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ABSTRACT

Three decades ago, the Supreme Court announced that false statements of fact are devoid of constitutional value, without providing either a reasoned explanation for that principle or any supporting citations. This assertion has become one of the most frequently repeated dogmas of First Amendment law and theory, endlessly repeated and never challenged. Disturbingly, this idea has provided the theoretic foundation for a regime in which some speakers can be penalized for even honestly-believed factual errors. Even worse, this dogma is flat wrong.

False statements often have value in themselves, and we should protect them even in some situations where we are not concerned with chilling truthful speech. When false statements are spoken sincerely, they are a useful and necessary part of argumentation, which is a powerful means of increasing human knowledge. When confronted with honest errors, proponents of competing beliefs have a natural impulse to contest them; in so doing, they unearth and disseminate facts that deepen the understanding of both speakers and listeners. False speech, therefore, is valuable because it is an essential part of a larger system that works to increase society's knowledge.

The benefits of false speech evaporate, however, when we move from honest errors to deliberate lies. Insincere speech tends to corrode, rather than further, argument. It is associated with a number of practices that deprive argument of its knowledge-promoting features. We may sometimes wish to protect insincere speech to avoid chilling truthful speech, but we should always do so cautiously.

After providing a summary of the existing law and scholarship concerning false speech, this Article analyzes the harms and benefits of false, insincere, and misleading speech. This question will be approached from the perspective of social veritistic epistemology, which will permit a detailed assessment of the consequences of various types of deceptive speech for the state of societal knowledge. I will conclude by suggesting some ways in which existing First Amendment doctrine

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could be reformed in order to better account for the constitutional value of false speech. Ultimately, it is insincerity, not falsity, which has "no essential part of any exposition of ideas," and is of "slight social value as a step to truth." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

> Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error."
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> —New York Times Co. v. Sullivan (quoting J.S. Mill) (1964)[1]

> [T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust and wide-open" debate on public issues.
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> —Gertz v. Robert Welch, Inc. (1974)[2]

INTRODUCTION

The two quotations above illustrate the confusion of the Supreme Court when it has applied the Speech and Press Clauses[3] to speech that is false, insincere, or misleading. Sometimes the Court is willing to give quite strong protections to speech that is false, as in the public official defamation context,[4] while in other contexts, such as restrictions on commercial speech, the Court has suggested that it would not protect even innocent errors in public discourse.[5] The most persistent theme of the Court's decisions in this area, however, is a reluctance to proceed beyond such superficial pronouncements and explain why the First Amendment should, or should not, value speech that is untrue or insincere.

The confusion in the Court's treatment is mirrored in the scattered scholarship on this issue. Although John Stuart Mill devoted considerable attention to the relationship between a free speech principle and the social value of false speech,[6] other scholars noted the defects in his treatment almost immediately, especially the fact that he examined examples of false speech in religious and political contexts to the exclusion of examining discourse about "facts."[7]

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[1] 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER WRITINGS 5, 20 (Stefan Collini ed., Cambridge Univ. Press 1989)).

[2] 418 U.S. 323, 340 (1974) (citations omitted).

[3] U.S. CONST. amend. I.

[4] *See, e.g.*, *Sullivan*, 376 U.S. at 271–86.

[5] *See, e.g.*, Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[6] *See* MILL, *supra* note 1, at 19–55.

[7] *See* JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 74–77 (R.J. White ed., Cambridge Univ. Press 1967) (2d ed. 1874); *see also* discussion *infra* Part I.B.1.

Strikingly, Mill's project was never taken up where he left off; rather, modern scholarly treatments of the relationship between free expression and falsity have tended to whistle their way past important assumptions about the values of falsity and insincerity in public discourse, rarely spending any time trying to justify or assess the degree to which falsity in speech is detrimental to free speech values.[8] As a result, both modern case law and scholarship on the relationship between free speech, falsity, and insincerity tend to be "casual, almost offhand," as Justice Douglas once characterized the arbitrary decision to exclude all commercial speech from First Amendment protection.[9] Thus, it is quite possible that these shallow treatments, like the old rule on commercial speech, "[will] not survive[] reflection."[10] It is the purpose of this Article to analyze the degree to which this might be the case.

This Article will, for the first time, undertake a detailed analysis of the harms and benefits that can flow from the various types of deceptive speech, including false speech (speech which does not accurately describe the world), insincere speech (speech which misrepresents a speaker's belief), and misleading speech (speech which may be literally true but which carries false or insincere implications). In this analysis, I will employ the tools of social veritistic epistemology[11] in order to assess when these types of speech are likely to increase the total number of false beliefs held by speakers and listeners. This epistemological approach has the capacity to illuminate questions that have remained obscure for some time.

The thesis of this Article is that speech that is false but sincerely believed by its utterer is generally protected by the First Amendment because such speech generally promotes the growth of social knowledge. Insincere speech, however, is excluded from First Amendment protection in almost all cases because it tends to inhibit, rather than promote, the increase of knowledge. Finally, misleading speech receives constitutional protection to the degree that its implied meanings represent what a speaker believes, whether or not those beliefs are false; it is only the insincere use of implied meanings that excludes speech from protection. However, this type of exception should only exist when the implied *meaning* of the speech is insincere, not merely when inferences might be drawn from a statement that would not be believed by the speaker.

The common theory tying all of these claims together is that the practice of good-faith argumentation by proponents of competing views is generally more conducive to the increase of knowledge than a regime that suppresses views that are probably false (when certain supporting conditions are met).[12] In other words, the

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[8] *See* discussion *infra* Parts I.B.2–3.

[9] Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

[10] *Id.*

[11] *See* ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 4–5 (1999) (defining and discussing this term).

[12] *See* discussion *infra* Part II.C (discussing the Truth-in-Evidence Principle and its relationship with defeater argumentation).

best way to arrive at true judgments is to listen to argument by proponents of opposing beliefs, rather than making an initial judgment on the validity of the question and suppressing contrary viewpoints. To the degree we believe that the First Amendment is designed to promote the growth of human knowledge,[13] such considerations point towards recognizing constitutional value in all sincere speech, whether or not it is false. But even if we reject such a view, an assessment of the degree to which false speech can advance our knowledge is critical if we wish to accurately compare the harm of protecting false speech with the harm of prohibiting it.

This Article will proceed in several parts. Part I will survey the existing case law and scholarship on the degree to which the First Amendment protects speech that is false or insincere. In this survey, I shall attempt to show that these sources are notable more for their gaps than for their broad coverage and that neither courts nor legal scholars have grappled directly with the question of how much harm false, insincere, or misleading speech causes. Next, in Part II, I shall attempt to provide a conceptual framework for a careful analysis of the relationship between free speech, falsity, and insincerity, drawing on basic concepts from legal scholarship, epistemology, and the philosophy of language to create a foundation on which to build a theory. In Part III, I will argue that false speech that is sincerely uttered should receive broad and categorical constitutional protection, subject to a few narrow exceptions, based upon its capacity to increase our knowledge as a driver of argumentation. In Part IV, I will explain why this conclusion does not extend to speech that is insincere and demonstrate that insincere speech should be protected only to the extent necessary to avoid chilling sincere speech. In Part V, I will address the problem of misleading speech. Finally, in Part VI, I will offer some suggestions of how modern First Amendment doctrine could be reformed so as to better reflect the knowledge-promoting value of false speech.

I. THE MUDDLED STATE OF CONSTITUTIONAL LAW AND THEORY ON FALSE AND INSINCERE SPEECH

A. Case Law: Bright Line Rules in Search of a Justification

This Section will explore the current state of the law applying to claims involving false, insincere, or misleading speech. After a brief flirtation with the idea that false statements might be valuable in themselves,[14] the Supreme Court has largely espoused the principle that false speech should never be protected for its own sake, but only to the extent that restricting false speech will chill truthful speech.[15]

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[13] *See, e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1978).

[14] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964).

[15] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

It has explored this idea in two primary contexts: the regulation of commercial speech and the regulation of defamation. However, although the Court has certainly been clear about false speech's lack of value, there are two reasons to doubt the validity of this dogma: first, the Court has spent little time attempting to justify or explain the reasoning underlying the rule, and second, the Court has rarely needed to test its commitment to it.

1. Defamation and False Light Privacy Cases

The Court's first significant treatment of false speech[16] came in *New York Times v. Sullivan*, a case in which the Court announced that defamation liability is significantly constrained by the First Amendment.[17] *Sullivan* held that false speech about public officials only gives rise to liability when made with actual malice, a state of mind involving either knowledge of falsity or reckless disregard for the truth.[18] The Court later clarified that "reckless disregard," in this usage, means that a speaker subjectively believed that what he said was probably false.[19] In other words, speech about public persons must be both false and insincere (not believed by the speaker) before it can be penalized.

The Court based this new rule on two key premises. The first and primary concern was the inevitability of false statements in free debate and the need to protect some such statements in order to prevent freedom of expression from being chilled.[20] The Court rejected the argument that the chilling effect could be effectively defrosted by the common law defense of truth because even truly believed statements can be chilled by the threat of expensive lawsuits and the doubt that a statement can be proven true in court.[21] As the Court reasoned, those who had only a defense of truth available would "tend to make only statements which 'steer far wider of the unlawful zone.'"[22]

The second premise involved the inherent value of speech that is false, rather than the dangers of chilling true speech. In a footnote, the Court noted that false

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[16] The Court had previously offered a few dicta on the subject, but these seemed more concerned with whether commercial speech deserved protection than whether false speech did. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147, 164 (1939) (noting in passing that "[f]rauds may be denounced as offenses and punished by law").

[17] 376 U.S. 254.

[18] *Id.* at 279–80. The rule was later extended to public figures as well as public officials. *See Gertz*, 418 U.S. at 344–45 (enunciating a distinction between private and public figure plaintiffs for First Amendment purposes).

[19] St. Amant v. Thompson, 390 U.S. 727, 731–33 (1968).

[20] *Sullivan*, 376 U.S. at 271–72.

[21] *Id.* at 279.

[22] *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

statements had an intrinsic value in public discourse.[23] Although it gave the point little discussion, the Court cited with approval John Stuart Mill's argument that false speech has value in itself, because "it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[24] Thus, *Sullivan* gave strong protection to some false statements that are made sincerely in order to protect both false speech and true.

Although *Sullivan* had been decided without a single dissent, it was not long before the Court retreated from its position on the value of false speech. Just ten years later, in *Gertz v. Robert Welch, Inc.*, the Court held that false statements regarding private persons received less protection than statements about public figures or officials.[25] Rather than an actual malice test, the Court held that false statements about private persons could be punished so long as states did not impose liability without fault.[26] This has been taken to impose a rule requiring at least negligent publication of a falsehood before liability can be imposed.[27]

More importantly for the purposes of this Article, *Gertz* signaled a sharp shift in the Court's stated attitude toward the constitutional value of falsity. In strong contrast to *Sullivan*, which had stated that false statements made "a valuable contribution to public debate,"[28] the *Gertz* Court stated that

> there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such

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[23] *Id.* at 279 n.19.

[24] *Id.* It is possible, of course, that the Court only intended this statement to apply to false statements about value laden subjects such as ethics and religion. Indeed, the main sources cited in support of this rule, Mill's *On Liberty* and Milton's *Areopagitica*, cited only examples of ethical or religious speech in support of their enunciations of a free expression principle that included false speech, so such a limitation would not be totally surprising. *See* MILL, *supra* note 1, at 19–53; JOHN MILTON, *Areopagitica*, *in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 716, 717, 728–29 (Merritt Y. Hughes ed., 1957).

[25] 418 U.S. 323 (1974).

[26] *Id.* at 347. Because *Gertz* involved speech on a matter of public concern, it remains unclear whether the requirement of fault extends to defamatory statements about private figures involving matters of solely private concern. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (limiting other aspects of the *Gertz* rule to cases involving matters of public concern); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1018 (2d ed. 2002) (stating that the Court has never resolved this question).

[27] *See* RESTATEMENT (SECOND) OF TORTS § 580B cmt. c (1977) ("It is clear also that negligence will likewise meet the constitutional requirement, though a lesser degree of fault probably would not.").

[28] *Sullivan*, 376 U.S. at 279 n.19.

> 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."[29]

Thus, the *Gertz* Court repudiated the reasoning in *Sullivan* that false statements are valuable in themselves, stating instead that error was "inevitable in free debate" and should be protected only because of the risk of inducing self-censorship.[30] At no point did the *Gertz* Court address the footnote argument from *Sullivan* asserting the opposite.[31] Moreover, *Gertz* cited no authority or scholarship that would provide an argumentative foundation for this conclusion; rather it merely rebutted the shallowly supported assertion in *Sullivan* with an equally conclusory counter-assertion.[32]

Although *Gertz* is largely notable for its limitation on the protection that the Supreme Court will afford to false speech, it simultaneously established a rule that gave very strong protection to some false speech. In a little-explained comment, the Court noted that "there is no such thing as a false idea" and that therefore "opinions" were completely immunized from liability and must be rebutted by the competition of other ideas, not by law.[33] Subsequent cases have shed only a little light on the fairly opaque distinction between facts and opinions. The inquiry, generally, is a highly contextual examination of the degree to which a statement is ambiguous versus definite in meaning, the degree to which it is verifiable, and the degree to which its context indicates that a reader should infer that it has factual content.[34] To the degree that a statement is significantly ambiguous, unverifiable, and seemingly unlikely to represent facts, it is deemed to be an opinion rather than a fact for constitutional purposes.[35]

Thus, the Supreme Court's defamation jurisprudence teaches that sincere but false speech sometimes needs constitutional protection in order to prevent truthful speech from being chilled, while consistently holding that insincere speech can be regulated.[36] At the same time, however, the Court has wavered on whether false speech

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[29] *Gertz*, 418 U.S. at 340 (quoting *Sullivan*, 376 U.S. at 270; Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (citations omitted).

[30] *Id.* at 340–41.

[31] *Id.*

[32] The only citations used for the *Gertz* Court's proposition that false statements had no constitutional value were *Sullivan*, which argued the opposite, and *Chaplinsky*, which addressed the category of fighting words, not false or insincere speech. *Gertz*, 418 U.S. at 340.

[33] *Id.* at 339–40.

[34] *See, e.g.*, Ollman v. Evans, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985).

[35] *Id.*

[36] The only notable case dissenting from the viewpoint that outright lies fall outside the protections of the First Amendment is *State v. 119 Vote No! Committee*, 957 P.2d 691, 693 (Wash. 1998). In *119 Vote No!*, the Washington Supreme Court held that a statute outlawing false statements made with actual malice nevertheless violated the First Amendment when

is valuable in itself and has provided shockingly little defense for either position in the cases most directly addressing false statements of fact.

The tort of false light invasion of privacy, which permits plaintiffs to recover for highly offensive false statements made about them,[37] is similar to the much older tort of defamation. Thus, it is unsurprising that in the few cases to consider the First Amendment limits on false light actions, the Supreme Court has followed principles it established in its defamation jurisprudence. Thus, in *Time, Inc. v. Hill*, the Supreme Court held that the actual malice rule of *Sullivan* also applies to false light claims for reasons very similar to those articulated in *Sullivan*.[38] In reaching this result, the *Hill* Court referred specifically to the risk that restrictions on sincerely believed false statements would chill the expression of true statements.[39] The Court, however, made no reference to the possibility that false speech might be valuable in itself.[40] Thus, the false light cases, though a significant area in which First Amendment law has been applied to false speech, give us little additional insight into the degree to which false speech has constitutional value in itself, although they do reaffirm the conclusion that a concern for chilling effects is a legitimate reason to protect sincerely-believed false speech.[41]

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applied to speech that did not defame any individual but merely served to mislead the public generally. *Id.* at 696–97. However, *119 Vote No!* remains something of an aberration; as a general matter, other courts addressing the constitutionality of election fraud statutes tend to hold that a *Sullivan*-like actual malice standard applies. *See, e.g.*, Vanasco v. Schwartz, 401 F. Supp. 87, 88, 91–93 (S.D.N.Y & E.D.N.Y) (applying actual malice standard to New York election fraud statute and striking down portions that restricted false political speech made without actual malice), *aff'd*, 423 U.S. 1041 (1976); Dowling v. Ala. State Bar, 539 So. 2d 149, 151–53 (Ala. 1988), *cert. denied*, 490 U.S. 1081 (1989); Snortland v. Crawford, 306 N.W.2d 614, 622–23 (N.D. 1981).

[37] *See* RESTATEMENT (SECOND) OF TORTS § 652E (1977).

[38] *Time, Inc. v. Hill*, 385 U.S. 374, 386–89 (1967). The continuing validity of this holding, as applied to false light claims brought by private individuals, has been placed in some doubt by the holding in *Gertz*, although the Court has so far declined to address whether *Gertz* has altered the rule in *Hill*. *See* Cantrell v. Forest City Pub. Co., 419 U.S. 245, 250–51 (1974) (declining to consider whether *Gertz* altered the applicable standard); Russell G. Donaldson, Annotation, *False Light Invasion of Privacy*, 57 A.L.R.4th 22, 39–47 (1987) (noting the continuing disagreement among lower courts as to whether *Gertz* had the effect of altering the rule from *Hill* and surveying relevant cases).

[39] 385 U.S. at 388–89.

[40] *See id.*

[41] The Court has used the defamation doctrines as a template for addressing other areas of false speech law as well, with a similar lack of further development. *See* Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 611–12, 619–21 (2003) (applying defamation-like principles of First Amendment protection to a fraud action against telemarketers engaged in charitable solicitations); Brown v. Hartlage, 456 U.S. 45, 61–62 (1982) (applying similar principles to an action grounded upon allegedly false statements made during an election campaign).

2. Commercial Speech Cases

There is one other area of doctrine in which false speech has figured significantly in First Amendment law: the Court's commercial speech cases. These cases give limited constitutional protection to commercial speech but deny all protection to commercial speech that is false or misleading without regard for a speaker's state of mind. The exclusion of all false or misleading commercial speech was first suggested in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.*[42] After the *Virginia Board* Court announced its new rule providing for the protection of commercial speech, it took pains to assure the public that its rule would not sweep away the bulk of then-existing commercial regulations, including those rules devoted to outlawing fraudulent business practices.[43]

The Court, in dicta, stated that the new protection it announced would not extend to speech that was false, deceptive, or misleading.[44] Citing to *Gertz*, the Court announced that untruthful speech had never been protected for its own sake.[45] Furthermore, the Court assured the public that the states would also be permitted to regulate speech that "is not provably false, or even wholly false, but only deceptive or misleading."[46] Thus, the Court's description of unprotected commercial speech involves a much broader swath of false speech than did the rules in *Sullivan* and *Gertz*, which required at least recklessness or negligence, respectively.

Although it relied on *Gertz*'s assertion that false speech had no constitutional value, the *Virginia Board* Court made no effort to support that assertion with a firmer argumentative foundation. Other than *Gertz* itself, the Court cited only a footnote from *Konigsberg v. State Bar*,[47] a footnote that stands for the widely accepted principle that the Speech and Press Clauses guarantee rights that are qualified rather than absolute and can be overcome by significantly strong countervailing policy interests.[48]

Soon after *Virginia Board* was decided, the Court in *Central Hudson* set forth a general test to determine when commercial speech is protected.[49] Unsurprisingly,

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[42] 425 U.S. 748 (1976).

[43] *Id.* at 770–73.

[44] *Id.* at 771.

[45] Once again, the court did not cite or discuss the contrary statements in *Sullivan*. *Id.*; New York Times v. Sullivan, 376 U.S. 254, 279 n.19 (1964).

[46] *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

[47] *Id.* (citing Konigsberg v. State Bar, 366 U.S. 36, 49 n.10 (1961)).

[48] *Konigsberg*, 366 U.S. at 49 n.10. Although *Konigsberg* does note that an absolutist reading of the First Amendment might well be inconsistent with much of the modern law that regulates falsity, it makes no effort to explain why a qualified First Amendment that incorporates a balancing component either does or does not protect false or insincere speech. *Id.*

[49] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–65 (1980).

all inaccurate speech was categorically excluded.[50] In the Court's formulation of the test, the government may ban commercial expression whenever it is "more likely to deceive the public than to inform it."[51] Although this part of the test was dicta,[52] it nevertheless has had an enormous impact on the content of the First Amendment law of commercial speech, as the *Central Hudson* test forms the backbone of all modern law in this area.[53]

Given the centrality of this test, it is worthwhile to look at the Court's reasons for treating commercial falsity so differently from the non-commercial false speech discussed above. The Court based its conclusion that the First Amendment did not protect inaccurate commercial speech on the assumption that the protection of commercial speech was related solely to its "informational function."[54] Thus, the Court's logic was that inaccurate speech does not advance the amount of valuable information available to the public. This reasoning makes sense if one has already concluded that false speech has no informational value, but it does not provide any new support for that position. Critically, there was no analysis of whether a regime permitting argument by proponents of both true and false beliefs would yield more informational increase than a rule allowing the government to suppress the false side of the argument. Nor did the Court cite to any new sources dissecting the constitutional value of false speech; although the Court did refer to two commercial speech cases, *Friedman v. Rogers*[55] and *Ohralik v. Ohio State Bar Association*,[56] neither case addressed the value of false speech in itself, separated from the dangers of insincerity.[57]

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[50] *Id.*

[51] *Id.* at 563.

[52] *Central Hudson* did not involve an allegation that the commercial speech at issue was false. *See id.* at 560, 566 ("The Commission does not claim that the expression at issue . . . is inaccurate.").

[53] *See* CHEMERINSKY, *supra* note 26, at 1049–50 (describing the Supreme Court's persistent reliance on the *Central Hudson* case in modern commercial speech cases).

[54] *Central Hudson*, 447 U.S. at 563.

[55] 440 U.S. 1 (1979).

[56] 436 U.S. 447 (1978).

[57] The *Friedman* Court's concern was not with all types of falsity in advertising, but rather with a specific type: intentionally misleading practices designed to confuse consumers about the identity and record of an optometry shop. 440 U.S. at 14. Thus, *Friedman* cannot support a broad rule exempting all inaccurate commercial speech from constitutional protection. Likewise, the *Ohralik* decision expressed a concern that "unsophisticated, injured, or distressed lay person[s]" would tend to fall prey to coercion during in-person solicitations by lawyers, who are after all "professional[s] trained in the art of persuasion." 436 U.S. at 465–66. *Ohralik* did not involve any claims of false or inaccurate representations, and its prophylactic rule is best read as expressing twin concerns about deliberate coercion or deception, on the one hand, and protecting the privacy of accident victims, on the other. *Id.* at 452–54, 465–67. Thus, neither case provides support for the conclusion that false speech is without constitutional value absent the additional element of insincerity.

The Court also noted that basing the regulability of commercial speech in part on its accuracy introduced a content distinction into First Amendment law that was arguably improper.[58] To rebut this potential concern, the Court made two arguments about why such content distinctions were appropriate. First, the Court noted that "commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages."[59] Second, the Court noted that commercial speakers are motivated by economic self-interest and thus are unlikely to be deterred by overbroad regulations.[60] In other words, the Court had accepted the logic of *Gertz* that false statements should only be protected when there is a danger of chilling true speech. Because it believed that there was no such danger when the speaker is a commercial entity, the Court saw little reason to protect false commercial speech.

Thus, after its brief flirtation in *Sullivan* with the idea that false statements might be valuable in themselves, both the defamation cases and the doctrine of commercial speech rely on a view of the Speech and Press Clauses in which false statements have no intrinsic value even when spoken sincerely. Rather, the Court views false statements as needing protection only when necessary to avoid chilling true speech. As a result, it has crafted a varying array of protections for false speech in different arenas based on its understanding of the risks of deterring true speech in each situation.

However, a close reading of the Court's cases in this area suggests that the Court has conveniently ignored difficult questions of free expression theory. The Court has rarely attempted to justify its assertions that false speech has no constitutional value, preferring an approach that involves repeating the conclusion in the hopes that saying it enough will make it true. The closest the Court has come to justifying its position was when it argued in *Central Hudson* that false speech is inherently harmful because it lacks useful informational content.[61] Perhaps this epistemological explanation of the harm of false speech could justify its exclusion—but the Supreme Court has yet to take up the challenge of showing that to be the case. The next Section will discuss the existing scholarly commentary on false, insincere, and misleading speech to see whether this deficit has been adequately addressed in the literature to date.

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[58] *Central Hudson*, 447 U.S. at 564 n.6.

[59] *Id.*

[60] *Id.* Both distinctions were drawn from language in *Virginia Board*. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976). These distinctions have been much criticized and are hard to defend on principle. *See, e.g.*, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 635–38 (1990). Indeed, it is hard to square the profit-motive distinction with the Court's demonstration in *Virginia Board* that a wide variety of speech at the core of First Amendment protections is uttered for pecuniary gain. *See* 425 U.S. at 761–63.

[61] *Central Hudson*, 447 U.S. at 563.

B. The Underdeveloped State of False Speech Scholarship

The exclusion of false speech from First Amendment protection permits the government to impose content-based restrictions on speech,[62] a type of speech-restriction that is typically subject to significant First Amendment limitations.[63] Given this special treatment, one might expect a significant amount of scholarly writing either attempting to explain this exclusion or arguing that it is improper. Surprisingly, this is not the case. Although early writers such as John Milton and John Stuart Mill wrote specifically concerning the value of protecting speech that is false, their arguments focused almost entirely on assertions of moral or religious claims rather than false speech concerning more verifiable matters.

Subsequent writers have occasionally suggested some reasons for protecting speech that is false but sincere. One category of such proposals has followed the Supreme Court's concern that restricting false speech will end up suppressing some true speech as well. The other strain has involved suggesting that we should generally try and avoid penalizing speakers who speak what they believe in good faith for reasons grounded in political theory, such as respect for the autonomy of speakers or for their role as sovereigns in a democratic state. However, none of this scholarship has given significant attention to a question at the core of this inquiry: what is the specific harm caused by false or insincere speech? Without providing answers to these questions, all of this scholarship skips an essential step, because without assessing how harmful false speech is, we cannot appropriately decide when its potential harm outweighs the benefits identified by scholars to date.

1. John Stuart Mill and the Values of False Speech

Many of the early writings on free expression argue that false speech should be tolerated and protected alongside true speech. For instance, when John Milton wrote his *Areopagitica* in opposition to the pervasive press licensing scheme enacted by Parliament in 1643,[64] he based his argument in part on the need for enlightened believers to encounter both truth and error in matters of religious belief.[65] Likewise, John Locke also wrote about the value of tolerating speech with which we disagree,

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[62] *Id.* at 564 n.6.

[63] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (citations omitted)); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 99–102 (2003) (noting that viewpoint discrimination is always disfavored, and content distinctions are typically suspect).

[64] *See* Merritt Y. Hughes, *Biographical Note*, *in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE, *supra* note 24, at 716.

[65] *See* MILTON, *supra* note 24, at 717, 728–29.

even when it is "false and absurd."[66] Locke wrote that: "[The] truth certainly would do well enough, if she were once left to shift for herself. . . . [I]f truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her."[67]

The force of these arguments is limited, however, by the fact that both men were arguing in support of an explicitly religious premise: differences of opinion should be tolerated because religious beliefs should be (and indeed can only be) formed by choice and not by compulsion.[68] Mill was the first writer to directly confront the question of why false speech should be protected from a secular point of view.

In the second chapter of *On Liberty*, Mill set out to defend a broad rule prohibiting all restrictions on public expression, regardless of the manner of expression, subject only to a narrow exception for speech that proximately causes grave harms to others, such as defrauding another person or inciting a mob to murder.[69] Fortunately for the purposes of this Article, Mill assumes during his argument that the only reason we might wish to suppress expression is because we believe it to be false.[70] This is fortunate because it means that his argument addresses itself entirely to the benefits and risks of restricting expression based upon its supposed falsity.

Mill's argument proceeds as follows: a message that the government wishes to suppress must be either true or false, or it must combine shades of truth and falsity.[71] Mill analyzes each possibility in turn, attempting to demonstrate that in all situations regulating speech on the basis of its falsity is improper.

First, Mill writes, we must be very cautious when restricting opinions we believe to be false, because those opinions we think are wrong may in fact be true.[72] As Mill points out, suppressing speech because you believe it to be false assumes infallibility on that question.[73] And we should be very cautious about assuming such infallibility

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[66] JOHN LOCKE, *A Letter Concerning Toleration*, *in* TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 241 (Ian Shapiro ed., Yale Univ. Press 2003).

[67] *Id.*

[68] *Id.* at 213 (framing his discussion as a response concerning the toleration of different sects of Christianity); MILTON, *supra* note 24, at 728 (arguing that Christian faith would be stronger if tested by the trial of reading evil writings).

[69] *See* MILL, *supra* note 1, at 19–20 (stating a general rule against restraint of speech); *id.* at 56 (excluding incitement from protection); *see also id.* at 95 (suggesting that fraudulent speech may be excluded from protection). For a helpful discussion of Mill's argument, see generally Lawrence B. Solum, Book Review, *The Value of Dissent*, 85 CORNELL L. REV. 859, 876–79 (2000) (reviewing STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA (1999)).

[70] MILL, *supra* note 1, at 20–21 (assuming that suppression will be based upon falsity); *see* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 22 (1982) (observing that Mill so limits his argument).

[71] *See* MILL, *supra* note 1, at 53–54.

[72] *Id.* at 22–25.

[73] *Id.*

because history is replete with examples of doctrines widely assumed to be true even by the best and wisest of men but later believed to be false with equal vigor.[74]

Second, Mill argues that even knowably false speech has value because it promotes "the clearer perception and livelier impression of truth, produced by its collision with error."[75] In other words, what is problematic about stifling false speech is that it deprives us of the opportunity and necessity of marshaling reasons for what we believe and of having to use reason to decide which among competing theories are true.[76] According to Mill, having an opinion without understanding its underlying justification is not very useful.[77] Under such conditions, both individuals and societies eventually forget both the basis for their beliefs and the meaning of those beliefs, and a "living truth" becomes a "dead dogma."[78] Even worse, the systemic effects of suppressing false opinions go further because having lost these individual opportunities for analysis and ratiocination, one loses the opportunity to practice the skills of analysis necessary to maintain and nurture a critical mind.[79] Thus, according to Mill, falsity in discourse is to be valued for its own sake.[80]

Third, Mill argues that the vast majority of speech does not fall into the first two categories; rather, most of our utterances combine some amount of truth with some amount of falsity.[81] In such cases, he argues, we need to hear both conflicting views in order to extract the whole and complete truth about a question.[82] According to Mill, on all subjects not directly available to the senses, the majority of human expression is only partially true, and this applies to both the favored and disfavored views on such subjects.[83] Only by analyzing the competing propositions and accepting the truth from both while discarding the falsity can we arrive at more complete and synthetic understandings of the world around us.[84]

Thus, Mill offered an important exposition of the values inherent in false speech and the dangers of suppressing speech based upon its presumed falsity. At the same time, however, Mill's analysis has three important shortcomings: it does not address

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[74] *Id.* at 21, 28–29.

[75] *Id.* at 20; *see also* Solum, *supra* note 69, at 877 (summarizing this argument and describing it as "one of the most elegant in all of political philosophy").

[76] *See* MILL, *supra* note 1, at 37–42.

[77] *Id.* at 38 (stating that people who do not know the basis for their beliefs have no ground for such beliefs and should rationally choose to suspend their judgment).

[78] *Id.* at 37.

[79] *See id.* at 45–47.

[80] *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (using Mill's argument on this point to support its holding that the Constitution protected some types of false speech).

[81] MILL, *supra* note 1, at 47.

[82] *Id.*

[83] *Id.* at 47–52.

[84] *See id.* at 47, 53.

the effect of insincerity on the utility of free expression, it is too demanding in its requirements for belief-formation, and it only addresses easy cases as examples.

First, and most importantly, Mill omits discussion of one of the hardest questions facing free expression theory in its application to false speech: in what sense does fault, i.e., knowledge or carelessness with regards to the falsity of a message, deprive false speech of the benefits Mill describes? Although Mill seems to acknowledge that fraudulent speech, for example, can be suppressed,[85] he never explains why a speaker's insincerity should or should not alter the cost-benefit calculus.

Second, Mill assumes that people are capable of far more ratiocination than is plausible; although he criticizes the holding of any belief when a speaker cannot explain the reasons for it,[86] our society depends upon individuals believing a great many things on authority. It is asking a great deal to assert that a person who cannot demonstrate the derivation of the general theory of relativity and defend it against all challengers therefore has no basis for believing it to be true, or to say that a person who cannot resolve an argument between meteorologists is unjustified in believing that a weather report is likely to be accurate. Mill's argument, in short, cannot deal with the necessity in a society such as ours for many people to be rationally ignorant on a great many topics.

Third, Mill uses only examples of the suppression of highly contestable propositions to support his arguments about the dangers of assuming infallibility and the benefits of hearing false speech.[87] Thus, Mill relies greatly on examples of religious or political "truths" that surely have many champions on both sides, but he does not assess the utility of denying simple facts about which agreement is nearly universal, such as that the sun rises in the East and sets in the West.[88] There may be good reasons for allowing people to assert that the sun does not behave in this way, but fear that we would be unable to assert confidently that the sun rises in the East unless we had argued the point with an unconvinced party is not one of those reasons.[89] More generally, Mill spends no time discussing why we should protect false assertions about facts available to sensory experience, the types of cases in which "moral certainty," if not infallible certainty, is available on the evidence.[90] Without an explanation of why it harms us to suppress speech regarding matters easily provable, Mill's theory seems guilty of overreaching and at most can establish that we should sometimes protect false speech, not that we should always do so.

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[85] *See id.* at 95 (suggesting that principles of free trade should admit of exceptions to prevent, inter alia, frauds by adulteration of products).

[86] *Id.* at 38.

[87] STEPHEN, *supra* note 7, at 74–77.

[88] MILL, *supra* note 1, at 26–31, 41–44, 48–52; STEPHEN, *supra* note 7, at 76.

[89] *See* STEPHEN, *supra* note 7, at 76.

[90] *Id.* at 78.

Thus, Mill constructed a powerful argument that false speech was generally deserving of protection from suppression because suppressing it tends to undermine the state of our knowledge. Unfortunately, Mill only analyzed false speech regarding ideas about religion or politics, not the more mundane types of factual falsity with which the law mostly concerns itself. Nor does he offer an account of when a speaker's insincerity ought to deprive false speech of protection. Thus, although Mill's work can offer a starting point for developing a theory of the First Amendment's application to falsity, it is unable to guide us in working out the details.

2. False Speech and Informational Goals: The Risk of Suppressing Truthful Speech

Mill's first argument for protecting false speech was based upon the risk of suppressing true speech in the attempt to ban what we believe to be false.[91] This concern has been greeted with acceptance in modern scholarship. Modern scholars have identified two important ways that suppressing false speech will tend to suppress true speech as well. First, even courts sometimes err, and thus suppression on the basis of falsity will inevitably sweep some true speech into the net as well. Second, suppressing false speech can have ramifications outside of individual cases, by chilling the speech of those who fear that they might not be able to prove that what they believe is true in a court of law or those who are simply reluctant to undergo the time and expense of litigation. Unfortunately, this scholarship suffers from an important gap: without estimating how much harm is caused by protecting false speech in order to avoid incidentally suppressing some truthful speech, it will never be possible to claim convincingly that these risks justify protecting false but sincere speech.

The first way that suppressing false speech might harm our societal access to knowledge is by erroneously suppressing some truthful speech. This point, which was made forcefully by Mill,[92] was also raised by Zechariah Chafee, who wrote that truth can only be found through free discussion, because "once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true."[93] This point has recently been expanded upon by Cass Sunstein, who noted that a key danger in permitting government suppression is that the government may err when it chooses to suppress allegedly false speech.[94] Professor Sunstein argued at some length that this danger is intolerable, given the strong social pressures toward conformity of belief and the corresponding social need to cultivate dissent in order to prevent "information cascades" that cause initial errors to be widely magnified through repetition.[95]

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[91] MILL, *supra* note 1, at 20–21.

[92] *Id.* at 22–25.

[93] ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 31 (1954).

[94] SUNSTEIN, *supra* note 63, at 97; *accord* SCHAUER, *supra* note 70, at 170 (noting that courts "are frequently wrong").

[95] SUNSTEIN, *supra* note 63, at 54–73.

The second way that suppressing false speech may suppress truthful speech is the possibility of "chilling effects," a concern that has animated the Supreme Court's willingness to protect some false but sincere speech in defamation cases.[96] As Kent Greenawalt has noted, we may often believe that what we would like to say is true but still feel uncertain about our ability to prove that truth to a court if pressed.[97] When such concerns are combined with the ever-increasing costs of litigation, liability for false speech may well deter non-litigants from uttering true statements. Nor is this concern merely hypothetical; modest empirical evidence of such an effect has already been gathered, with news organizations in Britain reporting that the possibility of being liable for making false statements has deterred them from reporting on some facts they believed to be true.[98]

The problem with this line of argument, however, has been noted by Frederick Schauer: to protect these evanescent traces of truth from being erroneously suppressed or chilled, we must also tolerate "a great deal of falsity."[99] If the expression of false facts is generally harmful to our knowledge as a society,[100] then the relevant question becomes a complicated empirical inquiry: does the harm we avoid by protecting false statements in order to avoid erroneous suppression and chilling effects exceed the increased harm caused by the false statements we might otherwise suppress? Even worse, the problem is not nearly so all or nothing as the above statements might suggest; the litigation system has numerous procedural devices that can be used to lessen the risk of erroneous verdicts and chilling effects.[101] Without a careful study of the extent of chilling effects and the harm caused by permitting false speech to flourish (which has never yet been performed), the argument from error and chilling effects simply cannot produce robust answers to the First Amendment problems of false and insincere speech. Thus, although the concerns raised by scholars such as Chafee, Greenawalt, and Sunstein are certainly apt, they do not answer key questions.

3. Political Theory and the Value of False Speech

The existing scholarship on the risk of suppressing true speech along with false speech fails to provide a complete approach due to its failure to weigh the gains of protecting false speech in order to avoid chilling effects against the potential harm

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[96] *See* discussion *supra* Part I.A.1.

[97] KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 136 (1989).

[98] Russell L. Weaver & Geoffrey Bennett, *Is the* New York Times *"Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1172 (1993) (surveying British media organizations and reporting that of the newsrooms surveyed, "all stated that they were not able to publish everything that they believed was true" as a result of potential defamation liability).

[99] SCHAUER, *supra* note 70, at 28.

[100] *Id.* at 28, 32–33 (suggesting that false speech is generally likely to harm listeners).

[101] See discussion *infra* Part IV.C.

that would be caused by the false speech we would protect. A workable theory will have to take into account the costs and benefits of the false speech itself in addition to its effects on truthful speech. One method would be to follow Mill's lead and argue that false speech is valuable for its ability to help refine and test our knowledge, but this argument has been roundly rejected in modern scholarship. In its place, scholars have suggested, although rarely elaborated, a number of alternative reasons why we might wish to protect false but sincere speech. These theories usually sidestep the difficult epistemological question of how much harm is caused by false speech by relying instead on premises from political theory or deontological ethics. Such theories provide useful insights and usually suggest that false speech that is sincerely believed by its utterer should receive some amount of constitutional protection. Unfortunately, because of the reluctance of these theorists to engage with the question of how harmful false or insincere speech may be, we cannot know how to balance the values they develop against such harms. Thus, unless one adopts certain specific, absolutist premises of free expression theory, one is unlikely to be persuaded by these rationales.

Modern First Amendment scholarship displays a broad trend towards rejecting Mill's arguments for the value of false speech, at least as a categorical matter.[102] Sometimes this rejection is cursory and unreflective; thus, in his otherwise careful exposition of issues of falsity and insincerity in free expression, Kent Greenawalt rejects Mill's thesis without argument, stating merely that the value of false speech is "highly limited."[103] Other scholars, however, have plowed this ground more thoroughly. Frederick Schauer argues that Mill's analysis works better when treating questions of broad normative principle than mundane facts and concludes that false speech about factual or scientific propositions is of little value because such information tends to be verifiable in a way that normative statements are not.[104] Because Schauer is skeptical about the ability of the public to sort out truth from falsity when competing ideas are freely discussed,[105] he thinks that there is a large risk that false statements will be believed and acted upon by the public at large.[106]

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[102] One of the few counterexamples is an extremely brief discussion by Thomas Emerson, which largely retreads Mill's argument, although without referring directly to it. *See* EMERSON, *supra* note 13, at 6–7.

[103] GREENAWALT, *supra* note 97, at 48 (raising Mill's argument but then asserting, without explanation, that the audience interest in hearing false messages is "highly limited").

[104] SCHAUER, *supra* note 70, at 30–33.

[105] *Id.* at 25–26. Schauer compares members of the public unfavorably with members of the scientific or academic communities, who he believes are more capable in this regard. *Id.* As he writes:

> It is one thing to say that truth is likely to prevail in a select group of individuals trained to think rationally and chosen for that ability. It is quite another to say that the same process works for the public at large. . . . We must take the public as it is.

Id. at 26.

[106] *Id.* Steven Smith uses a different approach to attack Mill's argument based on the claim

Thus, in Schauer's account, the harm of allowing false statements of fact to be uttered is in fact quite significant.[107]

Another group of scholars, however, addresses falsity without reference to these epistemological questions, instead supporting the protection of false statements for reasons that do not relate to their effect upon our knowledge. Thus, several theorists

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that it is internally inconsistent. Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 668–69 (1987). Smith attacks Mill's notion that, under conditions of free competition between true and false beliefs, knowledge will be increased, on the basis that this argument depends on a contradiction. *Id.* According to Smith, "one must believe [that] . . . truth is unattainable" to believe that government will be incapable of sorting out true beliefs from false as part of a regulatory scheme. *Id.* at 668. But at the same time, one must be very optimistic about the ability of people to ascertain truth when comparing competing ideas, in order to believe that the collision of truth and falsity will tend to produce truth. *Id.* Smith believes that this tension between skepticism and epistemic confidence explodes the truth-seeking rationale for protecting falsity. *Id.* at 668–69.

Smith's argument is premised on the idea that we cannot know things unless we know them with certainty. The problem is that this is a false assumption: we very commonly believe things without certainty, yet feel confident enough to act upon them. Certainty is a stringent standard of belief that should only apply when we can conceive of no way that we could be wrong, given our evidence. It is the statement of infallibility, that we cannot possibly be wrong on a question. Thus, after walking in from the rain, I might say "it is raining outside," and believe it to be the case. At the same time, I would not be certain, because I know that it may have stopped raining since I walked in, and thus it is possible, though unlikely, that I am wrong.

We constantly make decisions on the basis of beliefs that are less strong than a certainty. A prime example is the reasonable doubt standard: before depriving citizens of their liberty or lives, we require not certain proof, but only proof to a high degree of probability. Indeed, the legal system will deprive people of property in civil suits on the basis of proof that is far less than a certainty. Thus, the error in Smith's argument is this: it is perfectly possible to believe, or even believe strongly, that some beliefs held in the past are false, while not holding all of our present beliefs to a certainty. For further discussion on this point, see GREENAWALT, *supra* note 97, at 18 (noting that we can be very confident of theories acknowledged as provisional); MILL, *supra* note 1, at 22 ("There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation."); SCHAUER, *supra* note 70, at 18 (noting that we can consider increasing our confidence intervals with regard to truth claims as progress towards knowledge, even if we do not reach one hundred percent certainty).

[107] Somewhat surprisingly, Schauer does not endorse a more limited role for state regulation of defamation as a result of this conclusion; rather, he rests his support for the current state of the law on a "stipulated priority" for speech interests over reputational and epistemological harms, combined with a concern for error and chilling effects in the regulation of false speech. SCHAUER, *supra* note 70, at 170–71. Of course, the point made *supra* still holds in this regard; Schauer is necessarily making an empirical presupposition—that the amount of true speech erroneously suppressed or chilled is sufficiently great, once the stipulated priority is placed on the scale, to outweigh the manifest harms he believes flow from false factual utterances made to members of the public.

have asserted—sometimes implicitly—that false but sincere speech deserves protection for reasons that flow from moral or political theory. The structure and consequences of such theories are rarely developed in detail, but the result is often the same: we should protect false speech that is sincerely believed to be true by its utterer but we should not protect knowing lies.

Perhaps the most commonly articulated version of this claim comes from theorists who believe that the free expression guarantee is designed to facilitate our ability to act as autonomous agents in making choices and in expressing ourselves. Multiple authors have posited that we should treat deliberate lies differently from innocent mistakes, because only lies violate the autonomy of listeners by treating them as means rather than ends, in the Kantian sense.[108] Thus, according to David Strauss, deliberate lies are problematic because they involve a "denial of autonomy" by "interfer[ing] with a person's control over her own reasoning processes."[109] By contrast, sincerely-made false statements do not involve the same degree of manipulation, so they should be protected.[110] A similar view has been forwarded by Professor Greenawalt. In Greenawalt's view, although lies can and should be punished in many cases, innocent falsehoods should generally be protected[111] because of the "affront to [a speaker's] dignity" and autonomy that occurs when we punish a speaker for saying what she believes to be true.[112]

Although Alexander Meiklejohn took strong issue with a focus on autonomy as an explanation for the meaning of free expression, his own theory, which emphasized the role of citizen-rulers in a democratic state, seemed to lead to a similar conclusion. Meiklejohn argued for an interpretation of the First Amendment that allowed for no balancing of First Amendment values against harm, while arguing that only speech on topics of concern to citizens as voters was entitled to protection.[113] However, within the sphere of discussion on matters of public concern, Meiklejohn believed the First Amendment protected all ideas, regardless of their truth and falsity, and specifically encouraged the sort of dialogic presentation of competing ideas that was so central to Mill's thesis.[114] In Meiklejohn's interpretation,

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[108] *See* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 910 (2002); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1002 & n.112 (1978); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354–55 (1991); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1113–15 (2006).

[109] Strauss, *supra* note 108, at 354.

[110] *Id.* at 355.

[111] GREENAWALT, *supra* note 97, at 48, 132.

[112] *Id.* at 48.

[113] ALEXANDER MEIKLEJOHN, *Free Speech and Its Relation to Self-Government, reprinted in* POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 3, 26–27, 64–65 (1948).

[114] *Id.* at 27.

the First Amendment leaves it to citizen-rulers to determine what wise policy is, and therefore we cannot ever suppress speech because we disagree with the ideas being expressed.[115] It is not clear whether Meiklejohn's argument was meant to extend to false statements of verifiable facts as well as ideas; although citizen-rulers presumably have an interest in determining for themselves the factual predicates that underlie their voting decisions, Meiklejohn never explored whether his theory required dialogic presentation of factual information as well as normative ideas.[116] What is clear, however, is that Meiklejohn clearly distinguished the type of false speech he was willing to protect from conscious lies; lies do not involve "discussing the public interest," but rather merely pretend to do so, and thus they cannot ever be the type of democratic deliberation that Meiklejohn believes should be protected.[117]

These insights regarding false speech are important. To a large degree, most of us would probably feel that the government was reaching too far if it punished us for innocent errors. Although the feelings involved may often be hard to articulate, there is surely something to the idea that such restrictions would be an invasion of a type of autonomy we cherish and that we would feel a loss of the dignity and equal respect owed to us as citizens.

Nevertheless, the analysis is still woefully incomplete on this score. First, although Meiklejohn and some autonomy theorists reject any notion of balancing First Amendment benefits against harm, a wide array of First Amendment theories hold that such balancing is absolutely necessary before we can know for sure whether a type of speech ought to be protected.[118] But because the political theory values discussed above skip the step of assessing the harms and benefits caused by false speech itself, we are unable to assess when such balancing may be necessary and to what degree. Likewise, the political theory values are typically painted with a broad brush, discussing only the extremes of innocent error and deliberate lies.[119]

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[115] *Id.*

[116] Meiklejohn did, however, respond very favorably to the Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that some false statements of fact deserved constitutional protection; he famously referred to that decision as an occasion for "dancing in the streets." *See* Harry Kalven Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125.

[117] MEIKLEJOHN, *supra* note 113, at 41–42; *see* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 259. *But see* John M. Kang, *The Case for Insincerity*, 29 STUD. L., POL. & SOC. 143(2003) (arguing that insincerity serves useful functions in democratic discourse by preventing friction between antagonistic social groups).

[118] *See, e.g.*, CHAFEE, *supra* note 93, at 35; *see also* MILL, *supra* note 1, at 56 (including an exception for speech that causes immediate and grave harms within his theory of free expression); GREENAWALT, *supra* note 97, at 292–93; SCHAUER, *supra* note 70, at 131–32; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 622–25 (1982).

[119] *But see* GREENAWALT, *supra* note 97, at 48, 316 (noting some grey areas between innocence and outright insincerity and providing a very brief sketch of how they might be addressed).

The problem is that there are a number of shades of grey between earnestly believing that what you say is true and being certain that it is false. Likewise, there are many statements that are neither simply true nor simply false, but combine truth and falsity or convey shades of implied meaning that can be misleading. Political theorists have spent little time exploring the details of the relationship between state of mind and the content of assertions, and the consequences of that relationship for constitutional protection. The present Article will be devoted to filling in this gap by showing how a detailed account of the epistemological harms and benefits of false and insincere speech buttresses these conclusions in political theory, removing any concern that the harms posited by Professor Schauer will require us to balance away the political theory values that urge protection for false but sincere speech. First, however, I will lay the groundwork for this argument by briefly introducing a few philosophical concepts that will assume center stage in the subsequent analysis.

II. FOUNDATIONS FOR A THEORY OF FALSE AND INSINCERE EXPRESSION

Before proceeding to the core of this project, it will be helpful to provide some background in important philosophical concepts that will aid an analysis of the harms and benefits that flow from false, insincere, or misleading speech. This Section will attempt to lay that foundation. First, I will try to define the concepts of falsity and insincerity with more precision, so that we can be clear what we mean when we analyze statements as "false" or "insincere."

Second, I will work to provide more clarity regarding what is meant by labeling a statement as misleading. To this effect, I will introduce Paul Grice's work in implicative meanings. The theory of implicatures will enable us to understand how we go about generating implied meanings and the ways that these meanings can be used to convey false or insincere messages via literally true communications. Furthermore, Grice's theory will help us to understand that each propositional statement we make is understood both as a description of the world and also as a description of our own mental states, so that every insincere statement is also factually misleading. Later on, the development of a careful understanding of the nature of implied meanings will be important as we try to understand the difference between implied meanings, on the one hand, and the larger class of inferences that can be drawn from all speech, on the other.

Finally, I will introduce some of the important work of Alvin Goldman in social veritistic epistemology, which will help us assess the harms and benefits of false, insincere, and misleading statements through an understanding of when argumentation between proponents of competing beliefs will be likely to lead to an increase in our social knowledge. When combined with the understandings developed above regarding the nature of false, insincere, and misleading speech, Goldman's work will help us see that, in most of the situations to which the First Amendment applies,

false but sincerely-believed speech will generally cause more benefits than harm, because it will provoke an argumentative discourse that will yield more increase in our knowledge than would have occurred if the false statement had never been uttered. Goldman's work will also help us understand why these benefits do not extend to statements that are insincere.

A. Falsity and Insincerity Defined

To begin, it will be useful to specify with more clarity what is meant by the concepts of truth, falsity, sincerity, and insincerity. For the purposes of this analysis, I will define truth broadly as a relation of correspondence between a statement and the world. A statement is "true," according to this definition, when it corresponds with facts, and it is false when it fails to do so. This is known as the correspondence theory of truth, and it represents the dominant strand of epistemic thought on the subject.[120]

Obviously specifying exactly what the "correspondence" relation involves can be a tricky proposition; sentences and events in the world do not admit of any obvious isomorphism.[121] But a simple way to approach the question of correspondence is to note that those sentences we view as propositional—those sentences that can be either true or false—are those that seem to be trying to describe reality. In other words, such sentences make reference to an event or object that exists in the world and then attempt to classify or describe it.[122]

A simple theory of truth-as-correspondence posits that when a sentence both purports to describe something about the world, and succeeds in doing so, it is called a true statement.[123] When a sentence purports to describe reality but fails to do so,

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[120] *See* GOLDMAN, *supra* note 11, at 42 (describing correspondence theory as being "the most natural and popular account of truth—acknowledged to be such even by its critics"); *id.* at 59–68 (setting forth one version of the correspondence theory). For other accounts of the correspondence theory, see J.L. AUSTIN, *Truth*, *in* PHILOSOPHICAL PAPERS 85, 89 (1961); BERTRAND RUSSELL, *Truth and Falsehood*, *in* THE PROBLEMS OF PHILOSOPHY 128–29 (1997).

[121] *See, e.g.*, GOLDMAN, *supra* note 11, at 61–63 (describing some of the difficulties implicit in simplistic accounts of the correspondence relation).

[122] *See* AUSTIN, *supra* note 120, at 89–90. I shall use the language of statements throughout this Section, although the view I establish works equally well as an analysis of what it means for belief to be true. Similarly, I shall assume, for the purposes of this discussion, that statements are successful, in that they actually communicate what a speaker intends to convey. In other words, the term "sincerity" is employed in this Article to describe a feature of utterances, rather than to describe a speaker's intent to speak truthfully or falsely. *Cf.* Micah Schwartzman, *The Principle of Judicial Sincerity*, 94 VA. L. REV. (forthcoming 2008) (defining sincerity as a correspondence between what a speaker believes and what a speaker intends to convey).

[123] *See* GOLDMAN, *supra* note 11, at 59–60.

it is called a false statement.[124] When a sentence does not purport to describe reality at all, we call it non-assertive, and say that it lacks truth-value entirely.[125]

The concept of sincerity is closely related to the concept of truth; however, rather than depending upon a correspondence between statements and external reality, sincerity concerns the correspondence between what a speaker believes and what he says. In other words, a statement is sincerely made when it accurately represents a speaker's belief state concerning the subject matter of the statement.[126] By contrast, when a statement does not accurately represent the speaker's belief state with regard to what is being spoken of, it is an insincere statement.

Although we often speak as if belief were a binary state, the reality is more complicated. At a minimum, there are three meaningful belief states I can have with respect to what I say: belief (where I think that my statement is true), disbelief (where I think my statement is false), and suspension of belief (where I do not know whether my statement is true or false, usually because I lack evidence).[127] And having gone this far, we can easily go further and realize that there is in fact a continuum of belief states, representing incremental increases or decreases in our confidence regarding certain facts about the world.

However, our linguistic capacity is limited, and we usually do not say things like "I believe it is raining outside to a degree of probability of .785." Nevertheless, the concept of sincerity still has value. We can get a fair idea of how strongly someone believes something through ordinary linguistic choices—like the difference between "I'm not sure," "I think so," and "I'm positive." We can also describe as insincere those statements that assert or imply a degree of belief regarding a statement that the speaker does not actually hold.

Thus, to say that speech is false is to say that it does not accurately describe the world; to say that it is insincere is to say that it does not correspond with a speaker's belief state. Any statement may be either true or false, sincere or insincere in any combination,[128] as follows:

	True	False
Sincere	Truly-Believed Statements	Honest Errors
Insincere	Accidentally Correct Lies	Deliberate Falsehoods

[124] *See id.* at 60.

[125] *See id.*

[126] *Cf.* GREENAWALT, *supra* note 97, at 131 (describing insincerity as saying what one does not believe, irrespective of its truth or falsity).

[127] *See* GOLDMAN, *supra* note 11, at 88.

[128] *See* GREENAWALT, *supra* note 97, at 131; *see also* Frederick Schauer & Richard Zeckhauser, *Paltering* 5–6 (Kennedy School of Gov't, Working Paper No. RWP07-006 2007), *available at* http://ssrn.com/abstract=832634 (discussing the category of unintentional misstatements).

B. Understanding Misleading Speech: Implicative Meanings

The sketch above of true statements as those that are descriptively successful begs an important question: how do we know what it is that a given statement is describing? Although this might seem a silly question (after all, we can all understand each other when we converse), it is in fact a very important one. People use language in many ways other than the strictly literal, making use of devices such as tone, metaphor, and implication to convey information not necessarily present in the literal meaning of a sentence's words and grammatical structure. A theory of false speech that could not process usages other than the literal would be hobbled and unable to interact with actual linguistic practices. Thus, this Section will briefly sketch out an account of the meaning of our statements, with special attention devoted to the complicated phenomenon of implicature.

Misleading speech is speech that is not literally false or deceptive but is used to convey things that are either untrue or which the speaker does not believe. People can deceive each other using far more subtle techniques than the outright lie, and this type of deception can include the conveyance of messages through other means than the literal meaning of speech.[129]

We encounter this sort of deception all the time. For instance, it can be seen in the selective suppression of unfavorable facts so as to give a false impression. Suppose that the CEO of an automotive company is asked if he believes the 2007 Herculon is dangerous. He replies by saying, "How dare you suggest such a thing? Consumer Reports gave the Herculon a perfect safety rating." Even if literally true, such a statement could be deceptive and misleading if the CEO knew that Consumer Reports had been reviewing the 2006 Herculon and that the 2007 model had performed significantly worse than the 2006 in safety testing.[130]

Another example would be the use of selectively unimpressive information regarding a candidate for a job recommendation. If a teacher wished to send a false message that a student was a poor candidate for a particular job, he could do so without uttering any false statements. Instead, he could simply focus his praise on the candidate's diligence, punctuality, and penmanship, using the selective omissions

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[129] *See* WILLIAM G. LYCAN, PHILOSOPHY OF LANGUAGE: A CONTEMPORARY INTRODUCTION 189–90 (2000); *cf.* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 23 (3d ed. 1958) ("There are . . . countless different kinds of use of what we call 'symbols,' 'words,' [and] 'sentences.' And this multiplicity is not something fixed, given once for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten.").

[130] *See* H.P. Grice, *Logic and Conversation*, *in* THE PHILOSOPHY OF LANGUAGE 165, 170–71 (A.P. Martinich ed., 4th ed. 2001) (suggesting that if someone is asked where a filling station is and responds with the location of a garage, without disclosing that it is closed or out of gasoline, such a response would surreptitiously violate a conversational maxim and thus be misleading).

of relevant information to send a message that the student was in fact underwhelming.[131] Because the teacher could use such tactics regardless of whether the student in question was actually underwhelming, the tactic could generate either a truthful implication or a misleading one.

An important tool in our attempt to analyze the harm of these misleading statements will be Paul Grice's theory of implicatures. An implicature is a message conveyed by other than the literal meaning of language; Grice attempted to describe the way in which we signal that we are using language in non-literal ways and understand when others have done so.[132] Grice began his project by noting that there were some implicatures that were easy to understand. What Grice calls "conventional implicatures" share a common feature, in that they all involve the use of predefined language conventions to generate their implicative force.[133] Thus, when we say, "Bob is a lawyer, but he's a nice guy, really," the word "but" creates the implication that this case is atypical, and lawyers in general are not nice.[134] A number of other words have this subtle but apparent ability to imply meanings beyond those literally conveyed in the sentence.[135]

Grice's more important contribution was his development of the concept of conversational implicatures. Conversational implicatures convey meanings outside the literal, but they differ from conventional implicatures because they do not rely on the use of words or grammatical forms with the preexisting conventional power to convey implicative meaning.[136] Rather, conversational implicatures arise solely from a combination of the context in which a statement is made and its form. For instance, when I respond to a query about Bob's lawyering skills by asserting that he is good at ping-pong, there are no conventional devices that I use to imply that Bob's lawyering is subpar; rather, the implication flows from the context (the question I was asked) and my choice of response—to talk about ping-pong, not trial advocacy skills.

According to Grice, the method by which we communicate such messages relies on the social conventions that underlie conversational exchanges.[137] Grice attempted to catalogue these rules and use them to explain the concept of implicatures. In his

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[131] *Id.* at 171; *see also* LYCAN, *supra* note 129, at 189–90 (providing the example of one philosopher being asked whether Smedley was a good philosopher and replying instead that Smedley was good at ping-pong).

[132] *See* Grice, *supra* note 130, at 165–75.

[133] *Id.* at 166–67.

[134] *Id.*

[135] For instance, "although" can impose a contrasting implication; "too" or "either" can imply similarity; "therefore" or "thus" can imply causation. *See* LYCAN, *supra* note 129, at 188. Similarly, we use certain standardized sentence structure to carry conventional implications, as when we ask, "Can you do something?" when we mean, "Please do something."

[136] Grice, *supra* note 130, at 167.

[137] *Id.*

account, we generally and unconsciously observe—and expect others to observe—the following restrictions on conversation:

(1) The Maxim of Quantity: this maxim is violated when we provide either significantly more or significantly less information than is appropriate at a given stage of a conversational exchange.
(2) The Maxim of Quality: this maxim is violated when we fail to make an effort to say only that which is true, either by uttering that which we believe to be false or by uttering that for which we lack evidence.
(3) The Maxim of Relation: this maxim is violated when our contributions to discussion are irrelevant.
(4) The Maxim of Manner: this maxim is violated when we fail to speak perspicuously; it teaches us to avoid obscurity and ambiguity and be as brief and orderly in our speech as is reasonably possible.[138]

As Grice describes it, we generally expect that our conversations will obey these maxims to a significant degree—and hence, we treat it as an implied feature of all communications that others are in fact doing so.[139] However, we can also use the maxims in a more striking way; by gratuitously and obviously violating them, we can signal to others that we are seeking to communicate something beyond the literal, what Grice calls a "conversational implicature."[140] An example may help here. When I ask about Bob's lawyering skills and am told instead about his ping-pong skills, I realize quickly that something is fishy about that response. I would normally expect a more relevant answer (this is the operation of the Maxim of Relation). Since I have no reason to think that my interlocutor is trying to mislead me or breach the normal rules of conversation, I have to search for another meaning than the literal one concerning ping-pong. One quickly springs to mind: she does not think much of Bob's legal acuity but is hesitant to say so directly. The meaning is thus communicated through the violation of the Maxim of Relation, combined with some fairly typical assumptions concerning her likely mental state.[141]

Neither type of implied message necessarily will be misleading; after all, we constantly send truthful and sincere implicatures through these channels. However, these two methods are a key way that we can choose to transmit misleading messages. Thus, we can speak as if nothing is unusual without disclosing that we are violating the standard rules of conversational exchanges, or we can flout those

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[138] *Id.* at 167–68.

[139] *Id.* at 169.

[140] *Id.* at 171–74.

[141] For the basis of the ping-pong example, see LYCAN, *supra* note 129, at 189. For an explication of more examples of how conversational implicatures are generated through the violation of conversational maxims, see Grice, *supra* note 130, at 171–74.

rules in an apparent way, signaling to a listener that we mean something other than what we are literally saying and thereby communicating a message that may be false or insincere. Thus, if asked to give a candid assessment of Bob's legal ability, assuming I held his abilities in high regard, I might mislead either by focusing on a few, totally unrepresentative examples in which he performed poorly, thus quietly violating the maxim of relation, or by adverting to his ping-pong skills as discussed above. Both situations will communicate the misleading message that Bob is a bad lawyer, without ever saying so directly, and both would be misleading even though both might be literally true.[142]

Finally, it is important to note that all insincere statements are examples of such misleading speech. Given Grice's inclusion of belief based in reasons as one of the assumptions underlying conversational exchanges,[143] his theory shows that most of our statements include both an explicit assertion about the world and an implied assertion about our own belief in that statement.[144] In other words, when we speak assertively, we are impliedly assuring a listener that we believe what we say; thus, each statement we make contains both descriptions of the external world and of our beliefs.

Having unpacked the concept of implicature and having identified its basis in the everyday norms of conversation, we can see that it will often be fairly easy to substitute an implicature for an overt statement. It should also be clear that we can use implicature to convey meanings which are false, or which we do not in fact believe. Thus, implicatures can be either misleading because they are factually false or misleading because they communicate an insincere assertion. Implicatures are a central part of human communication and can convey important information, such as when we signal directly what might be indelicate to say explicitly. Nevertheless, implicatures may be capable of great harm when used to mislead others. Thus, an analysis of the value of false speech will have to include an analysis of each of these types of implicatures.

C. The Search for Knowledge as a Social Project

In addition to their relevance in helping us categorize statements for analysis, the concepts of truth and belief have a second use. They form important components of knowledge. Knowledge is generally analyzed to include only true beliefs[145] (with the additional caveats that true beliefs must generally be held for appropriate

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[142] Grice, *supra* note 130, at 170.

[143] *Id.* at 167–68.

[144] *See* Smith, *supra* note 106, at 712–13.

[145] ROBERT AUDI, EPISTEMOLOGY: A CONTEMPORARY INTRODUCTION TO THE THEORY OF KNOWLEDGE 214–16 (1998) (discussing true belief as an essential component of knowledge).

reasons—in other words, must be *justified*[146]—and not be formed in an accidental way[147] in order to properly constitute knowledge).

Increasing our knowledge has frequently been acknowledged as an important free expression value.[148] Knowledge is both an individual and a social good.[149] Thus, we generally feel that, ceteris paribus, it is better to know more rather than

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[146] *Id.* (describing the importance of justification as an element of what constitutes knowledge). *See generally* Matthias Steup, *Epistemology* § 2 (2005), *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *available at* http://plato.stanford.edu/entries/epistemology/ (discussing the concept of justification and its myriad treatments). Justification enters the picture because certain sorts of true beliefs are enormously unsatisfying and do not seem to constitute knowledge in the ordinary sense. Thus, suppose that, on the basis of no evidence, I develop an irrational confidence that it is currently raining in Paris. Suppose that not only do I deeply believe this, but it is in fact correct, despite the fact that I did not have any reason to think so. Such a belief is true, but it is not justified. *See* AUDI, *supra* note 145, at 215.

Why do we value justification—in other words, why not be satisfied with just being right and not worry about the basis for our beliefs? Justification, as an account of why we think what we think, and when we ought not to do so, is a critical tool we can use to assess which of our beliefs are likely to be true and which are likely to be in error. When a belief is not sufficiently justified—when we lack reasons for a belief—that indicates that it is less likely to be true. *See* Steup, *supra*, § 2.1 (describing non-deontological justification as a view that "properly probabilifies" a belief); *see also* GOLDMAN, *supra* note 11, at 29 (describing the concept of justification as tied to "truth-conduciveness"). Of course, it is important to remember that justification makes a belief likely to be true but does not preclude the possibility that it is false or does not constitute knowledge. For instance, on the basis of a normally reliable weather report, I might believe that it is raining outside, even if in fact it is not. Such a belief would be justified (because it is based on evidence that I have every reason to think is reliable) but false (because it is not actually raining). Likewise, justified true beliefs can be subject to Gettier problems. *See, e.g.*, AUDI, *supra* note 145, at 216 (giving an example of a justified true belief that is Gettiered).

[147] In the language of epistemology, justified true beliefs must not be *Gettiered*, or formed in certain ways that break the link between the justification of a belief and its truth, if they are to count as knowledge. AUDI, *supra* note 145, at 216 (showing that although justified true belief is necessary, it cannot account for some cases where we would feel that despite the presence of all three conditions, knowledge does not exist); *see* EARL CONEE & RICHARD FELDMAN, *Internalism Defended*, *in* EVIDENTIALISM: ESSAYS IN EPISTEMOLOGY 53, 71 (2004) (providing an example of a de-Gettierizing condition used to prevent accidentally acquired but reasonable true beliefs from constituting knowledge). *See generally* Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 ANALYSIS 121–23 (1963) (providing the famous critique of the tripartite theory of knowledge that led modern philosophers to incorporate a de-Gettierizing condition into their theories).

[148] *See, e.g.*, CHAFEE, *supra* note 93, at 31–33; EMERSON, *supra* note 13, at 6–7; MILL, *supra* note 1, at 22–25, 28–29; Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 553.

[149] *See, e.g.*, GOLDMAN, *supra* note 11, at 3 ("Information seeking is a pervasive activity of human life."); SCHAUER, *supra* note 70, at 17 ("[T]he advantages of truth are almost universally accepted.").

know less, and we also feel that we are harmed when external factors deprive us of knowledge we desire to have.[150] In addition to the satisfaction it provides in itself, knowledge helps us navigate the world and achieve our goals and thus has enormous instrumental value.[151]

In addition to these benefits to individual self-realization and autonomy, knowledge carries other distinctly social benefits. It allows us to govern ourselves effectively in the democratic process[152] and helps us detect and prevent abuses of government authority.[153] Through the disciplines of science and the work of inventors and engineers, it enables us to enormously improve our security and our quality of life. Thus, we can appropriately say that legal rules that cause or permit our knowledge to be impoverished cause significant social harm, while those that help expand our aggregate store of knowledge, and each member of society's access to it, cause great social benefit.[154]

An important insight, developed by Alvin Goldman, is that the tools of epistemology can be used to assess not just what sort of internal practices we should follow in order to form accurate beliefs, but what sort of social processes contribute to increases in our aggregate knowledge as members of social groups.[155] Goldman's project of social veritistic epistemology is dedicated to assessing the performance of various social institutions based on whether they tend to increase or decrease the aggregate strength and number of true beliefs across relevant social groups.[156]

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[150] *See* GOLDMAN, *supra* note 11, at 3 (describing the strong and universal human impulse towards knowledge as motivated in part by our innate curiosity).

[151] *Id.* (describing practical concerns driving our need to know); Redish, *supra* note 118, at 622–25 (discussing the value of self-realization, its connection with the free expression principle, and its dependence on our ability to increase and develop our knowledge); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213, 216–18 (1972) (discussing the relationship between free expression and the value of obtaining knowledge about the world, and thereby increasing our freedom and flourishing as autonomous beings).

[152] MEIKLEJOHN, *supra* note 113, at 26–27 (discussing the importance of access to information for the process of democratic self-rule).

[153] Blasi, *supra* note 148, at 553.

[154] *But see* Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 709–13 (1991) (arguing that some increases in knowledge, such as those that cause distress to the person about whom new facts are learned, are more harmful than beneficial). Schauer's argument need not concern us very much, however. Even if we grant that in some limited cases it is harmful to learn true things, such exceptions do not defeat the general principle that increasing our knowledge is usually valuable; rather, they only suggest that there should be some limited exceptions to our general impulse to protect truthful speech. *Id.* at 723–24 (arguing that the disclosure of facts that an individual would like to keep private necessarily subordinates that individual's interest in privacy to the communities' interest in knowledge, and suggesting that with respect to some matters, such as the disclosure of a private individual's sexual orientation, we should be reluctant to engage in such subordination).

[155] *See* GOLDMAN, *supra* note 11, at 4.

[156] *See id.* at 5.

One important aspect of Goldman's work involves epistemic specialization and the reliance upon experts to facilitate social knowledge. It is very often rational to base our beliefs on what a reliable authority tells us.[157] Thus, if I know that a particular meteorologist is generally reliable and will give me more accurate information regarding tomorrow's weather than I could predict using my own (inferior) knowledge of meteorology, the rational and epistemically appropriate choice is to defer to his judgment, even if I cannot understand the reasons he gives for his conclusion. Indeed, much of the knowledge we receive in our education, especially concerning the sciences, is justified on similar grounds. Few of us could elaborate the reasons for the energy-orbital model of the atom and of atomic bonds, but that does not mean it is rational for us to reject it. Thus, the often-heard scorn for belief or argument from authority is more effective as a debating tactic than as a description of any epistemic reality.

A further point follows: it is often rational for people to make decisions based solely on the weight of authority when other considerations give little guidance towards a truth-determination.[158] I would have little to no ability on my own to assess whether a given substance is carcinogenic; rather, I would need to rely on the degree to which genuine experts agreed in order to decide whether I should believe that the substance is carcinogenic, withhold belief, or disbelieve it. Thus, accurate information concerning what opinions experts hold, when combined with what we know about their general reliability, is an important tool for everyday citizens to evaluate the truth-value of complex propositions as accurately as is possible given their position.[159]

A second critically important insight from Goldman's work is what Goldman calls the Truth-in-Evidence Principle (TEP). Built on the work of Carnap[160] and Hempel in the philosophy of science, the TEP is intended to apply to all aspects of the human search for truth.[161] It runs as follows: "A larger body of evidence is

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[157] *See id.* at 266–67.

[158] *See id.* at 81–82 (discussing the utility of forming beliefs through the weighing of expert opinion, and the preferred method, which involves creating weighted averages of expert opinion on the basis of their expected probability of yielding correct answers); Alvin I. Goldman, *Experts: Which Ones Should You Trust*, 63 PHIL. & PHENOM. RES. 85, 97–102 (2001) (discussing the benefits and drawbacks of arriving at an opinion through the simple weighing of expert testimony and concluding that this can in fact be a valuable technique, provided one has reason to believe that the experts in question are at least partially independent of one another, one does not have reason to believe that the minority are more reliable experts, and the division of experts does not give rise to the conclusion that the risk of error is simply too great to make a call).

[159] *See* Goldman, *supra* note 158, at 97–102.

[160] *See* RUDOLF CARNAP, LOGICAL FOUNDATIONS OF PROBABILITY 211–13 (2d ed. 1962) (noting that we should always use the largest possible subset of available evidence when making inductive inferences).

[161] *See* GOLDMAN, *supra* note 11, at 145.

generally a better indicator of the truth-value of a hypothesis than a smaller, contained body of evidence, as long as all the evidence propositions are true and what they indicate is correctly interpreted."[162]

It is important to state clearly what this means and what it does not mean. It does not mean that increasing the amount of evidence under consideration will always increase the accuracy of our belief states; after all, it is perfectly possible that our evidence is locally misleading. For instance, if we were interested in determining whether or not it was raining outside, we might take the entry of a person with wet clothes to be useful evidence on this point. If, however, it was not raining and the person got doused by a lawn sprinkler, we would be led away from the truth by locally misleading, albeit true, evidence. But what the TEP does mean is that it will *usually* be the case that an increase in evidence will yield an increase in accuracy in belief states, because the weight of the evidence should favor the true proposition and a subset of that evidence should on average reflect its overall weight (with the caveat that this only works when we are able to rationally assess the additional evidence).[163]

Goldman uses the Truth-in-Evidence Principle to argue for the superiority of a specific type of truth-seeking practice: defeater argumentation.[164] Defeater argumentation is the practice of assailing an opponent's argument by presenting new reasons that make a previously valid argument no longer hold.[165] Goldman argues that argument will tend to increase the knowledge of speakers and listeners, so long as the speakers are arguing from true premises (which can be assured to a significant degree by requiring them to assert only sincerely-believed premises) and so long as the audience is capable of interpreting the relationship between premises and conclusion appropriately.[166] This might seem to provide a quite limited justification for the use of argumentation as a veritistic practice were it not for several other features of such argumentation.

First, critical arguments often involve disputes over the truth of premises, which may then be followed by further argumentation over the subdomain of the disputed premises.[167] If argumentation is generally truth-conducive, it should be possible to

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[162] *Id.* Other epistemologists have suggested a similar idea, although often expressed in different terms. *See, e.g.*, Richard J. Hall & Charles R. Johnson, *The Epistemic Duty to Seek More Evidence*, 35 AM. PHIL. Q. 129, 130–31 (1998) (stating that when we desire to believe as many truths and disbelieve as many falsehoods as possible, we have a diachronic epistemic duty to acquire as much evidence as possible concerning propositions about which we are not certain).

[163] *Cf.* SCHAUER, *supra* note 70, at 26 (expressing skepticism regarding the rationality of members of the American public). It should be noted that Goldman does not claim that the TEP is subject to rigorous proof; rather, he describes it as "an attractive methodological postulate." GOLDMAN, *supra* note 11, at 146.

[164] GOLDMAN, *supra* note 11, at 146–47.

[165] *See id.* at 138–41.

[166] *See id.* at 146.

[167] *See id.* at 140–42.

winnow back to a set of true premises by the systematic dispute of any contestable premises, as long as an audience is still engaged by the discussion.

Likewise, argument often contests the support relationship between premises and conclusion. If we view the appropriate relationship between premises and conclusion as a conclusion in its own right with a separate set of proper premises, then it is possible that dialectic argumentation can increase the rationality of an audience's assessment of an opposing theory. These facts, combined with the frequent use of dialectic argumentation in veritistically focused settings such as courtrooms, help to show that the presentation and development of opposed arguments by believers of incompatible propositions may be a very useful way to increase the aggregate social awareness of truth. This insight—that argument between champions of opposing beliefs tends to increase our social store of knowledge when Goldman's conditions are met—will form the backbone of this Article's assessment of the harms and benefits caused by false and insincere speech.

This Section has introduced several key concepts. First, it has attempted to define the concepts of falsity and insincerity with enough precision to enable thorough analysis. Second, it has introduced some key concepts from the philosophy of language regarding the nature of implied meanings, including both the insight that most of our speech includes implied assurances of our belief states regarding what we say and the insight that it is remarkably easy to substitute implicatures for outright assertions in a wide variety of situations, so that we can easily communicate either false or insincere messages without saying anything that is literally untrue or insincere. Finally, it has related the important contributions of Goldman's work on social veritistic epistemology, including the importance of specialization, as well as the Truth-in-Evidence Principle and its use in a demonstration of the informational gains that are produced by the right kind of argumentation.

III. FALSITY AND THE FIRST AMENDMENT

The previous Sections have provided a summary of existing false speech case law and scholarship and presented some philosophical concepts that can be of use for analyzing the problem of false speech. Now, I will defend the principle that the First Amendment protects sincerely believed false speech as well as true speech. The core of this argument will be a demonstration that, contrary to conventional wisdom, the harm caused by sincerely believed false speech is generally outweighed by its capacity to drive argumentation, which in turn furthers the collection, dissemination, and preservation of evidence supporting true beliefs. Although sincerely believed false speech will not always have this effect, it will do so often enough that the harm it does cause should not generally disqualify it from constitutional protection in the absence of severe and immediate harm flowing from a local increase in false belief.

A. The Truth-in-Evidence Principle and the Aggregation of Evidence

As discussed earlier, the Truth-in-Evidence Principle states judgments are likely to be more accurate when they are based on a larger subset of the totality of relevant evidence on a question.[168] The TEP generally supports the conclusion that argumentation is likely to increase our store of true beliefs, providing that two subsidiary requirements are satisfied: (1) the evidence propositions asserted during argument are true (the True Premises Condition), and (2) we are able to correctly interpret the asserted links between premises and conclusions (the Transparent Inference Condition).[169]

Argumentation generally promotes an increase in our evidence and thus increases the likelihood that our beliefs are correct via the TEP. This is because those who hold opposing views on a question, in the process of trying to defend their beliefs, are likely to search out and disseminate supporting evidence on both sides of a question.[170] Furthermore, those who hold opposing views are likely to attack the evidentiary facts asserted by the other side; this will work to identify and revise premises that are false, helping to assure that the True Premises Condition is satisfied.[171] Finally, opponents are likely to assail weak connections between premises and conclusions; this will help assure that the Transparent Inference Condition is satisfied.[172] Thus, good faith argument by those who hold opposing viewpoints is generally likely to increase the available evidence on the questions that are disputed and, therefore, is likely to increase the accuracy of our beliefs with respect to those questions.

We see evidence of this abstract principle in many domains in which we have a strong and paramount interest in reaching true conclusions. For instance, the adversary system of litigation clearly incorporates most of these features; it involves an extended argument between advocates of opposing beliefs, in which each side endeavors to locate and introduce facts favorable to their side, to show that the facts asserted by their opponents are not true, and to locate flaws in the logical relationship between the evidence asserted by one side and the ultimate questions at issue. Likewise, the scientific and scholarly methods largely consist of an endeavor both to assert positive arguments and to attack the arguments made by those with opposing beliefs through the introduction of defeater evidence, assaults on

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[168] GOLDMAN, *supra* note 11, at 145; *see also* discussion *supra* Part II.C.

[169] *See* GOLDMAN, *supra* note 11, at 145.

[170] *See id.* at 145–49.

[171] *See id.* at 140–42; *see also* Brown v. Hartlage, 456 U.S. 45, 61 (1982) ("In a political campaign, a candidate's factual blunder is unlikely to escape the notice of, and correction by, the erring candidate's political opponent.").

[172] *See* discussion *supra* Part II.C.

underlying assumptions, and attacks on an opponent's argumentative structure. Thus, in domains in which arriving at true conclusions is viewed as a paramount good, we regularly rely on argumentation to lead us to true conclusions.

It is important to note, however, what this argument does not show. Contrary to Mill's original argument,[173] it does not show that argumentation will *always* lead to more or deeper knowledge. Rather, the TEP suggests that more evidence is *likely* to increase our knowledge. Thus the veritistically useful feature of argumentation, its ability to increase our working total of evidence, will not always lead to more accurate beliefs. Rather, argument will increase the accuracy of beliefs more often than it will decrease accuracy. Specifically, argument will be of little utility when it serves to create a locally misleading field of evidence.

The concept of a locally misleading subset of evidence should not be hard to grasp. Examples of such situations, and their negative consequences for the accuracy of our beliefs, abound both historically and in our daily experience. Thus, the long-held belief that the Earth is still and the heavenly bodies rotate around it is a reasonable resolution of the evidence available throughout most of human history; knowing only that we did not feel the Earth moving and that we could observe the heavenly bodies passing across the sky, the pre-Copernican models of heavenly movement were reasonably produced by a locally misleading subset of evidence.

Likewise, we can encounter locally misleading evidence in our day-to-day lives without anything sinister occurring. Imagine, for instance, that you are working in a basement office without a radio or internet access, and you are trying to determine what the weather outside is like. You observe several people walk by with umbrellas or raincoats, and some of them seem to have damp hair. You ask a colleague who ventured outside for lunch and learn that it was raining when he did so. On this evidence, you reasonably conclude that it is raining outside. Nevertheless, the subset of evidence may well be incomplete; it could have stopped raining since the people you observed or interacted with had been outdoors. In such a case, true evidentiary facts used in an appropriate way to generate a conclusion can nevertheless generate an incorrect conclusion.

Note, however, that in both cases, further increasing the available subset of evidence could have resolved the error by introducing astronomic results inconsistent with a non-moving Earth or by helping our underground denizen learn that the weather had changed recently. Such examples show the essential validity of the TEP: increasing available evidence is likely in both cases to correct erroneous beliefs.

Now that we have refreshed ourselves with respect to the TEP and the epistemic importance of acquiring more evidence on disputed questions, it is time to turn to the central question: what are the effects of false but sincere speech, for better or for worse, on the aggregate state of our knowledge?

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[173] *See* discussion *supra* Part I.B.1.

B. Erroneous Speech as a Means of Increasing Our Evidence

When considering the potential harms and benefits of sincerely believed false speech, it is important to analyze such speech in its social context. An analytic approach that assumes that all or most false speech will cause false attitudes is oversimplified;[174] we frequently hear incorrect information without instantly adopting it as our own belief. The key question is this: what usually results from the utterance of a sincerely believed false proposition?[175] In other words, this discussion will analyze only cases in which the speaker believes what he is saying.

1. General Principles

There are essentially three important cases that must be considered: the false proposition is believed by no one or by very few people (other than the speaker); the false proposition is widely believed; or the false proposition is believed by some and disbelieved by others, with large numbers on both sides of the question. Each will be considered in turn to demonstrate that, as a general matter, protecting sincerely believed false speech is less harmful to the state of our knowledge than suppressing it.

The first class of false utterances involves those assertions that are patently false and are believed by very few people. Examples would include the earnest assertion that the Earth is primarily made of butternut squash, that water turns to ice as its temperature rises, or that Mickey Mouse is the current President of the United States.[176] False assertions of such matters are unlikely to cause any harm to our search for knowledge because almost no one would believe them. By contrast, however, such utterances also convey an implied assertion of the speaker's belief; we thereby learn that the speaker believes such unusual things. This causes a gain in our knowledge; we learn that this particular speaker is not very credible (or suffers from a mental illness or deficiency). We might even, on the basis of frequently hearing ridiculous assertions, come to form beliefs about the proper course of future education policy. But the main point is that hearing patently false assertions produces, on the whole, more veritistic gain than harm.

It could be objected here that some propositions that would be patently false to an informed expert may not appear so to an unschooled listener. For instance, few of us would be capable of detecting all patently false assertions regarding high-energy physics. However, there is an important additional consideration here: very

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[174] *See* SCHAUER, *supra* note 70, at 28 (seeming to argue that this will be the usual result of hearing false speech).

[175] The category of speech at issue here is either innocent or negligent error: speech that is false but which the utterer believes to be correct. The case of false propositions that are insincerely uttered is discussed *supra* Part IV.

[176] *See* GREENAWALT, *supra* note 97, at 48.

few of us would take the word of an everyday person as authoritative on such highly technical concepts without first inquiring as to the foundation for the claimed expertise on such questions. Thus, on technical matters, few people would give great weight to the testimony of a non-expert. By contrast, very few experts would be likely to hold patently false beliefs in their area of expertise.[177] Thus, a comparable, patently false statement uttered by an expert would nearly always be an insincere statement as well and would be analyzed separately.

It seems clear that hearing patently false speech will rarely be likely to cause significant epistemic harm and that typically the positive consequences of learning that some people hold such strange beliefs will strongly outweigh the low risk that we might be taken in by such assertions. The next category, false beliefs that are almost universally held, is problematic to the extent that it is difficult to provide examples of such beliefs. This difficulty points out a deeper problem; if we pervasively believe false things, it may be very difficult to identify and refute them. Certainly a legal rule would have difficulty applying itself to such cases. Obviously, such cases are deeply epistemically distressful given that they imply serious roadblocks in our search for knowledge. Nevertheless, such cases resist analysis, because if we had a way of describing such cases or giving examples of them, we would no longer be dealing with pervasively false beliefs. Certainly we know that

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[177] Of course, a further qualification is needed here. It is often the case that non-experts set themselves up to be experts, and sometimes large segments of the public believe them. For instance, many religious authorities with little to no scientific training purport to be authorities regarding the genesis and development of life and routinely make scientific claims that are far beyond their field of expertise; many religious devotees likewise accept such claims without the scrutiny that might ordinarily accrue to a non-expert in biological science. *See, e.g.*, Nicholas D. Kristof, Op-Ed, *Believe It, or Not*, N.Y. TIMES, Aug. 15, 2003, at A29 (noting that three times as many Americans believe in the virgin birth of Jesus as believe in the validity of the theory of evolution). Such acceptance is troubling, in large part because it is likely to inhibit the advance of true belief to a substantial degree. Nevertheless, I believe the real problem here stems not from a simple failure of rationality in religious worshippers, but rather from complex and deep-seated disagreements regarding the *source* of true belief and the proper nature of epistemic justification. In other words, many religious believers no doubt think that the word of a minister is superior to the word of a scientist even on scientific matters because they believe that true beliefs are more likely to flow from revelation and religious meditation than from empirical inquiry. This means that this situation is better treated as a contested issue of belief than as an issue of patent falsity, even if most people we would regard as true "experts" would argue that such assertions were patently false. Try as we might, it is unlikely that such epistemic views would be alterable by any regulatory or constitutional interpretive strategy, and even if we felt capable of achieving such a goal, the religion clauses of the First Amendment would likely forbid such activity. Furthermore, attempting to alter such beliefs through coercion would likewise violate political values such as respect for individual autonomy and self-realization to an extraordinary and unpalatable degree. *See* discussion *supra* at Part I.B.iii. Thus, even in such epistemically distressing situations, free discussion is a better recourse than any strategy of government coercion or suppression.

such beliefs exist, because we can analyze past beliefs and identify universally held beliefs we now know on better evidence to be false (for instance, the notion of an earth-centric universe). The most we can say about them is that to the extent we hold such beliefs, we are likely to (incorrectly) view the corresponding true belief that contradicts them as false. To that extent, protecting falsity will work an epistemic benefit because it will enable us to hear (even if we think it absurd) the true beliefs when they are expressed. Therefore, it behooves us to protect contrary assertions regarding beliefs that are widely held, regardless of whether the beliefs we hold happen to be true or false.

Finally, we must deal with the more complex case: false assertions on matters whose truth is disputed. Here the harm is more palpable; given that one type of evidence we routinely use in making truth judgments is an assessment of the weight of opinion on either side of a question,[178] an increase in the number of people propounding a false belief has some tendency to induce incorrect beliefs in those who hear it and (erroneously) find the report to be credible.[179] For instance, the false assertion given in the rain example (by a colleague who wrongly believes that it is raining outside) does tend to induce a false belief in a hearer. Thus, the key question is whether false speech on disputed matters has an epistemic value that outweighs this harm.

Mill argued that falsity would help us develop a deeper understanding of truth; however, he spent relatively little time explaining how in fact it would do so and used only illustrations involving matters so complex that they may not have involved truth values at all.[180] What is absent from scholarship to date is an argument addressed to an intermediate case between the highly complex religious assertions discussed by Mill and the obvious truths or untruths discussed above. Goldman's argument on the veritistic merit of argument helps to illustrate how Mill's approach might work on this more pragmatic level.[181]

The first important point is that, on disputed questions that interest us, it will be very rare for there to be speakers on only one side of a question. Politicians may make one claim, but their opponents will assert another. Manufacturers will make positive claims about their products that will be disputed by competitors or by consumer advocates. Thus, for the most part, competing ideas will be championed by interested parties in the same way that attorneys champion opposite claims of fact in legal disputes.

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[178] *See* Goldman, *supra* note 158, at 97–102.

[179] *See* GOLDMAN, *supra* note 11, at 117 (using Bayesian reasoning to show that we will not improve the state of our knowledge when we rely on erroneous estimates of credibility); SCHAUER, *supra* note 70, at 28 (arguing that the main risk flowing from the expression of false speech is that it will be accepted as true and acted upon).

[180] *See* MILL, *supra* note 1, at 30–47; *see* STEPHEN, *supra* note 7, at 76.

[181] *See* GOLDMAN, *supra* note 11, at 144–48.

Once we have two or more individuals advocating opposing claims of fact, we have Goldman's description of argumentation, as long as a few more conditions apply. First, those arguing must assert premises that are true.[182] To some extent, of course, those engaged in a dispute may be able to assure this premise by assailing those of their opponents' premises that seem doubtful, thus generating a subargument that may help to improve the accuracy of views with respect to the subquestion. Likewise, proper conditions for veritistically useful argument require that listeners be able to assess the validity of reasoning.[183] Those with strong views are likely to assail the reasonableness of arguments, however, and this will help listeners to identify faulty links between premises and conclusions.

Proper argument has the extremely useful feature of increasing our available evidence.[184] It harnesses the interest of persons on either side of a dispute to ferret out new and important facts that help us improve the accuracy of our assessments with regard to the disputed questions. It helps to discover when premises that seem plausible are in fact false or when reasoning that seems valid is in fact faulty.[185] But argument about factual propositions only takes place when someone is arguing for a proposition that happens to be false.[186]

2. False Statements Concerning Verifiable Facts

But perhaps this is unsatisfying because it is somewhat abstract. After all, some disputed facts are rather simple things; is it really likely that argument will increase the depth of our understanding with respect to simple facts? Surprisingly, the answer is yes, as long as the dispute centers on conflicting positions that are truly believed by the disputants. For whenever we hear an earnest disagreement, we learn biographical propositions about the disputants: we learn that they disagree. And this fact, in and of itself, communicates that there is room for disagreement on a proposition and hence that something we had previously been sure of might need investigation.

This modest epistemic advance might not be enough to outweigh the risk that we will believe the false assertion rather than the true. But hearing a disagreement

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[182] *See id.* at 146.

[183] *See id.*

[184] *See id.* at 145–46.

[185] *See id.*

[186] If neither side believed the false proposition, then the true premises requirement for veritistically good argument would be violated because one party would be employing insincere assertions. Because insincere assertions of even true propositions incorporate false biographical assertions regarding the speaker's belief, such argument would incorporate false premises. *See* Smith, *supra* note 106, at 712–13. Nor would such deception be veritistically harmless; one important element of our weighing of competing views involves an assessment of authorities on either side, and even a good faith assertion of a view we do not believe deprives an audience of an opportunity to properly assess the weight of authoritative belief.

about even simple facts is likely to spark something more useful: a discussion that brings out the reasons for disagreement. This type of discussion both increases our confidence about a final result and deepens our understanding about the circumstances that produced the disagreement, possibly allowing us to learn entirely new and useful facts. As an argument proceeds between people who disagree, the reasons supporting either's belief will be offered and critically examined.[187] If defeater evidence exists that undermines an opponent's argument, it will likewise be introduced and examined.[188] At the end of such a conversation, both the participants and any hearers will be in possession of a larger number of facts than before the argument had occurred. They will have seen an exploration of the probable truth of many of these facts, as well as a critical examination of the logic of either side's presentation.[189] Because a greater subset of evidence is generally more likely to favor true propositions than false propositions,[190] both disputants and audience will be in a better position to evaluate the likelihood that even mundane facts are true, than if there had been no false assertion and subsequent argument. Those who already believe the true facts will come to believe those facts with greater confidence, which is an important veritistic advance.[191] Those who hold false beliefs, by contrast, will tend to have them either changed or weakened as they are confronted with the greater body of evidence, which is an even more valuable.

For instance, imagine a simple dispute about the weather. Person A maintains that it is raining, while Person B maintains that it is not (both work in a basement office where the answer to the question is not obvious). Both are interested in the answer to this question because they are trying to decide whether to go out for lunch or order in. In such a situation, once the initial positions (one true and one false) are set out, the conversation will almost immediately turn to evidence, the reasons each have for their beliefs. Suppose that A's evidence on the question is that it was raining when he stepped outside for a paper thirty minutes ago. His dialogue with B could alter his belief and deepen their collective knowledge in a number of ways:

B could inform A that he stepped outside five minutes ago and that the sky was clear. A would learn that it was no longer raining, and both would learn that it was raining not too long ago (and that therefore it might be raining again soon).

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[187] *See* GOLDMAN, *supra* note 11, at 139–44.

[188] *See id.* at 139–40.

[189] *Cf. id.* at 145–46. Goldman never explicitly makes this point, but it is implicit in his connection between the TEP and the veritistic benefits of defeater argumentation.

[190] *Id.* at 145; *see* CARNAP, *supra* note 160, at 211–13; Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 38–41, 45–46 (2002).

[191] *See* SCHAUER, *supra* note 70, at 18 (noting that ninety-nine percent assurance of a true fact is better than fifty-five percent assurance); *cf.* MILL, *supra* note 1, at 37 (arguing that without hearing falsehoods, belief in truth becomes rote and mechanical, lacking in the vitality of an activated belief).

B could inform A that he thought it was clear on the basis of having stepped outside an hour ago; B would learn that it was raining as of thirty minutes ago (and thus, probably still raining), and both would learn that it was raining intermittently.

B could inform A that he thought it was clear on the basis of a weather report he had believed to be quite reliable. B would learn it was recently raining, and both would learn that the particular weather report was less reliable than B had supposed.

B could tell A that he had believed it was clear on the basis of the report of a coworker (C), who swore thirty minutes ago that it was clear. Upon investigating the matter, both A and B might learn that C is a lying practical joker who thinks it is funny to fool people regarding the weather.

Another excellent example of the veritistic advantage produced by an argument over a factual disagreement was provided by Lawrence Solum. Imagine the following exchange:

> Speaker: Please open that window.
> Listener: No, it doesn't open.
> Speaker: Yes, it does. I opened it yesterday.
> Listener: No, it doesn't. I tried this morning.
> Speaker: Yes, but do you know the trick of thumping the latch?
> Listener: No, I didn't. Let me try.[192]

Each step before the last in the exchange involves a new defeater, a premise that undermines the evidence on which the other party is basing the truth determination. As this argument proceeds, each party learns about the other side's evidence, comes to understand the root of the disagreement, and, probably, comes to a more certain view regarding the window's condition. Note that all of the above examples depend on a false assertion being made; without the falsity, there is no argument and no increase in the evidence needed to form a more accurate set of beliefs. The false statement is the signal that shows the existence of disagreement, creates the motivation to inquire further into the matter through the tools of argument, and begins the process that leads to a gain in knowledge for both parties. It is this powerful property of false statements that forms the basis of Mill's best reply to J.F. Stephen who criticized Mill for failing to use simple examples when he elaborated the virtues of hearing false speech:[193] it is not the simple denial of a basic fact that brings an advance in knowledge, but the attempt to resolve that disagreement and the consequential exploration of the reasons for it. It is in this sense that we should understand Mill's claim that disagreement deepens our understanding of truth.[194]

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[192] Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U.L. REV. 54, 95 (1989).

[193] *See* STEPHEN, *supra* note 7, at 76.

[194] MILL, *supra* note 1, at 30–31.

Disagreement is likely to bring out the good reasons for our true beliefs, possible flaws in the reasoning used to support even correct beliefs, and altogether unrelated truths that explain the existing disagreement.

3. Unequal Access to Supporting Evidence

However, there is a wrinkle here. These simple examples have all involved scenarios where the reasoning necessary to understand the basis of a truth claim is highly accessible to any reasonably competent adult. In these sorts of cases, erroneous premises are likely to be quickly discovered, and the steps of reasoning involved are accessible to all participants. The harder cases involve arguments about subjects where important evidence is unavailable to those who might wish to engage in an argument, limiting their ability to challenge the factual validity of premises, or arguments on subjects where the reasoning leading from valid premises to a valid conclusion is simply too abstruse for most people to follow. Either situation might imperil the ability of argumentation to lead towards an increase in knowledge.[195]

The truth-tropic features of argumentation depend on the ability of participants to challenge the other side's evidence premises; otherwise, we cannot be confident that those premises are true.[196] Therefore, when the underlying data necessary to do so are not available to both sides, we have less reason to rely on argument to increase the accuracy of our beliefs because a crucial condition, reliance on true premises by both sides, is less likely to be true. One paradigmatic example of such a situation is where one side is lying regarding their evidence. Not only does such a situation increase the likelihood that the propositions themselves are false, it also insulates those propositions from scrutiny by the other side.

But an opponent does not have to be lying to be relying on inaccessible premises that cannot easily be verified. For instance, imagine a dispute regarding the existence of an unusual purple albatross. Person A argues that this fantastic creature exists on the basis of his observations while sailing at dangerously high southern latitudes. A might earnestly believe that his observation is real and not the product of a hallucination brought on by food poisoning and lack of sleep. B, an albatross expert who doubts the existence of such a creature, is not without tools to assail A in an argument. He can argue that no other explorer has seen such a creature and that this makes its existence unlikely, although not impossible. He might further argue that sailors in such extreme conditions are known to have had hallucinations in the past. Indeed, we might feel that the unverifiable nature of A's data makes it more likely to be a fraud or an illusion. But in the end, the private nature of A's experiential data makes that aspect of his argument hard to verify and reduces the veritistic utility of argument on this point.

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[195] *See* GOLDMAN, *supra* note 11, at 144–46.

[196] *See id.*

Most likely, there are many similar cases in which access to information is asymmetric in this way.[197] In some cases, this will be irremediable, such as in cases where one party's memory provides crucial evidence premises that are not externally verifiable—as in the above example. However, in many other cases, such as claims regarding physical objects or processes in one party's control, asymmetric access can be corrected by a disclosure rule mandating sufficient access so that the other side can investigate and either verify or refute the other's evidence premises. One example of such a rule is embodied in the modern discovery practice created by the Federal Rules of Civil Procedure which provide both parties with broad access to the other side's supporting evidence and to information that might undermine opposing claims.[198] Other examples include the extensive disclosure required of the issuer of publicly traded securities regarding their internal financial situation[199] or the scientific practice of making data and methods used in generating a conclusion publicly available for examination, in order to facilitate attempts to independently verify results.[200] If the defect in access to supporting evidence can be corrected, then we may regain the knowledge-producing advantages of argument. The frequent resort to disclosure rules in situations of unequal access to information helps to illustrate this principle.

4. Asymmetric Analytic Capacities and Expert Speech

The second complication to the beneficence of argument arises when we cannot be sure that the link between premises and conclusion is valid.[201] Since the TEP-based theory of the utility of argument depends upon a valid link between premises and conclusions offered on both sides,[202] the inability to scrutinize that link may mean that we cannot be confident that those engaged in an argument are linking evidence to conclusion in an appropriate way.

In many cases, those engaged in argument will be able to identify such problems when they occur, so that the relevant audience can realize the danger and avoid being taken in by a flawed argument. If A is trying to show that he owns a red wheelbarrow, offers as his only evidence that he very much enjoys the poetry of

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[197] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976) (arguing that commercial speech ought to be less protected because it is more easily verifiable by an advertiser, and implicitly, less easily verifiable to members of the public); *see also* Kozinski & Banner, *supra* note 60, at 635–38 (criticizing this argument).

[198] *See* FED. R. CIV. P. 26–37.

[199] *See, e.g.*, 15 U.S.C. §§ 78*l*, 78m, 78o(d) (Supp. V 2005) (Exchange Act Sections 12, 13, and 15(d) which impose a variety of periodic disclosure requirements on issuers of securities).

[200] *See* Epstein & King, *supra* note 190, at 38–41, 45–46.

[201] *See* GOLDMAN, *supra* note 11, at 144–46.

[202] *Id.*

William Carlos Williams, and asserts that this proves his ownership, most listeners would balk. Clearly, most of us are competent to assess the relationship between liking a poem about a red wheelbarrow and actually owning one. Thus, for most arguments on everyday matters, we are all fairly competent at assessing the sorts of reasoning that accord with common sense. Of course, in some cases, we may all employ mental shortcuts that diverge from strict rationality and that may therefore distort some of our conclusions.[203] However, such heuristics may well have minimal impact on the processes of truth-seeking; some evidence exists to show that the biases we display in laboratory conditions have more to do with the artificiality of such scenarios than persistent defects in our reasoning.[204]

But there are definitely cases where our everyday ability to judge the links between evidence and conclusions will not help us; a wide variety of arguments require substantial expertise to be comprehended. For instance, neither I nor most readers of this Article are capable of adequately assessing the relationship between the premises and the conclusion of Andrew Wiles's proof of Fermat's Last Theorem, even after assuring ourselves that all of his premises were true.[205] This failure does not result from defects in our rationality but from the simple fact that the proof uses methods of reasoning that require special mathematical training to appreciate. Numerous examples of such inaccessible arguments could probably be found in every discipline with specialized knowledge and methods of reasoning. In an argument between a mathematician who comprehends Wiles's proof and a lay person, a defect in Wiles's argument would probably not be detected through the process of argumentation. Thus, such an argument would not involve appropriate assurances that the rule requiring an adequate relationship between premises and evidence was being followed.

Does this mean that argumentation is not a knowledge-producing exercise when expert knowledge is involved? No, for several reasons. First, and most obviously, the expert might correct the non-expert on errors that are within the non-expert

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[203] *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 4–20 (Kahneman et al. eds., 1982) (describing the shortcuts frequently used in human cognition and the ways that these shortcuts can cause us to reach conclusions that are less than perfectly rational).

[204] *See* GOLDMAN, *supra* note 11, at 230–33 (reviewing literature on cognitive biases that suggests that the deviations observed by experimenters such as Kahneman and Tversky may have more to do with the abstracted experimental conditions than with real deficiencies in human rationality and that the experiments may have incorporated fallacious ideas concerning probabilities).

[205] *See* Gerd Faltings, *The Proof of Fermat's Last Theorem by R. Taylor and A. Wiles*, 4 NOTICES OF THE AMS 743 (1995) (providing a summary of the proof for other mathematicians); Andrew Wiles, *Modular Elliptic Curves and Fermat's Last Theorem*, 142 ANNALS OF MATHEMATICS 443 (1995) (part of the original proof); Charles Daney, *The Mathematics of Fermat's Last Theorem*, http://cgd.best.vwh.net/home/flt/fltmain.htm (last visited Mar. 4, 2008) (giving an accessible summary of the proof).

audience's comprehension, thus leading to a veritistic gain, so long as the expert was speaking honestly. More importantly, however, an argument between experts can promote knowledge even among a non-expert audience. First, assuming that neither expert is misrepresenting his own opinion, an audience will learn an important fact: informed experts disagree on this particular point. For many lay people on many topics, the knowledge that the jury is still out on a question may be the most useful information we can acquire. Given the fact that we are unlikely to be able to understand the intricacies being debated by the experts, learning that they disagree—and getting an impression of the rough weight of expert opinion on an issue[206]—may be the best we can do to form correct beliefs on such a question.

But this does not end our inquiry, because the relevant question is not whether hearing a dispute between experts produces any gain in knowledge at all, but whether it produces more gain than a government policy suppressing the presumably false opinion would bring. In analyzing the necessity for suppression, it is important to make one distinction clear: the government can act on a particular set of factual assumptions (assuming a sort of corporate belief state) without also needing to suppress the contrary opinion.[207] The question is not when the government should arrive at a particular conclusion, but rather when the government is justified in attempting to impose its conclusion on the rest of us—if, indeed, this can ever be justified. For the purpose of analyzing suppression of false expert opinions, there are two possible situations: either expert opinion is significantly divided, or expert opinion is unanimous or nearly unanimous on one side of the question.

When expert opinion is divided, there are three key harms that would occur from suppressing one side of the debate, even when the side suppressed is false. First, the government could well be wrong; especially on a question that divides experts, we should tread very lightly before assuming that we have the final answer. The drive to demonstrate that presently persuasive scientific opinions are in fact untrue is one of the great motivating principles of scientific advance, and we do ourselves harm if we act as if that strong skeptical tendency were not an important foundation of our scientific understandings.[208] Second, the experts whose opinion will be suppressed may be disincentivized from researching on that side of the question, even if the suppression is less than total and experts are allowed to communicate with each other. One important drive for all of us, experts included, is the drive for credit and acclaim.[209] If experts are precluded from informing the

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[206] *See* GOLDMAN, *supra* note 11, at 81–82 (discussing the importance of weighing expert opinion accurately as a means for non-experts to form true beliefs on expertised subjects); Goldman, *supra* note 158, at 97–102 (same).

[207] *See* MILL, *supra* note 1, at 22–23.

[208] *See* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 268–69 (2002) (discussing the process of corroborating scientific hypotheses through repeated tests aimed at falsifying a theory).

[209] *See* GOLDMAN, *supra* note 11, at 260–63.

public about their results, they may be discouraged from pursuing particular avenues of research. If this were to happen, then the expert community would be deprived of the epistemic advantages that argument brings.[210] Finally, the public would be deprived of important evidence; it would fail to learn that the expert community was divided, a critical piece of data if they are to form appropriate likelihood estimates and not believe these propositions with more certainty than is presently appropriate.[211]

Even when expert opinion is unanimous, or nearly so, all three of the above concerns are still valid. First, unanimity of opinion does not always indicate certainty of belief. Indeed, many of the most important moments in the history of science have involved major revisions in understanding that brushed aside widely adopted orthodoxies.[212] Nor is it the case that major revisions of technical belief occur only at the level of high theory. For instance, an overwhelming scientific consensus existed for the view that human beings had forty-eight chromosomes until, as microscopic technology improved, a few dissenting voices began to challenge that orthodoxy and suggest that there were only forty-six—the number we now know to be correct.[213] Thus, even in the case of substantial agreement among experts, we still risk suppressing a true opinion when we restrict dissenting views. Second, given the importance of challenging orthodoxy and the difficulty of getting anyone, including experts, to do it,[214] we should be especially wary of taking actions that might discourage scientific investigation by stigmatizing the work of those who are willing to challenge widely prevailing views. Finally, when the public is largely aware of the scientific consensus, hearing the dissenting view, and thereby learning that what might have been certain is in fact subject to some doubt, may be of exceptional epistemic value. Thus, the rationales for protecting potentially false expert opinions apply both where the subject of the opinion is disputed and when there is broad consensus on one side of the question.

There is still one point of difficulty with regard to the value of false speech on technical issues, however. The veritistic gains that accrue from hearing experts debate technical issues relies upon our being able to determine the weight of expert

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[210] Within the community of experts, the premises-conclusion relationship can be probed just as with an ordinary question.

[211] *See* Goldman, *supra* note 158, at 97–102.

[212] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 12–22, 102–03 (3d ed. 1996).

[213] *See* Stanley M. Gartler, *The Chromosome Number in Humans: A Brief History*, 7 NATURE REVS. GENETICS 655, 656–58 (2006) (noting that scientists continued to count forty-eight chromosomes for some time after the technology had developed to clearly show that only forty-six existed).

[214] *See* KUHN, *supra* note 212, at 24 (noting that scientists do not normally invent new theories and that they are often intolerant of those who do); MILL, *supra* note 1, at 45 (suggesting that the values of dissenting argument, even where opinion is nearly unanimous, are so great that we should endeavor to simulate vigorous dissent when no one is ready to supply it in actuality).

opinion. This rationale has less force when applied to discussions between experts and non-experts who are pretending to be experts. Some such cases will involve the misrepresentation of the non-expert party's credentials and thus will be cases of insincerity, not honest error. These cases will be discussed below. But on other occasions, non-experts may believe themselves qualified to discuss an issue, may make no misrepresentations regarding their qualifications, and may nevertheless persuade some members of the public to adopt their ill-informed view. A common example of this involves religious authorities who present themselves as experts on scientific topics such as the genesis and evolution of life and are accepted by some followers as such.[215]

Even in these cases, there is still knowledge to be gained through the discussion. The expert may respond to common misconceptions contained in the non-expert's arguments and thus improve the state of public knowledge on the topic. By contrast, although this is by no means universally true, most of us do not blindly adopt opinions on technical matters offered by those with no apparent qualifications; we are unlikely to accept a plumber's opinion on matters of biology, or vice versa, absent some evidence of special qualifications in that field. This suggests that, when those non-experts continue to be influential, we are dealing either with deception regarding their qualifications or a more fundamental disagreement regarding the types of expertise and evidence that are appropriate bases for influencing our beliefs.[216] The arguments of religious authorities may be an excellent example of such a scenario; followers may believe that due to religious beneficence, the statements of a minister are more authoritative than those of a scientist, even within the scientist's special domain of expertise. It is unlikely that we would be able to alter such beliefs through selective suppression of non-expert opinion on such matters, even if the First Amendment's speech or religion clauses allowed us to engage in such selective suppression of religious speech. Thus, there does not seem to be a strong case for excepting the speech of non-experts from the general principle that advocacy of false views will generally produce more knowledge via its power to drive argumentation than the suppression of those false views.

Even in cases where argument is unlikely to increase our immediate access to truth, it can still provide other social epistemic benefits, specifically through developing the analytic capacities of the citizenry. Enabling the citizenry to develop its capacities is an important First Amendment goal,[217] and engaging in and hearing argumentation is a key way that the citizenry can develop its capacity for analyzing

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[215] *See supra* note 177.

[216] *See supra* note 177.

[217] *See, e.g.*, Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971*, 51 DEPAUL L. REV. 359, 370 (2001) (discussing the importance of the self-development value in democratic theory); Redish, *supra* note 118, at 593 (discussing the connection between the self-development value and the protection of free expression).

competing truth claims.[218] First, hearing disagreements forces the citizen to take an active and skeptical role in assessing arguments; this may serve him well in his quest to improve the general state of his knowledge in order that he might live a satisfying life. Moreover, it may help him better exercise the factual judgment that is necessary when analyzing competing policy proposals during election cycles, enabling him to make more informed choices in his vital role as a democratic sovereign.[219] Likewise, both in their individual and sovereign capacities, it may benefit citizens to grow more aware of the error factor in all human calculations.[220] Just as epistemological humility is an important value in a government,[221] it is an important value in a citizenry, having the general effect of discouraging rash and impulsive action before adequate evidence is available and promoting tolerance towards those who have reached opposing conclusions on similar evidence.[222] Thus, the benefits of argumentation extend beyond the issues under discussion; they help to develop habits of thought that are likely to promote both a more critical and a more tolerant society.

There is, however, one narrow exception to the principles developed above regarding the generally valuable nature of false speech on matters requiring expertise; there are situations in which false statements are not very likely to produce any sort of useful argument but instead are expected to be relied upon by a listener without a great deal of reflection.[223] When we retain an attorney to render confidential advice on a legal question, for instance, we typically expect to rely on her advice and do not anticipate a need to obtain independent verification or critiques of her views. Given the confidential nature of this relation, and the lack of other experts who are privy to the relevant facts and the opinions offered by our attorney, it would be very difficult for any useful argument to arise and correct a false statement. Furthermore, the promissory nature of the relationship, in which an advisor is receiving compensation in return for rendering competent advice, removes some of the value we might ordinarily place in allowing her to speak her mind

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[218] *See* MILL, *supra* note 1, at 36 (noting that competition in ideas is necessary for the maintenance of an intellectually active people).

[219] *See* MEIKLEJOHN, *supra* note 113, at 25 (noting the importance of developing voter wisdom as well as voter knowledge).

[220] *Cf.* Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1316 (9th Cir. 1995) (noting that even scientists often have vigorous and sincere disagreements about the subjects under their study).

[221] *See* Redish, *supra* note 118, at 383 (noting the value of precluding the government from assuming a posture of certainty regarding highly contestable issues of moral truth).

[222] *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 120 (1986) (noting that developing tolerant habits in the citizenry is an important First Amendment goal).

[223] *See* GREENAWALT, *supra* note 97, at 316 (stating that innocently false statements should be immunized unless made to a listener who should not be expected to do further independent checking).

without conducting adequate verification first. Thus, it is quite possible that in this and analogous situations (such as confidential advice from accountants or other retained expert advisors) liability for negligently-made false statements would produce a net veritistic gain, rather than bringing about the harms to our knowledge that such a restriction would bring if imposed more broadly.[224]

The foregoing discussion has set out the reasons why argument will produce good consequences for the state of our knowledge even when the logic linking premises to conclusions is complex or technical. With this step being reasonably well established, the general principle becomes fairly clear: in all the circumstances thus far surveyed, argument is likely to produce more knowledge than suppression, and this holds to the extent that the views that are advocated in argument are in fact believed by their advocates. The one major exception we have seen involves cases where one side seeks to support their argument with premises that are not easily open to investigation or dispute by opposing advocates and are expected to be relied upon without further investigation.

Previously, I argued that there was a persistent gap in the theory of free expression's application to false speech: a failure to carefully assess the degree to which false speech is harmful. In this Section, I have set forth the view that restricting sincere speech on account of its falsity impoverishes us epistemically by foreclosing arguments that would increase the sum total of our knowledge. When combined with the autonomy and self-realization values that militate against forbidding people to say what they earnestly believe,[225] the conclusion that little harm will generally result from sincerely-believed false speech lends strong support to the argument that such speech should receive First Amendment protection. Furthermore, although it might seem that there would be an exception in situations where access to supporting evidence was asymmetric,[226] this is not the case. Rather, subject to the confidential advice exception discussed above, a rule requiring disclosure of the inaccessible information infringes less on our interest in increasing our knowledge than does a rule of outright suppression, because such a rule permits argumentation to occur with its correlative epistemic advantages.

This Section has set forth the rationale for giving strong, although not absolute, First Amendment protection to most false statements that are believed to be true by a speaker. Next, I will address the reason why the First Amendment should not generally protect speech that is insincere.

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[224] A distinction of a similar type is already recognized in the law of tortious misrepresentation, which provides for a lowered standard of fault in cases involving a false statement made by a professional advisor in the course of her business. *See* RESTATEMENT (SECOND) OF TORTS § 552 & cmt. I (1977); *see also, e.g.*, Private Mortgage Inv. Serv., Inc. v. Hotel & Club Assocs., 296 F.3d 308 (4th Cir. 2002) (recognizing liability for negligent misrepresentation in a professional appraisal).

[225] *See* discussion *supra* Part I.B.3.

[226] *See* discussion *supra* Part I.B.3; *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 (1976).

IV. THE SPECIAL PROBLEM OF INSINCERE SPEECH

The relationship between falsity and insincerity has proved quite problematic in First Amendment doctrine. In some circumstances, the Supreme Court has required both insincerity and falsity before the First Amendment can be overcome;[227] in others, the Court has stated or held that perfectly sincere false statements can be subjected to liability.[228] In the previous Section, I argued that falsity alone should rarely be enough to justify suppression of speech, because although false speech can cause some harm to our knowledge, that harm is usually outweighed by the power of false speech to drive knowledge-augmenting argumentation. This Section will discuss how a mismatch between a speaker's belief state and his assertion alters this calculus; in other words, it will address the difference between lying and erring. The discussion will show that insincere statements are entitled to little constitutional protection in their own right, although such statements may sometimes need modest protections in order to avoid chilling sincere speech.

A. Insincerity and the Problem of Asymmetric Access to Information

At the outset, we might wonder whether lies are in fact valuable. After all, we have seen that false speech has value, and telling lies is one easy way to assure that we will speak falsely. Indeed, Mill seemed at one point to argue in favor of such a view, when he noted that if we lacked advocates of dissenting views, we would do well to create artificial advocacy of dissenting views in order to capture some of the value that advocacy of false views provides us.[229]

But reflection shows that this simple argument for the value of insincere speech does not have merit. Although insincerity is itself a form of false speech (because every assertion includes an implied assertion of belief),[230] it lacks most of the features that make sincerely-believed false speech worth protecting.[231] First, as

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[227] *E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (imposing actual malice rule on defamation actions arising out of criticism of public officials). All speech that falls within the actual malice rule is insincere speech because knowing or reckless falsity involves a misrepresentation of belief states. *See* discussion *supra* Part II.A. But not all insincere speech is made with actual malice, because assertions that a speaker neither believes nor disbelieves are not "probably false" but are insincere. *See* St. Amant v. Thompson, 390 U.S. 727, 730–33 (1968).

[228] *E.g.*, Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 757–61 (1985); *Va. State Bd. of Pharmacy*, 425 U.S. at 771–72 (stating that false or misleading commercial speech could be restricted without reference to knowledge of falsity).

[229] *See* MILL, *supra* note 1, at 39, 45.

[230] *See* Smith, *supra* note 106, at 712–13.

[231] *But see* SCHAUER, *supra* note 70, at 159–60 (arguing that a speaker's state of mind should have little bearing on the First Amendment inquiry).

discussed above, most theorists to consider the question have concluded that insincerity deprives false speech of most of the value that it would have from the standpoint of moral and political theory.[232] Insincere assertions do not further our interest in governing ourselves through a free and open exchange of information and ideas, because they involve the betrayal of the public interest, not argument made in service of it.[233] Likewise, because the coercive nature of insincere speech robs another of the ability to exercise her own autonomy, insincere statements exist outside the sphere of autonomy that Kantian moral theorists argue should be a ground for constitutional protection.[234] An individual's dignitary interest in speaking his mind cannot extend to the willful manipulation of others.[235] Thus, many of the intangible values that justify the protection of sincerely-believed false speech do not support the protection of deliberate lies as well.

In addition to these considerations of political theory, insincere speech is also different from ordinary false speech because it will generally harm the state of our knowledge more than it will help. Falsity is valuable not in a direct sense, but for the indirect benefit it brings by provoking argument, which tends to augment our knowledge.[236] Insincere statements, when they contain assertions with which others disagree, are just as likely as other false statements to give rise to argument. However, we can only reliably expect argument to increase our knowledge when we have ways of assuring that the premises are true and that they support the conclusion in a reliable way.[237] As we shall see, insincerity tends to undercut the first prerequisite for the value of argument.

First, insincerity undermines our ability to be confident that the premises asserted on either side of an argument are true. As previously discussed, those who participate in argument frequently assail their opponents' premises, and when there is fairly equal epistemic access to the premises asserted in argument, that scrutiny can give us some assurance that argument is likely to increase our knowledge.[238] One factor that undermines this ability is when one side is at a significant disadvantage in its ability to assess the factual validity of an opponent's premises. Insincere speech is a special case of this situational defect in argumentation; we are always disadvantaged in our access to an opponent's premises when he is misrepresenting his belief state to us.

The reasons why insincerity undercuts our ability to probe the truth of an opponent's premises are twofold. First, insincerity directly introduces a premise into argument which eludes argumentative scrutiny. An insincere statement in fact

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[232] *See* discussion *supra* Part I.B.3.

[233] *See* Meiklejohn, *supra* note 117, at 259.

[234] *See* Strauss, *supra* note 108, at 354.

[235] *See* GREENAWALT, *supra* note 97, at 48, 132.

[236] *See* discussion *supra* Part III.A.

[237] GOLDMAN, *supra* note 11, at 144–46.

[238] *Id.* at 140.

contains two important assertions: a statement about the world—which may be true or false, although it is usually false—and an implied statement about the speaker's belief state concerning that first assertion, which is always false.[239] Both assertions are important, given that we will frequently rely on another person's belief in a premise as important evidence that it is true, especially when that person has some expertise or personal knowledge on the matter. But regardless of how easy it may be to verify the factual assertion, the assertion of belief eludes verification, hidden as it is within the speaker's own mind. To be sure, it is not impossible to come to a reasonable conclusion regarding a speaker's belief—after all, the law frequently requires us to determine the mens rea of defendants who refuse to testify on the subject—but it is nevertheless a highly challenging endeavor, requiring us to compare a speaker's assertion with voluminous evidence concerning his knowledge, actions, and past statements. By contrast, the speaker's access to his own deceptive belief state is immediate; indeed, there are few things we can know with more confidence than our own internal mental states, at least when we are paying attention to them.[240] This means that any discussion in which one speaker is speaking insincerely involves a dramatic information asymmetry arising out of the serious difficulties involved in verifying an opponent's biographical assertions. This information asymmetry means that the false biographical assertions which serve as implied premises in any argument are unlikely to be caught and corrected.

There is a second, even more troubling way that insincerity undercuts our ability to be confident in the truth of premises. When one is being insincere, one is generally not approaching the argument in good faith; rather, one is trying to subvert the argument based on a goal of winning, without regard to the persuasive merit of one's true position. Once one has decided to breach the norms of proper argument by asserting propositions one does not believe,[241] there is little reason to refrain from also choosing those premises that will be difficult for an opponent to refute. Such an approach will likely be desirable because it will prevent the insincerity from being discovered. If we can tailor our lies so that they will not be incompatible with our opponent's knowledge, we can thereby insulate them from being corrected.[242]

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[239] LYCAN, *supra* note 129, at 106; Grice, *supra* note 130, at 168; Smith, *supra* note 106, at 712–13.

[240] *See* AUDI, *supra* note 145, at 84–85 (noting the difficulties involved in arguing that we can be mistaken about our own mental states when we are trying to attend to them).

[241] *See* GOLDMAN, *supra* note 11, at 134, 140 (believing one's premises is a norm of proper argumentation); Grice, *supra* note 130, at 168 (believing one's statements to be true represents a conversational maxim and is understood as an implied assertion flowing with all conversation that is not conspicuously flouting those maxims).

[242] *Cf.* PETER LIPTON, INFERENCE TO THE BEST EXPLANATION 164–83 (2d ed. 2004) (discussing the related proposition that scientific theories are less verified when they are "predicting" data they were designed to accommodate on the grounds that the fit is as easily explained by the accommodation as by the truth of the theory).

For example, imagine that there is at present a dispute concerning whether a strange phenomenon observed in the sky during recent weeks is better explained by the presence of alien visitors or by more typical meteorological phenomena. If my desire to convince others of the alien thesis is stronger than my desire to observe the normal rules of argument, I might decide that it is worthwhile to invent evidence to achieve this end. I am unlikely, then, to choose to invent evidence that will be easily detected as false. Thus, if I invent a fake sighting, I will be careful to make it match up to reports I have encountered previously. I will also be careful to invent a sighting that, if true, would not have been seen by someone else, so as to avoid having counter-evidence introduced. If I set up my false account properly, it will be verifiable primarily through my own or my confederate's testimony, relying on the baseline expectation of others that I will be speaking honestly, with that reliability buttressed by its correspondence with existing data. Thus, having decided to lie, I will most likely choose to invent stories that will exploit information asymmetries in order to be as convincing as possible.

Thus, insincere statements will tend to undermine the verifiability-of-premises condition for knowledge-producing argument. In the previous Section, I argued that dangerous information asymmetries can often be corrected through a disclosure rule and that a disclosure rule that facilitates argument will be more useful for increasing our knowledge than a suppression rule. But such a rule has no application to asymmetries produced by insincerity. It is meaningless to talk of being insincere but also disclosing the insincerity, because the disclosure effectively cancels the insincere statements. Thus, requiring disclosure of insincerity is functionally equivalent to suppressing insincere speech. There does not seem to be a way, in other words, to avoid the destructive consequences of insincerity for knowledge-producing argument.

Thus, it seems as if the significant epistemic harm of insincere speech, when compounded with its lack of other important First Amendment values,[243] would suggest a rule exempting all insincere speech from the protections of the First Amendment. Such a rule would apply whenever the implied assertion of our belief state does not match our actual belief state.[244] It would cover not only occasions where speakers assert statements that they do not believe (misrepresenting disbelief as belief), but also statements impliedly asserting belief when in fact the speaker neither disbelieves nor believes the statement but has merely suspended judgment on it.[245]

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[243] *See* discussion *supra* Part I.B.3.

[244] *See* discussion *supra* Part II.A (defining sincerity as a correspondence between an assertion and a belief state of the speaker).

[245] In this respect it would exclude slightly more speech than the actual malice rule, which extends only to speech that is known to be false or that is believed to be "probably false," which mostly amounts to the same thing. *See, e.g.*, Masson v. New Yorker Magazine, 501 U.S. 496, 510 (1991); St. Amant v. Thompson, 390 U.S. 727, 730–33 (1968).

Taking the previous Section along with this Section, then, we can make the following general assertion: the First Amendment protects speech that is innocently false in most cases, but it does not, as a general rule, protect speech that is insincere. Having said this much, I must backpedal slightly: there are some complicated issues relating to this simple principle that cannot be resolved in this space. For instance, a rule based on sincerity butts up uncomfortably against the reality of corporate speakers who may not have "beliefs" in the simple sense; although such cases can probably be resolved through doctrines of implication, this Article will not discuss in detail how these principles should be applied to such cases.[246]

B. Special Categories of Harmless Insincerity

A further wrinkle is that there may be some cases in which protections for insincerity are appropriate. The first class of such cases involves insincere speech that, for peculiar reasons, is not viewed as causing much harm. As Professor Greenawalt has shown, not all lies are harmful. For instance, a "white" lie told to spare someone's feelings may be of little consequence, especially when the listener is not really interested in the "true" answer.[247] It is important to note that such lies often involve speech on questions of aesthetics to which truth value might not attach, such as statements with respect to the positive attributes of a loved one as compared with others. Likewise, although such statements do involve a misrepresentation of biographical truth, it may not actually be the case that discussions of such matters are primarily oriented at eliciting those biographical truths; rather, such conversations may be more focused on a process of ritual affirmation that cements our social bonds with one another. Thus, our comfort with lies on such topics may reflect the fact that the emotional and social values present in such communication are more important to us than the truth-seeking component. In such circumstances, it is possible that the detriment to our knowledge may be minimal enough that it would become reasonable to provide protection on the basis of other First Amendment values. Such a conclusion does not follow from what I have argued above, but it does reflect our intuitions that it would be enormously intrusive to prohibit such "harmless" lies.[248]

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[246] For an introduction to some of the complexities involved in assessing corporate belief states, see generally Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 1–4 (1995).

[247] GREENAWALT, *supra* note 97, at 50; *see also* Schauer & Zeckhauser, *supra* note 128, at 7 (discussing white lies).

[248] Most likely, such intuitions are shared so broadly that there will never be a live constitutional question; white lies are most likely adequately protected from regulation by the political process. Similar considerations likely apply to other sorts of "harmless" lies in situations where we do not view truth as very important. GREENAWALT, *supra* note 97, at 50. Greenawalt offers the example of lies told to protect others from harm, such as "the person

Lies may also deserve protection in some cases for a very different reason: certain narrow categories of lies may sometimes have strong epistemic value that can outweigh their ability to harm us, as when lies are used to great advantage in investigations of wrongful conduct by police officers or private individuals.[249] When a lie is used for investigative purposes, it may uncover much greater truths that make the local epistemic distortion "worth it." A categorical rule would be difficult to state here, as the epistemic benefits and costs would be highly variable on a situational basis. For present purposes, it is sufficient to note that such an exception to the general principle announced above may exist, depending on specific factors involved in particular types of investigative deceptions.

C. The Problem of Chilling Effects

Finally, there is a potential exception that is far more uncertain in its reach: a prophylactic "exception" that tries to limit the risk of chilling some sincere speech that might arise in a regime that permitted extensive regulation of insincere speech. Such a concern is entirely proper and has motivated Supreme Court Justices to express a desire to broadly protect even deliberate lies on certain topics.[250] As the concurrences in *New York Times v. Sullivan* noted, litigation is expensive business, and proof of belief can be a complicated inquiry.[251] Potential defendants may therefore decide not to speak sincerely in cases where they doubt their ability or willingness to endure the pains of litigating their own veracity.

The Court's defamation jurisprudence to date has primarily been motivated by a concern about the chilling effects of restricting falsity in speech, because with only a few exceptions, the Court has shown little concern for the harms of successfully restricting false speech in itself.[252] Thus, the Court's actual malice rule, which we

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you want to shoot is no longer in the house." *Id.* Another example involves the use of placebos in therapeutic deceptions; if a deceptive treatment saves our lives, we are unlikely to object to a small loss of knowledge. *See* Adam J. Kolber, *A Limited Defense of Clinical Placebo Deception*, 26 YALE L. & POL'Y REV. 75, 76–77 (2007). As with the "white lies," most such cases will not be real constitutional problems because it is hard to imagine regulation in such areas, although the placebo issue is more likely to admit of government restrictions. *Id.*

[249] *See* Varat, *supra* note 108, at 1122–26.

[250] *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 293–96 (1964) (Black, J., concurring) (expressing concern that even under the majority's actual malice rule, the threat of civil liability could effectively silence the press); *id.* at 300 (Goldberg, J., concurring) (worrying that a rule permitting restriction of criticism of public officials based upon a jury's evaluation of a defendant's state of mind would excessively constrain such criticism).

[251] *Id.* at 293–96 (Black, J., concurring); *id.* at 300 (Goldberg, J., concurring).

[252] *See* discussion *supra* Part I.A.1. For the rare exception to this principle, see *Sullivan*, 376 U.S. at 279 n.19 (quoting Mill for the proposition that false speech is valuable in itself for its knowledge-producing effects).

have seen is very similar to a rule that would be produced by a desire to interpret the First Amendment so as to protect knowledge-producing speech, is largely premised on this value.[253] The Court, however, has included a number of other protections on defamation actions designed to limit chilling effects. These other protections have focused more on procedure than substance, enabling most defamation actions that satisfy the actual malice rule to go forward subject to limits on the quality of proof that will be sufficient, substantial appellate scrutiny of proof of belief states, and limits on the amount of damages that can be obtained.[254] The effect of such rules is to cut back on lawsuits that involve low levels of actual, quantifiable harm and to restrict speculative lawsuits brought in an attempt to intimidate defendants into silence by limiting the ability of plaintiffs to bring suits to court in the absence of significant evidence of wrongdoing.

A concern about chilling sincere speech by regulating insincere speech is consistent with the framework offered above. As I have previously argued, protecting sincere speech, whether true or false, generally serves important First Amendment purposes, both by helping to advance our knowledge and by promoting important political theory values.[255] Thus, when regulating insincere speech has the consequence of deterring sincere speech, that regulation becomes constitutionally suspect. However, we should not overstate such a principle. Insincere speech, as we have seen, directly undermines our interest in furthering our knowledge, which in and of itself represents an important free expression value.[256]

Thus, we would be acting contrary to important First Amendment values if we imposed a broad rule prohibiting regulation of insincere speech on the basis of chilling effects that are present only in some cases. The appropriate approach would involve categorically balancing the epistemic gains and detriments of regulating insincerity in different contexts, with a sharp eye towards the actual amount of sincere speech that is likely to be deterred by a specific restriction. And although we must be careful to remember that the costs imposed by chilling insincere speech may be less salient than the harms caused by the insincerity,[257] we should not let a

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[253] *Sullivan*, 376 U.S. at 279.

[254] *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252–53 (1986) (imposing a heightened burden of production); Bose Corp. v. Consumer's Union of U.S., Inc., 466 U.S. 485, 514 (1984) (imposing more searching appellate review of key factual determinations); Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974) (imposing limits on available damages).

[255] *See* discussion *supra* Parts I.B.3, III.B. I am bracketing off, for the moment, any discussion of the other reasons, such as a potential to do imminent harm, why even truthful sincere speech will sometimes be unprotected, and focusing solely on situations in which we would wish to protect sincere speech while leaving insincere speech unprotected.

[256] *See, e.g.*, CHAFEE, *supra* note 93, at 31–33.

[257] *See* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 744 (2002).

concern for absent effects cause us to impose protections so broad that we undermine the First Amendment's knowledge-promoting function.

One important question is that raised in *State v. 119 Vote No! Committee*: are there arenas, such as ballot propositions, in which we should be so concerned about chilling effects that we should categorically protect all insincere speech?[258] In *Vote No!*, the Washington Supreme Court held that the state was categorically prohibited from regulating even outright lies (false statements made with actual malice) regarding factual issues relevant to ballot propositions because such speech did not implicate private rights.[259] Similarly, the *Sullivan* concurrences suggested that the Court had not given enough protection to false political speech by imposing the actual malice rule; the minority of Justices believed that the First Amendment prohibited any restrictions on criticisms of public officials, even if those criticisms were outright lies.[260]

The problem with these suggestions is that they downplay the very real epistemic harm that can be caused by insincere speech on issues of public importance. As Professor Meiklejohn and others have noted, discussion of public issues such as the conduct of public officials and the merits of ballot propositions is critical to our ability to govern ourselves through the democratic process and reach wise decisions.[261] The central value at issue here is a listener interest, and it is fundamentally epistemic in nature. We value discussion on such issues primarily because it is likely to lead us to true conclusions; after all, we can hardly be expected to govern effectively when we are relying on false premises.[262] But as the value of reaching true conclusions rises, the harm of believing lies increases as well. If we value speech for its ability to help us reach informed deliberative conclusions on matters of public concern, we should likewise be very concerned about deceptive conduct aimed at undermining our ability to form accurate beliefs. Such deceptive speech could include creating false evidence on matters of key public concern with the intent to alter election results in order to advance a narrow private interest. It is hard to imagine a form of private conduct that could have broader negative impact

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[258] *See* 957 P.2d 691, 697 (Wash. 1998).

[259] *Id.* (citing Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992), for the proposition that the First Amendment protects all speech that did not impinge on private rights).

[260] New York Times v. Sullivan, 376 U.S. 254, 293–96 (1964) (Black, J., concurring); *id.* at 300 (Goldberg, J., concurring).

[261] *See* MEIKLEJOHN, *supra* note 113, at 25 (noting that citizens must understand public issues in order to vote wise decisions); SHIFFRIN, *supra* note 69, at 118 (emphasizing the importance of accurate information to the value of encouraging dissent); Blasi, *supra* note 148, at 539 (emphasizing the importance of accurate public opinion as a check on government power).

[262] *See* MEIKLEJOHN, *supra* note 113, at 25–27 (noting the importance of information in facilitating democratic self-governance).

on the state of public knowledge or on democratic values more generally. Thus, giving categorical protection to insincere speech on political topics would not accord well with the First Amendment's knowledge promotion value,[263] nor with any of the First Amendment values that rely on furnishing accurate information to the citizenry.

There is a better means of avoiding chilling sincere speech when outlawing insincere speech, however: the sort of procedural protections that the Supreme Court has relied on in the defamation context. We should generally be cautious and impose such protections only when necessary to prevent a significant chill on protected speech. This determination will necessarily be contingent on complex judgments about the specific types of speech being regulated and the degree to which potential sincere speakers will hold their tongues rather than risk prosecution or liability. Furthermore, we should not assume, without evidence, that speakers will be significantly chilled just because they speak on topics for which they could be liable if they were to speak insincerely; some survey research shows that media speakers operating under the actual malice rule do not find themselves to be significantly deterred by the threat of liability for insincere defamatory speech.[264]

There are essentially four useful categories of procedural rules that can reduce the threat of harassing or frivolous litigation and lessen the risk of chilling protected speech: (1) heightened burdens of pleading, (2) heightened burdens of production and persuasion, (3) limitations on available damage awards, and (4) heightened standards of appellate review. Each of these limitations has been applied in cases involving insincere speech, and each may be appropriate in cases where we are concerned about chilling effects.

Heightened burdens of pleading have often been used as a safeguard against harassing or frivolous litigation. Such rules, in conjunction with restrictions on making frivolous or unsupported statements in pleadings,[265] effectively constrain the ability of plaintiffs to impose costly discovery burdens on defendants when they do not have substantial reasons for believing that bad conduct occurred before suing. One example of such a rule employed in the context of restrictions on insincere speech is Federal Rule of Civil Procedure 9(b).[266] Rule 9(b) imposes an exception to the generally liberal notice pleading standards imposed by Rule 8.[267] Rather than requiring merely "a short and plain statement . . . showing that the pleader is entitled to relief,"[268] which is the general standard in federal pleadings, Rule 9(b) imposes

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[263] *See* EMERSON, *supra* note 13, at 6–7.

[264] *See* Weaver & Bennett, *supra* note 98, at 1185 (noting that, unlike their British counterparts, American editors and publishers reported that the impact of potential defamation liability was minimal with respect to their publishing decisions and that few reported having ever killed a story or curtailed a statement out of worry for defamation liability).

[265] *See, e.g.*, FED. R. CIV. P. 11.

[266] FED. R. CIV. P. 9(b).

[267] *Compare id.*, *with* FED. R. CIV. P. 8.

[268] FED. R. CIV. P. 8(a)(2).

the additional requirement that, when asserting fraud, the claimant must state "with particularity the circumstances constituting fraud."[269] This rule requires plaintiffs to allege, in detail, exactly which statement was fraudulent, and although a plaintiff need not allege a basis for her belief that a statement is false or was made insincerely,[270] the specificity requirement nevertheless reduces the costs of defending a lawsuit by giving the defendant early notice of precisely which statements are alleged to be fraudulent. When combined with Rule 11's limitations on frivolous assertions of fact in pleadings,[271] such a rule can inhibit plaintiffs from filing strike suits or other frivolous assertions of fraud,[272] reduce the risk of reputational harms[273] and excess litigation costs for defendants, and thereby reduce the chilling effects of civil liability.

Procedural safeguards against frivolous insincerity litigation need not stop at the pleading stage. Another useful means of avoiding the chilling of sincere speech can be to impose heightened burdens of persuasion and production. Raising the standard of proof can help to ensure that fewer defendants will be erroneously found to have uttered unprotected insincere statements when in fact those defendants believed what they uttered. Thus, for instance, the clear and convincing evidence standard can make it harder to obtain a judgment on the basis of insincere speech than the normal civil standard of the preponderance of the evidence.[274] The clear and convincing evidence standard of proof is frequently applied to insincerity claims, both as a matter of common or statutory law, as in fraud claims,[275] and as a matter of First Amendment law.[276] When such heightened burdens of proof are interpreted as

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[269] FED. R. CIV. P. 9(b).

[270] *See* Bankers Trust Co. v. Old Republic Ins. Co., 959 F.2d 677, 683 (7th Cir. 1992) (describing the level of pleading needed to satisfy Rule 9(b)'s restrictions on claims of misrepresentation).

[271] FED. R. CIV. P. 11(b)(3) (requiring that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

[272] *See* 1–9 MOORE'S MANUAL: FEDERAL PRACTICE AND PROCEDURE § 9.11(2)(b) (discussing the purposes of Rule 9(b), which include preventing strike suits); Krista L. Turnquist, Note, *Pleading Under Section 11 of the Securities Act of 1933*, 98 MICH. L. REV. 2395, 2408 (2000) (discussing the prevention of strike suits as a Rule 9(b) purpose).

[273] *See Bankers Trust*, 959 F.2d at 683 (stating that a primary value of Rule 9(b) is the prevention of unwarranted reputational harm to fraud defendants); Turnquist, *supra* note 272, at 2408 (same).

[274] *See* John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1072 (1968) (noting that the clear and convincing evidence standard is properly employed in cases where the harm of wrongfully finding a defendant liable exceeds the harm of erroneously denying a plaintiff compensation).

[275] *See id.*

[276] Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 620 (2003); Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967).

imposing heightened production requirements as well,[277] they can serve to enable more frivolous cases to be resolved at the summary judgment stage, thus helping to hold back the costs of litigation and their corresponding chilling effects. In addition to reducing the frequency of wrongful judgments against those who speak sincerely, such rules, by making claims based on insincere speech harder to prove, serve to decrease the amount of litigation filed against speakers who might be subject to chilling effects and thus can serve a salutary function in reducing those effects.

Standards of pleading and proof can only do so much, however, if we are afraid that trial judges or juries may be overeager to find that particular speech is insincere, perhaps as a way to punish speakers who urge unpopular viewpoints. If we are worried that faulty verdicts may issue despite the existence of heightened proof standards, another means of preventing sincere speech from being chilled by excessive risks of liability is to impose more searching appellate review. The Supreme Court has imposed just such a safeguard, requiring appellate courts to "exercise independent judgment and determine whether the record establishes actual malice" to the level of clear and convincing proof in public official defamation cases.[278]

Finally, there is one other way that the procedural law can limit the chilling effect on sincere speech: through limits on the size of potential damage awards. Limiting the size of potential damage awards can disincentivize plaintiffs from pursuing lawsuits and thus can limit the risk of liability (and hence the chilling effect) for sincere speakers who may nonetheless worry about costly litigation. In some types of defamation cases, the Supreme Court has pursued such a strategy as well, limiting the ability of states to impose presumptive or punitive liability and requiring that damages represent actual proven harm to plaintiffs.[279] Such a rule may reduce the frequency with which speakers will be sued, a result that acts to directly lessen the chilling effect on speech.[280] Of course, such rules are very blunt instruments, as they equally disincentivize suits against sincere and insincere speakers. Nevertheless, by focusing lawsuits on actual harm, damage limitations do enable the most seriously injured plaintiffs to maintain a remedy, while deterring more speculative litigation (or strike suits) by lowering the value of claims that do not involve grave harm. As we seek to strike a balance between deterring insincere speech and limiting the chilling effects of litigation, tools that decrease the total

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[277] *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (holding that the clear and convincing evidence requirement in libel cases applies to the burden of production on summary judgment, as well as to the necessary standard of persuasion at trial).

[278] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984); *see also Telemarketing Assocs.*, 538 U.S. at 621.

[279] *See Gertz*, 418 U.S. at 349–50.

[280] *See* Weaver & Bennett, *supra* note 98, at 1182–85 (noting that American media companies, which are sued far less often than their British counterparts, experience a correspondingly smaller concern for potential liability when deciding what to report).

amount of litigation, while permitting the most serious suits to proceed, may sometimes be the best we can do.

The four methods listed above—heightened burdens of pleading and proof, heightened standards of appellate review, and limits on damage awards—all provide potential rules by which courts can address the chilling effect on sincere speech without totally cutting off liability for potentially destructive insincere speech. It would be foolish to try to map out the precise application of such safeguards in all possible cases here, as the inquiry is necessarily highly context dependent, requiring close attention to the chill experienced by actual speakers in particular contexts. Thus, these safeguards are offered more as a menu for courts to select from in trying to resolve the difficult problems in the realm of regulating insincere speech than as an attempt to impose a prix fixe solution across the wide range of situations courts may encounter.

This Section has established that insincere speech should not generally be constitutionally protected to the same high standard as innocently false speech because insincere speech generally does not promote the increase of knowledge, but rather, acts to inhibit that growth. Nor should we provide strong categorical protection for insincere speech as a means of avoiding its chilling effects on sincere speech, given the potential of insincere speech to undermine important First Amendment goals. Rather, courts should employ procedural methods of limiting the chilling effect in situations where it is judged to be a danger, with a careful eye towards weighing the epistemic benefits and costs of particular rules. Next, we will consider the final piece of the puzzle: how should the First Amendment handle speech that is not literally true or false, but rather misleading?

V. MISLEADING SPEECH IN FIRST AMENDMENT THEORY

For the most part, the fact that a meaning is implied rather than stated outright does not alter the general analysis; speech that is misleading because it implies something false should generally be protected, unless that implication is also insincere. However, there are certain types of implicative relations that should be immune from regulation altogether.

As discussed above, the use of language is a complex process, and people are adept at using indirect means of communication to convey meaning.[281] These methods can be grouped and discussed under the concept of implicature, and they include both common devices like metaphor and irony and other devices without ready names.[282] Given the diversity of such available means by which we can convey non-literal messages, it is simply not plausible to suggest that the First Amendment should only provide protections based on the literal meanings of speech; such a rule

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[281] *See* discussion *supra* Part II.B; *see also* Grice, *supra* note 130, at 165–75.

[282] *See* discussion *supra* Part II.B.

would both protect numerous statements that abuse implicature to harmful ends and exclude from protection statements that might be literally deceptive but that were understood by all parties to convey a sincere and truthful message.

When we call a message misleading, we are essentially saying that the message conveys a false implicature. We ordinarily only refer to a message as implying something if it contains an unspoken message that both speakers and listeners would understand as implied given both the content of the message and its context. Such implicatures have a great deal in common with ordinary communication. Although they may use a more complex means of transmission,[283] they are essentially just another form of meaning conveyed through our speech and writing. Thus, it makes sense to apply a similar set of rules to them as those we apply to normal speech. After all, an implied message is just as capable of sparking debate, or of corrupting it, as a directly expressed message.

Thus, we must unpack the concept of misleadingness into two subconcepts. If speech is misleading when it conveys a false implication, then we can parse such misleading speech into (1) speech that conveys an implied false statement, which we can call propositionally misleading speech, and (2) speech that conveys an implied insincere assertion, which we can call biographically misleading speech.[284] Speech may be propositionally misleading, biographically misleading, or both, just as speech may be false, insincere, or both.

For example, imagine that when asked, "Is your food made with organically certified ingredients," a chef responds, "How can you even ask that? I only buy from Splendid Natural Farms—it is a point of pride for me." Given the context of the question being asked, the Maxim of Relation suggests that there is an implication at work when the chef brings up Splendid Natural Farms—the implication that Splendid Natural Farms is an organically certified grower. This implicature might be false in several different ways. It could be propositionally misleading but biographically accurate; in other words, the chef might earnestly believe that Splendid Natural Farms is a certified organic grower but be mistaken in that assumption. Likewise, it might be propositionally accurate but biographically misleading; this would occur when the chef believed that Splendid was not an organic grower (even though it actually was) and sought to mislead customers about that belief. Finally, there is what might be called normally misleading speech: if the chef rightly believes that Splendid is not on organic grower, but utters the above statement which suggests otherwise, the statement is misleading on both the propositional and the biographical level.

Having made this distinction, it is simple to fit misleading speech into the theory thus far set forth. Thus, when speech is propositionally misleading, it should be protected by the First Amendment because it will tend to cause little harm, because

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[283] *See* Grice, *supra* note 130, at 170–75.

[284] *See* Smith, *supra* note 106, at 712–13.

it may help to increase our knowledge by producing veritistically useful argument, and because, like other forms of sincere speech, it serves important political theory values.[285] By contrast, whenever speech is biographically misleading, it should be excluded from First Amendment protection for the same reasons that outright lies are excluded, absent reason to think that procedural protections are needed in order to prevent excessive chilling of sincere speech. Thus, the First Amendment inquiry with respect to speech that is misleading resolves to the question of whether the implied assertion is believed by the speaker or not.

The general exclusion of biographically misleading speech should extend across all of what could be called "strong" implicatures: those implicatures that we understand to be part of what a speaker generally intends to convey by his message. Thus, such a principle would include both conventional implicatures[286] (implications arising from subtle features of language) and conversational implicatures[287] (implications arising from conspicuous violations of standard conversational rules). Both of these forms of implicature would be included because both form part of our shared understanding of what people mean, in a broader sense, by what they say.[288]

There is another way that we use the term "implied" that does not share this important feature of the implicatures discussed above. Thus, if a friend told us that he was about to depart from New York for London, we might say that he had implied that he was going to fly there. Such a conclusion would not follow automatically from what our friend had said; after all, it is still possible to cross the Atlantic on a ship. Rather, we would say that it was "implied" because people generally do not cross the Atlantic by any other means than air anymore; thus, our friend's statement gave us a high degree of confidence in the subsequent belief that he would be flying. We might describe this sort of implicative relation as "Bayesian implicature," because it reflects the degree to which a change in belief in what our friend directly told us produced a change in our estimates of the probability of other, related propositions.[289]

There is a fine but important distinction between Bayesian implicatures and the other types of implicature I have discussed thus far. The distinction is best seen when we take the class of implicatures that most resemble Bayesian implicatures and try to identify what distinguishes the two categories. Some conversational implicatures are formed through the selective disclosure of information and have

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[285] *See* discussion *supra* Part I.B.3.

[286] *See* Grice, *supra* note 130, at 166–67.

[287] *Id.* at 167.

[288] Thus, in none of the examples of these types of implicature given above would it be meaningful to say that a speaker would not mean to communicate the message that is implied through his statement. *See* discussion *supra* Part II.B.

[289] *See* GOLDMAN, *supra* note 11, at 111–15 (discussing the Bayesian model of estimating related event probabilities).

their implicative effect through the Maxim of Relation;[290] the Splendid Farms conversation is an example of this. What distinguishes the two cases? In the Splendid Farms example, the context indicates that the relevance, and hence the meaning, of bringing up Splendid Farms is produced by its interaction with the context of a question about organic ingredients. In other words, we would normally understand the implication that Splendid Farms was an organic producer as part of the broader meaning of what was said to us by our hypothetical chef. By contrast, none of the numerous (and probably uncountable) Bayesian implicatures derived from our friend's message regarding his London trip are part of the broader meaning of his utterance. We may infer from what he tells us that he is probably taking a plane trip soon, that he will probably experience jet lag soon, or that he will probably be staying in a hotel soon, and so on. This sort of inference relies on using what he has told us as evidence to make predictions about other related facts about which he was not speaking. The distinction is between implication via meaning and implication via non-linguistic inference.

Like the stronger class of linguistic implicatures, the Bayesian implicatures can be false as well as true. Thus, if our friend intends to proceed to London by dirigible, the implication that he will be taking a plane will be false. Likewise, if we were to take it as implied that he was asserting a plan to travel by airplane, his implication would be insincere as well. However, unlike the other types of implicatures we have discussed,[291] it is hard to suggest that we generally intend to convey our agreement with most of the Bayesian implications that might follow from our speech. If I inform you that I am headed to the grocery store, there are surely dozens of other facts that are made more likely by that suggestion.[292] We would not, as a rule, say that a speaker is misrepresenting his mental state if he fails to cancel many of them because they do not come to mind or do not seem relevant to the exchange. Rather, we would say merely that some of the potential implications of what was said turned out not to be the case, without any sort of deception on the part of the speaker.

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[290] *See* text accompanying *supra* note 138.

[291] *See* Grice, *supra* note 130, at 171–72 (describing conversational implicatures as those which are *conveyed* by the exploitation of conversational maxims).

[292] For instance, you might assume, based on the normal behavior of people who go grocery shopping, that I am likely to drive to the store, that I am likely to use a shopping cart, that I am likely to stock up on groceries for several days, or that I am likely to pay with a credit or debit card. Any or all of these assumptions might be false without it being appropriate to label my statement as misleading; the falsification of any or all of these implications might simply not be relevant to the purpose of our communication, if, for instance, I am intending to convey merely that I will be present at the store and will be able to pick something up for you if you would desire it. *See id.* at 168–69 (listing the conversational maxims, which generally only require that contributions be appropriately tailored to the goals of the exchange, not that every possible false implication be explicitly cancelled by a speaker).

These differences help to indicate why even speech that gives rise to Bayesian implicatures that would not be believed by the speaker should receive constitutional protection, absent insincerity in the underlying statement or the presence of a more direct biographically misleading implicature. "Insincere" Bayesian implicatures will generally be parasitic upon sincere (and often true) utterances that are not themselves misleading, as in the above example. Thus, such utterances will normally produce increases in our knowledge. Furthermore, the fact that Bayesian implicatures will not normally be imputed as a belief of the speaker (at least not as having been asserted as such by the speaker) means that they are unlikely to cause harm by introducing false evidence with respect to the belief states of the speaker.[293] Finally, speakers will frequently (and probably mostly) produce false or "insincere" Bayesian implications in perfect good faith, either through failing to realize that they are creating such implicatures or through viewing such implicatures as irrelevant to the conversational goals of either party. Thus, most "insincere" Bayesian implicatures will not involve the risk of production of strategically unverifiable evidence that supports the exclusion of directly insincere speech from the protections of the First Amendment.

One common type of Bayesian implicature involves selective disclosures made by advocates of a particular view; such selectivity is, for instance, a common feature of our litigation system. Often, attorneys who are constrained from asserting an ultimate conclusion nevertheless adduce facts that might tend to suggest that conclusion. For instance, lawyers are not permitted to assert facts that they know to be false.[294] Thus, an attorney who has been privately informed by his client that she was present at the scene of a robbery would not ordinarily be permitted to argue the opposite of that fact to a jury. Nevertheless, although the lawyer would be prohibited from openly asserting that his client was absent, he is nevertheless allowed to adduce facts into evidence that would suggest that to be the case.[295] Such selective advocacy is another form of a Bayesian implicature. The underlying facts asserted are true and not misleading. They may induce a jury to make less accurate likelihood estimates regarding the ultimate inference at stake; on the other hand, the attorney might be wrong (his client, after all, may have lied) and the facts would thus be contributing to a true inference by the jury. In the end, we value having the jury consider the whole picture more than we worry about the harm that may be caused by false Bayesian implications—and we rightly worry that without providing

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[293] *See* discussion *supra* Parts III.A, III.B.3, I.A (emphasizing the risks inherent in the asymmetric distortion of the available evidence when false evidence is introduced that is not easily subject to falsification).

[294] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2007) (prohibiting a lawyer from making a false statement of fact to a tribunal).

[295] MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 217 (3d ed. 2004) (noting that almost every commentator on lawyers' ethics believes that it is proper for an attorney to cross-examine a witness who is offering truthful testimony in an attempt to undercut her credibility).

an incentive to an interested party to bring such facts forward, the jury would not hear a number of facts that are relevant to their decision.[296] Thus, selective disclosures made during the course of advocacy represent an important class of Bayesian implicatures and help to show the general principle: we gain more value by protecting even insincere Bayesian implicatures (and hence the sincere statements from which they arise) than by requiring advocates to suppress true facts which would tend to support conclusions they do not presently believe.

Thus, sincere and non-biographically misleading speech that generates "insincere" Bayesian implicatures, unlike the stronger sort of biographically misleading implicatures discussed above, should be protected by the First Amendment. Likewise, speech that is propositionally misleading but that conveys a message believed to be true by a speaker should generally receive First Amendment protection. However, when speech is misleading with respect to a speaker's belief state, it should be treated like other insincere speech and excluded from protection, unless concerns regarding chilling effects make it appropriate to employ procedural protections.[297]

VI. DOCTRINAL APPLICATIONS

Before concluding, it will be useful to take the principles developed above and apply them to the current state of First Amendment law applicable to false, insincere, and misleading speech, in order to assess how dramatic a change the recognition of the benefits of false speech would work in the law. To the degree that readers have been persuaded by my argument that false speech has constitutional value, this analysis can also serve as a guide to reforming the law in a way that better protects the free expression values inherent in it. In order to conduct this survey, I will examine two key areas of doctrine and discuss the degree to which they tend to inhibit the social pursuit of knowledge by the manner in which they regulate falsity and insincerity: the First Amendment law of defamation and the commercial speech rule from *Central Hudson*.

The foregoing sections have outlined the principles at stake in the application of free expression principles to false, insincere, and misleading speech. False speech should generally be protected, as it serves to increase our aggregate social knowledge and furthers important values in moral and political theory. This principle should be subject only to narrow exceptions in situations where argument cannot be expected to perform its knowledge-promoting function. By contrast,

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[296] Yet another concern is that if faced with a rule outlawing any advocacy that would support an outcome they did not believe to be true, advocates would keep themselves deliberately in the dark in order to maintain their ability to advocate their preferred position. *See id.* at 225.

[297] *See* discussion *supra* Part IV.C.

insincere speech should generally not receive constitutional protection, because it is much less likely to increase our knowledge or further other First Amendment values. In some circumstances, however, procedural safeguards may be useful in order to prevent the regulation of insincere speech from chilling sincere speech. Finally, misleading speech should be subject to regulation only when the implied meanings conveyed by that speech would be insincere if communicated directly; the falsity of such implied meanings should not usually exclude them from protection.

A. Defamation

The modern constitutional law applicable to defamation liability has the following salient features. Although liability may be imposed for false statements about ordinary citizens when those statements are made negligently,[298] when speech concerns a public official or public figure, the speaker must utter it with "actual malice" in order to be liable, which means either that he knows it is false or believes it is probably false.[299] Furthermore, the Court has imposed a number of procedural safeguards to lessen the chilling effect of defamation liability on valuable speech, including heightened burdens of proof,[300] more searching appellate review of factual determinations,[301] and limitations on available damages.[302] However, the Court has refused to extend the damages limitations to cases involving private plaintiffs in which the false statements did not involve matters of "public concern"—in particular, false statements concerning an individual consumer's creditworthiness have been held to be of private and not public concern.[303] Finally, the Court has imposed a sharp distinction between statements about facts and statements of opinion, holding that the latter can never be a subject of defamation liability even when made insincerely.[304]

Some features of the existing framework correspond very closely with the rules we might make if we were focused solely on promoting the growth of knowledge. Thus, the actual malice rule is very similar to a rule permitting only insincere speech to be punished. The actual malice rule excludes speech made with knowledge of falsity or belief in probable falsity, and all such speech is insincere, as the implied

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[298] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).

[299] New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); *see* St. Amant v. Thompson, 390 U.S. 727, 731–33 (1968) (unpacking the meaning of reckless disregard and defining it to mean belief in probable falsity).

[300] *See Gertz*, 418 U.S. at 331–32; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967).

[301] *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984).

[302] *See Gertz*, 418 U.S. at 349–50.

[303] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985).

[304] *Gertz*, 418 U.S. at 339 (stating that there is "no such thing as a false idea").

assertion of belief would not correspond with a mental state of belief.[305] However, the use of insincerity as a dividing line would in fact permit slightly more speech to be the subject for defamation liability than the actual malice rule, because an assertion made when the speaker had in fact suspended belief does not involve "belief in probable falsity"[306] but does involve a harmful misrepresentation of belief. I suspect that most of us would be fairly comfortable with such a revision in First Amendment law. After all, a confident assertion of truth made when the speaker actually has no idea whether the statement he makes is true or false closely corresponds with the everyday meaning of "reckless disregard" for the truth[307] and would generally be regarded as corrosive to useful discourse.

However, the limitation of the actual malice rule to lawsuits brought by public officials or public figures cannot be sustained under the analysis offered above. Sincerely-believed false statements concerning private individuals may be just as capable of provoking knowledge-augmenting argumentation as speech concerning those who have sought out the limelight. Furthermore, the proliferation of means of private electronic publication has given new resources to private persons seeking to correct false statements made publicly about them. Although there might be some types of defamation where a *Gertz*-like rule might be appropriate—for instance, in cases where the nature of the initial false publication would make any subsequent argument unlikely—a broad rule permitting liability for all negligently-made false statements about private individuals would sweep far too broadly, including within its ambit numerous statements that would be likely to drive veritistically useful argument. Furthermore, given that the chilling effect applies with as much force to speech about private persons as about public persons,[308] and given the fact that our respect for individual autonomy and self-realization[309] should not vary based upon whether the speaker is discussing a private person or a public person, there are strong reasons to apply the same rule—a rule protecting all sincere speech—to both public and private-person defamation actions.

The varied use of procedural prophylactic rules designed to mitigate the chilling of truthful speech can be justified under this Article's framework.[310] Even after extending protection to all sincere speech, there is still a significant risk that some sincere speech will be chilled by liability for insincere statements. Furthermore, the nuanced and varied level of protections offered to date may indicate a useful attempt to adapt these protections to varied levels of potential chilling effects. For instance, denying damage limitations to those who speak insincerely concerning the financial

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[305] *See* discussion *supra* Part II.A.

[306] *See* discussion *supra* Part II.A.

[307] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[308] *Gertz*, 418 U.S. at 360 (Douglas, J., dissenting).

[309] *See* discussion *supra* Part I.B.3.

[310] *See* discussion *supra* Part IV.C.

data of other companies could probably be justified on the grounds that such reporting is driven by strong financial motives and is unlikely to be significantly chilled by the prospect of occasional punitive liability.[311] However, the existence of some possible exceptions of this type should not be construed too broadly; it is probably wrong, for instance, to suggest that all commercial speakers are similarly immune to chilling effects.[312]

Finally, however, the above analysis makes clear that the fact/idea dichotomy requires some revision in order to properly further our interest in maximizing our knowledge. The Court has focused on the fact that ideas cannot be provably false as the basis for their absolute First Amendment protection,[313] and this initially makes a certain amount of sense. Depending on how we define the term "idea," it might be true that it is hard to conceive of an idea as being literally true or false; terms such as "good" and "bad," "right" and "wrong" might not involve enough determinate meaning to be capable of being assessed in terms of descriptive success, at least until the particular usages being discussed are specified in terms of clearer underlying conceptions.[314] However, this theory offers a reason to protect "false" ideas regardless of whether one believes that they lack determinate factual content. The conclusion that false statements generally deserve protection for their contribution to the growth of social knowledge eliminates a dichotomy between facts and ideas in this respect: we should protect all false speech, whether it concerns ideas

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[311] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985). To be clear, it was ambiguous whether a jury finding of actual malice was given in *Dun & Bradstreet*, and the Supreme Court did not rely on the possibility that such a finding might have taken place. *Id.* at 752–53. However, given that the false representation concerning the plaintiff's bankruptcy status had originated in the faulty analysis of one 17-year-old employee of the financial reporting company defendant and given that this data was never subjected to the usual verification procedures employed by that company, it would be quite reasonable to infer that the company did not actually believe its reporting to be true, but rather had no firm belief on the question at all. *Id.* at 752. Thus, the facts of the case, if not its procedural posture, could easily have supported liability based upon insincerity (because it might be possible for a jury to infer on those facts that the company had no real belief in the truth or falsity of its report). If such had been the case, it might well have been appropriate to deny some procedural protections to the financial reporting company, given that such companies are in the direct business of providing information, are generally quite dedicated to doing so truthfully, and are unlikely to be chilled significantly by being liable for making insincere statements.

[312] *See, e.g.*, Kozinski & Banner, *supra* note 60, at 635–38 (noting that in many cases commercial speakers may be as easy to deter from speaking sincerely as non-commercial speakers).

[313] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

[314] *See generally* W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC. 167 (1956) (discussing the degree to which a number of commonly-used, value-laden concepts may lack broadly-shared conceptions of meaning and the degree to which arguments over the use of these terms may be arguments about their definitions as much as arguments about their application).

or facts, because nearly all false statements will help to drive knowledge-producing argumentation. Thus, this theory offers a basis for protecting false ideas that can appeal to those who believe that such ideas are capable of determinate falsity and who worry that permitting the discussion of false ideas will lead to an increase in false beliefs.[315]

Nevertheless, although in one sense this theory supports the impulse to insulate false ideas from suppression, it also provides a basis for curtailing the present extent of the fact/opinion dichotomy: specifically, its total protection for even the insincere expression of ideas. An understanding of the way we use implicative meaning indicates that any time we assert an idea, we also assert a fact; we imply that we believe the idea we are asserting to be true.[316] This type of information about the attitudes and ideas others subscribe to can have great social value; although we might in some cases wish to carefully consider the use of strong procedural protections in order to avoid the abuse of such litigation, the specter of insincere expression of ideas has potentially very harmful implications. It would be distressing, for instance, to conclude that the Constitution provides protection to a pundit who insincerely promoted the ideas of a candidate for office as having merit in return for kickbacks from that candidate. Given that it is hard to see what First Amendment values might be served by protecting such speech and given that the false reporting of attitudes can cause social harm—for instance, by inducing members of the public to make voting or purchasing decisions that they would not make absent hearing the insincere expression of certain opinions—it is hard to justify protection for such speech on free expression grounds.

In short, the constitutional law applicable to defamation cases would not be very much altered if redesigned so as to protect false speech while permitting insincere speech to be significantly restricted. The amount of protection offered by the actual malice rule would narrow slightly (because ignorance would no longer be an effective defense) but would cover an expanded set of cases; the procedural safeguards built to prevent chilling truthful speech would largely survive as a means of preventing the chilling of sincere speech; and the fact/opinion dichotomy would cease to exist, given that false opinions would be protected, like all other false speech, while insincere opinions would be excluded, like other insincere statements. In practice, the alteration to case outcomes will likely be modest, as many cases in

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[315] *Cf.* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises.").

[316] *See* Grice, *supra* note 130, at 167–69 (discussing the maxim of quality and its standard use to convey our belief in our own statements); Smith, *supra* note 106, at 712–13 (discussing the dual nature of most assertions).

which a speaker would previously have been found negligent (through a lack of adequate objective basis for a false statement) would also involve the sort of investigative failure that would prevent most speakers from forming affirmative beliefs that correspond with their assertions. The primary effect of this change will be to give speakers who earnestly believe what they are saying immunity from liability based upon others' disagreement with their conclusions.

B. Commercial Speech

A more radical intervention will be required to bring the commercial speech doctrine into line with a better understanding of the value of false speech. This should not be very surprising, given that this doctrine arose primarily from the Court's previous conclusion in *Gertz* that false speech had no independent constitutional value;[317] this assertion was both unsupported[318] and—as we have seen—incorrect.[319] The Court's decision to exclude false commercial speech from protection therefore flowed largely from its view that such speech was less likely to be chilled by liability,[320] a conclusion that is not itself free from doubt.[321] Thus, the broad exception from protection for all commercial speech that is false, misleading, or deceptive, without regard for the state of mind of the speaker, flows entirely from an underanalyzed and erroneous premise.

Furthermore, the Court has never needed to put its money where its mouth is regarding this remarkably broad exclusion. There is not a single case on record in which the Court has had to decide whether to stick with its stated doctrine in a case where a commercial speaker is held liable for speaking sincerely, absent additional reasons to exclude speech from protection.[322] The closest the Court has come has been in the attorney advertising cases, in which the Court—without making findings of insincerity—has been willing to uphold professional conduct regulations that prevent attorneys from soliciting clients in person, due in part to concerns about possible deception.[323] However, the animating concern in these cases has been a fear of coercion and fraud, not a worry that lawyers would communicate innocent

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[317] Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974).

[318] *See* discussion *supra* Part I.A.1.

[319] *See* discussion *supra* Part III.B.

[320] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980); Friedman v. Rogers, 440 U.S. 1, 10 (1979).

[321] *See* Kozinski & Banner, *supra* note 60, at 635–38 (criticizing this argument).

[322] *See* discussion *supra* Part I.A.2; *see also* CHEMERINSKY, *supra* note 26, at 1054 (noting that the Court "has never decided a First Amendment case concerning false and deceptive ads").

[323] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465–66 (1978) (expressing concern that "unsophisticated, injured, or distressed lay person[s]" would tend to fall prey to coercion by lawyers, who are after all "professional[s] trained in the art of persuasion").

or negligent errors to potential clients.[324] Furthermore, such cases can be amply explained as time, place, and manner restrictions aimed at protecting the privacy of distressed laypeople;[325] after all, the Court has based its case law in this area in part on the concern that "the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy"[326] and has held that mail solicitations (which are certainly equally capable of containing false or misleading information) are protected by the First Amendment.[327] Thus, this line of cases is better read as expressing a concern about privacy than as applying anything like the strong rule announced in *Central Hudson*,[328] and it remains the case that the Court has never yet tested its willingness to permit the restriction of sincerely believed false or misleading commercial speech.[329]

Although the Court has never tested its present doctrine, its stated rule has had an enormous and detrimental effect, permitting widespread restrictions of commercial messages solely on the basis of disagreement with the message that an advertiser wishes to convey. To take but one example, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) enforces regulations designed to limit false or misleading advertising regarding wines.[330] Under these regulations, the ATF takes the enforcement position that any claim that wine may have health benefits—regardless of its support in evidence—is factually misleading unless it purports to give all sides of the issue, listing all the possible ways in which such a statement might not hold true.[331] As a result, wine makers are generally restrained from imparting the truthful information that there is mounting evidence to support the claim that red wine consumed in moderate quantities reduces the risk of cardiac illness.[332] This is the extent of what current Supreme Court doctrine has wrought: consumers are prevented from hearing true information from companies that sell

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[324] *See id.*

[325] *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding restrictions on truck-mounted loudspeakers as a reasonable time, place, and manner restriction).

[326] *Ohralik*, 336 U.S. at 465.

[327] Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988).

[328] *See supra* notes 49–57 and accompanying text.

[329] The only other plausible candidate as an application of this principle is *Friedman v. Rogers*, which involved restrictions on the use of trade names by optometrists. 440 U.S. 1, 10 (1979). *Friedman* does not truly test the Court's willingness to prohibit sincere-but-false speech, however, because trade names do not, in and of themselves, communicate messages that can be true or false, and because the Court's concern was clearly the deceptive use of trade names, not their erroneous use (whatever that might mean). *See id.* at 13.

[330] *See* 27 U.S.C. § 205 (2000); 27 C.F.R. § 4.39 (2007).

[331] *See* Dep't of Treas., ATF, *Health Claims in the Labeling and Advertising of Alcoholic Beverages*, Industry Circular 93-8 (1993), *available at* http://www.ttb.gov/industry_circulars/archives/1993/93-08.html.

[332] Lawrence M. Fisher, *Here's to the Benefits of Red Wine, but Don't Advertise Them*, N.Y. TIMES, Nov. 25, 2006, at C1.

products with demonstrated health benefits because the government can threaten anyone who advocates a particular factual assertion with a lawsuit. And this merely scratches the surface; there are strict liability rules against misrepresentations, often leaving substantial discretion to government enforcers to decide what is false, across an enormous swath of business regulations,[333] as well as at common law.[334]

The better rule for commercial cases is the same as that announced above: false but sincere commercial speech should generally receive protection, while speech that is either directly insincere, or insincere via implication, should be properly subject to regulation. Such a rule resonates well with the Court's expressed respect for the informational value of advertising[335] by promoting discussion that will tend to provide the public with greater information than a rule penalizing advertisers for saying what they believe. At the same time, it permits the government to prevent advertisers from deliberately misleading the public, either directly or through subtle implications.

To state this as a general rule, however, is not to preclude the possibility of some narrow exceptions. First, as discussed above,[336] when circumstances suggest that a particular class of false statements is not likely to give rise to useful argumentation, and when such statements have the potential to cause significant harm, such statements may properly be excluded from First Amendment protection, at least when some level of fault, such as negligence, is involved. A classic example of such a situation is when a confidential advisor, such as an attorney, is retained to provide accurate and competent advice that will be relied upon by a client without further inquiry. In such a case, argument is unlikely to be produced by errors in the advisor's counsel, and thus the benefits of false speech are unlikely to materialize. Therefore, such statements may lie outside the zone of protection for false commercial speech.[337]

A second class of potential exceptions may lie in cases where a localized increase in false belief may have very serious consequences and opposing arguments

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[333] *See, e.g.*, 15. U.S.C. § 45 (2000) (making deceptive acts that affect commerce unlawful); Securities Act of 1933 §§ 11, 12, 48 Stat. 74 (1934) (creating strict liability for various types of misrepresentations in the sale of securities) (codified as amended at 15 U.S.C. §§ 77a–77mm (2000)); 15 U.S.C. § 1679b(a)(1) (2000) (creating strict liability for any false statement made with respect to a consumer's creditworthiness to any credit-reporting agency). *See generally* Aleta G. Estreicher, *Securities Regulation and the First Amendment*, 24 GA. L. REV. 223, 266–67 (1990) (discussing the Federal Trade Commission's power to restrain false and misleading advertising).

[334] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 552C (1977); *see also* RESTATEMENT (SECOND) OF TORTS app. § 552C (1989) (listing cases imposing liability for innocent misrepresentations in an exchange, sale, or rental transaction).

[335] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).

[336] *See* discussion *supra* Part III.B.4.

[337] *See* GREENAWALT, *supra* note 97, at 316 (implicitly suggesting that such speech may be unprotected).

are unlikely to reach listeners in time to avoid such harms.[338] A classic example of this might involve warning labels on over-the-counter medications. I doubt that most of us could keep track of which medications did or did not cause drowsiness based upon claims made in advertising; rather, when an illness strikes, selection is often made at the point of purchase, based on labeling claims made on each competing medication. Nevertheless, the risk of adverse consequences flowing from a manufacturer's overconfident decision that its medicine did not cause an unacceptable level of drowsiness or did not interact negatively with certain other drugs, might create significant dangers to the health of consumers before they could encounter counterspeech from the government or health-advocacy organizations. Left unchecked, the risk to health might well outweigh any informational gains from the false label claims.

Nevertheless, the appropriate remedy in such a case would not be suppression of the false claim, but rather finding a way for the regulator to assert its own beliefs without denying advertisers the ability to make their own claims. Such compelled speech (either the seller might be compelled to include certain information on the label, or the retailer might be compelled to include certain information at the point of purchase) should not require anyone to assert false facts regarding their own belief states; this would distort the available information to consumers, who do after all have an interest in knowing that these claims of harm are disputed by the manufacturer.[339] Rather, a warning could be clearly labeled as coming from an appropriate regulatory body, with a manufacturer being permitted to dispute the government's contentions if it wished to do so. Such a resolution would permit many of the gains of argumentation to persist, while avoiding the risk of having consumers rely on potentially dangerous, false information due to lack of counterspeech.

Finally, it could be argued that commercial speech as a class should be treated differently, because manufacturers and advertisers as a class generally have much greater access to information about their products than possible critics do. To some extent, this unequal access might represent the kind of informational disparity that could impede the ability of critics to assure that the evidence premises underlying arguments made in commercial speech are generally true.[340] Indeed, the Court has often adverted to such a distinction as a basis for the lessened protection of commercial speech.[341] However, as discussed above, a rule absolutely suppressing false speech on this account would be less veritistically desirable than a rule requiring disclosure but permitting advocacy of sincerely-believed viewpoints, whether false

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[338] *See* discussion *supra* Parts III.A, III.B.1.

[339] *See* discussion *supra* Part III.B.4 (discussing the value of knowing when expert opinion is divided).

[340] *See* GOLDMAN, *supra* note 11, at 146–47.

[341] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980).

or otherwise.[342] In other words, it is better to have access both to commercial speakers' beliefs, and the evidence they use to support those beliefs, than to have them decline to speak rather than be sued for making a false statement.

Subject to these narrow exceptions, commercial speech should be subject to the same regime as all other speech: sincere falsity should generally receive constitutional protection, while insincerity should be outside the scope of First Amendment coverage. This discussion has merely scratched the surface of the existing law regulating false speech; there are numerous areas involving false or insincere speech that have not traditionally been scrutinized for compliance with the First Amendment at all.[343] Although the general principles offered above should remain sound as applied to new cases, it is possible that there will be unique facts in each domain—such as the special concerns discussed regarding commercial speech—that may alter the veritistic calculus and change the proper assessment of the costs and benefits involved in First Amendment values in each domain. The important thing is to avoid facile assumptions that false speech is always harmful[344] and instead assess the regulation of speech in a way that pays attention to the modes of discourse in which that speech is situated, noting the degree to which seemingly useless statements may be embedded in, and necessary to, a larger conversation that is valuable. Given the analysis offered above, it would be the gravest mistake to assume that we can generally restrict false messages without also constraining the processes of argumentative discourse that need error to exist and that contribute usefully to all of our knowledge.

CONCLUSION

This Article has attempted to set forth a theory of the First Amendment's application to false, insincere, and misleading speech. The theory can be restated as follows. First, false speech that is sincerely uttered should generally be protected, for reasons grounded both in political theory and in its ability to generate argumentation that will usually increase the sum of our knowledge. This rule is subject to narrow exceptions, however, for circumstances where argument cannot be relied upon to serve a corrective function. Second, insincere speech is generally harmful to the state of our knowledge, and the First Amendment therefore puts forward no barrier to its suppression, except to the extent that suppressing insincere speech will chill sincere speech. The concern with chilling effects is an important one, but it should be addressed through procedural safeguards than through rules giving full

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[342] *See* discussion *supra* Part III.B.3.

[343] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767–68 (2004).

[344] *See, e.g.*, CHEMERINSKY, *supra* note 26, at 1054 ("False and deceptive advertisements do not contribute to the marketplace of ideas . . . in any useful way.").

protection to insincere speech, given the very grave harm that such speech can cause. Third and finally, speech that is misleading should be protected if the implied assertions are false but believed by the speaker, but such speech should not be protected when those implied assertions are not believed by the speaker to be true, with the caveat that implications that proceed solely through the ability of facts to convince listeners of other, related facts that are not the subject of communication should not be permitted to generate liability.

At one level, this Article has been a project in First Amendment theory, with the aim of providing a starting point for understanding how free expression principles interact with the many ways that speech can be incorrect or improper in its relation to truth and belief. To this end, I have attempted to apply basic concepts from the fields of social veritistic epistemology and the philosophy of language in order to provide a more systematic way to assess the relationship between First Amendment goals and restrictions on false or insincere speech. At the same time, however, this project also may be useful towards more doctrinal ends. To date, the First Amendment doctrine applicable to insincere or false speech has been underdeveloped, and what development that has occurred has been inconsistent and often pronounced with little grounding in First Amendment principles. The theory offered here provides a straightforward means by which courts can fill the gaps in existing law and also provides suggestions for the rationalization of existing law so as to better protect the types of deceptive speech that have First Amendment value. Indeed, the theory could be implemented without the necessity of overruling many existing Supreme Court precedents in this area; almost the only cases with holdings that cannot be justified under these rules are those cases refusing to extend the actual malice rule to defamation cases brought by plaintiffs who are not public officials or public figures.[345]

Certainly much work remains to be done in this area. In particular, the proper boundaries and scope of the procedural protections we should give to insincere speech to avoid chilling sincere speech is a question that deserves significant further investigation.[346] At the least, however, I hope this Article demonstrates the need for a more critical approach to these questions and that it may put to rest the facile assumption that all false statements of fact are without constitutional value.[347]

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[345] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974).

[346] *See* discussion *supra* Part IV.C.

[347] *See, e.g.*, *Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact."); CHEMERINSKY, *supra* note 26, at 1054 ("False and deceptive advertisements do not contribute to the marketplace of ideas or the commercial marketplace in any useful way."); GREENAWALT, *supra* note 97, at 48 ("[T]he contribution to understanding that most demonstrably false statements make is highly limited.").