

The New Criterion

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Ought We Always To Have the Freedom to Lie?

by James Bowman

In today's *Washington Post*, Robert Barnes reports on a court test of the Stolen Valor Act, passed by Congress in 2005 in response to a proliferation of poseurs claiming to have been awarded medals for bravery that they had not, in fact, been awarded. Mr Barnes is struck by the opinion of the chief judge of the U.S. Court of Appeals for the Ninth Circuit in San Francisco, Alex Kozinski, that outlawing such fakery is tantamount to an attempt to outlaw lying itself.

"We lie to protect our privacy ('No, I don't live around here'); to avoid hurt feelings ('Friday is my study night'); to make others feel better ('Gee, you've gotten skinny'); to avoid recriminations ('I only lost \$10 at poker')," Kozinski wrote recently in a case about an inveterate liar named Xavier Alvarez who, just to drive home the point, is also known as Javier Alvarez. Kozinski listed 28 other reasons we avoid the truth, including to "avoid a nudnick" and to "defeat an objective ('I'm allergic to latex')," and ending sweetly with "to maintain innocence ('There are eight tiny reindeer on the rooftop')." Judge Kozinski concludes that "If all untruthful speech is unprotected . . . we could all be made into criminals, depending on which lies those making the laws find offensive."

Of course, it is not "all untruthful speech" which is at issue in this law but only that involving false claims to the possession of officially conferred military decorations. But the judge presumably sees this as a "slippery slope" sort of prohibition and therefore imagines that if Congress can behave constitutionally in not allowing lying of this kind, it could also constitutionally outlaw lying of any kind.

Yet no one supposes that the kind of lying known as perjury — that is, lying under oath in a court of law — is unconstitutional. The crime of perjury has been a part of the common law for centuries without anybody's being tempted to put Santa Claus or insincere compliments in the same category. Judge Kozinski's argument may seem like yet another example of the decline of common sense in our over-lawyered times, but I think it goes further than that — to an essential part of common sense that came from the old honor culture and that has disappeared with the disappearance of that culture. The crime of perjury itself codifies what is essentially an honorable stricture against breaking one's word when it has been solemnly and formally pledged on one's

honor. Always this has been recognized as the one of the multiple varieties of lying that cannot be suffered with impunity because it is an attack on the community of honor, or honor group, which constitutes legitimate authority and whose existence, however little recognized it may be nowadays, is the reason why those appearing before Judge Kozinski still refer to him by the archaic term, "Your honor."

There seems to me an excellent case to be made for including insult to the lawfully constituted armed forces of that legitimate authority in the same class of prohibitions as perjury. It is a way of our deciding, as a society with a special identity as the United States of America, that certain symbols of that society are to be treated as sacrosanct because they are what makes up that identity. The prohibition against flag-burning should also be included in this category of protections for the sacred symbols of the nation, as should that against the ravings at military funerals of the lunatics of the Westboro Baptist Church — as Mr Justice Alito was alone among the members of the Supreme Court in recognizing only the other day. Our freedoms are precious to us and therefore do not include, or ought not to include, the freedom to derogate from and ultimately to destroy that honor by which our freedoms and the nation that embodies them are preserved.

James Bowman is a Resident Scholar at the Ethics and Public Policy Center and the author of *Honor, A History* (Encounter).