WAR OF THE WORDS: WHY FALSE STATEMENTS SHOULD BE GUARANTEED FIRST AMENDMENT PROTECTION

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I. INTRODUCTION

In 2009, members of the Georgia Bureau of Investigation (GBI) thought they had the information they needed to track down a mass murderer.[1] After receiving a tip from the father of one of the victims, a GBI agent watched a video[2] posted on YouTube.[3] In that video a man, with his face blurred and his voice distorted, described details of an unsolved murder that he claimed only the killer could know.[4] The username associated with the video was "catchmekiller."[5]

A GBI agent later testified that it was his "duty" to uncover the identity of the individual in the video and fully pursue the lead.[6] Using the agency's high-technology unit, agents uncovered the internet protocol (IP) address of the computer that created the video and posting.[7] GBI agents traced the IP address to a computer located in a Georgia home.[8] During their search, GBI agents also discovered that "catchmekiller" had used the same computer to post another "clues" video.[9] They then discovered that the computer belonged to Andrew Scott Haley, whom they subsequently questioned about the crimes.[10]

While Haley created the "catchmekiller" videos, he denied killing anyone.[11] He stated that he created the YouTube videos as a part of a murder-mystery "game" in which he urged viewers to visit the site, watch weekly videos, and gather enough "clues" to eventually solve the sixteen highly-publicized murders he claimed to have committed.[12] Haley permitted his viewers to leave

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[1] *See* Haley v. State, 712 S.E.2d 838, 840 (Ga. 2011) (discussing testimony of a GBI agent that he thought the agency had a lead on the killer), *cert. denied*, 133 S. Ct. 60 (2012).

[2] *Id.*

[3] Brief of Appellant at 6, *Haley*, 712 S.E.2d 838 (No. S11A0606). YouTube is a popular "entertainment site where videos of various types are posted for various purposes ranging from the humorous to the artistic to the instructive." *Id.*

[4] *Haley*, 712 S.E.2d at 839–40.

[5] *Id.* at 839.

[6] *Id.* at 840.

[7] *Id.* at 840–41.

[8] Brief of Appellant, *supra* note 3, at 5–6.

[9] *Haley*, 712 S.E.2d at 840–41.

[10] *Id.* at 841.

[11] *Id.*

[12] *Id.* at 839–40.

comments and view others' comments to assist in their detective work.[13] "By solving all the clues and finding all the bodies," a viewer could ultimately locate the "catchmekiller"[14] and maybe even become a "hero."[15]

Haley obtained the "unique details" that he posted from a public, missing persons website.[16] When Haley commented as "catchmekiller" on the YouTube page dedicated to the mysterious disappearance of a woman referenced in his videos, the woman's father watched Haley's first video and then contacted law enforcement.[17]

When questioned, Haley freely admitted creating the video but vehemently denied any involvement in the woman's disappearance.[18] He claimed he " 'did this as a game and . . . didn't believe anybody would believe him.' "[19] During the GBI investigation, Haley "was nothing but cooperative and truthful," even explaining to officers how he made the video.[20]

Haley was charged with (1) tampering with evidence under O.C.G.A. § 16-10-94 and (2) making a false statement in a matter within the GBI's jurisdiction under O.C.G.A. § 16-10-20.[21] At trial, the jury found Haley guilty of both charges, and the court sentenced him under the First Offender Act to serve ten years for tampering with evidence and five consecutive years for making a false statement, with three years to serve and the remainder to be completed on probation.[22] The Georgia Supreme Court upheld Haley's conviction only under the false-statement statute.[23] The Supreme Court of the United States denied Haley's petition for a writ of certiorari on June 29, 2012.[24]

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[13] Brief of Appellant, *supra* note 3, at 3.
[14] *Id.* at 4.
[15] *Haley*, 712 S.E.2d at 840.
[16] Brief of Appellant, *supra* note 3, at 3.
[17] *Haley*, 712 S.E.2d at 840.
[18] *Id.* at 841.
[19] *Id.*
[20] Brief of Appellant, *supra* note 3, at 6.
[21] *Haley*, 712 S.E.2d at 841.
[22] *Id.*
[23] *Id.* at 849, 850.
[24] Haley v. Georgia, 133 S. Ct. 60, 60 (2012).

This Note argues that the Georgia Supreme Court wrongly upheld Haley's conviction and that the U.S. Supreme Court missed an opportunity to defend constitutional rights by denying certiorari. Although his statements gave false hope to the victims' families[25] and spurred an expensive and time-consuming police investigation,[26] Haley's actions did not merit imprisonment. This Note contends that by punishing his conduct, the court infringed Haley's First Amendment right to free speech. But this Note posits that the main problem lies not with the Georgia Supreme Court's decision but with the law it used to evaluate Haley's case. The language of O.C.G.A. § 16-10-20 poses serious constitutional issues that call Haley's conviction, and others like it, into question.

Part II examines both the political and philosophical histories of First Amendment rights. The treatment of these fundamental rights during the past few centuries sheds light on the gravity of the *Haley* decision. Even with the limitations on the right to free speech, false statements remain in an ambiguous position, with the Supreme Court using inconsistent language to characterize their treatment.[27] The struggle to deal with this category of speech sets the stage for a more focused investigation of O.C.G.A. § 16-10-20 and provides a context to examine attacks on the statute's constitutionality. Luckily, the Supreme Court has recently handed down another decision that helps illuminate the issue.[28]

Part II then analyzes both the Georgia and federal laws concerning false statements. By comparing the language of the federal and state statutes, this Note identifies the points of departure in the Georgia statute and hones in on the problematic language that deviates from the established provisions of the federal act approved by the Supreme Court. This comparison in turn sets up a constitutional argument focused on the overbreadth of the Georgia law.

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[25] *See Haley*, 712 S.E.2d at 849–50 ("The State proved that video . . . caused pain to the Grinstead and Kesse families.").

[26] *See id.* at 840–41 (describing the steps leading up to Haley's identification and arrest).

[27] *See infra* notes 53–59 and accompanying text.

[28] *See infra* notes 172–78 and accompanying text.

In particular, this Note takes issue with the jurisdictional language of O.C.G.A. § 16-10-20, which mirrors federal law but was applied erroneously in Haley's case. This Note also examines the absence of a materiality requirement in Georgia's provision regarding false statements, which represents a pivotal departure from the federal law that considers the degree of falsity of the statement and the seriousness of the offense when considering the illegality of the statement. Finally, this Note uses multiple mechanisms to examine the instructive differences between the treatment of false statements and fraudulent statements under both federal and Georgia law. It champions the correct characterization of false statements as falling under First Amendment protection and fraudulent statements as remaining outside the scope of protection.

This Note next examines Haley's unique position as someone asserting free speech rights over the Internet. Although the subject of free speech on the Internet has only recently been addressed by the judicial system,[29] this additional twist in Haley's case further strengthens his claims and provides a new context in which to examine the potential changes that First Amendment protections must undergo with the development of technology.

After providing this background, Part III of this Note highlights the immense interests at stake in protecting false statements. It argues that none of the commonly cited balancing tests concerning the protection of free speech prevent the expression of false statements. Although Haley's speech could be characterized as worthless to society—even harmful to the victims' families—under the Supreme Court's treatment of First Amendment rights,[30] his speech deserves just as much protection as the most truthful of utterances.

After a thorough discussion of the interests at stake, Part III proposes solutions to cure O.C.G.A. § 16-10-20 of its constitutional offenses. By urging adoption of a law that more closely parallels the Federal False Statement Act,[31] this Note examines the ways in which O.C.G.A. § 16-10-20 can be saved. In closing, this Note

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[29] *See infra* notes 123–28 and accompanying text.

[30] *See infra* notes 53–59 and accompanying text.

[31] 18 U.S.C. § 1001 (2006).

predicts the future of protection for false statements in the context of a society burgeoning with technological advancements. If Internet speech is not afforded the same protections as other more traditional forms of speech, users will be prevented from fully expressing themselves in this unique medium, and the benefits of this new form of communication will be thwarted.

II. BACKGROUND

A. FIRST AMENDMENT INTERESTS EXPLORED

The gravity of the rights protected by the First Amendment cannot be denied. The Supreme Court lionizes the freedoms of speech and of the press as "among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action."[32] Even when discussing the Amendment's limitations, the Supreme Court has been cautious about suppressing speech too far.[33] Despite these sentiments, several "historic and traditional categories long familiar to the bar"[34] have been proscribed by the Court, including obscenity,[35] defamation,[36] fraud,[37] incitement,[38] and speech integral to criminal conduct.[39]

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[32] Lovell v. City of Griffin, 303 U.S. 444, 450 (1938).

[33] *See* United States v. Stevens, 130 S. Ct. 1577, 1580 (2010) ("But the First Amendment's free speech guarantee does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."); *see also* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. However, this principle, like other First Amendment principles, is not absolute." (citations omitted) (internal quotation marks omitted)).

[34] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring).

[35] *E.g.*, Roth v. United States, 354 U.S. 476, 492 (1957) ("[O]bscenity is not expression protected by the First Amendment.").

[36] *E.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–61 (1985) (stating that the Court has "long recognized that not all speech is of equal First Amendment importance" then holding that defamatory statements made in a false credit report were not constitutionally protected).

[37] *E.g.*, Ill. *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 606 (2003) (stating that "when nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim").

Although false statements have not historically been included among speech disfavored by the Court, much weight has been given to the majority's comment in *Gertz v. Robert Welch, Inc.* that "there is no constitutional value in false statements of fact."[40] The Court in proscribing and permitting certain types of speech offered different rationales for its decisions.[41] Examining these justifications and other theories on the importance of false statements may help explain why false statements are still standing, despite facing severe criticism from the Court.

1. What Has the Court Excluded and Why? Even the cases that most heartily champion First Amendment rights[42] recognize that it is unrealistic for *all* speech to be protected.[43] For example, after espousing its importance,[44] the Court in *Chaplinsky v. New Hampshire* admits that "the right of free speech is not absolute at all times and under all circumstances."[45] The speech included in the "well-defined and narrowly limited class"[46] of exceptions to First Amendment protection is deemed to be "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[47] The Court has branded some categories of speech unprotectable: namely, those where "the evil to be restricted so overwhelmingly outweigh[ed] the expressive interests . . . at stake, that no process

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[38] *E.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (citing "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation *except* where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (emphasis added)).

[39] *E.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (rejecting the contention that First Amendment protection extends to speech "used as an integral part of conduct in violation of a valid criminal statute").

[40] 418 U.S. 323, 340 (1974).

[41] *See infra* notes 43–52 and accompanying text.

[42] *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942).

[43] *Id.* at 571.

[44] *Id.* at 570 ("It is now clear that 'freedom of speech and freedom of the press . . . are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.' " (quoting Lovell v. City of Griffin, 303 U.S. 444, 450 (1938))).

[45] *Id.* at 571.

[46] *Id.*

[47] *Id.* at 572.

of case-by-case adjudication [was] required. . . . [and] the balance of competing interests [was] clearly struck [such] that it [was] permissible to consider these materials as without the protection of the First Amendment."[48]

Despite treating certain types of speech harshly, the Court has also been hesitant to remove First Amendment protection too freely.[49] For instance, in *United States v. Stevens*, the Court rejected the state's argument that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."[50] The Court found such "a free-floating test for First Amendment coverage . . . startling and dangerous."[51] As the Court explained, protected speech may not always prevail in a social cost-benefit analysis; nevertheless, Americans place independent value on speech free from governmental intrusion, so the Constitution prevents certain forms of speech from being silenced just because they're deemed "not worth it."[52]

Regarding false statements in particular, "courts have consistently accorded constitutional protection to false statements within certain topical areas, but they have not developed any consistent approach for assessing the constitutionality of nondefamatory false statements."[53] Where the Court has protected false statements, it has defended its position by claiming "[t]hat erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[54] Indeed, in its

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[48] New York v. Ferber, 458 U.S. 747, 763–64 (1982). Obscenity, defamation, fraud, incitement, and speech integral to criminal conduct all meet this test. *See supra* notes 35–39.

[49] *See* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (discussing the Court's concerns about attempting to weigh the costs and benefits of restricting certain types of speech).

[50] *Id.* (quoting Brief for the United States at 8, *Stevens*, 130 S. Ct. 1577 (No. 08-769)) (internal quotation marks omitted).

[51] *Id.*

[52] *Id.*

[53] Josh M. Parker, Comment, *The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions*, 78 U. CHI. L. REV. 1503, 1512 (2011).

[54] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

most recent case discussing the protection of false statements, the Supreme Court explained that "some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation."[55]

On the other hand, the Court has expressed an aversion to false statements. In *Hustler Magazine, Inc. v. Falwell*, the Court stated: "False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."[56] The Court also referenced the potential harm of false statements in *Keeton v. Hustler Magazine, Inc.*: "False statements of fact harm both the subject of the falsehood *and* the readers of the statement. . . . There is 'no constitutional value in false statements of fact.' "[57] The Court has pushed back against the value of false statements in other opinions as well.[58] This divergent handling of the potential constitutional value of false statements is reflected in the inability of lower courts to determine any systematic way to treat this type of speech.[59]

2. A Practical Examination of False Speech. Supreme Court Justices are not the only ones who have offered insight into the values and drawbacks of protecting false statements. Noted philosopher John Stuart Mill touted the benefits of false speech.[60] He encouraged caution when "restricting opinions we believe to be false, because those opinions we think are wrong may in fact be

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[55] United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

[56] 485 U.S. 46, 52 (1988).

[57] 465 U.S. 770, 776 (1984) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

[58] *See, e.g.*, Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech . . . ."); Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials.").

[59] Julie K. Wood, Note, *Truth, Lies, and Stolen Valor: A Case for Protecting False Statements of Fact Under the First Amendment*, 61 DUKE L.J. 469, 489 (2011) ("[A]lthough lower courts often cite the Supreme Court's statements that there is no constitutional value in false statements of fact, they may be hesitant to find all false statements of act outside First Amendment protection.").

[60] *See* Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1214–18 (2008) (detailing Mill's concerns about suppressing free speech and his affirmative arguments in favor of unrestricted speech).

true."[61] Going one step further, he stated that "even knowably false speech has value because it promotes 'the clearer perception and livelier impression of truth, produced by its collision with error.' "[62] Another philosopher, David Nyberg, actually "characterizes truth-telling as 'morally overrated' and emphatically highlights the positive contributions that lies and other forms of deception can bring to civil society in terms of the protection of privacy and the preservation of emotional comfort."[63] Sources other than court decisions can help establish the proper constitutional framework for false statements. However, analyzing the constitutionality of uttering false statements becomes more difficult when laws explicitly target false statements.

B. A NEW TYPE OF RESTRICTION: THE FEDERAL FALSE STATEMENTS ACT

Congress's attempt to regulate false statements is embodied in the Federal False Statements Act.[64] That Act criminalizes three categories of behavior "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."[65] First, it applies to anyone who "knowingly and willfully . . . falsifies, conceals, or covers up by any trick, scheme, or device a material fact."[66] Second, it criminalizes "knowingly and willfully . . . mak[ing] any materially false, fictitious, or fraudulent statement or representation."[67] Third, it covers "knowing and willfully . . . mak[ing] or us[ing] any false writing . . . knowing the same to contain any materially false, fictitious, or fraudulent statement."[68]

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[61] *Id.* at 1215.

[62] *Id.* at 1216 (quoting John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND OTHER WRITINGS 5, 20 (Stefan Collini ed., 1989)).

[63] Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 554 (2011) (quoting Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 LAW & PHIL. 393, 399 (2003)).

[64] 18 U.S.C. § 1001 (2006).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

Haley was convicted of making a false statement under O.C.G.A. § 16-10-20,[69] which shares much of the language of the Federal False Statement Act.[70] The Georgia statute also criminalizes three categories of behavior. First, it applies to "[a] person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact."[71] Second, it covers "knowingly and willfully . . . mak[ing] a false, fictitious, or fraudulent statement or representation."[72] Third, the statute criminalizes "knowingly and willfully . . . mak[ing] or us[ing] any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement."[73] The Georgia Supreme Court found that Haley's actions fit within the second category.[74] Importantly, these acts must be committed "within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state" for the statute to apply.[75] Despite the concerns of some members of the Supreme Court regarding the Federal False Statements Act,[76] the Court has provided support for the language in the Georgia statute by upholding the constitutionality of similar language in the federal analogue.[77]

The crux of Haley's case rests on the specific language of O.C.G.A. § 16-10-20.[78] To analyze whether his false statements should merit First Amendment protection thus requires a comparison of the federal and state statutes. This, in turn,

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[69] Haley v. State, 712 S.E.2d 838, 839 (Ga. 2011), *cert. denied*, 133 S. Ct. 60 (2012).

[70] 18 U.S.C. § 1001.

[71] O.C.G.A. § 16-10-20 (2011).

[72] *Id.*

[73] *Id.*

[74] *See Haley*, 712 S.E.2d at 839 (affirming Haley's conviction for making a false statement).

[75] O.C.G.A. § 16-10-20. The Georgia statute's jurisdictional language mirrors the federal law regarding the prohibition of false statements. *See* 18 U.S.C. § 1001 (extending the reach of the statute to matters "within jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").

[76] *See* United States v. Yermian, 468 U.S. 63, 76 (1984) (Rehnquist, J., dissenting) (commenting on the ambiguity of the statute).

[77] *See id.* at 74–75 (holding that the statute does not create a "trap for the unwary" or impose criminal sanctions on "wholly innocent conduct" and is thus constitutional).

[78] *See* Brief of Appellant, *supra* note 3, at 17–27 (describing the textual arguments against O.C.G.A. § 16-10-20).

involves examining the relevant federal and state case law interpreting these statutes.

First Amendment challenges to a statute often attack it for being "overbroad."[79] This allows the claimant to "challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him."[80] The Court has also stated that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[81] Several pieces of the Georgia statute have been subject to First Amendment scrutiny, which casts doubt on the overall constitutionality of the law.[82]

1. "Within the Jurisdiction." In interpreting O.C.G.A. § 16-10-20's jurisdictional requirement,[83] many state courts have turned to federal decisions interpretating similar language in 18 U.S.C. § 1001 for guidance.[84] When dealing with jurisdictional questions, federal courts have resisted giving the term *jurisdiction* "a narrow or technical meaning for purposes of § 1001."[85] Instead, they have consistently held that a violation of § 1001 does not require a false statement to be made or submitted directly to an agency.[86] In fact, an agency has "jurisdiction" over a statement if it has "the power to act upon information when it is received."[87] This open-ended interpretation of the jurisdictional language has led federal courts to apply the statute broadly.[88] In *Tesler v. State*, the Georgia

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[79] *See* Parker, *supra* note 53, at 1510 (describing the overbreadth argument in the First Amendment context).

[80] Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482–83 (1989) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978)).

[81] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

[82] *See* Brief of Appellant, *supra* note 3, at 7–8 (outlining several arguments that O.C.G.A. § 16-10-20 is unconstitutional).

[83] *See* O.C.G.A. § 16-10-20 (requiring that the criminal act be committed "within the jurisdiction of any department or agency of state government" for the statute to apply).

[84] *See, e.g.*, Tesler v. State, 672 S.E.2d 522, 527 (Ga. Ct. App. 2009) ("In addressing the question of whether [the defendant] can be prosecuted under O.C.G.A. § 16-10-20, we are guided by those federal decisions interpreting 18 USC § 1001.").

[85] Bryson v. United States, 396 U.S. 64, 70 (1969).

[86] *See, e.g.*, United States v. Green, 745 F.2d 1205, 1208 (9th Cir. 1984) (noting that "it is only necessary that the statement relate to a matter in which a federal agency has power to act").

[87] United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967).

[88] For an interpretation of what it means to have "the power to act," see *United States v. Rodgers*, 466 U.S. 475, 477 (1984), discussing the power to investigate under § 1001. *See*

Court of Appeals took a similar approach in interpreting the jurisdictional language of O.C.G.A. § 16-10-20. There, the court held that although the defendant gave false statements to the FBI, the local District Attorney's Office—the FBI's partner during the investigation—had the authority to act on information obtained during FBI questioning.[89] So "Tesler's false statements . . . were made in a matter within the jurisdiction of the District Attorney's Office" and violated O.C.G.A. § 16-10-20.[90]

Despite the case law's treatment of the "jurisdictional" language in § 16-10-20, it is important to note that the two other Georgia statutes involving false statements, O.C.G.A. § 16-10-25 (giving false name to officers) and § 16-10-26 (false report of a crime), require that the false statement be given directly to law enforcement.[91] Unlike under § 16-10-20, crimes committed under these statutes hinge on the intent and the affirmative action of the defendant toward law enforcement.[92]

2. "Materiality" (or Lack Thereof). One of the most marked differences between O.C.G.A. § 16-10-20 and its parallel federal statute, 18 U.S.C. § 1001, concerns the materiality requirement. A 1996 congressional amendment added a materiality element to the

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also Bryson v. United States, 396 U.S. 64, 71 (1969) (discussing the power to request information under § 1001); United States v. Suggs, 755 F.2d 1538, 1542 (11th Cir. 1985) (noting that the use of federal funds by a state agency is usually sufficient to establish agency jurisdiction under § 1001); United States v. Waters, 457 F.2d 805, 805 (3d Cir. 1972) (noting that a contractor with the Department of Labor qualified as a government agency for the purposes of § 1001 jurisdiction); Friedman v. United States, 374 F.2d 363, 367–68 (8th Cir. 1967) (noting that the power to investigate was not sufficient for "jurisdiction" under § 1001); Carroll Vocational Inst. v. United States, 211 F.2d 539, 540 (5th Cir. 1954) (explaining that "jurisdiction means the right to say and the power to act").

[89] *Tesler*, 672 S.E.2d at 528–29.

[90] *Id.* at 529.

[91] *See* O.C.G.A. § 16-10-25 (2011) ("A person who gives a false name, address, or date of birth *to a law enforcement officer* in the lawful discharge of his official duties with the intent of misleading the officer as to his identity or birthdate is guilty of a misdemeanor." (emphasis added)); O.C.G.A. § 16-10-26 (2011) ("A person who willfully and knowingly gives or causes a false report of a crime to be given *to any law enforcement officer or agency* of this state is guilty of a misdemeanor." (emphasis added)).

[92] *See* Brief of Appellant, *supra* note 3, at 25–26 ("[A] literal reading of O.C.G.A. § 16-10-20 does not make guilt dependent upon an accused's making the false statement *to* any department or agency . . . . It does not make guilt dependant [sic] on even intending the statement to be in some way transmitted to or received by a department or agency. . . . These fatal flaws do not exist in O.C.G.A. §§ 16-10-25 or 16-10-26, the other statutes involving false speech.").

federal statute,[93] which now prohibits "mak[ing] any *materially* false, fictitious, or fraudulent statement or representation."[94] The Supreme Court set the standard for materiality in *Kungys v. United States* as "a natural tendency to influence, or . . . capable of influencing, the decision of the decisionmaking body to which it was addressed."[95] Even though the materiality requirement represented a congressional attempt to limit the scope of 18 U.S.C. § 1001, the vague language of the amendment, which left the meaning of "influence" unspecified, resulted in competing interpretations by lower courts.[96] Furthermore, despite the 1996 amendment process, "the fact that the statement does not have to be made *to* the government agent in question to be material has not been challenged."[97]

In contrast, O.C.G.A. § 16-10-20 only imposes a materiality requirement on concealment or falsification of a fact.[98] The "false, fictitious, or fraudulent statement" and "false writing" offenses make no mention of materiality.[99] Georgia case law also notes this difference.[100]

3. Fraudulent Statements Versus False Statements of Fact. O.C.G.A. § 16-10-20 specifically enumerates both false and fraudulent statements as separate violations under the second category of prohibited activities.[101] The statutory-interpretation

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[93] *See* Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111, 119 (2009) (describing the legislative history of the statute).

[94] 18 U.S.C. § 1001 (2006) (emphasis added).

[95] 485 U.S. 759, 786 (1988) (quoting Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956)).

[96] *See* Morrison, *supra* note 93, at 119 (discussing the consequences of Congress's choices).

[97] *Id.* at 121 (emphasis added).

[98] *See* O.C.G.A. § 16-10-20 (2011) (criminalizing "A knowingly and willfully falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device a *material* fact" (emphasis added)).

[99] *See id.*

[100] *See, e.g.*, Dorsey v. State, 615 S.E.2d 512, 520 (Ga. 2005) ("It was not error to refuse to charge the jury that materiality is an essential element of each prong of a false statement and writings offense. . . . OCGA § 16-10-20 makes materiality only an element of the first prong of the offense. . . . [and] contains no express materiality requirement as to the final two prongs." (internal citation omitted)).

[101] *See* O.C.G.A. § 16-10-20 (covering anyone who "makes a false, fictitious, *or* fraudulent statement" (emphasis added)).

"rule to avoid redundancy" compels the conclusion that unlike laws that lump the two types of statements together (e.g., the prohibition against fraudulent/false statements), the Georgia General Assembly intended that these two types of statements be separate concepts.[102] Georgia courts, on the other hand, have not yet clearly differentiated between these two types of statements.[103]

The Supreme Court of the United States, however, has provided a definition for fraud in the context of fraudulent statements, including elements of both knowledge and intent in its definition.[104] In *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, the Court cited Illinois law and found that in order for a defendant to be liable for fraud, "the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so."[105]

In addition to case law, a plain-meaning examination of false statements and fraudulent statements may also shed light on meaningful differences. According to *Black's Law Dictionary*, a false statement is "[a]n untrue statement knowingly made with the intent to mislead."[106] *Black's* includes a reference to 18 U.S.C. § 1001 in this definition.[107] *Black's* does not contain an entry for fraudulent statement but defines a fraudulent misrepresentation as "[a] false statement that is known to be false or is made recklessly—without knowing or caring whether it is true or false—

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[102] *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 865 (4th ed. 2007) ("Under the whole act rule, the presumption is that every word and phrase adds something to the statutory command. Accordingly, it is a 'cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.' " (quoting Kungys v. United States, 485 U.S. 759, 778 (1988) (plurality op.))).

[103] *See* Oral Argument for Appellant at 12:06, Haley v. State, 712 S.E.2d 838 (Ga. 2011) (No. S11A0606), *available at* http://multimedia.dailyreportonline.com/2011/03/haley-v-state/ (pointing out the lack of Georgia case law distinguishing false and fraudulent statements).

[104] *See* Ill. *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003) (detailing the elements of fraud).

[105] *Id.*

[106] BLACK'S LAW DICTIONARY 1539 (9th ed. 2009).

[107] *Id.*

and that is intended to induce a party to detrimentally rely on it."[108] While the Supreme Court included knowledge and intent elements in its definition of fraud, the plain meaning of false statement attributes an intent element to the making of that type of statement, as well. Thus, it appears that there is no concrete answer, even from the highest legal sources, on how to differentiate fraudulent statements from false statements.

It is clear however that Haley was convicted for uttering a "false statement," not a "fraudulent statement." He was convicted under O.C.G.A. § 16-10-20, "false statements and writings."[109] Additionally, among the various definitions for "false" and "fraudulent" statements,[110] Haley's words clearly fall in the "false" category. Haley lacked the "intent to mislead the listener"[111] when he posted his YouTube videos.[112] Haley told law enforcement officials that he "didn't believe anyone would believe him."[113] Under the plain-meaning examination, Haley similarly lacked the intent "to induce a party to detrimentally rely on [his statement]."[114] In federal court his lack of intent would have mattered.

Regardless of the differences, fraudulent—but not false—statements have been singled out by the Supreme Court as a type of speech in particular need of exclusion from First Amendment protection.[115] In fact, the Court "has acknowledged that [false] statements are neither categorically protected nor unprotected" and has even conceded (in dicta) that it may have been too quick to criticize false statements.[116]

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[108] *Id.* at 1091.

[109] O.C.G.A. § 16-10-20 (2011).

[110] *See supra* notes 105–08.

[111] *See* Ill. *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003).

[112] *See* Haley v. State, 712 S.E.2d 838, 841 (Ga. 2011), *cert. denied*, 133 S. Ct. 60 (2012).

[113] *Id.*

[114] BLACK'S LAW DICTIONARY 1091 (9th ed. 2009).

[115] *See, e.g.*, *Telemarketing Assocs.*, 538 U.S. at 609, 620, 624 (holding that a "[f]alse statement alone" does not subject one to liability whereas "fraudulent misrepresentations," which were "knowingly deceptive and materially false," are not protected under the First Amendment).

[116] Parker, *supra* note 53, at 1507 (citing Nike v. Kasky, 539 U.S. 654, 664 (2003)). The Court in *Nike v. Kasky* stated, "That is why we have broadly (perhaps overbroadly) stated that 'there is no constitutional value in false statements of fact.' " 539 U.S. at 664 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)).

Since the passage of the Bill of Rights, the Court has handed down several decisions restricting the broad protection of speech initially proclaimed in the First Amendment.[117] In particular, the Court has targeted certain "well-defined and narrowly limited classes of speech," including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[118] The Court eventually extended its efforts to curb problematic speech to fraudulent speech.[119] Of particular note is what the Court has insisted it was *not* doing with its decision to prohibit fraudulent speech.[120] The Court was content to leave false statements alone.[121] In fact, the Supreme Court has recently expressed a desire to protect false statements under the First Amendment.[122]

C. THE INTERNET CONTEXT

A unique element of Haley's case is that his false statements were broadcast over the Internet.[123] In terms of First Amendment protection, the Supreme Court has treated speech communicated online with more deference than speech transmitted through other forms (e.g., radio, television, and newspapers).[124] Another wrinkle in Haley's case concerns the protection of anonymous speech. When Haley posted his videos, he did so under the username "catchmekiller."[125] Though the First Amendment obviously does not expressly address the right to free speech as an anonymous

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[117] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[118] Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 572 (1942).

[119] *See Telemarketing Assocs.*, 538 U.S. at 609, 620, 624 (excluding protection for fraudulent statements).

[120] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Nor is there any claim that prescription drug price advertisements are forbidden because they are *false or misleading* in any way." (emphasis added)).

[121] *See generally id.*

[122] *See infra* notes 164–78 and accompanying text.

[123] Haley v. State, 712 S.E.2d 838, 839 (Ga. 2011), *cert. denied*, 133 S. Ct. 60 (2012).

[124] *See* Reno v. ACLU, 521 U.S. 844, 868 (1997) (noting that "the special justifications for regulation of the broadcast media," such as "the history of extensive Government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its 'invasive' nature" are not present in cyberspace (citations omitted)). The Court therefore reasoned that those cases "provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]." *Id.* at 870.

[125] *Haley*, 712 S.E.2d at 839.

Internet user, some scholars argue that the First Amendment still "protects the right of individuals to speak anonymously online."[126] One scholar has even pointed out that the Supreme Court has indicated that anonymous speech is a protected category and that "online speech receives no less constitutional protection than any other speech."[127] The examination of Haley's case in the context of the ever-widening online community could provide more support for the protection of his First Amendment rights.[128]

Analyzing Haley's First Amendment claims for false statements requires close scrutiny of the statutory language and substantive principles laid out in this section. Multiple viewpoints on the constitutionality of false statements have developed since the enactment of the Constitution and the Bill of Rights; some question the expansion of the First Amendment while others champion even more vigorous protection for various forms of speech.[129] The federal statute and Georgia provisions prohibiting false statements provide the context needed to understand *Haley*, his conviction, and the potential ramifications of this decision on those expressing themselves on the Internet or elsewhere in Georgia.

III. ANALYSIS

Haley's case provides an excellent springboard for examining the constitutionality of O.C.G.A. § 16-10-20 and other efforts to curb the dispersion of false statements. The Georgia Supreme Court's interpretation of § 16-10-20 directly conflicts with many of the rationales the Supreme Court has provided concerning the prohibition or permission of certain kinds of speech.[130] In addition to conceptual infirmities surrounding the statute, its specific language is also flawed. Despite its similarity to the Supreme

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[126] Miguel E. Larios, *ePublius: Anonymous Speech Rights Online*, 37 RUTGERS L. REC. 36, 36 (2010).

[127] *Id.* at 42 (citing *Reno*, 521 U.S. at 870 (stating that the Court's "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]" when compared to more traditional media)).

[128] *See supra* notes 124, 126 and accompanying text.

[129] *See supra* Part II.A.

[130] *See supra* notes 49–52 and accompanying text.

Court-approved federal act, several elements of the Georgia statute can be challenged on First Amendment grounds.[131] Finally, the online aspect of Haley's case provides a unique opportunity to examine free speech on the Internet and serves as a bellwether for potential ramifications of cases like Haley's.[132]

A. FALSE STATEMENTS SHOULD BE CONSTITUTIONALLY PROTECTED

1. Unpacking the Court's Decisions: The Balancing Tests. When faced with decisions that could limit established individual rights like those enumerated in the Bill of Rights, the Supreme Court does not hand down sweeping bans on individual freedoms.[133] The Court has shown considerable deference to First Amendment freedoms in particular, extolling the "fundamental" nature of free speech rights.[134] It is therefore not surprising that the Supreme Court has not handed down a solid, incontrovertible decision determining the constitutional protection for false statements.[135] Although the Supreme Court has not given specific instructions for lower courts handling this potentially complex issue, the Court has delineated a balancing test to determine whether to curb other forms of speech, which reveals how lower courts should treat false statements.[136] Using these indicators, lower courts, including the Georgia Supreme Court, should find that the U.S. Constitution protects false statements.

Despite the multitudes of constitutional challenges raised before the Supreme Court, it has only proscribed free speech in a select few contexts.[137] While weighing the arguments presented in

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[131] *See* Brief of Appellant, *supra* note 3, at 7–8 (explaining the jurisdictional language problem, lack of materiality requirement, and other potential challenges).

[132] *See supra* Part II.C.

[133] *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (finding that a statute which is "narrowly drawn and limited to define and punish specific conduct" does not offend First Amendment principles).

[134] *See* Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) ("Freedom of speech and freedom of the press . . . are among the fundamental personal rights . . . protected by the Fourteenth Amendment from invasion by state action.").

[135] *See* Parker, *supra* note 53, at 1512 (explaining that "courts . . . have not developed any consistent approach for assessing the constitutionality of nondefamatory false statements").

[136] *See supra* notes 43–52 and accompanying text.

[137] *See* Roth v. United States, 354 U.S. 476, 492 (1957) (obscenity); Dun & Bradstreet, Inc. v. Areenmoss Builders, Inc., 472 U.S. 749, 758–61 (defamation); Ill. *ex. rel.* Madigan v.

these cases, the Court established several tests to find either constitutionally protected speech or a nonprotectable exception to the First Amendment.[138] In *Chaplinsky*, the Court examined a New Hampshire statute to determine if the state had a compelling interest in limiting free speech.[139] The Court emphasized the narrowness of the exceptions to First Amendment protection and identified a strict standard for finding a lack of constitutional coverage: Such statements must be of "no essential part of any exposition of ideas, and . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[140] Using this test, the Court found the speech at issue constituted nonprotectable "fighting words," which, when uttered face-to-face, were "plainly likely to cause a breach of the peace."[141]

In addition to stressing a narrow approach to construing First Amendment exceptions, the Court in *Chaplinksy* also focused on the limited reach of its decision. It emphasized that the relevant statute "define[d] and punish[ed] specific conduct[,] . . . the use in a public place of words likely to cause a breach of the peace."[142] The content of the offensive speech alone was not enough for the Court to uphold the statute proscribing it.[143] Pulling directly from the state's espoused concerns about a "social interest in order and morality,"[144] the Court found the public location of the speech to be the most problematic factor.[145] The risk of offensive words

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Telemarketing Assocs., Inc., 538 U.S. 600, 606 (2003) (fraud); Bradenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (speech integral to criminal conduct).

[138] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (comparing the social value of reaching truth and the social interest in order when determining First Amendment protection); New York v. Ferber, 458 U.S. 747, 763–64 (1982) (discussing the balance of "evil" and "expressive interests" when determining First Amendment protection).

[139] *See Chaplinsky*, 315 U.S. at 569, 571–72.

[140] *Id.* at 572.

[141] *Id.* at 573.

[142] *Id.*

[143] *Id.* at 574 (finding the appellations "[un]likely to provoke the average person to retaliation" and thereby inherit prohibition without more).

[144] *Id.* at 572.

[145] *See id.* ("It is a statute narrowly drawn and limited to . . . the use in a *public place* of words likely to cause a breach of the peace." (emphasis added)).

sparking a violent public reaction outweighed any value to the defendant in uttering the speech.[146]

While Haley uttered words that could be considered offensive, classical "fighting words," he escapes an unfavorable outcome under *Chaplinsky* due to his unique technological circumstances. Unlike the recipient of the offensive words in *Chaplinsky*, who was forced to experience the insults and threats firsthand, anyone adversely affected by Haley's comments were separated from him by a computer screen and potentially hundreds of miles. Under the *Chaplinsky* doctrine, which takes special issue with the potential for social disorder, Haley's statements are not nonprotectable because the miniscule possibility of a physical outcry in reaction to his words. If the Supreme Court's desire for a narrow reading of any First Amendment exception is to be honored, Haley's words must remain constitutionally protected, along with any false statements unlikely to result in a *Chaplinsky*-like outburst.

The Supreme Court developed another test in *New York v. Ferber* regarding the treatment of free speech rights.[147] It found speech nonprotectable when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. . . . [and] the balance of competing interests is clearly struck [such] that it is permissible to consider these materials as without the protection of the First Amendment."[148] Several elements of this test underscore the specific concerns necessary to deny free speech protection discussed in *Chaplinsky*. Designating potentially nonprotectable speech as "evil" and mandating that this "evil" must "overwhelmingly" outweigh any expressive benefit in a "clearly struck" balance indicates that the Court is not prepared to extend an exception to free speech to statements that present a close question for the Court.[149] The Court even goes so far as to imply that it is uncomfortable with banning speech in

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[146] *Id.* at 573 ("We are unable to say that the limited scope of the statute as thus constructed contravenes the constitutional right of the expression. It is a statute . . . limited to define and punish specific conduct . . . likely to cause a breach of the peace.").

[147] New York v. Ferber, 458 U.S. 747, 763–64 (1982) (discussing another balancing test).

[148] *Id.*

[149] *Id.*

situations where that speech could merit protection in even one case, instead preferring to only restrict speech that is so problematic that it could never be found protectable in "case-by-case adjudication."[150]

Using this approach, the Court held that a state statute banning the sale of child pornography[151] was constitutional as it prohibited the production and distribution of material "not entitled to First Amendment protection."[152] On the other side of the balance, the Court cited its compelling "interest in 'safeguarding the physical and psychological well-being of a minor.' "[153] When compared to the expressive benefit of producing pornographic films involving children, the Court ignored the "dangers of censorship inherent in unabashedly content-based laws,"[154] instead emphasizing the marked need to combat the burgeoning national issue of the exploitation of children.[155] When weighing the need to protect children from exploitation against the constitutional rights of those involved in an industry harming the nation's youth, the Court came down firmly on the side of protecting children.[156]

However, applying *Ferber*'s standard and rationale to Haley's case produces a different result. As illustrated by prior Supreme Court decisions regarding the treatment of false statements, constitutional treatment of this type of speech remains ambiguous.[157] A comparison of the interests in Haley's case hardly results in a "clearly struck"[158] balance against Haley's free speech rights. Accordingly, it is not difficult to imagine a set of facts under which false statements may very well deserve constitutional

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[150] *Id*. at 764.

[151] *Id.* at 749.

[152] *Id*. at 765.

[153] *Id*. at 756–57 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

[154] *See id.* at 756.

[155] *Id*. at 749.

[156] *See id.* at 764 ("When a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.").

[157] *See* Parker, *supra* note 53, at 1512 (discussing the ambiguity that remains regarding false statements).

[158] *Ferber*, 458 U.S. 764.

protection, such as those involving honest mistakes of fact or satire. If lower courts abide by the Supreme Court's reasoning in *Ferber*, they cannot prohibit a category of speech unless there is no chance of that speech ever requiring an individual assessment of constitutional claims.[159] Even comparing the specific facts of *Ferber* and *Haley* indicates that courts should not treat these two cases alike. In *Ferber*, the Court made it clear that it was addressing a pervasive problem jeopardizing the health and stability of a significant population in our society.[160] Alternatively, in Haley's case, one of the main arguments in favor of speech restriction was an interest in keeping law-enforcement-investigation costs to a minimum.[161] Even coupled with the pain of the victims' friends and family who saw Haley's videos, the harms produced by Haley's actions are far more limited than those guarded against in *Ferber*.

2. Another Approach: Questioning the Balancing Tests and Recognizing the Independent Value of False Statements. In addition to finding that Haley's comments merit constitutional protection according to the interests and rationales the Supreme Court has promoted, a compelling argument exists in favor of rejecting the use of any balancing test to determine the validity of free speech rights. Support for this argument lies in language found in opinions of the same Supreme Court that promulgated the various balancing tests. Such language lends further support to the contention that restricting free speech is a sensitive practice to which the Court is not willing to fully commit.[162] In *United States v. Stevens*, the Court rejected an argument that would categorically exclude speech from First Amendment protection based on a balancing test.[163] The Government in that case argued that "[w]hether a given category of speech enjoys First Amendment protection [should] depend upon a categorical

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[159] *See id.* at 747, 763–64 (discussing the deferential standard used to evaluate of free speech rights).

[160] *See id.* at 758 n.9 (noting that the use of children in pornographic materials is incredibly harmful to the exploited children as well as to society).

[161] Haley v. State, 712 S.E.2d 838, 847 (Ga. 2011).

[162] *See* United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (illustrating the Court's hesitation to utilize a black-and-white test regarding the protection of free speech rights).

[163] *Id.*

balancing of the value of the speech against its societal costs."[164] The Court found such a "free-floating test for First Amendment coverage . . . startling and dangerous."[165] Under *Stevens*, courts must use other approaches to determine constitutional protection, rendering any assertion that social harms outweigh the benefits of false statements inapplicable to a constitutional analysis of this type of speech.

Consideration of the substantive social value of false statements, both by the Court and by social commentators, provides a context—regardless whether lower courts choose to follow the *Chaplinsky* and *Ferber* Courts and employ balancing tests[166] or follow the *Stevens* Court and reject them[167]—in which to examine constitutional protection for these comments. If courts decide to use balancing tests, considerations of the substantive social values of false statements weigh in favor of protecting false statements. Otherwise, they provide independent rationales on which to base constitutional protection.

In *Stevens*, the Court defended its rejection of a balancing test to delineate free speech rights by citing a commonly held, democratic value.[168] The Court felt that individuals valued freedom from governmental intrusion to such an extent that they would not approve of a test that restricted some forms of speech, even socially harmful ones, as not "worth it" to protect.[169] The Supreme Court cited another social benefit of protecting false statements in *N.Y. Times Co. v. Sullivan*.[170] The Court in that case found practical and far-reaching implications in the treatment of false statements and noted "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[171]

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[164] *Id.* (quoting Brief for United States, *supra* note 50, at 8).

[165] *Id.*

[166] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); New York v. Ferber, 458 U.S. 747, 763–64 (1982) (both discussing the employment of balancing tests).

[167] *See Stevens*, 130 S. Ct. at 1585 (discussing the rejection of a balancing test).

[168] *See id.* (discussing the high stakes in limiting free speech).

[169] *Id.*

[170] 376 U.S. 254 (1964).

[171] *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

Furthermore, the Supreme Court took another look at the rationales behind protecting false statements in *United States v. Alvarez*.[172] Again, the Court emphasized the danger of a "free-wheeling" balancing approach to determine protection for broad categories of speech,[173] choosing instead to apply "the most exacting scrutiny" to any content-based restriction on free speech.[174] Although the Court acknowledged the value in limiting the kind of speech the government sought to restrict—falsely claiming military service and honors[175]—the Court ultimately determined that the Government failed to prove that the restriction it sought was "actually necessary" to achieve its desired goal.[176] The Government failed to demonstrate that individuals like Alvarez who lie about their military service could undermine the government's interest in safeguarding public reverence of and trust in the meaning of military awards.[177] Thus, proscription of Alverez's free speech rights was not warranted.[178]

Moreover, many scholars extol the value of allowing false statements to exist uninhibited by statute or practice.[179] Mill's insistence that the free proliferation of false statements helps reach the truth[180] and Nyberg's emphasis on the ability of false statements to both protect individual privacy and preserve emotional comfort of speakers—among other social values[181]—also highlight the potential social benefits of false statements.

Regardless of the approach lower courts choose to decide the constitutional protection for false statements, Haley's First

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[172] 132 S. Ct. 2537 (2012).

[173] *Id.* at 2548.

[174] *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)).

[175] *Id.* at 2542.

[176] *Id.* at 2549.

[177] *Id.* at 2550.

[178] *Id.* at 2549.

[179] *See supra* notes 60–63 and accompanying text.

[180] *See* JOHN STUART MILL, ON LIBERTY 21 (Currin V. Shields ed., 1956) (1859) (extolling the value of false statements as bringing about "the clearer perception and livelier impression of truth produced by its collision with error").

[181] *See* DAVID NYBERG, THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE 219 (1993) ("Deception is . . . an essential component of our ability to organize and shape the world, to resolve problems of coordination among individuals who differ, to cope with uncertainty and pain, to be civil and to achieve privacy as needed, to survive as a species and to flourish as persons.").

Amendment right to free speech must remain intact. If a court decides to use a balancing test, Supreme Court precedent dictates that it must find only the narrowest exception to the general rule of constitutional protection for speech.[182] When the Court has found that free speech rights must be limited, it has enumerated focused, context-specific rationales to support its decisions.[183] It would thus be inappropriate for lower courts to use the reasoning in these narrowly decided cases to impose a restriction on false statements.

In the alternative, if a court chooses to examine the protection of false statements without a balancing standard, both the Supreme Court and other commentators provide a solid basis for defending Haley's right to speak openly.[184] Despite the moral turpitude exhibited by Haley, the values established by the Framers of the Constitution mandate that our society protect the rights of even the most unpopular individuals,[185] especially when such slight harm is done.[186] A consideration of the long-term effects of the Georgia Supreme Court decision in *Haley* should cause anyone well versed in constitutional principles to pause, for traversing the slippery slope of limiting First Amendment rights is a dangerous task. One can ask the timeless question: Once Haley and others uttering false statements are stripped of their rights, who is next?

B. THE STATUTORY LANGUAGE OF O.C.G.A. § 16-10-20 DEPARTS FROM THE FEDERAL ACT AND IS UNCONSTITUTIONALLY OVERBROAD

Although much of its language mirrors the Federal False Statements Act[187]—a statute that has received explicit approval from the Supreme Court[188]—the few points of departure taken in

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[182] *See supra* note 47 and accompanying text.

[183] *See supra* note 48 and accompanying text.

[184] *See supra* notes 53–55, 60–63 and accompanying text.

[185] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) (mandating that courts "protect even hurtful speech on public issues to ensure that we do not stifle public debate").

[186] United States v. Alvarez, 132 S. Ct. 2537, 2545 (emphasizing that categories of free speech have been restricted typically due to their "legally cognizable harm").

[187] *See supra* note 70 and accompanying text.

[188] *See* United States v. Yermian, 468 U.S. 63, 74–75 (1984) (rejecting challenges to the constitutionality of the federal act).

O.C.G.A. § 16-10-20 are enough to find the state law unconstitutionally overbroad. Accordingly, Haley is just one of potentially many individuals who have been wronged by the Georgia law and other efforts to inappropriately curb the use of false statements. These other victims could be people like Haley—individuals with unsavory motives who end up harming innocent people already in pain. But they could also be innocent actors themselves who have simply uttered the wrong statement in the wrong place. Although these two groups differ in many ways, they are united by the need to protect their constitutionally mandated freedom of speech.

In order to find a statute "overbroad," the Court has indicated that it must find that the statute "restrict[s] more speech than the Constitution permits."[189] Of particular interest to the examination of false statements, the purpose of the overbreadth doctrine is to "attempt[ ] to avoid the chilling of protected expression."[190] Several elements of O.C.G.A. § 16-10-20 invite applications of the overbreadth doctrine that would make the statute inapplicable to people like Haley. Namely, the jurisdictional language, the lack of a materiality requirement, and the treatment of false versus fraudulent statements provide grounds for challenging the constitutionality of § 16-10-20.

1. Both the Jurisdictional Language in O.C.G.A. § 16-10-20 and the Georgia Supreme Court's Interpretation of That Language Are Unconstitutionally Overbroad. The jurisdictional language in § 16-10-20 requires that the utterance of a false statement be committed "within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state."[191] In Haley's case, the Georgia Supreme Court held that this requirement was satisfied because Haley's video-posting revealed a "contemplat[ion] or expect[ation] that his false statement w[ould] come to the attention of a state or local department or agency with the authority to act on it."[192] Haley's comments were found to have been made in the

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[189] R.A.V. v. City of St. Paul, 505 U.S. 377, 381 n.3 (1992).
[190] *Id.* at 402.
[191] O.C.G.A. § 16-10-20 (2011).
[192] Haley v. State, 712 S.E.2d 838, 843 (Ga. 2011).

jurisdiction of the Georgia Bureau of Investigation.[193] Since O.C.G.A. § 35-3-8.1 authorizes state or local officials to ask the GBI for assistance in investigating criminal activities, the Georgia Supreme Court found that the duties of GBI agents encompass an authority to act on information obtained during that those investigations.[194]

The jurisdictional language in the Georgia statute mirrors that of the Federal False Statements Act, which covers statements made "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."[195] Federal and Georgia courts that have dealt with the issue of jurisdiction have resisted imposing narrow restrictions on the concept.[196] This approach presented a problem for Haley, as he would have benefitted from the jurisdictional language being read more narrowly. However, despite the courts' approach to this issue, Haley's comments cannot be covered by the statute. Although the courts have not held that a direct communication is required for a jurisdictional finding, the common thread in the cases touching on the jurisdictional issue is some type of direct relationship between the speaker of a false statement and someone with a primary or secondary involvement in the justice system.[197] Haley is saved from application of O.C.G.A. § 16-10-20 not by the authority (or lack thereof) of the GBI. Rather, the way that Haley chose to communicate his false statements separates his case from others considered by the courts. Haley did not direct his comments to a law enforcement officer. In fact, he did not direct his comments to any human being. He simply looked into a camera, spoke, and then posted his video online. There was no guarantee that any person, let alone someone with the authority to handle the murder investigations, would stumble across his comments. Unless the Georgia Supreme Court intends to criminalize any false statement uttered in the privacy of one's home, in the confidentiality of a friendly conversation, or to a

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[193] *Id.* at 841.
[194] *Id.* at 848.
[195] 18 U.S.C. § 1001 (2006).
[196] *See supra* notes 49, 84–88 and accompanying text.
[197] *See* cases cited *supra* notes 138.

stranger who has no interest in the truth or falsity of the statement—an approach that would open the floodgates of litigation—Haley's comments cannot be deemed to have been uttered within the jurisdiction of the GBI.

2. O.C.G.A. § 16-10-20's Lack of a Materiality Requirement Results in an Unconstitutionally Overbroad Criminalization of Speech. Of the three prohibited activities listed in O.C.G.A. § 16-10-20, the one at issue in Haley's case is "mak[ing] a false, fictitious, or fraudulent statement or representation."[198] The parallel provision in the Federal False Statements Act contains an additional word that completely changes the meaning and implications of the statute. Under federal law, "mak[ing] any *materially* false, fictitious, or fraudulent statement or representation" is the crime.[199] The Court provided a definition of "materiality" in *Kungys v. United States*, finding it to mean " 'a natural tendency to influence, or . . . capable of influencing, the decision of' the decisionmaking body to which it was addressed."[200] The inclusion of this term in the federal statute indicates a congressional intent to somewhat limit the statute's reach. Perhaps recognizing a potential that false statement claims could become rampant, Congress decided it did not want to allow courts to entertain claims based on fictions that would not influence the judicial decision-making process.[201] The Georgia Legislature indicated a similar desire for limitations in the descriptions of the other two categories of prohibited behavior under O.C.G.A. § 16-10-20.[202] Regarding the first prong of the act, an individual must act with the specific intent to "*knowingly* and *willfully* falsif[y], conceal[ ], or cover[ ] up by any trick, scheme, or device a material fact."[203] Regarding the third prong of the act, the affirmative action of "mak[ing] or us[ing] any false writing or document" is required.[204] The second category of behavior in § 16-10-20

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[198] O.C.G.A. § 16-10-20 (2011).

[199] 18 U.S.C. § 1001 (emphasis added).

[200] 485 U.S. 759, 786 (1988) (quoting Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956)).

[201] *See supra* note 94 and accompanying text.

[202] *See* O.C.G.A. § 16-10-20.

[203] *Id.* (emphasis added).

[204] *Id.*

regarding false statements should be amended to reflect the same concerns demonstrated by the limiting language in the Federal False Statements Act and the other prongs of Georgia's own statute. That way, individuals in Haley's position who do not demonstrate the requisite intent or commit the affirmative action to merit criminal sanctions would remain outside the scope of the law. Borrowing the rationale of the federal courts, this amendment could help avoid wasting precious judicial resources on claims that should have no effect on the outcome of the case. It could also help avoid the premature criminalization of actions that do not merit such a consequence.

3. O.C.G.A. § 16-10-20 Is Unconstitutionally Overbroad in That It Covers Both False and Fraudulent Statements. The language used to convict Haley under the Georgia statute describes as criminal conduct "mak[ing] a false, fictitious, or fraudulent statement or representation."[205] The fact that the legislature chose to list false and fraudulent claims independently indicates an understanding that they are two completely different types of speech.[206] As such, one element can be removed from the statute without impinging upon the validity of the other elements. In order to cure the constitutional defects of O.C.G.A. § 16-10-20, the Georgia Legislature should remove "false." Criminalizing fraudulent statements casts a wide enough net to prosecute individuals who deserve punishment for their unsavory actions without making the statute unconstitutionally broad. A conviction for uttering a fraudulent statement requires that the intent elements included in both the materiality requirement of the Federal False Statements Act and the other two prongs of the Georgia statute be met.[207] If the Georgia Legislature employed the Supreme Court's definition of fraud,[208] O.C.G.A. § 16-10-20 would

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[205] *Id.*

[206] *See* ESKRIDGE ET AL., *supra* note 102, at 865 (explaining that no provision should be construed to be entirely redundant when interpreting statutes).

[207] *See supra* notes 66, 68, 93 and accompanying text.

[208] *See* Ill. *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 620 (2003) (stating that "to prove a defendant liable for fraud . . . the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false . . . [and] that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so").

contain a sufficient guarantee of intent to mirror the requirements of the federal law without pushing the envelope too far.

Although § 16-10-20 contains unconstitutional textual elements, there is hope for the Georgia statute. A proper reading of the parameters imposed by the jurisdictional language, the addition of a materiality requirement for false statements, or the complete removal of the false statement provision from the act could all remedy the defects of this law. By bringing § 16-10-20 more in line with the Supreme Court-approved Federal False Statements Act, the law would withstand constitutional scrutiny and would not infringe upon the constitutional rights of individuals like Haley.

C. HALEY'S UNIQUE INTERNET CONTEXT MANDATES SPECIAL CONSIDERATION OF THE LASTING IMPACT PROHIBITING FALSE STATEMENTS MAY HAVE ON FUTURE FREE SPEECH CLAIMS

Although Haley's plight is not limited to his special technological circumstances, his unique position of asserting free speech rights over the Internet serves both to strengthen his claims and to provide an opportunity to examine the potential changes First Amendment protections will undergo alongside the development of technology.

Though the concept of free speech rights on the Internet is not heavily covered under common law or statutory law, the Supreme Court has stated that an analysis of speech rights online should be treated with more deference than other forms of media.[209] This instruction indicates at least a temporary reservation on the part of the Supreme Court with regard to developing precedent dealing with free speech rights on the Internet without fully exploring the consequences of limiting such rights. Regardless of how the courts eventually choose to deal with these issues, individuals in Haley's position should benefit from the Supreme Court's seemingly careful consideration of this new set of available rights.

Another element of Haley's case is the context it provides for the future of free speech rights on the Internet. As more people log on, there will be an increased opportunity to make and apply

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[209] *See supra* note 124 and accompanying text.

laws that protect or infringe upon their rights online. In a time where the avenues of speech are constantly developing and changing, the value of protecting free speech is particularly crucial in order to preserve and encourage the expansion of ideas in every possible form. If the Supreme Court proceeds too hastily in its decisions regarding free speech rights on the Internet, it runs the risk of adopting an inconsistent approach to Internet speech in relation to the more traditional forms of speech. Federal and state legislatures and courts need to keep the Internet user in mind as they draft and interpret free speech provisions. If they are not careful, Internet users will be prevented from fully expressing themselves through this unique medium and the benefits of this new form of communication, along with others that may quickly follow.

Along with the theoretical and textual arguments laid out to defend Haley's right to free speech in his false statements, the Internet context of his case should compel a finding beyond a reasonable doubt that the Georgia Supreme Court wrongly convicted this video-posting individual.

IV. CONCLUSION

On the night before Halloween in 1938, millions of Americans settled down in their homes and turned on their radios.[210] What followed can only be described as "mass hysteria."[211] Mistaking a broadcast of Orson Welles's adaption of H.G. Wells's novel *War of the Worlds* as a recounting of an actual alien invasion of New Jersey and New York, people all over the United States panicked.[212] Some called the police, fled the area, or took measures to protect themselves against a feared gas raid.[213] It took an outpouring of efforts by both the news media and law enforcement personnel to quell the widespread terror and assure listeners that the broadcast was a farce.[214]

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[210] *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES, Oct. 31, 1938, http://www.war-of-the-worlds.org/Radio/Newspapers/Oct 31/NYT.html.

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

Despite the very real emotional reactions of many Americans—and the outrage they felt after realizing they fell victim to a harmless hoax—no one ever suggested that Orson Welles be indicted for making a false statement. Welles had no way of knowing what chaos he would create with his broadcast. Even if he meant to create such an overwhelming reaction, no judge would have levied the same punishment against him that Haley faced. Despite the funds and energy exerted in an attempt to undo the damage his broadcast caused and despite the fear and emotional turmoil that he put thousands across the nation through, Orson Welles was never labeled a criminal for his conduct.

The story of *War of the Worlds* sheds light on the predicament of individuals like Haley. The story also serves as a stark reminder of the interests at stake here. Not only would prosecuting wild stories broadcast to the public result in a massive waste of law-enforcement and judicial resources, but it would also lead to the criminalization of many legally innocent individuals. This argument does not render Haley blameless. He caused a great deal of pain to a family already suffering from the death of a loved one.[215] However, as this Note has argued, federal law could not be used to convict Haley unless his statement had a degree of materiality that would render it useful to a court's decision-making process.[216] The parallel Georgia statute, O.C.G.A. § 16-10-20 has several textual problems including the absence of a materiality requirement,[217] that simply cannot overcome the massive interests at stake in defending Haley's right to free speech.[218] Nothing about Haley's actions called for a prison sentence, and O.C.G.A. § 16-10-20 should be modified to ensure that such a result never occurs again.

Virginia Rose Priddy

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[215] *See supra* note 6 and accompanying text.
[216] *See supra* note 95 and accompanying text.
[217] *See supra* note 82 and accompanying text.
[218] *See supra* notes 53–54, 60–63 and accompanying text.