustration of specific material harm, which would have assisted to certain that the ambit of liability remains not too large and thus does not discourages or prohibits statements which have less chances of causing harm henceforth the need to regulate is less.[22]

BRILLOPEDIA

Secondly, the majority opined that the upholding of the Act would have created a precarious precedent and worked as a dam break for excessively broad enactments for regulating lies without any judicial stopping.[23] Further, the majority, analyzed the issue with the fact that the Stolen Valor Act could be applied virtually to all false statements stating recipient of military valor irrespective of their time, location, audience, or purpose, and also to statements made in public or privately conveyed on a lighter note in homes.[24] Themajority intended not to protect false speech but rather to discourage the government to pronounce whole categories of false

[17]*See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964),
[18]*See generally* United States v. Alvarez, 567 U.S. 709 (2012)
[19]*See id.* at 725–26 (plurality opinion).
[20]*See id.*
[21]*See id.*
[22]*See id.* at 736, 738 (Breyer, J., concurring in the judgment).
[23]*See id.* at 723 (plurality opinion).
[24]*See id.* at 722–23,

speech as invalid.[25] The court was anxious, that it would be unable to draw lines of distinction about which categories of false speech might be constitutionally valid to regulate when such enactments would have been challenged.[26]

The court opined that allowing the government to exercise such broad censorship powers to regulate falsehood would lead to chill speech and people will fear selective prosecution.[27] The court, in order to avoid a slippery slope where any category of false speech could be regulated by the government and could lead to an arbitrary exercise of power, erred on disallowing the government to regulate any category of falsehoods without illustrating provable harm.[28]

Further, the Court in the*United States v. Alvarez* did not determine as to what standard of scrutiny must be applied to false speech regulations.[29] The majority scrutinized the Act with a "most exacting scrutiny"[30], which requires that enactment be in reality essential to achieve a compelling interest of the government,[31] while on the other hand, the concurrence's applied the "proportionality review"[32] standard, which analyzes the threats regulation poses to free speech with respect to its justifications.[33] The concurrence opted for the intermediate standard of scrutiny because it opined that the restriction did not pose a grave and unacceptable threat to the free speech as it concerned only that false statements which could easily be verified with facts.[34]

BRILLOPEDIA

The court further did not decide as to which standard of review would be applicable to general false speech regulations, not prohibiting a particular category of false claims as the recipient of

[25]*See* Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 383 (2016).
[26]*See id.*
[27]*See* Alvarez, 567 U.S. at 723 (plurality opinion)
[28]*See id.*; *see also* Greene, *supra* note 120, at 383; *see also*Manzi, *supra* note 38, at 2636.
[29]*See id.* Manzi, *supra* note 38, at 2636.
[30]*See* R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That is No Longer Worth the Fuss*, 67 Fla. L. Rev. 2081 (2015).
[31] *See* Alvarez, 567 U.S. at 724–25 (plurality opinion).
[32]*See* Wright, *supra* note 125.
[33]*See* Alvarez, 567 U.S. at 730 (Breyer, J., concurring in the judgment).
[34]*See id.*at 731–32.

military valor awards in this case.[35] Such elusiveness regarding standard would hinge on whether the regulation to curtail false statements of fact to be considered as content-based.[36] The court previously had charted out two types of content-based regulations to false speech[37];*firstly* viewpoint-based regulation and *secondly* subject matter based regulation.[38] Restrictions favoring and preferring one opinion over another are termed as viewpoint-based regulation, while on the other hand regulations restricting certain specified categories of false claims irrespective of the viewpoint conveyed are termed as subject-matter-based regulations.[39]

The court also declared that a content-based regulation must be strictly scrutinized,[40] and a content-based regulation is one, where it makes a distinction on the basis of the message the speaker conveys or it can only be justified by referring to the content of the speech which is regulated.[41] Based on this rule, false speech could be regulated with regard to the intent of the speaker making a false claim rather than based on the content of his claim.[42]For instance, consider two similar false statements made by two different speakers. One made it out of error, while the other out of malice, in such a case the latter could be prosecuted without relying on the strict scrutiny standard as his intent of malice would be enough to prove him liable rather than the content of his speech.[43]However, since any restriction on an entire content of a category, whether made out of malice or erroneously, would be analyzed by referring to its content, henceforth such a restriction must be scrutinized by strict scrutiny standard.[44]

The false speech regulation, thus based on the assumption that the court will apply strict scrutiny standard, must be narrowly drafted to facilitate in achieving acompelling interest of the

[35]*See*Manzi, *supra* note 38, at 2636.
[36]Id.
[37]Police Department v. Mosley, 408 U.S. 92 (1972).
[38]Id.at 95–96.
[39]*See id.*
[40] Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).
[41]*Id.* at 2222.
[42]*See* Shiffrin, *supra* note 79, at 126, 132.
[43] *See*Manzi, *supra* note 38, at 2636.
[44]*See* Reed, 135 S. Ct.2218 (2015), at 2222.

government.[45] The court in *Alvarez* despite identifying that the protection of valor of military awards was a compelling interest of the government did not uphold the act, as it opined that less restrictive options could be opted out to achieve the same.[46] Both the majority and concurring justices were on a consensus that the best suitable remedy for false speech is its true counter speech.[47] Based on John Mill's principle of liberty, Justice Kennedy stated that "The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[48] Further scrutinizing the act, Justice Kennedy stated that "only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication."[49]

The precondition laid down by the court in the*United States v. Alvarez* to narrowly draft a speech regulation thriving to achieve the compelling interest of the government has been severely looked upon as a hurdle in legislating such regulation because "no legislature could ever draft a statute that invades an individual's freedom of speech rights less than allowing for discourse to blossom and thrive in free and open debate."[50] Further in order to endure strict scrutiny standard of review, "the final constitutional hinge, therefore, swings upon the effectiveness of truth."[51]

BRILLOPEDIA

[45] Citizens United v. FEC, 558 U.S. 310, 340 (2010).
[46] *See* United States v. Alvarez, 567 U.S. 709, 724–26, 729 (2012) (plurality opinion)
[47] *See id.* at 727; id. at 738 (Breyer, J., concurring in the judgment).
[48] *See id.* at 727 (plurality opinion).
[49] *See id.* at 729.
[50] *See* Note, *Victory Through Deceit: The Constitutional Collision Between Free Speech and Political Lies*, 50 SUFFOLK U. L. REV. 717, 740–41 (2017), *see also* Manzi, *supra* note 38 at 2637.
[51] *See* Note, *supra* note, at 741; *see also* Manzi, *supra* note 38 at 2637.