University of Chicago Legal Forum

Volume 2020 *12/01/2020* Article 8

2020

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Recommended Citation
Miller, Judith A. (2020) "Defending Speech Crimes," *University of Chicago Legal Forum*: Vol. 2020 , Article 8.
Available at: https://chicagounbound.uchicago.edu/uclf/vol2020/iss1/8

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Defending Speech Crimes

Judith Miller†

The First Amendment is supposed to provide important protections against criminal prosecutions for speech crimes. In practice, however, those protections are inadequate: in a world of vanishing trials, criminal defendants lack meaningful opportunities to litigate often fact-bound First Amendment questions. Through the lens of prosecutions for false speech, this article proposes refocusing First Amendment protections in criminal cases on criminal procedure rather than substantive questions about what the First Amendment protects. It suggests two procedural reforms—revitalizing the indictment and unanimity requirements—to help make the First Amendment's ostensible protections more of a reality for criminal defendants.

I. INTRODUCTION

In *United States v. Alvarez*[1] the Supreme Court expressly held, for the first time, that false speech is entitled to First Amendment protection in its own right. The Court concluded that the First Amendment requires any such prohibition either to map onto a common law crime (e.g., fraud, defamation) or to criminalize only a narrow slice of speech or conduct, focused specifically on the harm to be avoided.[2] Subsequent *Alvarez* litigation and the related academic analysis focus almost entirely on the substantive question of what kinds of false expression the First Amendment allows the state to prohibit.[3] Questions in First Amendment criminal case law and academic literature more broadly

† Tremendous thanks go out to my extraordinarily patient editors at the *University of Chicago Legal Forum* and to the other participants in the autumn false speech symposium, my devoted and insightful research assistant Elisabeth Mayer, and also to William Baude, Genevieve Lakier, David Owens, Erica Zunkel, Andrew Mackie-Mason, and Max Samels.

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

2 *Id.* at 709; Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 665–70 (2018).

3 *See, e.g.*, Chen & Mereau, *supra* note 2; Louis W. Tompros et al., *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-*Alvarez*, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65 (2017); David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70 (2012).

likewise reflect this focus on substantive questions of just what the First Amendment protects or prohibits.[4]

These substantive questions about the reach of the First Amendment are largely orthogonal to the world of actual criminal practice. In criminal practice, substantive First Amendment questions are typically as-applied challenges—that is, questions of the form "Does criminalizing this or that alleged misconduct violate the First Amendment?" These questions are litigated almost exclusively mid-trial or post-trial: mid-trial, at a jury instruction conference, after the evidence is in, or post-trial, via a sufficiency of the evidence challenge.[5]

But by then the First Amendment offers little protection. Post-trial motions offer the most thorough place to litigate the issue, but of course

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[4] Take, for example, the last decade of Supreme Court criminal cases involving the First Amendment and related statutes: Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (finding that a state statute prohibiting registered sex offenders from accessing social networking sites violated the First Amendment); Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (holding that negligence could not support conviction for transmitting threats); *Alvarez*, 567 U.S. at 730 (concluding "[t]he Stolen Valor Act infringes upon speech protected by the First Amendment."); United States v. Stevens, 559 U.S. 460, 482 (2010) (holding that a statute criminalizing depictions of animal cruelty violated the First Amendment). Leading First Amendment articles in the last decade are the same. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246 (2017); Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015); Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81 (2011). Research reveals only sporadic exceptions, further underscoring the axiom that the exceptions prove the rule. *See, e.g.*, Scott M. Matheson, Jr., *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215 (1987) (arguing for a revised approach to procedural law in First Amendment libel law); *cf.* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1476 (2005) (examining interplay between First Amendment values and defendants' silence in criminal cases).

[5] *See* FED. R. CRIM. P. 29. A defendant challenges the sufficiency of the evidence via motion under Federal Rule of Criminal Procedure 29. The motion can be raised up to three times: first, at the close of the government's case, second, at the close of evidence but before the jury's verdict, and third, after the verdict. FED. R. CRIM. P. 29(a), (c). However, judges may reserve ruling on either the first or second form of the motion until the evidence is complete, the jury is deliberating, the jury is discharged without a verdict, or even after the jury has returned a verdict. FED. R. CRIM. P. 29(b). As a practical matter, this means that there is often effectively only one sufficiency of the evidence challenge, litigated via a post-trial motion.

Declaratory judgments are unlikely to fix this problem. To be sure, plaintiffs who suspect themselves to be a likely target for criminal prosecution can in theory seek out a declaratory judgment declaring the law (or the law as applied) unconstitutional. *See, e.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 15–16 (2010). But that is no solution for run of the mill criminal defendants, who are largely indigent and less sophisticated than the plaintiffs in cases such as *Humanitarian Law Project*. Approximately ninety-three percent of federal criminal defendants need appointed counsel. *See* 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT 17 (2018), https://cjastudy.fd.org/ [https://perma.cc/FGV3-GDJD]. Even when repeat-player appointed defense attorneys recognize a statute's weakness to a class of clients, they may face serious institutional challenges in bringing such a challenge, *see, e.g.*, *id.* at 71, 89–92, 104, if their statutory underpinnings even allow such challenges. *See, e.g.*, *id.* at 67–69.

a post-trial motion requires a trial—a rare event in our world of vanishing trials.[6] Moreover, judges are understandably reluctant to disturb a jury's verdict. And, in any event, the legal standard substantially favors the prosecution by prohibiting the judge from reversing a conviction unless the judge concludes that no "rational trier of fact could have found the essential elements of [the] crime beyond a reasonable doubt," evaluating the evidence "in the light most favorable to the prosecution[.]"[7]

Jury instructions fare little better. The court finalizes jury instructions at a jury instruction conference after the close of evidence and before closing arguments.[8] There, either party can object to the court's proposed instructions and any refusals to present party-proposed instructions.[9] In relevant part, the parties can raise as applied challenges to prevent the jury from convicting or acquitting for unconstitutional reasons raised by the evidence.[10] But case law, again, puts a thumb on the scale against issuing such instructions: district courts are typically safe from reversal for instructional error where the instructions "read as a whole . . . completely and correctly state[] the law."[11] And even when an appellate court finds constitutional error, another level of deference still requires affirming the verdict when the error is ostensibly harmless beyond a reasonable doubt.[12] Jury instructions, too, are thus not an especially effective mechanism for enforcing the First Amendment in criminal cases.

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[6] The "vanishing trial" is a widely used shorthand that refers to the dramatic decrease in the percentage of civil and criminal cases resolved via trial, as opposed to settlement (civil), guilty pleas, or other means. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEGAL STUD. 459 (2004).

[7] *See* United States v. Mohamed, 759 F.3d 798, 803 (7th Cir. 2014) (internal quotation marks omitted).

[8] *See* FED. R. CRIM. P. 30. Note that experienced practitioners will prepare and even submit key jury instructions before trial, especially instructions about the elements of the offense. *See generally* F. Lee Bailey & Kenneth J. Fishman, *Criminal Trial Techniques* § 49:3 (2019). However, a judge need not rule on the proposed instruction until before closing arguments, per FED. R. CRIM. P. 30(b), and in any event can revise earlier rulings at that time. *See id.* For an overview of the many stages of jury instructions in a criminal trial, see 6 Wayne R. Lafave et al., *Principles of Criminal Procedure: Investigation* § 24.8(a) (4th ed. 2019).

[9] FED. R. CRIM. P. 30(d); Lafave et al., *supra* note 8, at § 24.8(b).

[10] An example may be illustrative for those unfamiliar with the intricacies of trial practice. Take United States v. White, 698 F.3d 1005, 1012, 1018–20 (7th Cir. 2012), a solicitation case. After defense objection, the district court issued a First Amendment instruction outlining some of the relevant *limits* to criminal solicitation that the government's evidence raised, in addition to issuing standard solicitation instruction setting out the elements of the offense. *See White*, 698 F.3d at 1012, 1018–20.

[11] United States v. Anzaldi, 800 F.3d 872, 880 (7th Cir. 2015) (quoting United States v. DiSantis 565 F.3d 354, 359 (7th Cir. 2009)).

[12] There are different standards of appellate review for the different ways in which these issues could come up, but all include *some* deference to the trial verdict. *See infra* Part V.B.

Ultimately, substantive litigation, at trial and after, over what the First Amendment prohibits provides inadequate protection against unconstitutional convictions. In response, this paper proposes expanding opportunities for First Amendment litigation throughout the criminal process by shifting focus from substantive to procedural litigation. Expanding sites for meaningful First Amendment litigation strengthens First Amendment protections by offering not only more opportunity to raise such issues but also greater variety of such challenges.

In a world of vanishing trials, such expansion is especially critical. First Amendment cases are often especially fact-intensive. Abandoning any analysis of the facts of a charge until trial in effect means abandoning most meaningful First Amendment challenges. A turn to criminal procedure helps solve this problem.

This article explores this shift to procedure through the lens of false speech cases. These cases provide relative clarity about what a more procedurally oriented First Amendment could look like, as well as the challenges facing criminal defendants under the current doctrine. That is because *Alvarez* gives constitutional weight to the "non-lying" elements of any offense involving false expression. In other words, following *Alvarez*, any legally valid false speech charge *must* involve more than simply a claim that an offender is lying; lying as such cannot be criminalized.[13]

This article focuses on two procedural mechanisms for strengthening the First Amendment within the criminal legal system: robust grand jury/indictment and unanimity requirements. These requirements help vindicate the First Amendment by testing the facts of a case against the constitutionalized elements of the offense. Specifically, they require the government to offer up specific *facts* that meet each and every one of the elements of an offense—including, for false speech, the constitutionalized "non-lying" elements.

Under the Fifth Amendment, a grand jury cannot return an indictment charging someone with a crime unless the grand jury finds facts constituting probable cause to believe that a defendant has violated each and every element of an offense.[14] The Sixth Amendment requires that the resulting indictment inform a defendant of the key facts of the charges against him—the "nature and cause" of the charges.[15] And, finally, Due Process and the Sixth Amendment require that a federal

[13] United States v. Alvarez, 567 U.S. 709, 715 (2012) (plurality opinion).

[14] U.S. CONST. amend. V; *see, e.g.*, United States v. Gonzalez, 259 F.3d 355, 361 n.3 (5th Cir. 2001), *on reh'g en banc sub nom.* United States v. Longoria, 298 F.3d 367 (5th Cir. 2002) (requiring "assurance that the grand jury found probable cause for each of the elements of an offense").

[15] U.S. CONST. amend. VI.

trial jury's verdict be unanimous on the facts demonstrating the central elements of an offense.[16]

The existing law of grand juries/indictments and unanimity already goes part of the way to providing considerable procedural protections for criminal defendants charged with false speech crimes. A First Amendment overlay serves to strengthen what doctrine already ostensibly requires; it does not require a radical transformation of criminal procedure. Part II of this article explains how, following *Alvarez*, criminal prohibitions on false speech are unconstitutional unless they are coupled with elements limiting the scope of that prohibition. Part III then shows how the intertwined grand jury/indictment requirements carry those First Amendment limitations from the text of the statute to the initiation of a criminal case: the grand jury must determine whether the government has evidence supporting those constitutionally required First Amendment limits, and the indictment notifies a defendant how the resulting case complies with the First Amendment requirement. Part IV, in turn, argues that convicting someone requires a petit jury to unanimously conclude that those First Amendment limiting facts—and not some others—occurred beyond a reasonable doubt, and that they make out the applicable limiting elements. Finally, Part V takes a step back and responds to counterarguments. It argues, first, the First Amendment provides ample reason to reinvigorate criminal procedure's sometimes empty formalisms, and, second, that trial level procedural changes like these matter.

II. FALSE SPEECH'S LIMITING ELEMENTS

In *United States v. Alvarez*, the Supreme Court struck down the Stolen Valor Act of 2005[17] as an unconstitutional prohibition on protected speech.[18] *Alvarez* was an impersonation case, and a sad one. Mr. Alvarez was convicted of claiming to be a Congressional Medal of Honor recipient when he was not. He had introduced himself at a public water board meeting as a Medal recipient, but he made no attempt to obtain any benefits or privileges reserved for Medal holders.[19] As the Supreme Court observed, his false claims "were but a pathetic attempt to gain respect that eluded him."[20]

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[16] U.S. CONST. amends. V, VI; *see also* Richardson v. United States, 526 U.S. 813, 817 (1999) ("[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.").

[17] Stolen Valor Act of 2005, Pub. L. No. 109-437, 120 Stat 3266 (2006), *invalidated by Alvarez*, 567 U.S. 709.

[18] *Alvarez*, 567 U.S. at 715.

[19] *Id.*

[20] *Id.*

A divided Court struck down the Stolen Valor Act, which prohibited such lies.[21] Writing for a four-justice plurality, Justice Kennedy applied "the most exacting scrutiny" to conclude that the Stolen Valor Act was unconstitutional.[22] Justice Breyer and Justice Kagan agreed that the Act was unconstitutional but applied intermediate scrutiny.[23]

Although no opinion garnered a majority, the upshot from both opinions was similar: lies are not categorically outside the protection of the First Amendment. Instead, the state can criminalize lies only when they falls into a categorically unprotected category of speech (e.g., fraud, etc.) or when the elements of the offense require not only a lie but also "some other legally cognizable harm."[24] Those elements, in the words of the concurring judges, impose "limitations on . . . scope" that narrow the offense to "lies most likely to be harmful or . . . contexts where such lies are most likely to cause harm."[25]

The absence of these limiting elements distinguished the unconstitutional Stolen Valor Act from the parade of federal and state statutes that the government and amici complained would be jeopardized by striking down the Act.[26] To the plurality and concurring justices, the Stolen Valor Act was different because it criminalized "all false statements" on a given subject "in almost limitless times and settings.".[27]

Constitutionally valid "false statements" statutes avoided the bogeyman of criminalizing mere lies by adding additional limiting elements. The Court illustrated this principle by walking through the limiting elements in the three statutory categories the government claimed would be put at risk if the Court found false speech to be constitutionally protected—false statements to officials (Section 1001), perjury, and impersonation. First and foremost, federal law prohibits making a false statement to federal officials, in violation of 18 U.S.C. § 1001. But § 1001 punishes only *materially* false statements made to government

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[21] *Id.* at 715; *id.* at 730 (Breyer, J., concurring).

[22] *Id.* at 724 (plurality opinion) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)).

[23] *Id.* at 732 (Breyer, J., concurring). In addition to the plurality and concurrence, Justices Alito, Scalia, and Thomas also dissented. *Id.* at 739 (Alito, J., dissenting).

[24] *Id.* at 717–19 (plurality opinion).

[25] *Id.* at 737–38 (Breyer, J., concurring).

[26] The government, for example, highlighted false statements (18 U.S.C. § 1001), perjury, and the various statutes criminalizing falsely representing oneself to be acting on behalf of the government. Brief for Petitioner at 29–32, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-210). First Amendment scholars Eugene Volokh and James Weinstein listed no less than thirteen categories of federal and state offenses, many with multiple subcategories—all of which would be implicated in finding First Amendment protection for false speech. Brief for Professors Eugene Volokh and James Weinstein as Amicus Curiae in Support of Petitioner at 3–11, *United States v. Alvarez*, 567 U.S. 709 (2012) (No. 11-120).

[27] *Alvarez*, 567 U.S. at 723; *see also id.* at 736 (Breyer, J., concurring) ("[F]ew statutes, if any, simply prohibit without limitation the telling of a lie, even a lie about one particular matter.").

officials, about official matters; it does not punish mere false statements.[28] Second, perjury prosecutions do not punish mere false speech as such but, rather material false speech under oath, in an official proceeding or document, in violation of 18 U.S.C. §§ 1621, 1623.[29] There is little risk that prosecuting such false speech, under oath, will impinge on "lies not spoken under oath and simply intended to puff up oneself."[30] Finally, impersonation statutes, too, are distinct from mere false speech in that they require showing that the communication appears to hold some kind of official authorization and "implicate fraud or speech integral to criminal conduct."[31]

The logic of *Alvarez* is not 100% pellucid, but its takeaway is much more so: a statute criminalizing false expression is unconstitutional unless it falls into a category of historically unprotected speech, or its elements meaningfully limit its scope. The exact contours of these limiting elements are defined by statute, but they are nonetheless required by the Constitution. The rest of this paper explores what it means to enforce the limits these constitutionalized elements impose.

III. INDICTMENTS AND GRAND JURIES

For better or worse, our criminal system is one of vanishing trials. Only two percent of federal cases go to trial.[32] As the Supreme Court famously recognized, "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials."[33] The absence of trials is self-reinforcing in cases that raise potential First Amendment issues: the constitutional limits of such offenses aren't tested because so few cases go to trial, and few such cases go to trial because trial is even more risky when the contours of the offense are unknown. Following *Alvarez*, one would have expected extensive litigation over the

[28] *See id.* at 720 (plurality opinion); *see also id.* at 734–35 (Breyer, J., concurring).

[29] *See id.* at 721 (plurality opinion); *see also id.* at 734 (Breyer, J., concurring).

[30] *Id.* at 721 (plurality opinion).

[31] *See id.* The elements of federal impersonation, in violation of 18 U.S.C. § 912, are much more controverted than the elements of perjury and § 1001 violations. The plurality and concurring opinions thus agree less as to the nature of the limiting element for a § 912 case than they do for perjury and § 1001 violations. Both opinions agree, however, that the limiting elements—whatever they are—play an important role. *See id.* at 735 (Breyer, J., concurring) (quoting United States v. Lepowitch, 318 U.S. 702, 704 (1943)). The plurality quotes in the text above would require elements analogous to fraud or speech integral to criminal conduct, while the concurrence focuses on "acts of impersonation, not mere speech" that "may require a showing that, for example, someone was deceived into following a 'course [of action] he would not have pursued but for the deceitful conduct.'" *Id.* (citing *Lepowitch*, 318 U.S. at 704).

[32] John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ [https://perma.cc/K9T7-YU6S].

[33] Lafler v. Cooper, 566 U.S. 156, 170 (2012).

contours of the limiting elements in false statement offenses.[34] But that hasn't happened: a review of all federal criminal cases citing *Alvarez* reveals few cases even challenging criminal prohibitions on false expression, and just one case striking down a statute.[35]

The prospect of defendants facing unconstitutional charges until a trial that never happens is itself a First Amendment problem. Just the *threat* of an improper conviction chills speech, regardless of whether the speech is ever prosecuted, and regardless of whether the speech is even prohibited.[36] As the Court has observed, the threat of criminal sanctions "may well cause speakers to remain silent rather than communicate" potentially lawful "words, ideas, and images."[37] And "[e]ven the prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."[38] In a world of vanishing trials, that threat is real.

Shifting focus to pretrial procedure is one mechanism for breaking this vicious cycle. But there is no need to invent new procedural steps. To charge someone with a crime, the government must already produce facts supporting each and every element of the charges and informing the defendant of the gist of the resulting charges. Specifically, a federal

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[34] The Court takes only important cases. *See* SUP. CT. R. 10. And, as noted above, the government and amici argued that striking down the Stolen Valor Act would topple a host of other federal and state statutes. *See supra* Part II. In addition, *Alvarez*'s lengthy discussion of the limiting elements of existing "false statements" offenses provides ample opportunity for defense lawyers to argue that their case falls outside the limiting elements as defined in *Alvarez*.

[35] Unsuccessful challenges: United States v. Bonin, 932 F.3d 523, 536 (7th Cir. 2019) ("Because the acts-as-such clause prohibits more than mere lies, it falls outside the scope of *Alvarez*'s holding."); United States v. Nabaya, 765 Fed. Appx. 895, 899 (4th Cir. 2019) (upholding federal statute prohibiting retaliating against federal employees and officers by filing a false lien or encumbrance); United States v. Ackell, 907 F.3d 67, 76–77 (1st Cir. 2018) ("[W]e are unconvinced that we must administer the 'strong medicine' of holding the statute facially overbroad."); United States v. Glaub, 910 F.3d 1334, 1338 (10th Cir. 2018) ("The Supreme Court, however, has held that the submission of a false claim to the government is not protected by the First Amendment.") (citing *Alvarez*, 567 U.S. at 723); United States v. Baumgartner, 581 Fed. Appx. 522, 530–31 (6th Cir. 2014) (finding that federal misprision statute did not violate the First Amendment); United States v. Tomsha-Miguel, 766 F.3d 1041, 1049 (9th Cir. 2014) (holding that 18 U.S.C. § 912 did not violate the First Amendment); United States v. Harkonen, 510 Fed. Appx. 633, 636 (9th Cir. 2013) ("The First Amendment does not protect fraudulent speech . . . ."); United States v. Chappell, 691 F.3d 388, 393–94 (4th Cir. 2012) (upholding a state personation statute); United States v. Hamilton, 699 F.3d 356, 374 (4th Cir. 2012) (holding that *Alvarez* does not call the constitutionality of federal insignia statutes into question); United States v. Keyser, 704 F.3d 631, 639–40 (9th Cir. 2012) (finding that defendant's hoax speech was not protected speech); United States v. Williams, 690 F.3d 1056, 1064 (8th Cir. 2012) (holding that federal statutes were constitutional regulations of true threats).

Successful challenge: United States v. Swisher, 811 F.3d 299, 303–04 (9th Cir. 2016) (en banc) (striking down 18 U.S.C. § 704(a), a federal statute prohibiting unauthorized wearing of military medals).

[36] Reno v. ACLU, 521 U.S. 844, 871–72 (1997).

[37] *Id.* at 872.

[38] Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).

felony case typically begins when a grand jury returns an indictment.[39] The grand jury can do that only when the government's evidence provides probable cause to believe that the individual charged committed each and every element of an offense, including, in the case of false speech offenses, the constitutionalized limiting elements.[40] The grand jury returns those charges in the form of indictment, which itself provides notice of the charges against a defendant—both the elements and "essential facts" of the offense.[41]

When analyzed through a First Amendment lens, these intertwined grand jury and indictment requirements enable part of First Amendment challenges to be litigated before trial, circumventing the vanishing trial problem. The grand jury already is supposed to evaluate whether the government has produced facts supporting the critical limiting elements of a false speech offense. In theory, the grand jury thus helps prevent defendants from being indicted for conduct that is protected by the First Amendment. Including those constitutionally salient facts in the resulting indictment would demonstrate that the grand jury did, in reality, find such facts.[42] The indictment would then also provide notice to a defendant of the nature of the pending charges, and, critically, would ensure from the outset of a proceeding that the constitutional facts underpinning the government's charges actually comply with the applicable First Amendment limits. Already, notice must involve the "essential facts" underpinning a charge.[43] In a post-*Alvarez* world, those "essential facts" should include the facts found by the grand jury to support the constitutionally relevant limiting elements. The government is then held to that notice at trial.[44]

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[39] Federal criminal cases can also be commenced via complaint or continued with an information. *See* FED. R. CRIM. P. 3, 7(b). However, both are subject to significant limitations such that their use is largely limited to cases involving early guilty pleas. *See* FED. R. CRIM. P. 5.1, 7(b).

[40] This is a foundational principle on which the grand jury operates. *See, e.g.*, United States v. Cole, 784 F.2d 1225, 1227 n.1 (4th Cir. 1986) ("If the grand jury had not found all elements of the offense, the indictment is invalid . . . .")

[41] FED. R. CRIM. P. 7(c)(1); *see also* United States v. Resendiz-Ponce, 549 U.S. 102 (2007).

[42] Grand juries have famously been criticized for being willing to indict a ham sandwich. *See* Josh Levin, *The Judge Who Coined 'Indict a Ham Sandwich' Was Himself Indicted*, SLATE (Nov. 25, 2014), https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html [https://perma.cc/98GF-ABBD] (providing history of "indict a ham sandwich" phrasing).

[43] FED. R. CRIM. P. 7(c)(1); *see also Resendiz-Ponce*, 549 U.S. 102.

[44] *See* Stirone v. United States, 361 U.S. 212, 218–19 (1960).

A. The Law of Grand Juries and Indictments

The Fifth Amendment's grand jury requirement and the Sixth Amendment's indictment requirement are supposed to work in tandem to protect federal defendants.[45]

The grand jury serves a dual role as a "sword" investigating and charging crime and as a "shield" protecting the accused from "unfounded criminal prosecutions."[46] The grand jury is thus centrally concerned with assessing *facts*—"whether there is adequate basis for bringing a criminal charge."[47] Any resulting indictment defines the scope of the government's trial case: the Fifth Amendment demands that the "allegations in the indictment and the proof at trial match . . . ."[48] The remedy for a fatal variance is dismissal for violation of a defendant's Fifth Amendment rights.[49] The prosecution thus has every incentive to persuade the grand jury to return as broad an indictment as possible so as to provide maximum flexibility over the evidence presented at trial.

The Sixth Amendment and Federal Rule of Criminal Procedure's Rule 7(c)(1) requirements for what an indictment must contain limit the breadth of that indictment.[50] Under the Sixth Amendment, an indictment must provide notice of "the nature and cause" of the charges against a defendant.[51] Notice is not an elaborate affair. The Federal Rules of Criminal Procedure require only a "plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ."[52] The Sixth Amendment likewise demands only the elements of the offense, and adequate facts to "fairly inform[]" the defendant of the charge(s), with sufficient specificity to protect against future double jeopardy problems.[53] In addition, an indictment serves the corollary purpose of informing "the court" about the facts alleged, "so that

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[45] When this article began, the indictment and grand jury requirement had not been incorporated against the states. *See* Hurtado v. California, 110 U.S. 516 (1884). Since then, the Supreme Court reversed course and concluded that juror unanimity is now incorporated against the states. Ramos v. Louisiana, 140 S. Ct. 1390 (2020). It is too soon to say with confidence what effect, if any, this will have on the unincorporated indictment requirement.

[46] *See* Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 101 (4th ed. 2010); *see also* United States v. Calandra, 414 U.S. 338, 343 (1974).

[47] United States v. Williams, 504 U.S. 36, 51 (1992).

[48] United States v. Trennell, 290 F.3d 881, 888 (7th Cir. 2002).

[49] *Stirone*, 361 U.S. at 218–19.

[50] U.S. CONST. amend. VI; FED. R. CRIM. P. 7(c)(1).

[51] U.S. CONST. amend. VI.

[52] FED. R. CRIM. P. 7(c)(1).

[53] U.S. CONST. amend. VI.; *see also* United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007) (quoting Hamling v. United States, 418 U.S. 87, 117 (1974)).

it may decide whether they are sufficient in law to support a conviction . . . ."[54]

All the action, so to speak, is in the second part of the Sixth Amendment test, which seemingly overlaps with Rule 7(c)(1): which elements require factual specificity in order to "fairly inform[]" a defendant of the charges? The Supreme Court's two most recent cases seem to say that, in most cases, simply reciting the language of the statute (or the elements of the offense) and providing the date and location of the offense will typically suffice.[55] On the other hand, the Court's third leading indictment case, *United States v. Russell*, recognizes that certain charges and elements "depend so crucially upon . . . a specific identification of fact" as to demand additional specificity.[56]

The appellate courts have elaborated on this tension by requiring an indictment to contain *some* facts that "pin[] down the specific conduct at issue," without imposing overly strict limits on the government's case.[57] Any "essential element of the offense" thus must be charged with some factual specificity.[58] But, even then, "a defendant is not entitled to know all the evidence the government intends to produce [at trial], but only the theory of the government's case."[59]

B. Indictments After *Alvarez*

As discussed in Part II, *Alvarez* frames valid "false speech" cases in terms of two components: the lie and limiting element(s) that bring the statute within the ambit of the First Amendment.[60] Both must be set out with some factual specificity in the indictment. Doing so meaningfully ensures—from the beginning of a case—that the grand jury does not authorize charges that violate the prohibition on prosecuting bare lies, that the government does not pursue an unconstitutional case, and of course that a defendant does not face such. Without such protection, there is little way to ensure such a result until trial—which likely will never happen in our world of vanishing trials.

[54] Russell v. United States, 369 U.S. 749, 768 (1962).

[55] *Hamling*, 418 U.S. at 117 ("It is generally sufficient that an indictment set forth the offense in the words of the statute . . . ."); *see also Resendiz-Ponce*, 549 U.S. at 102 (recognizing language of statute "coupled with the specification of the time and place" of offense satisfied indictment requirement).

[56] *Russell,* 369 U.S. at 764 (finding indictment insufficient).

[57] United States v. Smith, 230 F.3d 300, 305 (7th Cir. 2000).

[58] United States v. Locklear, 97 F.3d 196, 199–200 (7th Cir. 1996).

[59] United States v. Kendall, 665 F.2d 126, 135 (7th Cir. 1981) (quoting United States v. Giese, 597 F.2d 1170, 1181 (9th Cir. 1979)).

[60] United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).

1. The misrepresentation element

Even before *Alvarez*, courts largely agreed that an indictment must specify the *lie* in a false speech case. Impersonation cases provide perhaps the clearest example. As far back as the nineteen-teens the Supreme Court in *United States v. Barnow* recognized that "the mischief to be cured" in an impersonation case "is the false pretense."[61] The next year, it concluded that an impersonation indictment must contain the lie: the "name and official character of the officer whom the accused [is] charged with having falsely personated."[62] Practice conforms to the rule. In the Seventh Circuit, for example, every indictment available on PACER as of fall 2017 complies with the requirement to specify the lie.[63]

The case law of other false speech statutes is perhaps not quite as neat, but nonetheless reaches the same conclusion: an indictment for false speech must factually specify the false statement. Indeed, though indictments are rarely found insufficient, a handful of cases have reversed convictions in false speech cases for failing to comply with this requirement. In *United States v. Nance*, for example, the D.C. Circuit overturned a conviction for ten counts of obtaining something of value by false pretenses when none of the counts set out the applicable false representations.[64] In *United States v. Frankel*, the Third Circuit likewise affirmed the dismissal of mail fraud and wire fraud charges where the alleged underlying false statement was not, in fact, a false statement.[65] And even the United States Attorneys' Manual concedes that a perjury indictment must specify the false statement, just as a mail fraud or wire fraud indictment must set out the fraudulent scheme—the lie—on which the charges depend.[66]

[61] United States v. Barnow, 239 U.S. 74, 78 (1915).

[62] Lamar v. United States, 241 U.S. 103, 116 (1916).

[63] *See* Table 1, Appendix. There is one exception: In *United States v. Bonin*, the government filed a superseding indictment with one impersonation charge that did not specify the lie. *See* Superseding Indictment, United States v. Bonin, No. 1:15-cr-00022, (N.D. Ill. Mar. 21, 2017), Dkt. 138. My colleague Professor Erica Zunkel, my students, and I challenged the sufficiency of that indictment for that charge based on the legal theory described in the text above. *Id.* at Dkt. 184 (N.D. Ill. Oct. 16, 2017). The government dismissed the charges ten days later without responding, after the coincidental death of a witness. *Id.* at Dkts. 186 (N.D. Ill Oct. 24, 2017), 188 (N.D. Ill. Oct. 26, 2017).

[64] United States v. Nance, 533 F.2d 699, 700–01 (D.C. Cir. 1976) (per curiam). Note that the underlying statute was a District of Columbia offense, and therefore not one of the usual enumerations of federal false expression offenses. *Id.* The principle still stands, however.

[65] United States v. Frankel, 721 F.2d 917, 917–19 (3d Cir. 1983).

[66] U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 1755 (4th ed. 1997) ("The indictment must set forth the precise falsehoods alleged and the factual basis of their falsity with sufficient clarity to permit a jury to determine their verity and to allow meaningful judicial review."); *id.* at § 971 ("[A] mail fraud or wire fraud indictment should contain a reasonably detailed description of the particular scheme the defendant is charged with devising to ensure that the defendant has sufficient notice of the nature of the offense.") (collecting cases).

2. The limiting element

But, of course, no one can be prosecuted merely for lying; that is the upshot of *Alvarez*. From the defendant's perspective, an indictment that fails to factually specify the constitutionally relevant facts underpinning the limiting element(s) effectively prosecutes him or her simply for lying. Such an indictment provides no evidence that the grand jury considered whether or how the defendant did more than just lie. It likewise fails to notify the defense as to how this particular case avoids the *Alvarez* problem, nor can the court make such an assessment. And it sets out no limits on the government's case at trial besides the lie itself and the language of the statute.

Following *Alvarez*, the better course is to require a "false expression" indictment to specify not only the false expression but also the facts supporting the constitutionally critical limiting element(s). That is because guilt in a false expression case depends not only on the specific false expression but also on whether (or how) that false expression is cabined by the facts supporting constitutionalized limiting element. Following *Alvarez*, not just the lie but also the limiting element are the "very core of criminality" of the charges.[67] Pinning down the "specific conduct at issue" in a given case—as opposed to just false expression that otherwise would be constitutionally protected—thus requires an indictment that specifies that conduct.[68] Without such specificity, not only the defendant but also the court are at sea until trial.

Alvarez confirms that the First Amendment harm of potentially criminalizing mere lies applies pretrial: "[T]he mere *potential*" exercise of government power to criminalize lies as such creates "a chill the First Amendment cannot permit."[69] And that is what happens with an indictment that omits facts supporting the constitutionally relevant limiting elements. The only thing defendants would learn about what, exactly, they did to violate the law is that they told a lie (and perhaps the date and location). In a false statements charge (§ 1001), that would be the lie absent materiality or jurisdiction; in a perjury charge, the lie absent any specific sworn proceeding; in an impersonation charge, the lie absent any particular actions to enact it. To be sure, any *conviction* presumably would have to rely on facts fulfilling the limiting elements of the offense. But in our criminal system without trials, the indictment alone may be all the government ever has to show. Such indictments thus chill speech in the fashion *Alvarez* contemplated—risking prosecution on the basis of no other misconduct (or mis-speech) than lies alone.

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[67] *Id.* at 764.

[68] United States v. Smith, 230 F.3d 300, 305 (7th Cir. 2000).

[69] United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).

The *Russell* test would reach the same conclusion: when "guilt depends . . . crucially upon such a specific identification of fact" the indictment must include that fact.[70] In *Russell* itself guilt depended, first, on refusing to answer questions from Congress[71] (which may well have been protected by the First Amendment) where, second, those questions were about a subject matter on which Congress was holding a hearing.[72] The Court accordingly concluded that the indictment must specify that limiting factor, the subject matter at issue.[73]

Moreover, an indictment that omits the First Amendment's necessary limiting facts (materiality, etc.) side-steps the relationship between the Sixth Amendment's indictment requirement and the Fifth Amendment's grand jury requirement. That is, if the indictment does not specify the limiting facts, then there is no evidence that the grand jury ever considered such facts. Or, even if it did, then there is no guarantee that those facts in reality survive constitutional scrutiny, much less that the theory of guilt on which the grand jury relied will be the same theory presented at trial. To be sure, criminal prosecutions routinely lack such protections. But First Amendment prosecutions—and especially such prosecutions for lying—are different because of the unique harms created by the mere *threat* of improper charges.

Some prosecutors may well be complying with *Alvarez*'s constitutional limitations already. The law already requires them to present evidence to grand juries about the constitutionally salient limiting factors for false expression cases, and there is no evidence that they have failed to do so. But neither is there evidence they comply with the constitutional limitations. Worse yet, courts have not yet required that the indictment—the sole consistent public documentation of the grand jury's decision-making—demonstrate compliance.[74]

In any event, relying on prosecutorial discretion does not solve the problem. "[T]he First Amendment protects *against* the Government."[75] No less than the Supreme Court recognizes the circularity of relying on

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[70] Russell v. United States, 369 U.S. 749, 764 (1962).

[71] *Id.*

[72] *Id.*

[73] *Id.* at 771–72.

[74] Grand jury proceedings are secret. FED. R. CRIM. P. 6(e)(2)(B). A transcript is kept, but it cannot be produced except under two relevant circumstances. First, and most importantly, the defense is entitled to grand jury testimony of a witness testifying at trial or certain other proceedings who previously testified before the grand jury about the same subject. FED. R. CRIM. P. 26.2; 18 U.S.C. § 3500. However, such transcripts need not be produced until trial itself. 18 U.S.C. § 3500(a). Second, defendants are entitled to their own grand jury testimony early in a case. *See* FED. R. CRIM. P. 16(a)(1)(B)(iii). However, given the rarity of a defendant testifying before the grand jury, that entitlement offers little assistance in solving the problem.

[75] United States v. Stevens, 559 U.S. 460, 480 (2010).

prosecutorial "restraint" to protect against the risk of improper prosecutions in First Amendment cases.[76] Far from helping solve the First Amendment problem, relying on prosecutorial discretion risks exacerbating it because of the concomitant risk of "discriminatory enforcement"—itself a separate First Amendment problem in criminal law.[77]

C. Consequences

Robust enforcement of the intertwined grand jury and indictment requirements is straightforward, with system-supportive effects. Unlike other procedural protections, doing so provides meaningful pretrial protections without any concomitant risk of releasing defendants on a "technicality."

On the one hand, the government suffers little from a marginally more robust indictment requirement. The government likely will have little problem meeting a robust indictment requirement in the first place, and, in the rare cases where it does not, it gets a free "do-over" until it gets the indictment right. Assuming prosecutors are already following the law, there is little more work to do before the grand jury because the prosecution is *already* presenting the relevant evidence. That is, the government has already worked through the facts of its case before presenting that case to the grand jury, which should make it easy to draft an indictment that includes the constitutionally critical limiting facts.

Even if a case is ultimately dismissed for an insufficient indictment, the remedy—re-filing the case with a superseding indictment—also imposes little cost on the government. That is because such a dismissal is typically "without prejudice," meaning that the government can simply to re-file a corrected indictment.[78] Moreover, the government has six months to file the new indictment, even if the limitations period has already run.[79]

On the other hand, robust enforcement could provide real protection for defendants and the law. An indictment that includes additional facts constrains the prosecution at trial to a case matching those facts.[80] Though an indictment need not include facts supporting each and every element of the offense, it is critically important to do so for the constitutionally mandatory elements of the offense—the limiting elements.

[76] *Id.*
[77] Reno v. ACLU, 521 U.S. 844, 872 (1997).
[78] *See* FED. R. CRIM. P. 48(a); Wright & Miller, *supra* note 46, at § 801.
[79] 18 U.S.C. §§ 3288–3289.
[80] United States v. Trennell, 290 F.3d 881, 888 (7th Cir. 2002).

An indictment that spells out the facts underpinning those limiting elements also provides the defense with critical information for moving to dismiss charges that fail to comply with the constitutionally relevant requirements of a false expression charge. This may result in more litigation, or it may have a hydraulic effect of prompting the government to avoid bringing cases that risk such challenge. Regardless, *Alvarez*'s prohibition on prosecuting mere lies will have a real effect if robust grand jury and indictment procedures in fact block such prosecutions.

IV. UNANIMITY

Opportunities for vindicating First Amendment interests also arise in trial procedure—as distinct from the substantive First Amendment jury issues also litigated at trial. The Fifth and Sixth Amendments, and Federal Rule of Criminal Procedure 31(a), require that a criminal jury verdict must be unanimous not just as to guilt but also as to the facts underpinning the elements of the offense.[81] "[I]t is an assumption of our system of criminal justice . . . that no person may be punished criminally save upon proof of some *specific* illegal conduct."[82]

Unanimity matters. Non-unanimity can cover up "wide disagreement among the jurors about just what the defendant did, or did not, do."[83] Non-unanimity likewise encourages jurors presented with a wide array of evidence to convict just because "where there is smoke[,] there must be fire."[84]

This kind of equivocation about what a defendant did or did not do is anathema to First Amendment-required elements. Following *Alvarez*, the point of the limiting elements is to limit—to constrain. They fail in that function when they fail to meaningfully cabin jurors' decision-making; they become no more than "statutory afterthoughts."[85]

Juror unanimity in a false speech case is indisputably required as to the specific facts of misrepresentation element(s). Requiring unanimity for a statute's constitutionally mandated limiting element(s) would further ensure that the limiting elements in fact bar prosecutions for bare lies.

[81] U.S. CONST. amend. V, VI; FED. R. CRIM. P. 31(a). As discussed above, the right to juror unanimity was not incorporated against the states when this article was first presented but has been since then. *See* discussion in *supra* note 45. Exactly how this change will apply to the unanimity issues discussed in the text above is still an open question. That said, the most straightforward inference is that the unanimity issues discussed in the text above now apply to the state as well as federal charges.

[82] Schad v. Arizona, 501 U.S. 624, 633 (1991) (emphasis added).

[83] Richardson v. United States, 526 U.S. 813, 819 (1999).

[84] *Id.*

[85] United States v. Griggs, 569 F.3d 341, 344 (7th Cir. 2009).

Requiring juror unanimity as to facts supporting the limiting elements also supports the broader goal of protecting the First Amendment by providing opportunities for litigating First Amendment issues outside of substantive fights over jury instructions and as-applied trial issues.[86] To be sure, unanimity is a jury instruction issue that is litigated at trial. But it differs from fine-grained substantive litigation over the elements and how they apply to the conduct in a particular case because it is wholly independent of the alleged misconduct in any particular case. *Whatever* misconduct the government claims happened, it must show that *that particular misconduct* actually occurred—rather than something else entirely. Moreover, unanimity need never be relitigated. Once established, it serves as a First Amendment guardrail over the course of a case: From the moment charges are filed, the government and defense both know that the petit jury must agree unanimously on the conduct that distinguishes a specific case from a conviction for mere lies. That knowledge will undoubtedly affect their decision-making from the outset.[87] Firmly settling unanimity on the side of the First Amendment thus strengthens the First Amendment not only before the petit jury but also throughout the entirety of the criminal legal process.

A. The Law of Unanimity

Current legal doctrine requires unanimity for some elements of an offense but not all: "[A] federal jury need not always [agree] . . . which of several possible means the defendant used to commit an element of the crime."[88] The question is always: which elements require unanimity and which do not. In the classic hypothetical, a jury could convict a defendant of robbery by force even if the jury disagreed about the means by which the government proved the force element—say, with a knife or a gun.[89] But there are also constitutional limits: Justice Scalia famously observed, "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on

[86] The line—or lack thereof—between procedure and substance is much discussed. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004). This article is not trying to stake a claim about that distinction. Rather, it characterizes as "substance" questions about what the statute prohibits and everything else as "procedural." That distinction may or may not be "correct" for other areas, but it is the relevant one here.

[87] For an excellent discussion of how the "shadow of the law" literature applies in criminal cases, see William J. Stunz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

[88] *Richardson*, 526 U.S. at 817.

[89] *Id.*

Wednesday . . . ."[90] This Section sets out the legal framework in broad strokes. The following Sections argue that unanimity must be required for the facts underlying both the misrepresentation element(s) and the limiting element(s) in false expression cases.

Courts and commentators have struggled—to put it mildly—to develop a clear test for determining when jurors must be unanimous about the facts underpinning an offense, and when those facts are nothing more than mere "means."[91] The problem is a certain "indetermina[cy]" in determining when "differences between means" amount to "separate offenses."[92] Rather than rest on "metaphysical" distinctions, the Supreme Court instead asks courts to use statutory interpretation, fairness, history, and practice to determine which elements of the offense require juror unanimity about the underlying facts, and which do not.[93]

The two leading Supreme Court cases are illustrative: in *Schad v. Arizona*, the Supreme Court focused on history, practice, and moral reasoning to conclude that a defendant could properly be convicted of first degree murder even if the jury did not unanimously agree on whether his mental state amounted to that of premeditated murder or felony murder—factually, very different scenarios.[94] The common law, the criminal code in many American jurisdictions, and a wide variety of state Supreme Courts had equated the two mental states, and they likewise "reasonably reflect notions of equivalent blameworthiness or culpability[.]"[95]

Nearly twenty years later, in *Richardson v. United States*, the Court returned to tradition and fairness, as well as statutory interpretation, to conclude that a jury must be unanimous about which specific violations of the drug laws constituted the "continuing series of violations" elements of the federal continuing criminal enterprise statute.[96] Here, close analysis of the statute yielded the opposite result as in *Schad*: there was no legal tradition reading "violations" to avoid unanimity, and the breadth of the potential "violations" varied greatly in culpability from, for example, possession of a controlled substance to endangering life while manufacturing a controlled substance.[97]

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[90] Schad v. Arizona, 501 U.S. 624, 651 (1991) (Scalia, J., concurring).

[91] *See, e.g.*, Stephen E. Sachs, *Alternative Theories of the Crime*, 22–23 (Nov. 10, 2019) (unpublished manuscript) (available at https://ssrn.com/abstract=1501628 [https://perma.cc/TJ2P-4Y5N]) (summarizing debate).

[92] *Schad*, 501 U.S. at 633–34.

[93] *Id.* at 635, 637; *Richardson*, 526 U.S. at 818–20.

[94] *Schad*, 501 U.S. at 640–643.

[95] *Id.*

[96] *Richardson*, 526 U.S. at 815.

[97] *Id.* at 818–20.

B. The Misrepresentation Element

The circuits vary widely as to which elements of which offenses require unanimity and which do not. There is strikingly little variation, however, on how to treat the misrepresentation or "false expression" element of the core false statement offenses.[98] In circuit after circuit, the "false statement" is the gravamen of these offenses, and a jury must therefore be unanimous as to which statement, specifically, was false. In *United States v. Fawley*, for example, the Seventh Circuit reversed a conviction where a jury verdict in a perjury case may not have been unanimous as to which of the defendant's false statements "formed the basis" of the conviction.[99] The First and Fourth Circuits reached the same conclusion.[100] The Fifth Circuit, joined by the Second and Fourth Circuits, likewise concluded that unanimity was required as to the false statement at issue in each count of the crime of false statement to federal officials; allowing a single count to contain multiple false statements would "embrace[] two or more separate offenses."[101]

The only substantive point of disagreement is over the level of generality. For example, some circuits characterize *each fraudulent wire transaction* as an individual wire fraud offense, rather than *each false statement* contained in a given wire transaction.[102] Those circuits accordingly don't require unanimity as to "a particular false statement within a wire" but rather unanimity that a specific transaction was indeed fraudulent, even if the jurors disagree as to which part of it was false.[103] Other circuits characterize the false statement itself as the offense, in which case unanimity is required.[104] The focus on falseness or fraud never varies, however. The government must always prove that a specific statement or transaction was false or fraudulent; it is never enough to gesture vaguely at a series of lies.

[98] *See* 18 U.S.C. §§ 1621, 1623 (perjury), 18 U.S.C. § 1001 (false statement to federal official).

[99] 137 F.3d 458, 461 (7th Cir. 1998).

[100] *See* United States v. Sarihifard, 155 F.3d 301, 310 (4th Cir. 1998) (perjury, false statements); *see also* United States v. Glantz, 847 F.2d 1, 9 (1st Cir. 1988).

[101] United States v. Holley, 942 F.2d 916, 927 (5th Cir. 1991) (false statements); *Sarihifard*, 155 F.3d at 310 (perjury, false statements); *see also* United States v. Crisci, 273 F.3d 235 (2d Cir. 2001).

[102] United States v. Nanda, 867 F.3d 522, 529 (5th Cir. 2017).

[103] *See id.*; *see also* United States v. LaPlante, 714 F.3d 641, 647 (1st Cir. 2013) (characterizing "the specific false statement" as merely the "means" by which offender carried out the "fraudulent scheme").

[104] *Compare* United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988) (requiring unanimity for each false statement in charges for making and preparing a false tax return under 26 U.S.C. §§ 7206(1), (2)), *with* United States v. Fairchild, 819 F.3d 399 (8th Cir. 2016) (allowing non-unanimity as to the "means" of accomplishing each false tax return because the offense is return by return).

C. The Limiting Element

No case appears to have addressed how—if at all—*Alvarez* adds to the analysis. But it must. Following *Alvarez*, the core of a false expression charge is not only the false statement or transaction but also the limiting element.[105] Without that limiting element, the statute itself would be unconstitutional. But an element is only as good as its facts. Allowing any number of different factual "means" to serve as the limiting element allows for "wide disagreement among the jurors about just what the defendant did, or did not, do."[106] Indeed, coupling a verdict that doesn't even purport to be unanimous on the facts of the limiting element, with an indictment that similarly fails to specify the precise conduct at issue, would raise a serious question about whether the limiting element limits much of anything at all.

1. Perjury, false statement to federal officials (Section 1001)

Requiring unanimity for the limiting elements may not prove especially burdensome for some offenses. As discussed above, perjury, for example, already requires unanimity as to the specific false statement at issue. As a practical matter, once the jury agrees on which statement is at issue, then the jury also almost necessarily agrees on some of the other central facts—whether the statement was under oath and the proceeding during which the statement was made.[107] Likewise with a false statement to a federal officer under 18 U.S.C. § 1001: once the false statement itself is identified, then the government branch to whom the statement was directed almost immediately follows.[108]

Perjury and § 1001's shared "materiality" requirement presents only marginally more of a challenge.[109] A false statement is "material" when it has "a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed."[110] Unanimity as to materiality therefore means that the jury must agree on the facts underpinning the statement's materiality, even where the government presents multiple ways in which it could have been material.[111]

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[105] *Supra* Part II.

[106] Richardson v. United States, 526 U.S. 813, 819 (1999).

[107] *See* 18 U.S.C. § 1623.

[108] 18 U.S.C. § 1001(a) (prohibiting false statements made "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").

[109] Perjury prohibits making or using a "false material declaration." 18 U.S.C. § 1623(a). The criminal prohibition on false statements to officials prohibits three different kinds of false statements, all of which require that the falsehood is "material." 18 U.S.C. §§ 1001(a)(1), (2), (3).

[110] Kungys v. United States, 485 U.S. 759, 770 (1988) (definition).

[111] *See* United States v. Gaudin, 515 U.S. 506, 523 (1995) (holding that materiality is a jury

Practically speaking, once the false statement itself is specifically identified, there may well be a very limited range of ways in which it could be material. Unanimity would carry some small bite only for those prosecutions involving a false statement where prosecutors propose multiple theories of materiality.[112]

But that is what *Alvarez* implies. The upshot of *Alvarez* was that the constraining elements of false speech offenses must *actually constrain* false speech prosecutions, else the offenses risk the same problems as the unconstitutional Stolen Valor Act. Non-unanimity would mean that half the jurors could conclude that the prosecution proved one set of constraining facts, and the other half could reject that conclusion in favor of wholly different set of facts. Such disagreement over the core facts is hardly a meaningful constraint on false expression prosecutions.

Nor does statutory interpretation lend itself to reading materiality as an element for which the facts don't especially matter. Materiality is a unifying feature of the statement itself, whereas other elements of the offense are expressly listed as disjunctive means. Thus, one can violate § 1001 if one, for example, "falsifies, conceals, or covers up" a material fact "by any trick, scheme, or device."[113] One likewise violates it by making a materially "false fictitious, or fraudulent" misrepresentation or by making or using a false document containing any "materially false, fictitious, or fraudulent statement."[114]

Perjury has a similar structure: materiality is the unifying element across the multiple means of committing perjury. Thus, one violates the law by making a "false material declaration" by book, paper, document, record, recording, or other material. To the degree unanimity is required for the false statement itself—which the courts unanimously find—the statement's materiality cannot be disentangled.

The common-law history of § 1001, perjury, and related statutes such as mail and wire fraud further confirms the centrality of "materiality" to the offenses. "Materiality" is a concept with a long-standing common-law history, and a relatedly "uniform understanding" in the numerous federal statutes that incorporate it.[115] It has been central to

question).

[112] The indictment itself also limits how much of a change this might make. As discussed above, variance between an indictment and the proof presented at a federal trial violates the Fifth Amendment's grand jury guarantee. To the degree the facts underpinning the limiting elements already must be specified in the indictment, then there is no question that unanimity is required at trial. The question of unanimity arises only when the facts need *not* be specified in the indictment.

[113] 18 U.S.C. § 1001(a)(1).

[114] *Id.* at §§ 1001(a)(2), (3).

[115] *Kungys,* 485 U.S. at 770 (1988).

the historical understanding of the various "false statements to federal officials" offenses such as § 1001 and perjury, dating back to the common law.[116] Even related misrepresentation offenses such as mail and wire fraud, which lack any express "materiality" requirement, are nonetheless interpreted to incorporate a materiality element based on the common law history.[117] It is not a "statutory afterthought;" rather, failing to agree on materiality means that "the jury fails to agree on the crime that the defendant committed."[118]

Requiring factual unanimity not just for a defendant's misrepresentation—the false statement or document—but also for the related constraint of materiality further disaggregates the First Amendment substantive questions into a mixture of substance and procedure. The materiality limiting element is much more limiting when jurors must agree on its facts. The further the jury is from unanimity, the less the materiality element actually prevents a general prohibition on lies. Here, the question is easy; even setting *Alvarez* aside, text, history, and constitutional avoidance all point in the same direction, supporting unanimity. There is thus little reason for the courts to allow juries to disagree about the facts underlying the materiality elements of perjury, § 1001, and related offenses.

2. Impersonation

Impersonating a federal officer is the third core "false statements" statute addressed in *Alvarez*. Some of the same logic applies as in perjury and § 1001: impersonating a federal agent in violation of 18 U.S.C. § 912 has two parts (1) the impersonation (the lie), and (2) an act (the limiting element).[119] First, an offender impersonates a federal officer when he "falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof."[120] Second, the offense is complete when an offender either "acts as such" or "in such pretended character demands or obtains any money, paper, document, or thing of value . . . ."[121] Impersonation plainly requires unanimity for the first part, for the same reasons as all the other false statement offenses. Indeed, it would be a gross anomaly to allow conviction for impersonating a federal agent by a jury that was not unanimous on the false statement or impersonation itself.

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[116] *Id.* at 769–70.

[117] *See, e.g.*, Neder v. United States, 527 U.S. 1 (1999) (holding that materiality was an implied element of federal mail and wire fraud statutes based on a common law understanding of fraud).

[118] United States v. Griggs, 569 F.3d 341, 344 (7th Cir. 2009).

[119] *See* 18 U.S.C. § 912.

[120] *Id.*

[121] *Id.*

But unanimity also must be required for a defendant's "act," just as unanimity is required for the limiting element for the other false expression offenses. An impersonation statute that criminalized falsely claiming to be a federal agent, without more, would prohibit "all false statements on this one subject in almost limitless times and settings," in violation of *Alvarez*.[122] The statute's "act" element is what prevents this unconstitutional outcome.

The best counterargument is unavailing. At least three circuits have rejected juror unanimity requirements for federal conspiracy's "overt act" requirement.[123] If impersonation's "act" element is analogous to that "overt act" element, then the logic of the conspiracy cases means that impersonation's "act" can be fulfilled by any number of different means. But that analogy fails.

Conspiracy's "overt act" requirement is a "statutory afterthought."[124] The reason for requiring an "overt act" is to show that the conspirators did something—anything—to put the conspiracy in motion.[125] The core of the offense is still the conspiracy itself. Indeed, other federal conspiracy statutes do not even include *any* overt act requirement.[126]

Impersonation's "act" requirement is totally different. It is not an afterthought; following *Alvarez*, it's part of the core of the offense. Without the "act," the statute would violate the First Amendment. Impersonation's parallel false expression statutes likewise differ from conspiracy. Where the federal conspiracy statutes only sometimes include an overt act requirement, *all* the parallel false speech statutes require proof of their limiting elements. Indeed, a statute that didn't require such proof would be unconstitutional.

V. RESPONSE TO OBJECTIONS

The arguments in this paper are not without their detractors. Indeed, my students and I spent approximately five years litigating these and other issues in the federal courts, to little avail. Here I address the most significant of these objections. First, it is fair to ask why my students and I lost if, as this paper argues, we were right that *existing* law largely supports us. Moreover, a critic might argue, this article seems

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[122] United States v. Alvarez, 567 U.S. 709, 722–23 (2012) (plurality opinion).

[123] United States v. Kozeny, 667 F.3d 122, 131–32 (2d Cir. 2011); *Griggs*, 569 F.3d at 343; United States v. Sutherland, 656 F.2d 1181, 1202 (5th Cir. 1981).

[124] *Griggs*, 569 F.3d at 341.

[125] *See* Yates v. United States, 354 U.S. 298, 334 (1957), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

[126] Most famously, federal drug conspiracy has no overt act requirement. 21 U.S.C. § 846.

to argue for substantively different procedural rules in First Amendment criminal cases—an argument that directly contradicts our system of trans-substantive criminal procedure. Second, one might question about whether any of this article's mucking about in trial practice on the front end makes a meaningful difference; perhaps the higher courts catch everything that matters on the back end. In other words, is there a real problem here? I respond in two ways:

A. The First Amendment Matters

First, the First Amendment matters. This article applies existing criminal procedural rules and standards in the context of the First Amendment. Criminal procedure is indeed trans-substantive,[127] but there is nothing substantive, distinct, or unusual about the bog-standard point that broad legal rules and standards apply differently, depending on the different contexts in which they apply.[128] Here, that context is the First Amendment, or, in the more specific example of this article, false speech.

Accounting for the First Amendment does not require modifying the test for what goes in an indictment, what requires unanimity, or anything else. It requires only recognizing that the First Amendment must be accounted for in applying those tests. And there is ample reason to think that it must be. There is *Alvarez* itself, for all the reasons previously discussed in this article. There are also the broader constitutional doctrines that emphasize the uniqueness of the First Amendment context—de novo review of so-called constitutional facts and doctrinal skepticism of prosecutorial discretion in First Amendment cases, for example.[129]

A turn to the First Amendment also follows the courts' lead. There is a disquietingly empty formalism to much of criminal procedure's ostensible protections: the formal rules may protect important rights, but

[127] *See, e.g.*, Russell L. Christopher, *Appointed Counsel and Jury Trial: The Rights That Undermine the Other Rights*, 75 WASH. & LEE L. REV. 703, 715–16 (2018) ("Most [procedural] rights are transsubstantive: the rights to a public trial, to be informed of the nature and cause of the accusation, to confront one's accusers, to compulsory process for obtaining favorable witnesses, to cross-examine adverse witnesses, to a speedy trial, to have the prosecution provide proof of each element of the offense beyond a reasonable doubt, to due process, and to equal protection of the laws.").

[128] *See, e.g.*, David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 B.Y.U. L. REV. 1191, 2003–04 (2013) (arguing that "nominally trans-substantive rules can lend themselves to patterns of application organized around antecedent regimes").

[129] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 453 (2011) (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) ("[I]n [ ] First Amendment cases, the court is obligated 'to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."'")); *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974)) (recognizing that the threat of criminal prosecution chills speech).

they too often serve as fig leaves for the real rule, namely, "defendant loses."[130] In the Seventh Circuit, for example, stacks of precedent over decades of cases reject all but two modern-era indictment challenges.[131] Lower courts cannot help but get the message.

That empty formalism does not extend to the First Amendment. The First Amendment requires *and is regularly given* robust protection. As many scholars have recently observed, recent Supreme Court decisions have profoundly expanded the First Amendment's reach.[132] But even before that, courts recognized the First Amendment's role in protecting a robust debate on public issues,[133] democratic self-governance,[134] and freedom of thought,[135] among other things, regardless of any distaste for the speaker.[136]

Courts have not yet worked out how to handle the intersection of criminal procedure and the First Amendment, but a resurgent First Amendment demands respect. The argument of this article is that the robust enforcement of procedural rights helps provide that respect—even where the courts have previously derogated such enforcement in mine-run criminal cases.[137]

B. Trial-Level Procedures Matter

To say that the higher courts will catch all important problems means *at best* accepting the blunt devastation the criminal legal system imposes on each criminal defendant, and the societal cost of processing

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[130] *See* Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429, 1439–40 (2002) (describing how the Burger Court used procedural tools like harmless error to undermine Warren Court's criminal procedure precedents); Akhil R. Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1125 (1996) (outlining the history of the decline of defense-protective constitutional criminal procedure).

[131] The two exceptions are: *United States v. Locklear*, 97 F.3d 196 (7th Cir. 1996) and *United States v. Hinkle*, 637 F.2d 1154 (7th Cir. 1981). Notably, even the most recent of these exceptions is over twenty years old.

[132] *See* Shanor, *supra* note 4, at 191–93 (discussing the expansion of the scope of protected speech); *see also* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1243 (2020).

[133] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[134] *See, e.g.*, Brown v. Hartlage, 456, U.S. 45, 52 (1982).

[135] *See, e.g.*, Ashcroft v. Free Speech Coal., 535, U.S. 234, 253 (2002).

[136] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 423 (1996).

[137] This article owes a debt to James Burnham's important piece calling for more factually robust criminal indictments so as to enable criminal defendants to file motions to dismiss much like civil defendants. *See generally* James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 GREEN BAG 2D 347 (2015). Burnham's article is compelling and, in this author's view, correct. But it offers little reason for the same courts that have undermined defendants' procedural rights to change course and adopt what is ultimately a pro-defendant procedural innovation. This article, too, argues for the reinvigoration of largely dead-letter procedural rules. It roots that renewal, however, not in criminal procedure alone but rather in the resurgent First Amendment.

so many people, their friends and families, and communities through its maw. Let's assume that the higher courts catch all First Amendment-related flaws in a prosecution. Even so, higher courts' deference to a trial level guilty verdict puts a significant thumb on the scale against reversing convictions for conduct that was at least potentially protected by the First Amendment. And even in the nearly-nonexistent case where a higher court finds error *and* the conviction is vacated, that still ignores the damage done by the trial and appellate process itself. Finally, given our system of pleas, relying on appellate review simply ignores the countless individuals who pled guilty when their conduct may not even have been a crime at all.

Higher courts are required to defer to lower courts, even in cases involving First Amendment problems. Setting aside facial challenges, there are, in essence, two forms of First Amendment challenges: constitutional errors (e.g., omitting an element of the offense or misinstructing the jury on an element of the offense) and sufficiency of the evidence challenges.[138] For the former, even where an appellate court finds constitutional error, it must nonetheless *uphold* the guilty verdict if it determines the error was harmless beyond a reasonable doubt.[139] As to the latter, appellate courts will not even find error unless a jury could not find guilt beyond a reasonable doubt when "view[ing] the evidence in the light most favorable to the government . . . [and] 'defer[ing] to the credibility determination of the jury[.]'"[140] Either way, the First Amendment problem in the original proceeding does not necessarily mean a new trial. And, as many have pointed out, even the supposedly defendant-friendly "harmless beyond a reasonable doubt" standard still puts

[138] A sufficiency of the evidence challenge can be an as-applied First Amendment challenge in that it asks whether the evidence presented at trial rises to the level of a statutory violation, where the statute is interpreted through the lens of the First Amendment. *See, e.g.*, United States v. Bagdasarian, 652 F.3d 1113, 1117, 1123–24 (9th Cir. 2011) (reversing conviction for threatening the President because insufficient evidence of intent to threaten, as understood through First Amendment lens). There is a third form of First Amendment challenge, namely, a facial challenge. In a facial challenge generally, a defendant argues that the statute is unconstitutional in all applications or "lacks any 'plainly legitimate sweep.'" United States v. Stevens, 559 U.S. 460, 472 (2010) (quoting Washington v. Glucksberg, 521 U.S. 739, 745 (1987)). First Amendment also allow for facially invalidating a law as overbroad when "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)). A successful facial challenge requires vacating the conviction altogether. *Id*. at 482 (affirming the vacation of defendant's conviction after successful First Amendment facial challenge). As a practical matter, however, successful facial challenges in the appellate courts are extraordinarily rare; the action is in as-applied challenges.

[139] Neder v. United States, 527 U.S. 1, 18 (1999) (holding that under harmless error review, courts ask whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error"). The Court in *Neder* held that harmless error applies to the omission of elements. *Id.*

[140] *Id.* (quoting United States v. Blassingame, 197 F.3d 271, 284 (7th Cir. 1999)).

a substantial thumb on the scale in favor of the prosecution.[141] For many defendants, the limited appellate review comes too late to ensure real First Amendment protection.

Moreover, even where an individual defendant's conviction is vacated by the higher courts, that doesn't undo the harm caused by the criminal process itself. When defendants are detained pretrial, they may lose their health, jobs, homes, and sometimes their children.[142] And even when defendants are released on bond, they face enormous process costs associated with going to trial.[143] Courts easily recognize the severe process costs imposed by the civil system in the context of qualified immunity in civil cases.[144] That is why there are special procedures in place to help accused officials avoid those costs where possible.[145] In the criminal context, consequences and costs are even more severe, and the remedies proposed in this paper more limited.

Relatedly, vacating an individual conviction does nothing for the scores of other defendants who already pled guilty. As discussed above, the "vanishing trial" means that our criminal legal system has become a sea of guilty pleas. Defendants may wisely choose to plead guilty to a crime that has a First Amendment defense rather than undergo the risks of trial.[146]

The upshot is: The higher courts may or may not catch all important First Amendment problems that come their way. (My guess is that they don't.) But the answer to that question doesn't much matter. By the time the question gets to a higher court, enormous and irreparable damage has already been done.

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[141] Scholars frequently criticize the constitutional harmless error doctrine. *See*, *e.g.*, Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277 (2020); Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309 (2002); David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483 (2000).

[142] Alison Siegler & Erica Zunkel, *Rethinking Federal Bail Advocacy to Change the Culture of Detention*, CHAMPION (forthcoming 2020) (manuscript at 5) (on file with author).

[143] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132–34 (2008) (discussing the personal and financial costs defendants face such as legal fees, lost wages, anxiety, and reputational damage).

[144] Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[145] *See* David L. Noll, Note, *Qualified Immunity in Limbo: Rights, Procedure, and the Social Costs of Damages Litigation against Public Officials*, 83 N.Y.U. L. REV. 911, 927–932 (2008) (discussing qualified immunity and procedural alternatives to protect officials from litigation costs).

[146] *See id.* at 1134 ("In low-stakes cases, process costs dominate, and plea bargaining is a potential way out."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 1010 YALE L.J. 1909, 1928 (1992) (arguing that indigent defendants would be at a worse disadvantage in the criminal process without plea bargains).

VI. CONCLUSION

This paper originated with a federal impersonation case that my students, colleagues, and I litigated from its initial charge through a petition for certiorari over the course of five years.[147] The arguments I raise in this paper rose out of ones we made in district court—to little avail. Some of our substantive arguments about how the statute must be interpreted in light of the First Amendment were ultimately vindicated by the Court of Appeals. But that decision came over four years after our client was charged with a federal felony—his first and only felony. And by the time the Court of Appeals concluded that we had been right all along, the trial evidence had long been in. The appellate court had little difficulty quickly and easily concluding that the error was harmless—erroneously, in my opinion.

The dispiriting experience left me convinced that the only real chance my client and others like him have to avoid losing years and years of their lives to unconstitutional charges and their significant collateral consequences is to shift the locus of First Amendment litigation more pervasively throughout the case, away from the substantive trial and post-trial issues. The constraining elements upon which *Alvarez* relies to save false statement statutes are meaningful only to the degree they *actually constrain* prosecutions for lying. The indictment constrains the grand jury and the prosecutor (and, to a limited degree, the petit jury). The unanimity requirement constrains the petit jury at trial, and awareness of this very real constraint would have influenced the government and my decision-making throughout the criminal process. Focusing exclusively on a substantive First Amendment misses these critical moments for shaping a criminal case to protect the First Amendment. A procedural First Amendment highlights them.

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[147] Although his consent was not required, my client authorized me to draft this paper referencing his litigation.

CASE: 1:15-CR-00022 DOCUMENT #: 184 FILED: 10/16/17 PAGE 6 OF 16 PAGEID #:1929

TABLE 1

Caption	**Case Number**	**Court**	**Indictment Language**
US v. Baer	15-cr-30036	C.D. Ill.	"a Special Agent of the Department of Homeland Security"
US v. Wheeler	15-cr-10048	C.D. Ill.	"a United States Marshal"
US v. Wallace	16-cr-54	N.D. Ill.	"an employee of the Federal Housing Administration"
US v. Harrison	14-cr-576	N.D. Ill.	"the United States Marshals Service"
US v. Rozycki	14-cr-13	N.D. Ill.	1: "an employee of the United States Marshals Service" 2: "an employee of the United States Marshals Service"
US v. Cortes	14-cr-13	N.D. Ill.	"an employee of the United States Marshals Service"
US v. Hoffer	13-cr-928	N.D. Ill.	2: "an employee of the Federal Bureau of Investigation"
US v. Butler	13-cr-918	N.D. Ill.	1: "an officer of the United States Air Force"
US v. Walsh	09-cr-1049	N.D. Ill.	"a special agent of the United States Department of State"
US v. Abbas	09-cr-840	N.D. Ill.	2: various, including "United States Department of Housing and Urban Development"
US v. Hemphill	06-cr-747	N.D. Ill.	2: "the Federal Bureau of Investigation" 2s: "the Federal Bureau of Investigation"
US v. Muhammad	06-cr-548	N.D. Ill.	1: "an officer and employee acting under the authority of the United States, and acted as such at Midway International Airport by signing the TSA Armed Law Enforcement Officer's Log" 2: "a federal law enforcement officer for the Department of Justice"

CASE: 1:15-CR-00022 DOCUMENT #: 184 FILED: 10/16/17 PAGE 7 OF 16 PAGEID #:1930

Caption	**Case Number**	**Court**	**Indictment Language**
US v. Limane	05-cr-834	N.D. Ill	10: "an employee of the U.S. Citizenship and Immigration Services" 11: "an employee of U.S. Citizenship and Immigration Services"
US v. Gaylor	05-cr-199	N.D. Ill	1: "an agent of the Federal Bureau of Investigation" 2: "an agent of the Federal Bureau of Investigation"
US v. Guzman et al.	03-cr-1020	N.D. Ill	"an employee of the Drug Enforcement Administration"
US v. Jamaleddin	02-cr-366	N.D. Ill	"an agent of the United States Immigration and Naturalization Service"
US v. Lovejoy	01-cr-791	N.D. Ill	1: "an agent of the United States Immigration and Naturalization Service" 2: "an agent of the United States Immigration and Naturalization Service" 3: "an agent of the United States Immigration and Naturalization Service"
US v. Hancock	17-cr-15	N.D. Ind.	1: "an agent of the Department of Homeland Security" 2: "an agent of the Department of Homeland Security"
US v. Mitschelen	12-cr-40	N.D. Ind.	"a Deputy of the United States Marshal Service"
US v. Mohammed	11-cr-169	N.D. Ind.	1: "an employee of the Internal Revenue Service"
US v. Marcotte	13-cr-30053	S.D. Ill.	5: "a duly authorized representative of the United States as a warranted contracting officer"
US v. Lowery	07-cr-30181	S.D. Ill.	2: "a United States Marshal" 3: "a United States Marshal"
US v. Eads	11-cr-239	S.D. Ind.	4: "a Special Agent of the Federal Bureau of Investigation"
US v. Eicher	16-cr-17	W.D. Wis.	"Special Agent of the Federal Bureau of Investigation

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Caption	**Case Number**	**Court**	**Indictment Language**
US v. McLaughlin	14-cr-20019	C.D. Ill	(transfer of jurisdiction for supervision, no indictment)
US v. McLaughlin	12-mj-7214	C.D. Ill	(extradition/transfer to EDNC, no indictment)
US v. Ottley	03-cr-40093	C.D. Ill	(indictment not available on PACER)
US v. Toran	01-cr-30011	C.D. Ill	(indictment not available on PACER)
US v. Coe	98-cr-20031	C.D. Ill	(indictment not available on PACER)
US v. Clay	14-mj-454	E.D. Wis.	(dismissed before indictment)
US v. Alberts	98-cr-231	E.D. Wis.	(indictment not available on PACER)
US v. Treloar	98-cr-35	E.D. Wis.	(indictment not available on PACER)
US v. Gendreau	16-cr-50057	N.D. Ill.	(extradition/transfer to SDNY, no indictment in NDIL file)
US v. Neal	07-cr-279	N.D. Ill.	(extradition/transfer to SDFL, no indictment)
US v. Al-Arouri	07-cr-184	N.D. Ill.	(dismissed before indictment)
US v. Ventura	07-cr-70	N.D. Ill.	(extradition/transfer, dismissed)
US v. Rizzo	04-cr-733	N.D. Ill.	(indictment waived)
US v. Akram	00-cr-968	N.D. Ill.	(indictment waived)
US v. Urschel	13-cr-75	N.D. Ind.	(indictment waived)
US v. Davis	07-mj-110	N.D. Ind.	(dismissed before indictment)
US v. Parisi	04-cr-15	N.D. Ind.	(indictment waived)
US v. Grissom	04-cr-43	W.D. Wis.	(indictment not available on PACER)