AO 91 (Rev. 08/09) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

District of Maryland

United States of America
v.

WILLIAM LAWRENCE CASSIDY
29720 Cove Road
Lucerne Valley, California 92356

Defendant(s)

Case No. 11-501 CBD

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of January 2009 in the county of Montgomery in the _____ District of Maryland, the defendant(s) violated:

Code Section	*Offense Description*
18 U.S.C. §§ 2261A(2) (A) and 2261A(2) (B)	Stalking

This criminal complaint is based on these facts:

SEE ATTACHED AFFIDAVIT of Special Agent Jessica A. Nye, FBI

☑ Continued on the attached sheet.

Jessica A. Nye
Complainant's signature

JESSICA A. NYE, Special Agent, FBI
Printed name and title

Sworn to before me and signed in my presence.

Date: Feb 2, 2011

Judge's signature

City and state: Greenbelt, MD

CHARLES B. DAY, Magistrate Judge
Printed name and title

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

IN THE MATTER OF THE CRIMINAL COMPLAINT FOR WILLIAM LAWRENCE CASSIDY 29720 Cove Road Lucerne Valley, California 92356	)	Misc No. 11-501CBD
	)	UNDER SEAL

AFFIDAVIT IN SUPPORT OF CRIMINAL COMPLAINT

I, Jessica A. Nye, ("Your affiant"), a Special Agent (SA) with the Federal Bureau of Investigation (FBI), Baltimore Division, Baltimore, Maryland, being duly sworn, depose and state as follows:

1. I have been a Special Agent with the FBI since March 19, 2006. During this time, I have been assigned investigations involving computer crimes and crimes against children on the Internet. I am currently assigned to the FBI Baltimore Division Cyber Crime Squad and am responsible for investigations involving computer-related offenses to include violations involving child pornography and the sexual exploitation of children on the Internet. I have expertise in conducting such investigations through training in seminars, classes, and everyday work related to these types of investigations. Also, I have participated in the execution of numerous search warrants involving the search and seizure of computers, computer equipment, software, and electronically stored information.

2. I have been personally involved in the investigation of this matter. This affidavit is based upon my conversations with other law-enforcement officers and agents, my interviews of witnesses, and my examination of documents, reports and other records. Because this affidavit is being submitted for the limited purpose of establishing probable cause, it does not include all of the facts that I have learned during the course of my investigation. Where the contents of documents and the actions, statements, and conversations of others are reported herein, they are reported in substance and in part, except where otherwise indicated.

3. As a federal agent, your affiant is authorized to investigate violations of laws of the United States and is a law enforcement officer with the authority to execute warrants issued under the authority of the United States.

4. This affidavit is made in support of an application for

a Criminal Complaint for **WILLIAM LAWRENCE CASSIDY, 29720 Cove Road, Lucerne Valley, California, 92356**, charging him with Stalking, in violation of 18 U.S.C. Sections 2261A(2)(A) and 2261A(2)(B).

5. This investigation concerns alleged violations of Title 18, United States Code, Sections 2261A(2)(A) and 2261A(2)(B). Title 18, United States Code Section 2261A(2)(A) states:

> Whoever, with the intent to kill, injure, harass, or place under surveillance with intent to kill, injure harass, or intimidate, or cause substantial emotional distress to a person in another State,... uses any interactive computer service, or facility of interstate commerce to engage in a course of conduct that causes substantial emotional distress to that person or places that person in reasonable fear of the death of that person [is guilty of a crime].

Title 18, United States Code Section 2261A(2)(B) states:

> Whoever with intent to kill, injure, and harass, and place under surveillance with intent to place a person in another State in reasonable fear of death or serious bodily injury ... uses any interactive computer service, or facility of interstate commerce to engage in a course of conduct that causes substantial emotional distress to that person or places that person in reasonable fear of the death of or serious bodily injury to, that person [is guilty of a crime].

BACKGROUND OF INVESTIGATION

6. According to the website, www.tara.org, Victim 1, a woman now 61 years of age is an enthroned tulku, or reincarnate master, within the Palyul lineage of the Nyingma tradition of Tibetan Buddhism. She was enthroned as a reincarnate llama in 1988. Following her enthronement ceremony, the Supreme Head of the Palyul lineage renamed the center where Victim 1 taught, Kunzang Odsal Palyou Changchub Choling ("KPC"), or "Fully Awakened Dharma Continent of Excellent Clear Light" and designated it as his seat in the West.[1] Victim 1 is believed by members of KPC to be the only American-born female tulku. Based on my conversation with Victim 1, as well as members of KPC, I learned the following, among other things:

Victim 1 and KPC are located in Poolesville, MD.

jaw

CBN

a) In or about September 2007, defendant **WILLIAM LAWRENCE CASSIDY** ("**CASSIDY**"), who was using the name William

1 www.tara.org

CBN jaw

Sanderson became friendly with one of the monks of KPC. **CASSIDY** spoke highly of Victim 1 and said he wanted to meet her. **CASSIDY** was self proclaimed as a Buddhist American tulku. Over the course of the next month, those close with Victim 1 encouraged her to meet **CASSIDY**.

b) Victim 1, invited **CASSIDY** to join her at her place of retreat in Arizona. Cassidy requested to ride alone with Victim 1 in her vehicle. Upon meeting Victim 1 for the first time, and while along her vehicle, **CASSIDY** grabbed her arm and stated "I want you to know one thing. I will never hit you. I will never leave you." After knowing Victim 1 for only a short period of time, **CASSIDY** asked her to marry him. Victim 1 declined. **CASSIDY** still asked for them to pretend that they were married. **CASSIDY** would text Victim 1 "Honey I'm home" and sent her a ring. During one-on-one conversations with **CASSIDY**, Victim 1 confided in **CASSIDY** and shared intimate details about her life, including sexual abuse as a child and failed relationship with her ex-husband. **CASSIDY** asked Victim 1 if she wanted him to kill her ex-husband. Victim 1 was stunned by this statement and told him not to harm her ex-husband.

c) **CASSIDY** claimed to have Stage IV Lung Cancer so members of KPC took care of him as if these were **CASSIDY's** final days. At that time, it came to light that his name was not William Sanderson but **CASSIDY**. **CASSIDY** admitted that his name was in fact **CASSIDY**. Victim 1 and other KPC members noticed strange things about **CASSIDY's** behavior that appeared inconsistent with Buddhist teachings, including gossiping about others. Gossiping is offensive to a Buddhist. At this time, Victim 1 began to request confirmation through channels in her lineage to determine if **CASSIDY** was in fact a recognized tulku.

d) In late February 2008, **CASSIDY** offered to assist with various financial and legal challenges and was promoted to Chief Operating Officer within KPC. **CASSIDY** held this position for two weeks, and during that time, made every effort to gather information about KPC.

e) On February 23, 2008, Victim 1 heard there was no indication that **CASSIDY** had ever been recognized for the title he was claiming to hold. Victim 1 contacted **CASSIDY** informing him of what she had just learned and almost immediately **CASSIDY** left the retreat taking with him KPC Buddhist nun Nydia Alexandra, a/k/a "Julie Greene", a/k/a "Jewel Lilly Annabella" whom he apparently seduced.

7. Members of KPC later found out **CASSIDY** is a convicted felon.

KPC estimates they spent approximately $10,000 of their personal resources and countless man hours caring for **CASSIDY** in what they thought were his final days.

8. The nexus for **CASSIDY's** harassment is via his blogs and his Twitter Accounts.

TWITTER

9. Twitter is a website, owned and operated by Twitter Inc., which offers a social networking and microblogging service, enabling its users to send and read messages called *tweets*. Tweets are text-based posts of up to 140 characters displayed on the user's profile page. Tweets are publicly visible by default, however senders can restrict message delivery to their friends list. Users may subscribe to other users' tweets. This is known as *following* and subscribers are known as *followers*. All users can send and receive tweets via the Twitter website.

10. Twitter Account "vajragurl" frequently posts tweets on his Twitter account. In one day for example, "vajragurl" may have twenty to forty tweets directed towards Victim 1 and KPC. On July 5, 2010, there were over 350 tweets directed towards Victim 1 and KPC. At present time, the account "vajragurl" has tweeted over 8,000 tweets. It is KPC's belief that all of those tweets, except a few hundred, pertain to Victim 1 and KPC.

11. The following are a small portion of the tweets that came from Twitter Account "vajragurl":

a) Sunday, May 30, 2010 "ya like haiku? Here's one for ya: "Long, Limb, Sharp Saw, Hard Drop" ROFLMAO."[2]

b) Sunday, May 30, 2010 "(Victim 1) is a demonic force who tries to destroy Buddhism".

c) Friday, June 4, 2010 "(Victim 1): somebody throw a couple shots of gin in the bitch & get her back on twitter: shes fun 2 play with."[3]

d) Monday, ~~June~~ July 5, 2010 "and that sound that keeps buzzing in the back of your head (Victim 1) is my hand touching the ground".

e) Monday, June 7, 2010 "may the legion of dakinis

2 ROFLMAO is Internet slang meaning Rolling on Floor Laughing My Ass Off

3 This tweet occurred immediately after Victim 1 closed her Twitter account and deleted her name.

trample on the false guide (Victim 1)'s head and bring her to her knees in submission to pure lineage".

f) Monday, June 7, 2010 "if she leaves rainbow i'll recant my words but all she'll ever leave isa shit stain onthe sheets & another lying coverup byher cult of fools".[4]

g) Tuesday, June 22, 2010 "want it to all be over soon sweetie?"

h) Friday, June 25, 2010 "(Victim 1) you are a liar & a fraud & you corrupt Buddhism by your very presence: go kill yourself".

i) Monday, July 5, 2010 "Dedicate the merit & so forth... & a hearty fuck you in the general direction of Maryland."

j) Friday, July 9, 2010 "(Victim 1) is no dakini: shes a grossly overweight 61 yr old burnt out freak with bad bowels & a lousy outlook: her "crown" is a joke."

k) Tuesday, July 13, 2010 "attendees at NY Palyul annual retreat being told to avoid (Victim 1): being warned that she is "delusional!" Just finding that out?"

l) Wednesday, July 14, 2010 "ho bitch (Victim 1) so ugly that when she was born the doctor slapped her mother #hobitch(Victim1)".

m) Wednesday, July 14, 2010 "that ho bitch (Victim 1) so fat if she falls & breaks her leg gravy will spill out".

n) Wednesday, July 14, 2010 "that ho bitch (Victim 1) so nasty her mama took her out on the stroll so she wouldnt have to kiss her goodbye."

o) Sunday, July 25, 2010 "I have just one thing I want to say to (Victim 1), and its form the heart: do the world a favor and go kill yourself. P.S. Have a nice day."

p) Sunday, July 25, 2010 "(Victim 1) you called me a "sick low life pig" oh great Mandarava? Go kill yourself."

q) Thursday, August 19, 2010 "hey! great idea! Go save the dogs in Maryland! I know where there are some bitches that

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4 In the Tibetan Buddhist tradition, miraculous signs, such as rainbows may follow an accomplished Master's death.

desperately need mental health care....."

r) Saturday, September 25, 2010 "Enough is enough. The final bit of magic begins now. Within 90 days, you will know. Owl and raven feathers separate... permanently."[5]

s) Tuesday, October 19, 2010 "One name rings inside her head.. over and over again... she can't get it out of her mind... it comes to her every "practice" session....."

t) Tuesday, October 19, 2010 "That name rings in her head a thousand times each day....."

u) Tuesday, October 19, 2010 "hey! who left the light on in the barn!"

v) Tuesday, October 19, 2010 "owl and raven feathers separate.... tick tock tick tock tick tock....tick...tock...tick.....tock..... ....."

w) Tuesday, October 19, 2010 "all for you... all for you..."

x) Tuesday, October 19, 2010 "owl and raven feathers separate.... tick tock tick tock tick tock".

y) Tuesday, October 19, 2010 "just for you...."

z) Wednesday, October 20, 2010 "The memory of Penor Rinpoche in America has been DISGRACED by (Victim 1) and Steven Seagal. All the spin in the world cannot change that."

aa) Wednesday, October 20, 2010 "(Victim 1) I will sign off a bit early. Tomorrow is a big day, I'd like to be rested and well. I will break retreat temporarily for important meetings".

bb) Sunday, October 24, 2010 "But for tonight? Was that a noise in the trees? Is that a light? No, not there... over there!"

cc) Sunday, October 24, 2010 "Rain tomorrow should cover the tracks..."

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5 "Owl and raven feathers separate" refers to a specific tantric magical invocation to "separate" (i.e., remove) the defenses of the enemy so that the enemy is then left defenseless against attack. This probably stems from the ancient belief in many aboriginal cultures that owls and ravens represent the two poles of "good" and "evil", based on white owl feathers and black raven feathers seen as symbols of polar opposites. Owl and raven feathers are also symbols of various protector deities in Vajrayana Buddhism. http://protectingnyingma2.wordpress.com/page/2/

dd) Monday, October 25, 2010 "city girls use Vaseline, country girls use lard, fat (Victim 1) don't use nothin', she gets it twice as....."

ee) Monday, October 25, 2010 "(Victim 1) is OBSESSED with Tenpa Rinpoche because he knows ALL her dirty little secrets. she lives in fear of being outed by him".

ff) Monday, October 25, 2010 "(Victim 1)'s livelihood:" uneducated bitch makes her living off suckers who need to believe in fairy tales."

gg) Wednesday, November 11, 2010 "(Victim 1) IS A SATANIC CORRUPTER OF DHARMA: A SHE-DEMON WHO MASQUERADES AS A "TEACHER" http://tinyurl.com/2fy2lnd".

hh) Tuesday, November 30, 2010 "@(Victim 1) sure hope you weren't referring to me as a felon, bitch, because as I'm sure your lawyer has informed you that could cost U money".

ii) Thursday, December 2, 2010 "(Victim 1), if you don't like the results of your actions, try a new approach: stop your hate, fear, insecurity, and greed: STFU&STFD)."

jj) Thursday, December 2, 2010 "yet still the bitch maintains hate sites, uses anonymous avatars to do her dirty work and pretends to herself we don't see right through her".

kk) Thursday, December 2, 2010 "because that delusive belief set of hers forms the rationale for all her craziness: wow! one name must ring in her ears nite & day".

ll) Sunday, December 5, 2010 "I do not believe (Victim 1) was a prostitute. I think that story is a made-up lie. Prostitutes are professionals."

mm) Sunday, December 5, 2010 "Can reputed ex-prostitute (Victim 1) weather the storm she has created for herself by obsessive online bullying & cyberstalking?"

nn) Sunday, December 5, 2010 "To call an overweight whore "mother of palyul" insults whores & palyul."

oo) Sunday, December 5, 2010 "Watch (Victim 1) and KPC decompose".

pp) Tuesday, December 7, 2010 "Got a wonderful Pearl Harbor Day surprise for KPC... wait for it."

qq) Wednesday, December 8, 2010 "A LA LA HO! so keep on shoutin & sweatin (Victim 1) & showin us all yer credentials & tellin us how very fucking high you are".

rr) Wednesday, December 8, 2010 "because everybody knows that grabbing nickels tossed by crowds into your tambourine is what you do best....."

ss) Wednesday, December 8, 2010 "it ain't cause yer a woman (Victim 1) & it sure aint jealousy. you got that all wrong. its because yer a fucking hypocrite from way down the road".

tt) Wednesday, December 8, 2010 "@WuTangTulku "(Victim 1)" sees Tenpa Rinpoche every time she closes her eyes. He is everywhere."

uu) Wednesday, December 8, 2010 "which pretty much makes Tenpa the Baddest Motherfucker With Blue Eyes on the face of the planet… because if what they say is true...."

vv) Thursday, December 9, 2010 "(Victim 1) is over 60, in extremely bad health, and about to get worse: karma will be very rough on her due to conditions she has created".

ww) Thursday, December 9, 2010 "A strong wind @ryderjaphy will blow down the KPC house of cards once and for all. They live by extortion now, and they live hand to mouth."

xx) Thursday, December 9, 2010 "Terrors in the night disturb Fat (Victim 1)'s sleep: she cannot sleep with taking something, and anxiety rules her body like a slavemaster".

yy) Thursday, December 9, 2010 "A thousand voices call out to (Victim 1) and she cannot shut off the silent scream".

zz) Thursday, December 16, 2010 "@ryderjaphy @waylonlewis @elephantjournal first off, these KPC punks got nothing, so fuck their "legal" threats."

aaa) Thursday, December 16, 2010 "So my unsolicited advice which I claim the right 2 give on grounds of being an obnoxious bitch is pop the fucking weasel & full speed ahead."

bbb) Monday, December 20, 2010 "I have this

amazing present for a group of people who really, really deserve something *amazing*. Long time in preparation. Wait for it."

ccc) Monday, December 20, 2010 "I have a really *special* eclipse present for somebody who really, really deserves something *special.* Full circle karma. Wait for it."

ddd) Monday, December 20, 2010 "RT @religionnews: Former cult member murdered in Texas: http://bit.ly/h2P6S8#religion #cults.[6]"

eee) Monday, December 20, 2010 "Some people really react badly 2 the screams of their victims So annoying Such people are called sociopaths A group of them is called "KPC"".

fff) Tuesday, December 28, 2010 "DOWN WITH KPC! The fascist insect that preys on the life of Buddhism in the West! DOWN WITH (Victim 1)! The corrupt poser who has nothing."

ggg) Thursday, December 30, 2010 "Warning to KPC cult followers: your leader has become even more unstable. #dontdrinkthekoolaid She is clearly in psychic distress."

hhh) Thursday, December 30, 2010 "2011 looks cursed for (Victim 1) & KPC :((Victim 1) May all beings benefit! http://bit.ly/fSCcoa".

12. The following are tweets that came from Twitter Account "aconlamho":

a) Thursday, May 13, 2010, "late at night at the edge o da farm, somethin creepin in the woods gonna do ya harm all ya gots 2 do 2 make it go away is pay pay pay pay".

13. The following are tweets that came from Twitter Account "kpc_watch":

a) Sunday, May 23, 2010 "what do you expect from the unwanted daughter of a weekend prostitute?"

b) Sunday, May 23, 2010 "(Victim 1) is like a waterfront whore: her price goes down as the night wears on".

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[6]The website is linked to a story entitled "2 Charged with murdering former Oregon cult member." The story highlights a story of a man shot to death in Lubbock, Texas.

c) Sunday, May 23, 2010 "(Victim 1)'s attendants say she shits the bed regularly and pisses it when she's drunk: at the moment of death such events are quite telling".

d) Friday, May 28, 2010 "Last night I had a dream about (Victim 1). Seems something sudden...".

e) Friday, May 28, 2010 "...something suddenly happened."

f) Friday, May 28, 2010 "The woods have eyes".

g) Friday, May 28, 2010 "Damn! I just heard more screams coming from the compound! Hope everything is OK! Worried!"

14. On November 12, 2010 and December 11, 2010, Twitter was served a grand jury subpoena for IP addresses accessing the following accounts: "vajragurl", "kpc_watch", "Vajrawarrior", "alicezeoli", "zeolialyce", "alycezeoli", "aconlamho", "MaliceZeholi", "tenparinpoche", "karmaKuchen", "PenorRinpoche", "femnikki", "ahkonnorbu". On November 16, 2010 and December 16, 2010, Twitter advised that those accounts were accessed from IP Address 174.32.77.242.

15. IP Address 174.32.77.242 is registered to Hughes Network Systems. On December 2, 2010 and January 5, 2011, Hughes Network Systems responded to a subpoena requesting subscriber information associated with that IP Address. Hughes Network Systems returned information identifying the subscriber and site contact name as William Cassidy, 29720 Cove Road, Lucerne Valley, California 92356, telephone number (928) 301-0636, site contact email: jewelpig8@gmail.com, billing information: Jewel Annabella, billing address: PO Box 1883, Lucerne Valley, CA 92356.

16. Some of the above Twitter account names are slight variations to Victim 1's name.

17. According to the Twitter subpoena results, Twitter Account "alicezeoli" was registered under email address: alyce@malyce.com. Twitter Account "alycezeoli" was registered under email address: phatalyce@peckerhead.edu. Twitter Account "MaliceZeholi" was registered under email address: malicezeholi@fuggedaboutit.com. All of these account names and email addresses have Victim 1's name or variations of Victim 1's name in them. Twitter Account "PenorRinpoche" was registered under email address: what@meworry1.com.

BLOGS

18. According to Wikipedia, a blog (a blend of the term web log) is a type of website. Blogs are usually maintained by an individual with regular entries of commentary, descriptions of events, or other material such as graphics or video.

19. KPC runs a website entitled "TibetanBuddhistAltar". A blog was created entitled: "DigitalTibetanBuddhistAltar", http://tibetanaltar.blogspot.com. The email address cited in the "DigitalTibetanBuddhistAltar" is the same email address **CASSIDY** used when he corresponded with members of the KPC Community, rinpoche2006@gmail.com. Once CASSIDY left the retreat site, some of the financial information of KPC went missing and was never recovered. Later that information was posted on DigitalTibetanBuddhistAltar. The blog claimed the financial information "proved" unlawful activity on the part of KPC, however it only showed information pertaining to donors and their donation amounts. **CASSIDY** continued to post defamatory information on the Digital Tibetan Buddhist Altar and continues to the present.

20. Blog "DigitalTibetanBuddhistAltar" posted the following: "Yes...beauty. A silver hammer on a hard head is beautiful, particularly if it is administered before one's funeral pyre catches blaze. Otherwise, one's head swells and explodes."

21. Blog "DigitalTibetanBuddhistAltar" posted the following: "This would be funny if it weren't so tragic. Back a couple of months ago, (Victim 1) (she calls herself "(Victim 1)," and claims she is a "living Buddha") called police near her Barnesville, Maryland home to report that, a "team of intruders" were observed "stalking the perimeter." Nothing wrong with that -- can't be too careful these days."

22. Blog "DigitalTibetanBuddhistAltar" posted the following: "Whenever I hear about a Buddhist cult, I immediately want to investigate. It is like watching hookers on the stroll. You never know when you'll find a really saucy one. Speaking personally, one whistled at me a while back, and she came right over to the car. I made the mistake of rolling down the window far enough for her to jump in. That led to my brief tenure as Chief Operating Office of KPC in all its farflung permutations and front operations. So, while I may not be an expert on Buddhist cults, at least I am entitled to an opinion, having examined one from the inside out, so to speak."

23. Blog "DigitalTibetanBuddhistAltar", posted the following: "Just for sake of example, lets pretend that once upon a time, you dreamed that somebody came clump, clump, clumping up the stairs to your bedroom and did you an injury... Maybe it was somebody you knew... The time, the body, and the circumstance no longer exist. This is to say that the body which was injured in the dream no longer exists, the apparent attack itself no longer exists, and the apparent attacker no longer exists... The body which was attacked may with equal validity only be claimed as extant for the precise moment of the attack. We may also say that was the younger body, whereas now there is the older body." Victim 1 revealed personal information to **CASSIDY** including sexual abuse by her step-father as a child. The above post pertains to those personal stories told to **CASSIDY**.

24. Subpoena results received from Google on January 25, 2011 provided the following information pertaining to http://tibetanaltar.blogspot.com: the blog name is Digital Tibetan Buddhist Altar, the description of the blog is: Buddhist Polemics Where Others Fear to Tread and it was created on September 4, 2006. The Username associated with this blog is rinpoche2006@gmail.com. The first and last name of the User are: Urgyan Tenpa.[7] The IP address associated with this account is 67.142.162.30. That IP address is registered to Hughes Network Systems. On January 5, 2011, Hughes Network Systems responded to a subpoena for subscriber information pertaining to IP Address 67.142.162.30. Hughes Network System advised that IP Address is a HTTP web proxy used by many hundreds of customers at one time. Hughes Network Systems advised IP Address 174.32.77.242, registered to **CASSIDY**, would use IP Address 67.142.162.30 as their HTTP web proxy from Hughes Network System.

25. These continual communications, particularly when viewed in the context of the history of **CASSIDY's** actions towards Victim 1 and KPC, have caused Victim 1 substantial emotional distress, and have caused Victim 1 to fear for her own safety and the safety of KPC members. The consequences of this harassment has forced Victim 1 not to leave her home in a year and a half except going to meet with her psychiatrist. Victim 1 has also not taught to her students since June 2009. Victim 1 is fearful to leave her residence for fear that **CASSIDY** or someone hired by **CASSIDY** may kill her. Victim 1 has experienced numerous physical ailments from the ongoing harassment. In October 2010, Victim 1 wanted to go on retreat but was unable to for fear that she would not be safe after recent tweets from **CASSIDY's** avatar regarding Victim 1's motor home and her intent to travel. Victim 1 does not believe that she has long to live and believes her

7 Urgyan Tenpa is a known alias used by William Cassidy.

professional career is ruined. Victim 1 has on occasion hired armed security guards to protect her residence for fear of her life.

26. A blog run by KPC students, but not affiliated with KPC, entitled http://protectingnyingma2.wordpress.com, is a website used to defend Victim 1. Logs showing IP addresses accessing this website indicate IP Address 174.32.77.242 on average accessed this website every day. That IP address is registered to **CASSIDY**. That same IP address has also accessed Victim 1's teaching blog website. This website was also created to track **CASSIDY's** whereabouts. KPC believed IP Address 174.32.77.242 belonged to **CASSIDY** and they had the sense of security that **CASSIDY** was in California when that IP Address accessed their website and could not harm Victim 1.

27. Based on my conversations with Victim 1, your affiant learned the following, among other things:

a) Victim 1 and members of KPC have brought their concerns to numerous Police Departments in the past. Court Records indicate in November 2007, a Nevada state court judge issued a bench warrant for **CASSIDY** for a probation violation in Las Vegas, Nevada. Cassidy was sentenced to 36 months due to health concerns.

b) In January 2009, prior to **CASSIDY's** release from prison, Victim 1 sought an "injunction against workforce harassment" for **CASSIDY** in Payson, Arizona. Victim 1 subsequently renewed the order in 2010 and 2011.

c) As part of the campaign of harassment, NYDIA ALEXANDRA, sought a temporary restraining order on Victim 1. As a result, Victim 1 hired a lawyer and traveled to California to defend herself. **CASSIDY** did not appear in court, but was named on the document. At the hearing on September 30, 2009, there was insufficient evidence to support the claim, and the restraining order was dismissed.

d) As the harassment of Victim 1 continued, in the beginning of 2010, a "task force" was established of originally 8 or 9 KPC members to address the concerns of **CASSIDY's** harassment. This task force communicates on a daily basis and sends morning and evening reports surrounding Twitter Account updates and blog posts.

28. The defendant, **CASSIDY**, has a criminal history including Transporting a Dangerous Weapon aboard an Aircraft on September 20, 1993, Corporal Injury on a Spouse, Cohabitant, or Fellow Parent

Resulting in a Traumatic Condition on March 1, 1996, Possession of a Firearm on December 18, 1996, Arson 1st degree and Battery/Domestic Violence on March 14, 2003.

29. Wherefore, your affiant respectfully requests that an arrest warrant be issued for the defendant **WILLIAM LAWRENCE CASSIDY**.

Jessica A. Nye
Special Agent, FBI

Sworn to before me this
2nd day of February, 2011

UNITED STATES MAGISTRATE JUDGE
DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	
v.	*	Criminal Case No. RWT 11-091
	*	
WILLIAM LAWRENCE CASSIDY	*	
	*	
Defendant	*	

MEMORANDUM OPINION

The Indictment in this case alleges that the Defendant, William Lawrence Cassidy, violated a federal stalking statute, 18 U.S.C. § 2261A(2)(A), when, with the intent to harass and cause substantial emotional distress to a person in another state, he used an interactive computer service to engage in a course of conduct that caused substantial emotional distress to a person whose initials are A.Z by posting messages on www.Twitter.com and other Internet Websites. Defendant has filed a Motion to Dismiss the Indictment (ECF No. 20) in which he argues that 18 U.S.C. § 2261A(2)(A) violates the First Amendment. Defendant also filed a Motion Requesting a Hearing Pursuant to *Franks v. Delaware* and to Suppress Tangible and Derivative Evidence, as well as, a Motion to Suppress. *See* ECF Nos. 21 and 22. Finally, Defendant filed a Motion for a Bill of Particulars (ECF No.16).

FACTS

(a) Blogs and Twitter

This case involves allegations, described in greater detail below, that a crime was committed through the Defendant's use of two recent phenomena of the internet age, "Blogs" and "Twitter." Essential to the analysis of the legal issues in this case is an understanding of both of these phenomena, which have become almost ubiquitous.

A "Blog" is a shorthand term for a "web log," i.e. a log or web page maintained on the World Wide Web. A Blog is like a bulletin board and contains whatever material its sponsor decides to post. It does not send messages, and there is no limitation on the length of statements that may be contained on a Blog. Like a bulletin board, it does not communicate except to those who voluntarily choose to read what is posted on it.

According to its web page, "Twitter" is a "real-time information network that connects" users to the "latest information about what you find interesting. * * * At the heart of Twitter are small bursts of information called Tweets. Each Tweet is 140 characters in length . . . ."[1] Twitter users may choose to "follow" other users. If user No. 1 decides to "follow" user No. 2, Twitter messages (Tweets) posted by user No. 2 will show up on the home page of user No. 1 where they can be read.[2]

A Twitter user may choose to block someone, e.g., someone whose messages are deemed offensive, in which case the offending user will be unable to follow the offended user or add that user to his or her lists, and the blocked user's Tweets will not be delivered to the other user's home page. Twitter provides detailed instructions for blocking Tweets from another user as well as for "unfollowing" another user, i.e. blocking Tweets from a user that one used to follow.[3]

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[1]*See About Twitter*, https://Twitter.com/about#about (last visited December 2, 2011).

[2]*See Twitter 101: How Should I Get Started Using Twitter*, https://support.Twitter.com/groups/31-Twitter-basics/topics/104-welcome-to-Twitter-support/articles/215585-Twitter-101-how-should-i-get-started-using-Twitter and https://support.Twitter.com/groups/31-Twitter-basics/topics/108-finding-following-people/articles/14019-what-is-following (last visited December 2, 2011).

[3]*See How to Unfollow Users on Twitter*, https://support.Twitter.com/articles/117063-how-to-block-users-on-Twitter and https://support.Twitter.com/articles/15355-how-to-unfollow-users-on-Twitter (last visited December 2, 2011).

A Direct Message ("DM") is a private message sent from one Twitter user to another, but such messages can only be sent to another user who is a "follower." All Twitter users are provided with the ability to block other users, in which case one user cannot follow another and neither their "Tweets" nor their Direct Messages will be delivered.[4]

Because this case involves First Amendment issues, terms that were in use by citizens when the Bill of Rights was drafted may help in understanding the legal context of Blogs and Twitter. Suppose that a Colonist erects a bulletin board in the front yard of his home to post announcements that might be of interest to others and other Colonists do the same. A Blog is like a bulletin board, except that it is erected in cyberspace rather than in one's front yard. If one Colonist wants to see what is on another's bulletin board, he would need to walk over to his neighbor's yard and look at what is posted, or hire someone else to do so. Now, one can inspect a neighbor's Blog by simply turning on a computer.

Twitter allows the bulletin board system to function so that what is posted on Colonist No. 1's bulletin board is automatically posted on Colonist No. 2's bulletin board for Colonist No. 2 to see. The automatic postings from one Colonist to another can be turned on or off by the owners of the bulletin boards, but there is no mandatory aspect of postings on one Colonist's

[4]*See What is a Direct Message*, https://support.Twitter.com/articles/14606-what-is-a-direct-message-dm (last visited December 2, 2011). There are also other forms of direct communication between Twitter users known as "@Replies" and "Mentions." As in the case of direct messages, a Twitter user has the ability to restrict the receipt of this form of communication. "@Replies" will only be seen by user if they are following both the sender and recipient of the update. "Mentions" will only be seen if they are posted by someone that the user is "following." Finally, users with protected accounts can only send replies to people they have approved to follow them. *See What are @Replies and Mentions*, http://support.Twitter.com/articles/14023-what-are-replies-and-mentions (last visited December 2, 2001).

bulletin board showing up on the other's. It is entirely up to the two Colonists whether their bulletin boards will be interconnected in such a manner.

Blogs are of unlimited size in terms of content, but must be accessed one at a time. Twitter is limited to 140 characters, but allows unlimited voluntary connectivity with other users. That connectivity, however, is subject to change at the whim of a user who has the ability to "turn off" ("block" or "unfollow") communications from another user.

Whether couched in terms of the Internet or Colonial bulletin boards, there is one consistent aspect of both eras. One does not have to walk over and look at another person's bulletin board; nor does one Blog or Twitter user have to see what is posted on another person's Blog or Twitter account. This is in sharp contrast to a telephone call, letter or e-mail specifically addressed to and directed at another person, and that difference, as will be seen, is fundamental to the First Amendment analysis in this case.

(b) The Defendant's Relationship With A.Z.

This case was initiated by the filing of a criminal complaint issued on February 2, 2011 by a magistrate judge of this Court based upon an affidavit submitted to him by F.B.I. Special Agent Jessica A. Nye. According to the Nye affidavit, A.Z. is an enthroned tulku or reincarnate master who was enthroned in 1988 as a reincarnate llama. (ECF No. 20-2) Following the enthronement ceremony, the Supreme Head of this particular Sect of Buddhism renamed the center where A.Z. taught as Kunzang Odsal Palyou Changchub Choling ("KPC" or the "Center"). KPC was designated as the Supreme Head's seat in the West, and A.Z. is believed by members of the KPC to be the only American-born female tulku.

According to Nye's affidavit, the Defendant, who was then known as William Sanderson, befriended one of the monks of the KPC in 2007; he claimed he was also a Buddhist American tulku and expressed an interest in meeting A.Z. Those close to A.Z. encouraged her to meet with the Defendant. Thereafter, A.Z. invited the Defendant to join her at her retreat in Arizona and Defendant asked to ride alone with her in her vehicle. While in the vehicle, Defendant proposed to A.Z., and she declined. He also asked her to pretend they were married. A.Z. confided in the Defendant and shared details of her personal life, including the sexual abuse she endured as a child and particulars of the failed relationship with her ex-husband. In response, Defendant asked A.Z. if she wanted him to kill her ex-husband, and A.Z. requested that her ex-husband not be harmed.

Nye's affidavit also alleges that when Defendant claimed to have Stage IV Lung Cancer, members of the KPC took care of him, as if these were his final days. At that time, it came to light that the Defendant's real name was William Cassidy. KPC members and A.Z. also began to notice that the Defendant's conduct was inconsistent with this Sect's teachings. For example, he would gossip even though the Sect considers gossip offensive. These incidents led A.Z. to investigate the Defendant's lineage in order to assess whether he was in fact a tulku. Despite these concerns, however, KPC promoted Defendant in February 2008 to the position of Chief Operating Officer of KPC. The Defendant only held this position for two weeks. On February 23, 2008, A.Z. learned that the Defendant was never a tulku and confronted him. The Defendant immediately left the retreat, taking with him a Buddhist nun, Nydia Alexandra.[5] The Nye affidavit asserts that, in the wake of his departure, the Defendant used Twitter and Blogs to harass KPC and A.Z.

[5] Nydia Alexandra also goes by the names "Julie Green" and "Jewel Lilly Annabella."

(c) The Defendant's Use of Twitter and a Blog

According to the Nye affidavit, the Twitter account "Vajragurl" frequently posts Tweets. As of July 5, 2010, over 350 Tweets were posted on "Vajragurl" that allegedly were directed at A.Z. KPC believes that all but a few hundred of the alleged 8,000 Tweets on the "Vajragurl" account pertain to A.Z. and KPC.[6]

On November 12, 2010, and December 11, 2010, Twitter was served with a grand jury subpoena for the IP addresses accessing the "Vajragurl," "aconlamho," "kpc_watch," and other Twitter accounts.[7] Some of these accounts are a slight variation of A.Z.'s name. On November 16, 2010, and December 16, 2010, Twitter responded that these accounts were accessed from IP Address 174.32.77.242, which is registered to Hughes Network. On December 2, 2010, and January 5, 2011, Hughes Network responded to a subpoena identifying William Cassidy, the Defendant, as the subscriber.

KPC and A.Z. also claim that Defendant used Blogs to harass them. According to the Nye Affidavit, a Blog entitled "Digitial Tibetan Buddhist Altar," located at http://tibetanalter.Blogspot.com, contains two posts not necessarily directed at A.Z.,[8] a statement

[6] Generally, the Tweets posted on the "Vajragurl" account fall into five categories: (1) threats directed at A.Z.; (2) criticism of A.Z. as a religious figure /criticism of KPC; (3) derogatory statements directed towards A.Z.; (4) responses to A.Z. and/or KPC; and (5) statements that may or may not be directed towards A.Z./KPC. Appendix A contains a categorization of the Defendant's Tweets by type.

[7] The other Twitter accounts included "vajrawarrior," "alicezeoli," "zeoliayce," "alycezeoli," "MaliceZeholi," "tenparinpoche," "karmaKuchen," "PenorRinpoche," "femnikki," and "ahkonorbu."

[8] "Yes . . . beauty. A silver hammer on a hard head is beautiful, particularly if it is administered before one's funeral pyre catches blaze. Otherwise, one's head swells and explodes."

"Just for sake of example, lets pretend that once upon a time, you dreamed that somebody came

pertaining to A.Z.,[9] and a derogatory statement about KPC.[10] On January 5, 2011, after receiving subpoena results from both Google and the Hughes Network, the Government learned that this Blog is registered to the Defendant.

According to the Nye affidavit, Defendant's Tweets and Blog postings have caused A.Z. substantial emotional distress. She fears for her own safety and that of her fellow KPC members. As a result of the alleged harassment, A.Z. has not left her house for a year and a half, except to see her psychiatrist. A.Z. was in such fear for her safety that she did not go to an October 2010 retreat.

(d) The Charge Against The Defendant

On February 2, 2011, Nye submitted an affidavit (ECF No. 20-2) in support of an arrest warrant for the Defendant on the basis that the Defendant violated 18 U.S.C §§ 2261A(2)(A) and 2261A(2)(B), and an arrest warrant was issued that same day. On February 23, 2011, the Grand Jury

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clump, clump, clumping up the stairs to your bedroom and did you an injury. . . Maybe it was somebody you knew…The time, the body, and the circumstance no longer exist. This is to say that the body which was injured in the dream no longer exists, the apparent attack itself no longer exists, and the apparent attacker no longer exists. . . . The body which was attacked may with equal validity only be claimed as extant for the precise moment of the attack. We may also say that was the younger body, whereas now there is the older body."

[9] "This would be funny if it weren't so tragic. Back a couple of months ago, (A.Z.) (she calls herself "(A.Z.)," and claims she is a "living Buddha") called police near her Barnesville, Maryland home to report that, a "team of intruders" were observed "stalking the perimeter." Nothing wrong with that—can't be too careful these days."

[10] "Whenever I hear about a Buddhist cult, I immediately want to investigate. It is like watching hookers on the stroll. You never know when you'll find a really saucy one. Speaking personally, one whistled at me a while back, and she came right over to the car. I made the mistake of rolling down the window far enough for her to jump in. That led to my brief tenure as Chief Operating Office of KPC in all its farflung permutations and front operations. So, while I may not be an expert on Buddhist cults, at least I am entitled to an opinion, having examined one from the inside out, so to speak."

indicted Defendant on one count of interstate stalking under 18 U.S.C. § 2261A(2)(A), but not § 2261A(2)(B).

DISCUSSION

I. Background of 2261A(2)(A)

Section 2261A is an interstate stalking statute originally passed as part of the Violence against Women's Act. *See* Pub. L. No. 104-201, Div. A, Title X, § 1069(a), 110 Stat. 2422, 2655 (1996).

Prior to 2006, Section 2261A(2)(A) made it a crime, *inter alia*, to use the mail or any facility of interstate or foreign commerce to engage in a course of conduct with the intent to place a person in reasonable fear of the death of, or serious bodily injury to that person. The pre-2006 version of Section 2261A(2)(A) reads as follows:

> Whoever—
>
> (2) with the intent—
>
> (A) to kill or injure a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States; or
>
> (B) to place a person in another State or tribal jurisdiction, or within the special maritime and territorial jurisdiction of the United States, in reasonable fear of the death of, or serious bodily injury to—
>
> (i) that person;
> (ii) a member of the immediate family (as defined in section 115) of that person; or
> (iii) a spouse or intimate partner of that person,
>
> uses the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in clauses (i) through (iii), shall be punished as provided in section 2261(b).

Pub. L. No. 106-386, Div. B, Title I, § 1107(b)(1), 114 Stat. 1464, 1498 (2000).

In 2006, Section 2261A(2)(A) was amended substantially and now reads as follows:

> Whoever—
>
> (2) with the intent—
>
> (A) to kill, injure, **harass**, or place under surveillance with intent to kill, injure, harass, or intimidate, or **cause substantial emotional distress** to a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States; or
>
> (B) to place a person in another State or tribal jurisdiction, or within the special maritime and territorial jurisdiction of the United States, in reasonable fear of the death of, or serious bodily injury to—
>
> (i) that person;
>
> (ii) a member of the immediate family (as defined in section 115 of that person; or
>
> (iii) a spouse or intimate partner of that person;
>
> uses the mail, any **interactive computer service**, or any facility of interstate or foreign commerce to engage in a course of conduct that **causes substantial emotional distress** to that person or places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in clauses (i) through (iii) of subparagraph (B) shall be punished as provided in Section 2261(b). (emphasis added)

Pub. L. No. 109-162, Title I, § 114(a), 119 Stat. 2690, 2987.

These amendments significantly broadened the scope of the law. The requisite *intent* no longer was limited to an intent to "kill or injure," but was broadened to include the intent to "harass or place under surveillance with the intent to . . . harass or intimidate or cause substantial emotional distress." The requisite *action* was also broadened so as to bring within the scope of the law a course of conduct that merely "causes substantial emotional distress." Prior to the 2006 change, the course of conduct was limited to one that places a person in reasonable fear of death or serious bodily injury. Finally, the 2006 changes expanded the *mechanisms of injury* to add use of an "interactive computer service" to the existing list which already included use of mail or any facility of interstate or foreign commerce.

II. The Defendant's Motion To Dismiss

The Defendant has moved to dismiss the Indictment, alleging that (1) Section 2261A(2)(A) violates the Free Speech Clause of the First Amendment because it is overbroad and implicates a broad range of otherwise constitutionally protected speech; (2) Section 2261A(2) is unconstitutional as applied to the Defendant; (3) Section 2261A(2)(A) is unconstitutionally vague, thus violating the Defendant's due process rights under the Fifth Amendment because it does not give notice as to what specific conduct is unlawful; and (4) the Indictment fails to state a criminal offense.

III. The Broad Protections Of The First Amendment

Under the First Amendment "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. From our nation's founding, there has been a tradition of protecting anonymous speech, particularly anonymous political or religious speech. *See Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 162 (2002); *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 248 (4th Cir. 2009) ("Courts have typically protected anonymity under the First Amendment when claimed in connection with literary, religious, or political speech.") For example, the Federalist Papers, written by James Madison, Alexander Hamilton, and John Jay, but published under the pseudonym "Publius," are in and of themselves the best example of anonymous political speech. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 343 n.6 (1995). And the opponents of the federalists, the anti-federalists, also used pseudonyms to publish their views anonymously. *Id*. In 1960, the Supreme Court recognized the importance of this type of core anonymous speech stating that "leaflets, brochures and even books have played an important role in the progress of mankind [as] [p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. California*, 362

U.S. 60, 65 (U.S. 1960). This is because anonymous speech allows individuals to express themselves freely without "fear of economic or official retaliation ... [or] concern about social ostracism." *McIntyre*, 514 U.S. at 341-42.

Moreover, the First Amendment protects speech even when the subject or manner of expression is uncomfortable and challenges conventional religious beliefs, political attitudes or standards of good taste. *See e.g., United States v. Stevens* 130 S.Ct. 1577, 1585 (2010). In *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940), the Supreme Court overturned the conviction of three individuals for passing out religious leaflets in violation of a Connecticut statute that made it a crime to solicit and breach the peace and observed:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Indeed, the Supreme Court has consistently classified emotionally distressing or outrageous speech as protected, especially where that speech touches on matters of political, religious or public concern. This is because "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate 'breathing space' to the freedoms protected by the First Amendment.'" *See Boos v. Barry*, 485 U.S. 312, 322 (1988) (citing *Hustler Magazine, Inc. v. Faldwell*, 485 U.S. 46, 66 (1988)); *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Snyder v. Phelps*, 131 S.Ct. 1207, 1219 (2011) (Because the emotionally distressing "speech was at a public place on a matter of public concern, that speech is entitled to 'special protection'

under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt").

Even though the Internet is the newest medium for anonymous, uncomfortable expression touching on political or religious matters, online speech is equally protected under the First Amendment as there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online speech. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). Indeed "whatever the challenges of applying the Constitution to ever-advancing technology, basic principles of freedom of speech and press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *See Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (internal quotations omitted).

IV. Limitations On The Protections Afforded To Free Speech

Even though numerous court decisions have made a point to protect anonymous, uncomfortable speech and extend that protection to the Internet, not all speech is protected speech. There are certain "well-defined and narrowly limited classes of speech" that remain unprotected by the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942). This type of unprotected speech is limited to, (a) obscenity, *Roth v. United States*, 354 U.S. 476 (1957), (b) defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 254-255, (1952), (c) fraud, *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, (1976), (d) incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-449 (1969) (*per curiam*), (e) true threats *Watts v. United States*, 394 U.S. 705 (1969), and (f) speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). Speech that does not fall into these exceptions remains protected. *See United States v. Stevens*, 130 S.Ct. 1577, 1586 (2010) (holding that statute

criminalizing "depictions of animal cruelty" remain protected because there is no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment.").

Applying these standards, it is clear that the Government's Indictment is directed at protected speech that is not exempted from protection by any of the recognized areas just described. First, A.Z. is a well-known religious figure who goes by the names Alyce Zeoli or Catherine Burroughs. Martha Sherrill, a *Washington Post* journalist wrote a critical non-fiction book about A.Z. entitled *The Buddha from Brooklyn* (Random House 1st ed. 2000). Second, although in bad taste, Mr. Cassidy's Tweets and Blog posts about A.Z. challenge her character and qualifications as a religious leader. *See* Appendix A. And, while Mr. Cassidy's speech may have inflicted substantial emotional distress, the Government's Indictment here is directed squarely at protected speech: anonymous, uncomfortable Internet speech addressing religious matters. Tellingly, the Government's Indictment is not limited to categories of speech that fall outside of First Amendment protection – obscenity, fraud, defamation, true threats,[11] incitement or speech integral to criminal conduct. Because this speech does not fall into any of the recognized exceptions, the speech remains protected.

V. Content-Based Restrictions On Speech

A content-based restriction on protected speech must survive strict scrutiny. *See United States v. Playboy Entm't Grp., Inc*., 529 U.S. 803, 813 (2000). But, if the regulation is "unrelated

[11] In its brief, the Government seems to shift its theory of the case from one based on emotional distress to one based on threats: "Defendant in this case engaged in a continual course of conduct intended to threaten and intimidate A.Z. and KPC." Opp'n. to Def.'s Mot. to Dismiss at 21 (ECF No. 27). Although "true threats" to another's physical safety are not protected, *Watts v. United States*, 394 U.S. 705 (1969), the Government, did not seek an Indictment on the basis that Defendant intentionally used the Internet to put A.Z. in reasonable fear of death or serious bodily injury. *See* 18 U.S.C. §2261A(2).

to the content of speech,"— i.e. content-neutral—it only need survive an intermediate level of scrutiny as these types of regulations "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys. Inc. v. Fed. Comm'cns Comm.*, 512 U.S. 622, 642 (1994). In determining whether a statute is content-neutral, one must determine whether "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). For example, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based," while laws that regulate "without reference to the ideas or views expressed are in most instances content-neutral." *Turner Broad. Sys.*, 512 U.S. at 643.

Typically, a restriction is content-based if it regulates speech based on the effect that speech has on an audience. For example in *Playboy Entertainment Group*, the Supreme Court held that the Telecommunications Act's "signal bleed" provision, requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours, amounted to a content-based restriction. 529 U.S. at 811-812. The provision "single[d] out particular programming content for regulation" as well as "particular programmers," applying by its terms only to channels "primarily dedicated to sexually-oriented programming." 47 U.S.C. § 561(a) (1994 Supp. III.). *Id*. at 806. Because the provision focused only on the content of the speech and the direct impact that speech had on viewers, the provision was a content-based restriction. *Id*. at 812, *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that a Washington, DC regulation making it unlawful, within 500 feet of a foreign embassy, either to display any sign that tends to bring the foreign government into "public odium" or "public disrepute" amounts to a content-based speech restriction because it focuses on the direct impact of the speech on a foreign government);

Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 877 (1997) (holding that Provisions of the Communications Decency Act (CDA) prohibiting transmission of obscene or indecent communications by means of a telecommunications device to persons under the age of 18, or sending patently offensive communications through use of interactive computer service to persons under the age of 18 is a content-based restriction on speech as it focuses on the impact of that speech); *PSINet Inc. v. Chapman*, 362 F.3d 227, 233 (4th Cir. 2004) (same).

In the present case, the only portion of Section 2261A(2)(A) mentioned in the Indictment amounts to a content-based restriction. Section 2261A(2)(A) criminalizes anyone who:

> (2) with the intent—
>
> (A) to kill, injure, **harass**, or place under surveillance with intent to kill, injure, harass, or intimidate, **or cause substantial emotional distress to a person** in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States... uses the mail, any interactive computer service, or any facility of interstate or foreign commerce to engage in a course of conduct that **causes substantial emotional distress to that person**... (emphasis added)

Mr. Cassidy allegedly violated the statute by intentionally causing substantial emotional distress to A.Z., specifically on Twitter and Blogs. The portion of Section 2261A(2)(A) relied on in the Indictment amounts to a content-based restriction because it limits speech on the basis of whether that speech is emotionally distressing to A.Z.

To survive strict scrutiny, the Government has the burden of showing that a content-based restriction "is necessary to serve a compelling state interest." *See PSI Net*, 362 F.3d at 234 (citing *Bank v. Belotti* 435 U.S. 765 (1978)). The Government indirectly argues that it has a compelling interest in protecting victims from emotional distress sustained through an interactive computer service. *See* Pl Mot. to Dismiss Indictment at 23 (ECF No. 20). However, the decision in *Playboy*

Entertainment Group, 529 U.S. at 865, underscores the fact that the Government's interest is not a compelling one:

> Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities simply by averting [our] eyes.

Here, A.Z. had the ability to protect her "own sensibilities simply by averting" her eyes from the Defendant's Blog and not looking at, or blocking his Tweets.

In *United States v. Stevens*, the Supreme Court affirmed the Third Circuit's decision holding that a content-based restriction of protected speech — i.e. a federal statute that criminalized the intentional creation, sale or possession of a depiction of animal cruelty — did not serve a compelling state interest on the basis that these types of content-based restrictions of protected speech are presumptively invalid. 130 S.Ct. 1577, 1584 (2010).[12] Because the Government's interest in criminalizing speech that inflicts emotional distress is not a compelling one, the statute does not survive strict scrutiny.

VI. Conduct Or Speech?

The Government argues that Section 2261A(2)(A) regulates conduct and not speech, and any impact on speech is incidental and content-neutral. However, in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), the Court stated that in situations where "'speech' and 'nonspeech' elements are combined in the same course of conduct" a government regulation must still pass

[12] *But see United States v. Lempley*, 573 F.2d 783, 787 (3d Cir. 1978) (stating that with respect to a statute that prohibits the intentional use of a telephone to harass and threaten, the "Congress had a compelling interest in the protection of innocent individuals from fear, abuse, or annoyance at the hand of persons who employ the telephone not to communicate, but for other unjustifiable motives.") That case is inapposite because A.Z. had the ability to not look at the Defendant's Blog or his postings on Twitter.

intermediate scrutiny. A content-neutral regulation of conduct that has an incidental impact on speech survives intermediate scrutiny if "'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *See Satellite Broad. & Comm'cns Ass'n v. Fed. Comm'cns Comm.*, 275 F.3d 337, 355 (4th Cir. 2001) (citing *O'Brien*, 391 U.S. at 377).

Arguably, preventing the use of the Internet and other interactive computer services to inflict emotional distress on others serves an important governmental interest. Indeed, by analogy, the Fourth Circuit has held that "the government has a strong and legitimate interest in preventing the harassment of individuals" in the context of a Virginia telephone harassment statute that prohibited the intentional use of the telephone to harass others. *Thone v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988).

However, it is questionable whether the same interest exists in the context of the use of the Internet alleged in this case because harassing telephone calls "are targeted towards a particular victim and are received outside a public forum." *United States v. Bowker*, 372 F.3d 365, 379 (6th Cir. 2004). Twitter and Blogs are today's equivalent of a bulletin board that one is free to disregard, in contrast, for example, to e-mails or phone calls directed to a victim. *See id*. at 378 (contrasting why a federal telephone harassment statute serves a compelling governmental interest and a statute that made it a criminal offense for three or more persons to assemble on a sidewalk and to be "annoying" to a passerby did not serve a compelling governmental interest).[13]

[13] No court analyzing Section 2261A(2)(A) has upheld the constitutionality of this statute when applied to situations implicating both the "interactive computer service element" and the "substantial emotional distress element." For example, in *United States v. Bowker*, 372 F.3d 365 (6th Cir. 2004), the court upheld Section 2261A(2)(A), the case involed the pre-2006 version of

Assuming, however, that preventing the use of the Internet and other interactive computer services to inflict emotional distress on others qualifies as an important governmental interest, the issue here is whether the incidental restriction Section 2261A(2)(A) places upon speech is no greater than is essential to the furtherance of that interest. The facts of this case indicate that it does not. Defendant and the Amicus, the Electronic Frontier Foundation, point out that A.Z. is not merely a private individual but rather an easily identifiable public figure that leads a religious sect, and that many of the Defendant's statements relate to KPC's beliefs and A.Z.'s qualifications as a leader.[14] Thus, this statute sweeps in the type of expression that the Supreme Court has consistently tried to protect. *See e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (the fundamental importance of the free flow of ideas and opinions on matters of public concern is the core of the First Amendment Protections, even where speech includes "vehement caustic and sometimes unpleasantly

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the statute that did not sweep the use "of any interactive computer service . . . that causes substantial emotional distress" into the conduct element, or "intent to . . . cause substantial emotional distress" into the *mens rea* element. Similarly, in *United States v. Shrader*, No. 09-270, 2010 WL 2179572 (S.D.W.Va April 7, 2010) *aff'd* No. 09-0270, 2010 WL 2179570 (S.D.W.Va, May 26, 2010) the court upheld the constitutionality of the statute. Although *Shrader* relies on a post-2006 version of the statute, under the facts in *Shrader*, the defendant engaged in conduct that would have violated pre-2006 elements of the statute. In *Shrader*, the defendant, who murdered his ex-girlfriend's mother, was charged under Section 2261A(2) for sending a letter and making frequent harassing telephone calls to his ex-girlfriend. Unlike the Defendant's conduct in *Shrader*, Mr. Cassidy did not put his victim in the same reasonable fear of death or serious bodily injury and was not indicted under this portion of the statute. Moreover, in contrast to telephone calls, or letters which were directed to a specific person in *Shrader*, Mr. Cassidy's Tweets and Blogs existed in cyberspace and the victim was free to ignore them.

[14] The Amicus, the Electronic Frontier Foundation, points out that A.Z. leads an "an ongoing public conversation on religion, addressing Internet users on a frequent basis from her own Verified Twitter account, which has 17,221 followers," "produced dozens of publicly accessible online video teachings which have been viewed over 143,000 times," and "makes her public teachings available to her followers through the Buddhist KPC website which she founded." Br. of Amicus Curiae in Supp. of Def., (ECF No. 24) at 8.

sharp attacks."); *Boos v. Barry*, 485 U.S. 312, 322 (1988) (refusing to uphold a statute that restricted the use of displays critical of foreign governments in front of embassies or consulates in light of a "longstanding refusal to [punish speech] because the speech in question might have an emotional impact on its audience.").

Indeed, the Government does not suggest that its interest in preventing the use of the Internet and other interactive computer services to inflict emotional distress on others would no longer be furthered if the statute did not apply to individuals engaging in political debates or critiques of religious leaders. *C.f. United States v. Popa*, 187 F.3d 672, 677 (D.C. Cir. 1999) (holding that a criminal statute prohibiting making anonymous phone calls with the intent to annoy could have been more narrowly drafted as applied to a defendant, who made calls to the US Attorney's Office containing racial epithets and complaints about police brutality, without loss of utility to the government by excluding individuals engaging in public or political discourse). Notably, the Government never challenges the notion that Defendant's Tweets and Blog postings are not political or religious in nature.

VII. Facial Validity Of Section 2261A(2)(A)

Although the Defendant and the Government extensively briefed the issue of whether Section 2261A(2)(A) is overbroad or void for vagueness, this Court will not address these facial challenges to the statute because the Court concludes that the statute is invalid as applied. Where courts have found a statute to be unconstitutional as applied, they do not generally reach facial challenges to statutes based on overbreadth or vagueness. For example, in *United States v. Popa*, the court found unconstitutional, as applied, a federal telephone statute that prohibited making anonymous telephone calls with the intent to annoy abuse or harass to a defendant who used the

phone to call the U.S. Attorney's office and communicate racial epithets and complaints about police brutality. 187 F.3d 672, 678 (D.C. Cir. 1999). Applying intermediate scrutiny, the court reasoned that the defendant engaged in a type of political speech, and the statute could have been more narrowly drafted to exclude such speech from prosecution. *Id.*

Even though the defendant in *United States v. Popa* also challenged the statute on its face under the overbreadth doctrine, the court explicitly decided not to address that issue, stating that "because the statute is unconstitutional as applied to [defendant's] conduct, we shall not go on to inquire as to whether the statute is overbroad." *Id*. Indeed, this approach is not unique. *See Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989) (holding that governmental restriction on commercial speech as applied to plaintiffs was unconstitutional and did not consider an overbreadth challenge, reasoning that "it is not the usual judicial practice . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily — that is before it is determined that the statute would be valid as applied.").[15]

[15] *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (invalidating statute regulating obscenity as applied to plaintiff but refusing to strike down statute in its entirety, reasoning "that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it"); *United States v. Grace*, 461 U.S. 171, 175 (1983) (declining to invalidate a federal criminal statute on its face that prohibited demonstrations on the Supreme Court grounds and confining its holding to invalidate the statute as applied to the case at bar in which the challengers were picketing on the public sidewalks surrounding the building); *Commodity Trend Service, Inc., v. Commodity Futures Trading Comm'n.*, 149 F.3d 679, 689 n.5 (7th Cir. 1998) (noting that when considering an overbreadth challenge, it is a proper exercise of judicial restraint for courts to adjudicate as-applied challenges before facial ones in an effort to decide constitutional attacks on the narrowest possible grounds and to avoid reaching unnecessary constitutional issues); *Jacobsen v. Howard*, 109 F.3d 1268, 1275 (8th Cir. 1997) (holding that because the court concluded that criminal statutes were invalid as applied, it is appropriate not to consider the overbreadth issue).

In this case, the Court concludes that the statute is unconstitutional as applied, and thus it is unnecessary to address the parties' arguments as to whether the emotional distress via an interactive computer service portion of 28 U.S.C. § 2261A(2)(A) is facially invalid.

CONCLUSION

For the reasons set forth above, the Court will, by separate Order, grant the Motion to Dismiss the Indictment and deny as moot all of the Defendant's remaining motions.

Date: December 15, 2011

/s/
Roger W. Titus
United States District Judge

Appendix A

Type 1: Threats

Sunday, May 30, 2010: "ya like haiku? Here's one for ya: "Long, Limb, Sharp Saw, Hard Drop" ROFLMAO."[16]

Monday, July 5, 2010: "and that sound that keeps buzzing in the back of your head (A.Z.) is my hand touching the ground."

Tuesday, June 22, 2010: "want it to all be over soon sweetie?"

Saturday, September 25, 2010: "Enough is enough. The final bit of magic begins now. Within 90 days, you will know. Owl and raven feathers separate... permanently."[17]

Tuesday, October 19, 2010: "owl and raven feathers separate .... tick tock tick tock tick tock tick tock tick tock."

Tuesday, October 19, 2010: "owl and raven feathers separate .... tick tock tick tock tick tock"

Sunday, October 24, 2010: "Rain tomorrow should cover the tracks…"

Tuesday, December 7, 2010: "Got a wonderful Pearl Harbor Day surprise for KPC ....wait for it."

Wednesday, December 8, 2010: "@WuTangTulku '(A.Z.)' sees Tenpa Rinpoche every time she closes her eyes. He is everywhere."

Thursday, December 9, 2010: "(A.Z.) is over 60, in extremely bad health, and about to get worse: karma will be very rough on her due to conditions she has created."

Thursday, December 9, 2010: "Terrors in the night disturb Fat (A.Z.)'s sleep: she cannot sleep with taking something, and anxiety rules her body like a slavemaster."

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[16] ROLFMAO is Internet slang for Rolling on Floor Laughing My A** Off.

[17] Owl and raven feathers separate" refers to a specific tantric magical invocation to "separate" (i.e., remove) the defenses of the enemy so that the enemy is then left defenseless against attack. This probably stems from the ancient belief in many aboriginal cultures that owls and ravens represent the two poles of"good" and "evil", based on white owl feathers and black raven feathers seen as symbols of polar opposites. Owl and raven feathers are also symbols of various protector deities in Vajrayana Buddhism. *See* http://protectingnyingma2.wordpress.comJpage/2/

Thursday, December 9, 2010: "A thousand voices callout to (A.Z.) and she cannot shut off the silent scream."

Monday, December 20, 2010: "I have this *amazing* present for a group of people who really, really deserve something *amazing*. Long time in preparation. Wait for it."

Monday, December 20, 2010: "I have a really *special* eclipse present for somebody who really, really deserves something *special.* Full circle karma. Wait for it."

Monday, December 20, 2010: "RT @religionnews: Former cult member murdered in Texas: http://bit .ly/h2P6S8#religion #cults"

Friday, May 28, 2010: "Last night I had a dream about Seems something sudden..."[18]

Friday, May 28, 2010: ". . . something suddenly happened."[19]

Friday, May 28, 2010: "Damn! I just heard more screams coming from the compound! Hope everything is OK! Worried!"[20]

Type 2: Criticism of A.Z. as a Religious Figure and/or Criticism of KPC Belief System

Sunday, May 30, 2010: "(A.Z.) is a demonic force who tries to destroy Buddhism"

Monday, June 7, 2010: "may the legion of dakinis[21] trample on the false guide (A.Z.)'s head and bring her to her knees in submission to pure lineage."

Monday, June 7, 2010: "if she leaves rainbow[22] I'll recant my words but all she'll ever leave is a [sic] shit stain on the [sic] sheets & another lying cover-up by her [sic] cult of fools"

Friday, June 25, 2010: "(A.Z.) you are a liar & a fraud & you corrupt Buddhism by your very presence: go kill yourself."

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[18] From Twitter account kpc_watch.

[19] From Twitter account kpc_watch.

[20] From Twitter account kpc_watch.

[21] Dakini is a goddess.

[22] In the Tibetan Buddhist tradition, miraculous signs, such as rainbows may follow an accomplished Master's death. (Affidavit)

Friday, July 9, 2010: "(A.Z.) is no dakini: shes a grossly overweight 61 yr old burnt out freak with bad bowels & a lousy outlook: her "crown" is a joke."

Tuesday, July 13, 2010: "attendees at NY Palyul annual retreat being told to avoid (A.Z.): being warned that she is "delusional!" Just finding that out?"

Wednesday, October 20, 2010: "The memory of Penor Rinpoche[23] in America has been DISGRACED by (A.Z.) and Steven Seagal. All the spin in the world cannot change that."

Monday, October 25, 2010: "(A.Z.) is OBSESSED with Tenpa Rinpoche[24] because he knows ALL her dirty little secrets: she lives in fear of being outed by him."

Monday, October 25, 2010: "(A.Z.)'s livelihood:" uneducated bitch makes her living off suckers who need to believe in fairy tales."

Wednesday, November 11, 2010: "(A.Z.) IS A SATANIC CORRUPTER OF DHARMA: A SHE-DEMON WHO MASQUERADES AS A "TEACHER" http://tinyurl.com/2fy21nd"

Thursday, December 2, 2010: "because that delusive belief set of hers forms the rationale for all her craziness: wow! one name must ring in her ears nite & day".

Sunday, December 5, 2010: "To call an overweight whore "mother of palyul" insults whores & palyul."

Sunday, December 5, 2010: "Watch (A.Z.) and KPC decompose."

Wednesday, December 8, 2010: "A LA LA HO! so keep on shoutin & sweatin (A.Z.) & showin us all yer credentials & tellin us how very fucking high you are."

Thursday, December 9, 2010: "A strong wind @ryderjaphy will blow down the KPC house of cards once and for all. They live by extortion now, and they live hand to mouth."

Monday, December 20, 2010: "Some people really react badly 2 the screams of their victims So annoying Such people are called sociopaths A group of them is called 'KPC.'"

[23] Penor Rinpoche is a religious leader of the Sect.

[24] Tenpa Rinpoche refers to the Defendant.

Tuesday, December 28, 2010: "DOWN WITH KPC! The fascist insect that preys on the life of Buddhism in the West! DOWN WITH (Victim I)! The corrupt poser who has nothing."

Thursday, December 30, 2010: "Warning to KPC cult followers: your leader has become even more unstable. #dontdrinkthekoolaid She is clearly in psychic distress."

Thursday, December 30, 2010: "2011 looks cursed for (A.Z.) & KPC ☹ (A.Z.) May all beings benefit! http://bit.ly/fSCcoa"

Type 3: Derogatory Statements Directed Towards A.Z.

Subpart A: Vulgarity

Friday, June 4, 2010: "(A.Z.): somebody throw a couple shots of gin in the bitch & get her back on Twitter: shes fun 2 play with."[25]

Monday, July 5, 2010: "Dedicate the merit & so forth ... & a hearty fuck you in the general direction of Maryland."

Thursday, August 19, 2010: "hey! great idea! Go save the dogs in Maryland! I know where there are some bitches that desperately need mental health care . . ."

Subpart B: Criticism of Looks

Wednesday, July 14, 2010: "ho bitch (A.Z.) so ugly that when she was born the doctor slapped her mother #hobitch (A.Z.)"

Wednesday, July 14, 2010: "that ho bitch (A.Z.) so fat if she falls & breaks her leg gravy will spill out."

Wednesday, July 14, 2010: "that ho bitch (A.Z.) so nasty her mama took her out on the stroll so she wouldn't have to kiss her goodbye."

Subpart C: Encouraging A.Z. to Commit Suicide

Sunday, July 25, 2010: "I have just one thing I want to say to (A.Z.), and its form the heart: do the world a favor and go kill yourself. P.S. Have a nice day."

Sunday, July 25, 2010: "(A.Z.) you called me a "sick low life pig" oh great Mandarava? Go kill yourself."

[25] This tweet occurred immediately after A.Z. closed her Twitter account and deleted her name. (Affidavit)

Subpart D: Sexually Explicit

Monday, October 25, 2010: "city girls use Vaseline, country girls use lard, fat (A.Z.) don't use nothing,' she gets it twice as . . . "

Sunday, December 5, 2010: "I do not believe (A.Z.) was a prostitute. I think that story is a made-up lie Prostitutes are professionals."

Sunday, December 5, 2010: "Can reputed ex-prostitute (A.Z.) weather the storm she has created for herself by obsessive online bullying & cyberstalking?"

Sunday, May 23, 2010: "what do you expect from the unwanted daughter of a weekend prostitute?"[26]

Sunday, May 23, 2010: "(A.Z.) is like a waterfront whore: her price goes down as the night wears on."[27]

Subpart E: Regarding A.Z.'s Personality

Thursday, December 2, 2010: "(A.Z.), if you don't like the results of your actions, try a new approach: stop your hate, fear, insecurity, and greed: STFU&STFD)."

Wednesday, December 8, 2010: "it ain't cause yer a woman (A.Z.) & it sure aint jealousy. you got that all wrong. its because yer a fucking hypocrite from way down the road."

Sunday, May 23, 2010: "(A.Z.)'s attendants say she shits the bed regularly and pisses it when she's drunk: at the moment of death such events are quite telling."[28]

Type 4: Responses to A.Z. and/or KPC

Sunday, July 25, 2010: "(A.Z.) you called me a "sick low life pig" oh great Mandarava? Go kill yourself."

Tuesday, November 30, 2010: "@(A.Z.) sure hope you weren't referring to me as a felon, bitch, because as I'm sure your lawyer has informed you that could cost U money."

Thursday, December 2, 2010: "yet still the bitch maintains hate sites, uses anonymous avatars to do her dirty work and pretends to herself we don't see right through her"

[26] From Twitter account kpc_watch.

[27] From Twitter account kpc_watch.

[28] From Twitter account kpc_watch.

Thursday, December 16, 2010: "@ryderjaphy @waylonlewis @elephantjournal first off, these KPC punks got nothing, so fuck their "legal" threats."

Type 5: Statements not necessarily directed towards A.Z.

Tuesday, October 19, 2010: "One name rings inside her head . . . over and over again . . . she can't get it out of her mind ... it comes to her every "practice" session . . . ."

Tuesday, October 19, 2010: "That name rings in her head a thousand times each day ..... "

Tuesday, October 19, 2010: "hey! who left the light on in the barn!"

Tuesday, October 19, 2010: "all for you . . . all for you . . . ."

Tuesday, October 19, 2010: "just for you . . . ."

Wednesday, October 20, 2010: "(A.Z.) I will sign off a bit early. Tomorrow is a big day, I'd like to be rested I will break retreat temporarily for important meetings"

Sunday, October 24, 2010: "But for tonight? Was that a noise in the trees? Is that a light? No, not there... over there!"

Wednesday, December 8, 2010: "because everybody knows that grabbing nickels tossed by crowds into your tambourine is what you do best . . . ."

Wednesday, December 8, 2010: "which pretty much makes Tenpa the Baddest Motherfucker With Blue Eyes on the face of the planet . . . because if what they say is true . . ."

Thursday, December,16, 2010: "So my unsolicited advice which I claim the right 2 give on grounds of being an obnoxious bitch is pop the fucking weasel & full speed ahead."

Thursday, May 13, 2010: "late at night at the edge da farm, somethin creepin in the woods gonna do ya harm all ya gots 2 do 2 make it go away is pay pay pay pay."[29]

[29] From Twitter account "aconlamho."

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Article

***425** THE NEXT CHALLENGE FOR THE FIRST AMENDMENT: THE FRAMEWORK FOR AN INTERNET INCITEMENT STANDARD

John P. Cronan [FNf1]

INTRODUCTION

The Internet [FN1] has rapidly emerged as arguably the most powerful communication tool in society, empowering people to exchange ideas and information with others across the globe with great ease and for very little cost. [FN2] One court characterized the Internet as "the most participatory marketplace of mass speech that this country — and indeed the world — has yet seen." [FN3] The number of Internet users has doubled every year since 1993, [FN4] and today has burgeoned to approximately 200 ***426** million worldwide, [FN5] with more than half of American homes having Internet access. [FN6] These individuals can post opinions and responses to thousands of public bulletin boards [FN7] and can create Web sites that reach out to a new and vast audience. [FN8] Advocacy groups who formerly were limited to disseminating their messages primarily through verbal channels or through the mail now can enter the lives of many more individuals by merely a few keystrokes. [FN9]

This unprecedented ability to communicate, however, has ushered in concerns regarding the content of that communication. According to the Southern Poverty Law Center, a leading monitor of hate speech on the Internet, the number of Web sites espousing hate speech ballooned from one in 1995 to 250 in 1999. [FN10] Groups presenting hateful messages now possess a new forum for discourse that reaches a more vast, and often more impressionable, audience. [FN11] The Anti-Defamation League is concerned that young and impressionable individuals will "surf the net" and uncover hateful sites. [FN12] Others share the Anti-Defamation League's concern, fearing that propaganda will indoctrinate the young and inspire criminal behavior by encouraging hate. [FN13]

How do these new dangers to society mesh with our commitment to the First Amendment? Free speech has been praised as "one of the most remarkable aspects of American constitutional law." [FN14] On the one hand, the Internet empowers millions of Americans to participate in new forms ***427** of speech, offering an opportunity to expand the "uninhibited, robust, and wide-open" debate that Justice William Brennan lauded. [FN15] On the other hand, the Internet enables individuals to voice hateful and dangerous messages. [FN16] The First Amendment's protection of free speech, however, is not absolute. [FN17] A small number of expressions fall outside the bounds of First Amendment protection because of their potential harm to society, including threats, incitement to lawless action, and child pornography. [FN18] How do Internet communications fit into the existing framework of free speech jurisprudence? Herein lies a major challenge to American society's commitment to the First Amendment, as the Constitution may protect Web sites and other cyberspace communications that most people find repulsive in the name of free speech. [FN19]

This Article explores one of the exceptions to the protection of free speech, incitement to imminent lawless ac-

tion. The question of incitement poses a unique problem that is usually absent from free speech inquiries involving pornography and threats because incitement often includes the fundamental American value of radical criticism of government and society. [FN20] When is such speech permissible, if not desirable, and when is it unconstitutional? Harry Kalven characterized this question as "the most important and the most difficult of the First ***428** Amendment issues." [FN21] Kalven is correct. Incitement brings to life the most central concerns of censoring speech. On the one hand is the right of speakers to be free to express their views on controversial subjects; on the other hand is the basic notion that public order demands that citizens refrain from illegal activity. [FN22]

In the seminal case, *Brandenburg v. Ohio*, [FN23] the United States Supreme Court held that the First Amendment does not protect advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [FN24] The *Brandenburg* standard, however, fails to instruct courts how to handle incitement on the Internet; the reason for this failure is simple. The Internet introduces a new type of speaker-audience relationship that makes the current standard unworkable. The most important prong of the *Brandenburg* test, the "imminence requirement," does not work with the vast majority of Internet communications, as words in cyberspace are usually "heard" well after they are "spoken." As a result, almost no Internet communication, regardless of the likelihood and seriousness of incitement, can be condemned under *Brandenburg*. How can courts strike the appropriate balance that addresses the unique dangers posed by the Internet, yet maintains the Constitution's commitment to a free and robust exchange of ideas? This question has yet to be answered. Unlike other free speech inquiries, the Internet implications of the incitement standards have remained unexplored by both courts and scholars alike.

This Article strives to fill this constitutional void. The explosion of Internet messages that may incite individuals to lawless activity demands the articulation of an Internet incitement standard. The aim of this Article is to propose a formulation for the incitement standard that meets the specific demands of cyberspace, yet remains faithful to the spirit of the Court's decision in *Brandenburg*.

Part I reviews the current standard for incitement and pays particular attention to the underlying motivation of courts in developing this standard. Part I tracks the development of free speech jurisprudence to identify the spirit of *Brandenburg*, a spirit that must be kept alive if the incitement standard is expanded to the Internet. This spirit reveals that *Brandenburg* erected a formidable shield for the protection of free ***429** speech, and subsequent judicial applications of the *Brandenburg* standard have maintained this shield.

Part II focuses on Internet incitement. With the proliferation of hateful postings in cyberspace, the threat of incitement to lawless action is very real. It is imperative for courts to develop a way to address the danger of Internet incitement because, as discussed in Part III, the current standard for incitement does not mesh with the majority of Internet communications. In fact, under a likely interpretation of *Brandenburg*'s "imminence requirement," the vast majority of Internet communication could never be considered incitement, regardless of content.

Part IV proposes a framework for addressing Internet incitement. Part IV further posits how to adopt the current standard to cyberspace. The proposal is careful to preserve the spirit of *Brandenburg* and not lower the laudable level of speech protection that *Brandenburg* constructed. In particular, this Article identifies the four considerations that are critical for extending *Brandenburg* to the Internet and attempts to apply these factors to recent instances of potential Internet incitement.

I. THE CURRENT INCITEMENT STANDARD

A. Brandenburg v. Ohio

The Supreme Court forged the modern incitement standard in *Brandenburg v. Ohio*, [FN25] a case reviewing the conviction of a Klu Klux Klan leader under the Ohio Criminal Syndicalism statute [FN26] after he made several

hateful remarks at a televised rally. [FN27] Reversing his conviction ***430** and striking down the statute, [FN28] the Court articulated the incitement standard:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. [FN29]

As such, the Court drew a critical distinction between the mere "advocacy" of violence and "incitement to imminent lawless action." [FN30] Beyond this statement, the Court did not elaborate any further on the elements of the incitement standard. [FN31] Although a brief, *per curiam* opinion, the standard articulated in *Brandenburg* marked a significant transformation in free speech jurisprudence. [FN32]

B. The "Tortuous Path" from Schenk: Capturing the Spirit of Brandenburg

To extend *Brandenburg* to the Internet, it is essential to understand what the decision actually meant. The true significance of *Brandenburg* exceeds the brief text of the opinion. [FN33] To view *Brandenburg* in a vacuum would miss the monumental impact of the decision. *Brandenburg* represented the culmination of, in the words of Harry Kalven, a "tortuous path" of free speech jurisprudence. [FN34]

The American free speech tradition has been likened to a shield that protects the "street corner speaker" who criticizes government policy from being silenced by the state. [FN35] This tradition began with World War I cases and came to fruition with *Brandenburg*, although the current shield barely resembles that in place in the early 1900s. [FN36] An examination of free speech jurisprudence throughout the twentieth century reveals that the Court has gradually raised the shield to its modern heights.

***431** At the outset of the free speech tradition, the protection of the street corner speaker was minimal. [FN37] The first major free speech pronouncement came not from the Supreme Court, but from Judge Learned Hand in *Masses Publication Company v. Patten*. [FN38] *Masses* involved an alleged violation of the Espionage Act of 1917, [FN39] legislation that was concerned with the protection of military secrets and became the focal point of many World War I free speech cases. [FN40] The conviction resulted from four political cartoons that appeared in a publication entitled *The Masses*. [FN41] Judge Hand articulated an incitement test, but it was a less formidable incitement test than the one that would later appear in *Brandenburg*. Judge Hand focused on the words, paying little attention to the context, and distinguished between "political agitation" and "direct incitement to violent resistance." [FN42] The latter, Judge Hand contended, cannot be permitted. [FN43]

The Supreme Court first addressed First Amendment questions during World War I, a period when police would arrest the street corner speaker upon the slightest provocation. [FN44] In 1919, the Court demonstrated a weak protection of speech in its first major free speech decision, [FN45] *Schenck v. United States*. [FN46] At issue was a leaflet that Schenck, a Socialist Party official, distributed advancing opposition to the war. [FN47] Schenck was convicted under the Espionage Act for conspiracy to cause insubordination in the Armed Forces and obstruct the recruitment and ***432** enlistment of services. [FN48] In reviewing Schenck's conviction, Justice Holmes articulated what has become known as the "clear and present danger" test. [FN49] Justice Holmes summarized the test as follows:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. [FN50]

The Court held that Schenck's leaflet constituted a clear and present danger, therefore it fell outside the scope of First Amendment protection. [FN51]

To understand the token protection of free speech that existed at this time, one need only look at the innocuous

language of Schenck's leaflet. The leaflet merely advocated that citizens exercise their right to assert opposition to the draft. [FN52] The most strongly worded part [FN53] stated, “Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.” [FN54] In the eyes of the Court, these words constituted a clear and present danger that warranted censorship, notwithstanding the First Amendment. [FN55] As Kalven commented, “Holmes verge[d] on saying that any serious criticism of the war and the draft sent to men who are eligible for service would violate [the Espionage Act].” [FN56]

A week later, the Court reinforced this low shield when it decided *Debs v. United States*. [FN57] The circumstances of *Debs* were similar to those of *Schenck*. Eugene Debs, a leader of the Socialist Party, was convicted under the Espionage Act for a speech made to a general audience at a Socialist convention. [FN58] This speech, which contained even fewer direct action words than Schenck's leaflet, extolled the growth of socialism and predicted its ultimate success. [FN59] Justice Holmes dismissed the free speech ***433** question very quickly without elaboration: “The chief defences upon which the defendant seemed willing to rely were the denial that we have dealt with and that based upon the First Amendment to the Constitution, disposed of in *Schenck v. United States*.” [FN60] The decision in *Debs* left doubt as to whether a person could safely say anything against the war without facing prosecution. [FN61] In the words of Kalven, “*Debs* marks a low point in the Court's performance in speech cases.” [FN62]

The first major jurisprudential shift can be traced to Justice Holmes' dissent in *Abrams v. United States*. [FN63] The *Abrams* defendants were convicted for violating several 1918 amendments to the Espionage Act after printing approximately five thousand leaflets condemning the United States for sending troops into Russia and calling for a general strike of workers in munitions factories. [FN64] The Court, relying on *Schenck*, upheld the conviction and curtly disposed of the First Amendment challenge. [FN65] Justice Holmes, joined by Justice Brandeis, dissented in what has become Justice Holmes' most influential free speech pronouncement. [FN66] Justice Holmes applied the “clear and present danger” test and concluded that the First Amendment protected the defendants' words. [FN67] Justice Holmes' interpretation of the “clear and present danger” test afforded greater free speech protection than *Schenck* and *Debs*. [FN68] Justice Holmes' argument took two main steps: to fall beyond the scope of First Amendment protection, both danger and intent must be ***434** present. [FN69] Justice Holmes observed that danger was lacking, as “nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinion would hinder the success of the government arms or have any appreciable tendency to do so.” [FN70] Second, Justice Holmes reasoned that intent was lacking because the “the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on.” [FN71] In sum, Justice Holmes interpreted the “clear and present danger” test as a two-pronged inquiry that demands the requisite danger and the requisite intent, neither of which was present in *Abrams*. [FN72]

In the years following *Abrams*, the dissents by Justices Holmes and Brandeis became increasingly influential and appeared to emerge as the voice of the Court. [FN73] When the World War I cases were decided, Justice Holmes' “clear and present danger” test seemed firmly embedded in the law. [FN74] The Court, however, retreated from Justice Holmes' view in the mid-1920s, when the Court, free of wartime pressures, rejected the “clear and present danger” test. [FN75] For this brief period, only Justices Brandeis and Holmes continued to endorse the “clear and present danger” test. [FN76]

The Court departed from the “clear and present danger” test in two notable free speech cases reviewing convictions for general advocacy of violence. The first of these cases, *Gitlow v. New York*, [FN77] reviewed a conviction of members of the Socialist Party, for publication of a Left Wing Manifesto, under a New York statute that criminalized the advocacy of anarchy. [FN78] The Court upheld the constitutionality of the ***435** statute, emphasizing a state's right to “punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means.” [FN79] Justice Holmes' dissent advocated application of the “clear and present danger” test, and argued that the manifesto failed to present any danger of an attempt to overthrow the government by force. [FN80] In Holmes' view, the manifesto was nothing more than a statement of political theory. [FN81]

The second case was *Whitney v. California*. [FN82] The defendant in *Whitney* was a member of the Communist Labor Party, [FN83] who was convicted for violating a general advocacy statute of California, entitled the Criminal Syndicalism Act. [FN84] At issue in *Whitney* was a resolution that the defendant proposed at the party convention. [FN85] The Court adopted its reasoning from *Gitlow*. [FN86] The Court deferred to the power of the states to criminalize acts of force, violence, or terrorism that involve danger to ***436** the public peace and the security of the state. [FN87] Justice Brandeis concurred in the judgment, but did so after concluding that the conduct constituted a clear and present danger. [FN88]

Starting in the 1930s, however, the Court's free speech jurisprudence underwent another shift. With the appointment of Chief Justice Charles Evans Hughes in 1930, Justices Brandeis and Holmes gained a critical ally. [FN89] The significance of this change became apparent rather quickly when Chief Justice Hughes wrote the majority opinion in *Stromberg v. California*, [FN90] the first case in the history of the Court that signaled an explicit victory for free speech. [FN91] In *Stromberg*, the Court held unconstitutional a California statute prohibiting the display of a red flag as a sign, symbol, or emblem of opposition to organized government. [FN92] The Court opined that the law curtailed "the opportunity for free political discussion." [FN93] Finally, the Court began to elevate the constitutional shield. [FN94]

The "clear and present danger" test, previously only embraced by the dissenters, now became the guiding doctrine of the Court. By the 1930s and 1940s, the "clear and present danger" test "emerged as the applicable standard not only for the kinds of issues with respect to which it originated but also for a wide variety of other First Amendment problems." [FN95] Opinions during this period treated the dissents by Justices Brandeis and Holmes with reverence generally reserved for majority opinions. In particular, the 1951 case, *Dennis v. United States*, [FN96] left no doubt that "clear and present danger" was the test of the Court. [FN97] *Dennis* ***437** affirmed the conviction of organizers of the Communist Party under the Smith Act. [FN98] In doing so, the Court unequivocally followed the formulation by Justices Holmes and Brandeis:

> Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that the subsequent opinions have inclined toward the Holmes-Brandeis rationale ....
>
> In this case, we are squarely presented with the application of the "clear and present danger" test, and must decide what the phrase imports. [FN99]

A plurality of the Court interpreted the "clear and present danger" test in the same manner as Judge Hand in the lower court: "'In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'" [FN100] The *Dennis* formulation of the "clear and present danger" test, however, appears severely watered down from the standard advanced in the dissents of Justices Holmes and Brandeis. Kalven believed that the Court in *Dennis* adjusted the "clear and present danger" test to meet the political demands of the case, but in doing so gave the test the proverbial "kiss of death." [FN101]

***438** This death occurred in *Brandenburg*, where the Court repudiated the "clear and present danger" test and brought into power the modern-day incitement test. [FN102] Although *Brandenburg* was a brief, *per curiam* opinion, the standard articulated in that opinion represented a major development in First Amendment jurisprudence and has become a cornerstone of constitutional law. [FN103] *Brandenburg* demonstrated a conscious and sharp departure from past decisions and elevated the shield to new heights. The Court raised this shield by forging a clear dichotomy between mere advocacy of violence and incitement. [FN104]

Kalven identified two primary objectives in the *Brandenburg* decision. First, the Court eliminated censorship of "mere advocacy" of violence, extending protection to all advocacy of violence, even the advocacy of particular acts. [FN105] As such, the Court explicitly rejected the *Gitlow* and *Whitney* decisions which permitted the censorship of general advocacy of violence. [FN106] The Fourth Circuit interpreted the *Brandenburg* decision as a right to advocate lawlessness, one of the ultimate safeguards of liberty. [FN107] In the words of the Fourth Circuit:

> Even in a society of laws, one of the most indispensable freedoms is that to express in the most impassioned terms the most passionate disagreement with the laws themselves, the institutions of, and created by, law, and the individual officials with whom the laws and institutions are entrusted. Without the freedom to criticize that which constrains, there is no freedom at all. [FN108]

In addition to significantly narrowing the permissible level of censorship, the Court reset the boundary line of permissible censorship of advocacy as that which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [FN109] By placing the mere advocacy of violence beyond censorship, *Brandenburg* elevated the proverbial shield to unprecedented heights. [FN110] The free speech safeguards established by *Brandenburg* become even more glaring when the standard is compared to Judge Hand's incitement ***439** standard from *Masses*. [FN111] Judge Hand's steadfast focus on words permitted censorship of speech without any consideration of the surroundings. [FN112] In contrast, the *Brandenburg* standard looks beyond words and includes contextual considerations as well. [FN113] Words alone were no longer sufficient to constitute incitement. The days of *Schenck* and *Debs* were behind the Court, and the Court now recognized the importance of protecting a right to voice objection to the government. [FN114]

Kalven further explained the meaning of *Brandenburg* in terms of certain requisite elements that emerged as necessary for censorship of speech. [FN115] These elements include:

> (i) to require, somewhat pedantically, that the message contain *explicit action words*. If we do not draw the line here, it will prove impossible to control the inclination to perceive implicit action commands and urgings in all serious criticism of government.
>
> (ii) to require that the action words be urgings of direct, immediate, concrete action.
>
> (iii) to read the message as a whole, and to develop sensitivity in reading the metaphors of violence which are frequent in radical rhetoric.
>
> (iv) to view the problem from the perspective of the countervalues to be protected; and to read the message against a tradition of robust criticism and political tolerance. [FN116]

With the culmination of *Brandenburg*, the Court came very close to adopting each of these criteria, thereby establishing a high threshold for censorship. [FN117]

C. Subsequent Applications of Brandenburg

Judicial interpretations of *Brandenburg* have remained faithful to the lofty protection of free speech discussed in the previous section. [FN118] Courts have left little doubt that only the most egregious circumstances justify censoring speech as incitement.

440** The Supreme Court's first application of the incitement standard came in the 1973 decision, *Hess v. Indiana*, [FN119] a ruling which reinforced *Brandenburg*'s causation principle. [FN120] Gregory Hess was convicted for violating an Indiana disorderly conduct statute [FN121] when he proclaimed to a crowd, "We'll take the f*** street later," after the police tried to break up an antiwar demonstration. [FN122] Applying *Brandenburg*, the trial court concluded that Hess's speech was "intended to incite further lawless action on the part of the crowd in the vicinity ... and was likely to produce such action." [FN123] The Court reversed Hess' conviction for two reasons. First, the Supreme Court held that his statement fell short of incitement because it was not directed to any person or group of persons, and therefore his statement was not advocating any action. [FN124] Second, the Court concluded that Hess' words were not intended to produce, or likely to produce, imminent disorder. [FN125] More specifically, the Court noted that Hess' words, "We'll take the f****** street later," could be taken, at best, as "counsel for present moderation" or, at worst, as advocating "illegal action at some indefinite future time." [FN126] According to the Court, neither interpretation constituted a present threat of imminent disorder. [FN127]

The Court again applied the incitement standard in *NAACP v. Claiborne Hardware Co.* [FN128] During a civil

rights boycott Charles Evers, the Field Secretary of the NAACP, allegedly threatened violence against boycott breakers. [FN129] The Court held that Evers' speeches "did not transcend the bounds" set forth by *Brandenburg* because he was making an impassioned plea for black citizens to unify. [FN130] Moreover, the Court ***441** noted such appeals are naturally spontaneous and emotional. [FN131] The Court held that because Evers' appeals did not incite lawless action, they merited First Amendment protection. [FN132]

Lower courts have been rather reticent in developing the incitement standard any further. Most lower courts' discussions of incitement merely have reiterated *Brandenburg*'s standard verbatim. Courts have typically construed the *Brandenburg* test as requiring the fulfillment of three elements: "(1) the speaker *subjectively intended* incitement; (2) in context, the words used were *likely to produce* imminent lawless action; and (3) the words used by the speaker *objectively encouraged* and urged incitement." [FN133] In applying these elements, courts have maintained the spirit of *Brandenburg* by restricting censorship to only the most dangerous and egregious speech. [FN134]

II. THE SPECTER OF INCITEMENT ON THE INTERNET

A. The Explosion of the Internet

The Internet has transformed the manner in which individuals across the globe communicate. With the Internet, individuals possess "an easy and inexpensive way ... to reach a large audience, potentially of millions." [FN135] As one commentator noted:

> ***442** Quickly fading are the days in which a person's main venue for expressing her revolutionary views included standing on a soapbox or distributing leaflets. Instead, the Internet provides any person with any opinion the ability to reach a virtually unlimited audience without the formidable barriers previously posed by costly and inaccessible mainstream visual or print media. [FN136]

The number of Americans with these new avenues of communication is almost unfathomable, and grows every day. Estimates place the global population of Internet users at roughly 200 million. [FN137]

The Internet enables a myriad of opportunities for communicating. The most common means of disseminating information is through Web sites. A Web site enables people to publish messages on any topic they desire at relatively little cost. [FN138] Electronic mail has become extremely common as well, as many students and employees have accounts. In addition, electronic messages are often sent to individuals who do not request or necessarily want the message, as seen in the growth of "spam" messages. [FN139] A more recent phenomenon is instant message systems, which are similar to electronic mail and notify the recipient of the message immediately. [FN140] Instant message systems, therefore, allow real time communication between persons in a manner that resembles actual conversation. In addition, on-line bulletin boards allow people to post their opinions on a wide range of subjects. [FN141] Another form of communication on the Internet is chat rooms. Similar to instant message systems, chat rooms most resemble normal conversation because they allow members to "speak" to each other in real time. [FN142] Chat rooms are often divided into subject areas so users can discuss mutually desired topics.

Additionally, the Internet population constitutes a representative cross-section of American society. While Web surfers were once predominantly more affluent and better educated than the average person, inexpensive computers and a highly competitive market for ***443** Internet services are changing this profile. [FN143] Furthermore, almost all computers sold today have Internet access, and free Internet service providers are helping to bridge the economic gap. [FN144] Consequently, the number of Americans with Internet access grows daily and is expected to continue to grow in the foreseeable future. By 2005 the number of Internet users worldwide is expected to triple and reach 600 million. [FN145]

B. Examples of Possible Internet Incitement

The Internet revolution has created a very real danger of arguably unconstitutional speech. In the colloquial sense of the word, various messages found on the Internet could be considered incitement to lawless action. Many Internet communications not only encourage viewers to engage in illegal acts, but also provide explicit instructions for doing so. [FN146] Whether they fall under the legal category of incitement, however, is a different story. The *Brandenburg* standard for incitement imposes a very high bar for censorship, allowing only the most egregious speech to be silenced. [FN147] The main concern, however, is that current free speech jurisprudence lacks a cohesive framework for assessing whether an Internet message constitutes incitement; consequently, the law is ill-prepared to determine whether a restraint on Internet speech is constitutional. This section outlines some of the more glaring instances of potential Internet incitement.

This section hardly aims to provide an exhaustive list of Internet messages that could qualify as incitement. There are countless Web sites, message boards, and listservs that contain messages of hate and bigotry. [FN148] A complete list of such postings is unnecessary at this point. Rather, this section shows that the potential for incitement exists on the Internet.

1. The Nuremberg Files Web Site

Perhaps the most well-known example of possible Internet incitement is a pro-life Web site known as the “Nuremberg Files.” [FN149] Pro-life activist ***444** Neil Horsley created the Nuremberg Files Web site in 1997 with the purported rationale of maintaining a list of abortion providers to facilitate their prosecution when abortion is criminalized. [FN150] The Web site lists approximately 400 abortionists, labeling them as “baby butchers” and supplying extensive personal information, including home and work addresses, pictures, spouses' names, and phone numbers. [FN151] This information was placed below an image of blood dripping from body parts of aborted babies. [FN152] When a doctor listed on the Web site was injured, the operators printed the name in gray; when a listed doctor was killed, the operators immediately struck a line through the doctor's name. [FN153]

The constitutionality of the Nuremberg Files Web site was evaluated under the First Amendment's “true threat” standard. [FN154] On February 2, 1999, a federal jury found that several pro-life organizations and individuals associated with the Web site were in violation of the Freedom ***445** of Access to Clinic Entrance Act (FACE) [FN155] and the Racketeer Influence and Corrupt Organization Act (RICO) [FN156] and awarded the doctors $107 million in actual and punitive damages. [FN157] Because the judge utilized an arguably broad and relaxed definition of “threats” which appeared inconsistent with the Supreme Court's jurisprudence on “true threats,” [FN158] several commentators predicted that the jury verdict would not survive on appeal. [FN159] On March 28, 2001, the Court of Appeals for the Ninth Circuit vacated and remanded the trial verdict holding that the actions of ***446** the pro-life organizations were not threats unprotected by the First Amendment. [FN160] The Ninth Circuit admonished the potentially chilling effect on free speech if the Nuremberg Files Web site were considered a threat not worthy of First Amendment protection. [FN161] The Ninth Circuit also criticized the jury charge, reasoning that “[u]nder the instruction in this case, the jury could have found the anti-abortion activists liable based on the fact that, by publishing doctors' names, the activists made it more likely that the doctors would be harmed by third parties.” [FN162]

A more fitting characterization of this Web site may be that it is an incitement. [FN163] After all, the doctors faced greater danger from individuals viewing the Web site than from those who posted their names. Moreover, the potential incitement at issue with the Nuremberg Files Web site is notably heinous because the lawless action encouraged by the Web site is to cause serious bodily injury or death. This potential incitement has become a reality. Several abortion providers listed on the Nuremberg Files Web site have been victims of violence. [FN164] Although the Web site only operated for about a year, three doctors listed on the site were killed. [FN165]

2. Web Sites Providing Instructions for Illegal Pranksters

Some Web sites, often in an attempt at humor, encourage readers to commit pranks against corporations

[FN166] or individuals. [FN167] These Web sites provide extensive instructions to facilitate the reader's effort to accomplish the prank. [FN168] More often than not, the action advocated on ***447** these Web sites is not just an annoying prank, but is clearly illegal activity. [FN169]

One recent concern is the emergence of Web sites encouraging viewers to commit illegal actions against corporations, a practice that has been coined "commercial terrorism." [FN170] *Phrack Inc. Magazine*, an on-line publication, is a leader in promoting commercial terrorism on the Internet. [FN171] *Phrack* contains articles on activities including computer hacking, anarchy, destruction of property, and death. [FN172] *Phrack* has published at least fifty-six issues and each issue contains between eight and twenty-eight articles. [FN173]

One *Phrack* article, entitled "Screwing Over Your Local McDonald's," is an example of the incitement that can appear on the Internet. [FN174] The article encourages the reader to engage in various juvenile actions against McDonald's, and it provides painful detail for following through. Some are relatively harmless pranks that may be illegal, such as making ridiculous orders, throwing trays in the garbage, taking extra pennies from the "Need a Penny—Take a Penny" cups, asking stupid questions, annoying the drive-thru attendants, and pouring boiling water into garbage cans to melt the sides of the bag and cause garbage to go everywhere. [FN175] Other actions are clearly illegal. [FN176] For example, the article advocates placing false advertisements on behalf of McDonald's, falsely claiming to find hair in your food, and hacking into the restaurant's computer system. [FN177] The article ends with a particularly disturbing message: "If you get bored, start molesting kids on the playland or just break [expletive] ... throwing salt shakers (plastic or glass) at the outside wall of the McDonald's is fun too .... Don't ***448** consider it illegal (most of it isn't ...) consider it more of a public service." [FN178]

Other articles from *Phrack* encourage additional illegal acts. Some of these articles include "A Novice's Guide to Hacking," [FN179] "A Hacker's Guide to the Internet," [FN180] "Hacking Voice Mail Systems," [FN181] "Fraudulent Application of '900' Services," [FN182] and "How to Pick Master Locks." [FN183] Like the McDonald's article, these articles provide extremely precise detail for how to achieve the pranks.

Phrack is hardly the only provider of explicit instructions for illegal pranks. For example, one Web site, posted by a group known as RedBoxChiliPepper, is titled "How To Turn the Work Life of a Local 7-Eleven Employee into a Living Hell" and enumerates sixty-four pranks to commit in the store. [FN184] Like *Phrack*, these pranks range from borderline illegal to unquestionably illegal. [FN185] Among the many pranks listed are taking bites out of the cookies and donuts, putting Ex-Lax into food and drink, writing graffiti on the sidewalk, slicing the milk cartons with a razor blade, causing the coffee pot to overflow, and discarding items that are for sale. [FN186] The Web site provides extensive instructions explaining how to accomplish these pranks. [FN187]

Corporations are not the sole targets of possible Internet incitement. Many Web sites instruct viewers on how to harm individuals. [FN188] An article from RedBoxChiliPepper presents a guide for "ruining someone's life" and offers detailed instructions on how to perform a vast array of ***449** illegal actions against another individual. [FN189] Another Web site is posted by an individual who operates under the moniker "the avenger" [FN190] and includes a handbook of ways to make an individual "suffer in one way or another." [FN191] The suggested tactics include canceling credit cards and phone cards, placing false classified advertisements, falsely reporting the individual to the police for criminal activity, subscribing to magazines for the individual, and forwarding his mail to different addresses. [FN192]

III. THE CYBERSPACE LIMITATIONS OF BRANDENBURG

Whether these instances of possible Internet incitement should receive First Amendment protection remains unclear. The problem, however, is that under the current *Brandenburg* standard, they cannot even be evaluated. Although the *Brandenburg* standard fails to address Internet incitement, this failure is not surprising. The *Brandenburg* opinion was handed down in 1969, two decades before the Internet emerged. [FN193] The *Brandenburg* standard

was not created for cyberspace and later courts interpreting the standard had no need to address the demands of the Internet. [FN194]

The flaw in the current standard is simple. The *Brandenburg* formulation does not work on the Internet because of the different speaker-audience relationship that exists in cyberspace. [FN195] More specifically, the Internet poses two obstacles to applying *Brandenberg*. First is the ambiguity of *Brandenburg*' s imminent, lawless action inquiry in cyberspace. [FN196] The second difficulty is the challenge of defining the audience in cyberspace. [FN197]

***450** *A. Ambiguity of Brandenburg's "Imminence Requirement" in Cyberspace*

The Internet facilitates several forms of communication, including Web sites, electronic messages, listservs, discussion groups, chat rooms, and instant messages. Of these forms of communication, only two, chat rooms [FN198] and instant messages, [FN199] allow the recipient of a message to "hear" it once it is "spoken." In other Internet communications, a time delay prevents words from being heard often until well after they are spoken. Herein lies a major difference between Internet communication and the forms of communication that have traditionally been subject to the incitement standard. When incitement occurs on street corners or at rallies, the words are heard immediately after they are spoken. In these instances, there is no time delay between speaking and hearing.

The problem with a time delay lies in *Brandenburg*'s imminence requirement. A fundamental component of the *Brandenburg* standard is that speech directed at some indefinite time does not constitute incitement. [FN200] Although courts have regarded the imminence requirement as the primary focus of the incitement standard, [FN201] it remains unclear what this requirement means in cyberspace. If the imminence requirement is interpreted as imminence from the perspective of the speaker, in other words incitement that occurs immediately after the words are spoken, the vast majority of Internet communications can ***451** never constitute incitement, regardless of the message. [FN202] This ambiguity of the imminence requirement has yet to be addressed by courts because in traditional forms of communication, imminence from the perspective of the speaker and imminence from the perspective of the listener are identical. The *Hess* decision indicates that the "imminence requirement" should be interpreted as lawless action occurring immediately after the words are spoken. [FN203] The Court in *Hess* held that because the alleged incitement could, at worst, be interpreted as advocating "illegal action at some indefinite future time," the words fell short of incitement. [FN204] Therefore, the time delay between when the words were spoken and when the illegal action could occur seemed to prevent the communication in *Hess* from constituting incitement. [FN205] If this interpretation is accepted, very few Internet communications could ever constitute incitement, regardless of their messages. [FN206]

Additionally, unlike the audience of a protest, the audience who receives an inciting Internet message will not be able to act immediately on the incitement. In many instances, the incited reader would have to travel some distance to commit the lawless activity. For example, a viewer of the Nuremberg Files Web site who is incited to violence would have to travel to the home or work of the named abortion provider. As the Court held in *Hess*, a delay in time defeats imminence. [FN207] In *Hess*, the Court regarded the words of the defendant as, at worst, advocating "illegal action at some indefinite future time." [FN208] For that reason, the words in *Hess* fell short of a threat of imminent disorder. [FN209] A reasonable interpretation of *Hess* would be that unless the reader of an Internet posting commits the lawless activity minutes after receiving the message, a disqualifying delay occurs and the posting is automatically protected under the First Amendment. [FN210] Such immediacy is virtually impossible with most Internet postings.

***452** *B. The Uncertain Audience in Cyberspace*

In contrast to a rally or protest, the audience of an Internet posting is often uncertain. The audience receiving many Internet messages, such as those from Web sites and discussion groups, will always be unknown to a certain

extent. *Brandenburg* created a speaker-audience relationship that is analogous to that of a principal and his agent because liability only attaches when the speaker knows the audience will act as a result of the speech and intends that the speech incite such activity. [FN211] Under such circumstances, and given the imminence requirement, the audience acts under the direction of the speaker and in fulfillment of the speaker's will. [FN212] Yet with a Web site, a similar speaker-audience relationship does not exist. The creators of the Web site do not engage in a conversation with specific individuals because they did not know exactly who would view the Web site and anyone with Internet access could read their postings.

In short, the traditional incitement standard does not address speech on the Internet. The incitement standard suits situations like those it has been applied to thus far, such as rallies, demonstrations, and crowded streets. [FN213] In such arenas, the speaker-audience relationship is maintained, with the presence or absence of an easily identifiable audience. In cyberspace, a comparable speaker-audience relationship rarely occurs, as messages tend to be viewed well after their initial postings and by an uncertain audience.

IV. PROPOSAL FOR AN INTERNET INCITEMENT STANDARD

A. Current Free Speech Jurisprudence on Internet Issues

Are current legal standards sufficient to address the speech concerns, or is it necessary to draft new jurisprudence to meet the specific demands ***453** of the Internet? [FN214] Current free speech jurisprudence in cyberspace provides minimal guidance for modifying the *Brandenburg* standard to apply to the Internet. While free speech in cyberspace has received extensive attention from courts and academics, this attention has largely focused on the need to regulate obscenity and pornography on the Internet. [FN215] A review of these topics may be helpful, as the central question posed in these areas resembles what courts would face in extending the *Brandenburg* standard to the Internet.

The Supreme Court addressed free speech on the Internet in *Reno v. ACLU*. [FN216] In *Reno*, the Court struck down the Communications Decency Act of 1996 (CDA), which imposed criminal liability on anyone who knowingly distributed “indecent” or “patently offensive” material on the Internet to anyone under the age of eighteen. [FN217] Although supportive of the goal of the CDA, the Court held that the Act was overbroad because it also prevented adults from accessing certain Web sites. [FN218]

At the very least, *Reno* establishes the Internet as a public forum for free speech purposes. The majority opinion offered a broad endorsement of free speech in cyberspace, with much of the opinion describing the increased possibilities of human communication that, just years ago, was unimaginable. [FN219] Professor Steven Gey observed, “it is not unreasonable to suggest that the *Reno* majority opinion itself treats the Internet as a public forum without actually making the designation explicit.” [FN220] Gey noted that the *Reno* Court held the Internet to a higher free speech standard, refusing to analogize the Internet to electronic forums involving broadcast or cable communications, which receive lower levels of constitutional protection than private speech in traditional public forums. [FN221]

***454** No court, however, has addressed the cyberspace implications of the incitement standard. The most analogous analysis was performed by the District Court for the Eastern District of Michigan in *United States v. Baker*, [FN222] where the “true threat” standard was applied to electronic mail. In articulating the “true threat” standard, the court remained faithful to the spirit of the standard since its birth in *Watts v. United States*. [FN223] Like prior decisions, *Baker* demonstrated a high hurdle required under the “true threat” standard, as well as the reluctance of courts to punish all but the most egregious threats. [FN224] Paraphrasing the Second Circuit in *United States v. Kelner*, [FN225] the *Baker* court held that “only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished.” [FN226]

B. Proposed Internet Incitement Standard

Unlike the "true threat" standard and obscenity, the incitement standard has yet to be evaluated in cyberspace. As such, the incitement standard represents one of the many constitutional inquiries that remains vacuous in the context of the relatively new phenomenon of cyberspace. Yet, for reasons discussed in Part III, it is hard to refute the exigency for formulating an Internet incitement standard.

Two considerations must remain the focus if courts are to extend an incitement standard to the Internet. First, the new standard must ***455** maintain the spirit of *Brandenburg*. As discussed earlier, *Brandenburg* represents the culmination of a long and arduous journey in our country's free speech jurisprudence. [FN227] The constitutional shield, which at the time of *Schenck* was embarrassingly low, is now strong and must remain strong. [FN228] Courts must not use the Internet to weaken the foundations on which the free speech tradition rests. In short, the new standard must continue to safeguard against any chilling effect on free speech, while preventing imminent and likely incitement to illegal activity.

The second consideration is the unique speaker-audience relationship created by the Internet. The new standard must remain cognizant of this new and unexplored relationship and must adjust the *Brandenburg* standard accordingly. On the Internet, unlike at a rally or protest, words are often heard well after they are spoken. [FN229] The Internet incitement standard must be able to adapt to this unusual relationship.

This Article proposes how to accomplish these ends. The Internet incitement standard should consider four primary factors: (1) imminence from the perspective of the listener; (2) content of the message; (3) likely audience; and (4) nature of the issue involved. In presenting these factors, this Article attempts to demonstrate how the standard would apply to the Nuremberg Files Web site and to the commercial terrorism Web sites discussed in Part III.

1. Clarification of the "Imminence Requirement"

To apply the incitement standard in cyberspace, the first step is to clarify the "imminence requirement." Under a likely interpretation of *Brandenburg*, the "imminence requirement" extends only to lawless action that results immediately after the words are spoken. [FN230] As discussed earlier, the nature of the Internet makes this requirement all but impossible to satisfy because words are "heard" on the Internet often after they are "spoken." [FN231] The essential question, therefore, is whether imminence should be interpreted from the perspective of the speaker or from the perspective of the listener.

To decide between these two interpretations of the "imminence requirement," the first step is to assess what the *Brandenburg* Court sought to target. The Court was concerned with the aftermath of the ***456** inciteful words. [FN232] In other words, the Court permitted censorship if the speech would imminently lead to lawless action. [FN233] The Court reasoned that words inciting such lawless action are harmful to free and robust debate. [FN234] At the same time, however, the Court was careful not to set the bar for protection so high as to infringe upon desirable forms of discussion. [FN235] The "imminence requirement" serves the purpose of keeping this bar high. By requiring a close causal connection between the incitement and the words, the Court maintained a high level of free speech protection. [FN236]

The goals of preventing the undesirable consequences of incitement, however, can only be attained on the Internet if the imminence requirement is interpreted from the perspective of the listener. The lawless action targeted by the Court occurs after the words are heard, not after they are spoken. [FN237] Incitement that results after words are heard is just as dangerous and repugnant to society as incitement occurring immediately after the words are spoken. Moreover, as long as the other criteria for Internet incitement remain committed to the core values of *Brandenburg*, the danger of desirable speech facing censorship will be avoided.

Additionally, the "imminence requirement" should be interpreted as imminently causing a person to initiate lawless action. Unlike at a rally, when an Internet message incites an individual to violence, that person often cannot act on the incitement within minutes. For example, if a viewer of the Nuremberg Files Web site were incited to lawless action against a listed abortion provider, he would need to travel some distance to commit that violence. This interpretation of imminence is necessary to prohibit harmful speech that could chill debate.

Applying this criterion to the Nuremberg Files Web site and to the commercial terrorism Web sites, a court would inquire into whether the viewer, upon reading the message, is likely to be incited to initiate imminent, lawless action. Without more information, however, it would be impossible to assess the likelihood of this incitement. Therefore, courts evaluating Internet incitement must examine other criteria as well to assess the likelihood of imminent incitement.

***457** *2. Content of the Message*

A basic, yet nonetheless critical, element requires courts to inquire into the specific words of the message. To be excluded from First Amendment protection, the incitement to violence must be clear. [FN238] As the Court held in *NAACP v. Clairborne Hardware Co.*, [FN239] the speech cannot just be an impassioned plea, but also must be intended to incite. [FN240] In Kalven's words, *Brandenburg* requires explicit action words; incitement cannot be implied. [FN241] Kalven emphasized the importance of this clarity, expressing a fear that if the line is not drawn at explicit words, "it will prove impossible to control the inclination to perceive implicit action commands and urgings in all serious criticism of government." [FN242] The chilling effect of a more lenient interpretation of *Brandenburg* would be considerable.

For this reason, courts must scrutinize the words of the Internet message. The Court engaged in such careful scrutiny in *Hess* when it examined the words of the speaker to determine the likely effect on the crowd. [FN243] Analogous close scrutiny is possible for the words on a Web site or in electronic correspondence. In short, courts must examine whether the Internet posting features content that, if spoken verbally, would be likely to incite others to violence. The reason for this meticulous scrutiny relates to the spirit of *Brandenburg*. Speech should only be censored if the words are serious and are legitimate calls for incitement. Words that are intended as jokes or are not likely to be taken seriously should not be censored as incitement, whether they are transmitted at a rally or in cyberspace. [FN244] A lower standard would compromise *Brandenburg*'s high constitutional shield. [FN245]

This consideration is especially relevant for the commercial terrorism Web sites. [FN246] Many of these Web sites are unlikely to be taken seriously. ***458** The *Phrack* Web site, for example, has a clearly sarcastic tone that may prevent it from being interpreted as more than an attempt at humor. [FN247] It is possible that most reasonable viewers will regard *Phrack* as an attempt at comedy, not a serious call for illegal action. The same could be said for articles from the RedBoxChiliPepper Web site. [FN248] Like the *Phrack* articles, the articles in this publication attempt to carry a tone of sarcasm and humor. [FN249] Reasonable readers who view the article are likely to find the content humorous and will not perceive it as a call for illegal action. [FN250]

Another feature of the content analysis ties into the nature of the issue involved. If the speech involves a heated debate, courts must consider what, if any, value the message adds to the current debate. In short, does the challenged speech foster Justice Brennan's "uninhibited, robust, and wide-open" debate [FN251] or does it chill debate? Potential incitement that legitimately adds substance to an important debate should be afforded more deference than messages that serve no probative value. However, if the message adds nothing to the current debate or, of even greater concern, if it risks hindering the debate, less deference should be afforded. This is especially true of incitement messages that take an aggressive tone in hopes of intimidating opposing viewpoints.

When applied to the Nuremberg Files Web site, this standard unearths strong evidence that the Web site could incite individuals to lawless action. The Web site undoubtedly was not intended as a joke. The Web site targets an

extremely serious subject, abortion, and maintains a very morbid tone throughout. [FN252] A review of the Nuremberg Files Web site demonstrates this stern tone. [FN253] The Web site, which has been considered by some to be akin to encouraging terrorist activity, [FN254] "posted a veritable hit list of abortion doctors," [FN255] cataloging their names, pictures, addresses, and phone numbers and branding them "baby butchers." [FN256] In fact, one ***459** page of the Web site providing personal information on the doctors is titled, "Third Trimester Butchers." [FN257] The doctors names were listed below what resembled dripping blood situated near a bloodied cartoonish representation punctuating its screaming headlines about baby killers. [FN258] Moreover, when listing the personal information, the Web site used more inflammatory phrases, such as "[t]here must be a special place in hell for such unrepentant slaughterers of God's children." [FN259]

The Nuremberg Files Web site provided *de facto* instructions for those seeking to injure or murder the doctors listed. [FN260] The Web site contained the home and work addresses and phone numbers for the doctors, as well as recent photographs. [FN261] The Web site further supplied intimate family information, such as the spouse's name, [FN262] and useful data for someone seeking to harm a doctor's loved ones. Of even greater concern, the Web site encouraged readers to contact these doctors. [FN263] For example, underneath the personal information of Dr. Warren Hern, a plaintiff in the lawsuit, the following statement appears: "You might want to share your point of view with this 'doctor."' [FN264]

Even more disturbing, however, is the evidence suggesting that the operators of the Nuremberg Files Web site intended to incite violence toward abortion providers. When three doctors on the list were killed their names were promptly crossed off like items on a grocery list. [FN265] Similarly, when a doctor was injured, the operators would print the name in gray. [FN266] By not only listing personal contact information about abortion providers, but also indicating when these persons were injured or killed, the Web site clearly seems to aspire to guide individuals intending to harm abortion providers.

***460** Therefore, although the Nuremberg Files Web site addressed an important political topic, it is harmful to the abortion debate. Instead of offering constructive contributions to the debate, the Web site more likely intimidates opponents and silences debate. The Web site maintains a threatening tone throughout, and the effects of this intimidation are felt by the abortion providers who, after seeing their colleagues injured or killed, are forced to take precautionary measures for their own safety.

3. Likely Audience

The *Brandenburg* standard carefully evaluates the context in which the message was delivered to determine the likelihood of incitement to imminent, lawless action. This consideration of context was one of the major developments from Judge Hand's incitement standard in *Masses*. [FN267] Identical words, delivered in different situations, yield varied risks of incitement. As Kalven observed, courts should "read the message as a whole, and ... develop sensitivity in reading the metaphors of violence which are frequent in radical rhetoric." [FN268]

An important consideration when considering context is the audience of the message. *Hess* held that incitement must be directed at an audience. [FN269] Although identifying the specific audience in cyberspace is often infeasible, it is possible to anticipate the likely audience of Internet messages. The identification of the likely audience enables a court to assess the likelihood of incitement. Under traditional applications of the incitement standard the audience is obvious. The individuals who attended the rally or demonstration were the ones who heard the message. If incitement were to occur, these individuals would be the one incited. The Internet incitement test, therefore, must compensate for the less transparent speaker-audience relationship that exists in cyberspace.

In many cases it is impossible to know with certainty who will receive a message once it is posted on the Internet. For certain Internet communications, the potential audience is endless. Anyone, across the world, with access to the Internet can view most Web sites and can join most discussion groups. [FN270] It is clear, however, that certain

individuals are more likely to visit a particular Web site or join a specific discussion group than others. For example, the creator of a Web site or discussion ***461** group often has an eye on a particular audience. Similarly, an individual who accesses a particular Web site or joins a discussion group often possesses an interest in that subject matter. For example, individuals often employ search engines to find particular Web sites. [FN271] To activate these search engines, the user must input key words for the search, and, within seconds, Web sites matching those keywords are displayed. Therefore, a Web site will acquire an audience composed of individuals with a strong interest in its content. [FN272]

Upon identifying the most probable audience of an Internet message, a court can garner insight into the likelihood of incitement. One Web site might attract a predominantly pacifist audience, while another might attract a more aggressive and violent audience. Naturally, incitement is far more likely to result from the latter audience. Similarly, once a court identifies the likely audience, the court can assess how impressionable the speaker's words will be to its listeners. A younger audience may be more impressionable than a more mature audience. Similarly, a more educated audience may be better equipped to resist the temptation of incitement.

A political Web site, such as the Nuremberg Files Web site, will naturally attract persons with intense convictions on the abortion debate. In the abortion debate, the individuals with strong convictions tend to fall into certain categories. Most of these individuals are peaceful, expressing their actions through attending pro-life marches, picketing outside clinics, or volunteering at pregnancy counseling centers. [FN273] These individuals prefer nonviolent expressions of their views and understand the benefits of peaceful, civilized debate. Others, however, favor violence. Among this latter group are individuals likely to deem the murder of abortion providers as an appropriate solution.

Although the group that favors violence constitutes a relatively small segment of pro-life activists, the group nonetheless exists. Moreover, considering the colossal number of users on the Internet, [FN274] the chance that an extremist with violent tendencies will visit the Web site is significant. In fact, these extremists are probably most likely to find the ***462** Nuremberg Files Web site. For example, a person who had entered the inflammatory phrases, “baby butchers,” “kill God's little babies,” “slaughtered babies,” and “wanton slaughter of God's children,” into a search engine would have found the Nuremberg Files Web site. [FN275]

For the commercial terrorism Web sites, however, the audience is more difficult to predict. The most likely audience would be “hackers” and other individuals who have acquired computer expertise because many of the articles deal with computer hacking. [FN276] These Web sites would also attract a wide range of individuals who are looking for comedy on the Internet. As a result, there is a clear contrast between Web sites that advocate commercial terrorism through a comical tone and politically volatile Web sites like the Nuremberg Files Web site. With most commercial terrorism Web sites, the audience is not only more difficult to define, but also is more likely to be composed of individuals who perceive the Web site as humor and not a call for violence.

4. Nature of the Issue Involved

A court's inquiry also must look at the nature of the issue around which the alleged incitement revolves. Certain issues or controversies conjure stronger and more impassioned emotions than others. Just as a fiery speech at an anti-war demonstration is more likely to incite lawless action than one at a religious rally, Internet postings on different topics have varied effects. If it is a political debate, what is the tone of the debate? Is it a debate that has been characterized by violence?

There is no doubt that abortion is one of the most divisive issues of our time. [FN277] Like many intense political debates, the abortion debate has ***463** found a home in cyberspace, as evidenced by the countless newsgroups, listservs, and Web sites championing pro-life and pro-choice positions. [FN278] Abortion has not only emerged as one of the most controversial debates in society today, but also as one of the most violent. [FN279] This propensity toward violence is particularly prevalent amongst anti-abortion extremists who believe that abortion providers

should be harmed or killed for their sins. [FN280] Since 1993, seven United States abortion clinic workers, including three doctors, have been murdered, according to the National Abortion Federation, an abortion-rights group. [FN281] The National Abortion Federation believes that anti-abortion extremists have been responsible for thirty-nine bombings, ninety-nine acid attacks, and sixteen attempted murders. [FN282] Similar violence has occurred in Canada when three doctors were injured in their homes by sniper fire. [FN283]

Of even greater concern, certain abortion providers listed on the Nuremberg Files Web site have been victims of the volatile abortion debate. [FN284] Although the Web site was only posted for about a year, three ***464** doctors listed on the Web site were eventually killed. [FN285] Perhaps most well-documented was the recent murder of Dr. Bernard Slepian, a Buffalo abortion provider who was slain in his kitchen by a sniper's bullet on October 23, 1998. [FN286]

As a result, many abortion providers live in fear. They and other abortion clinic employees are escorted by guards to and from cars, some wear bullet-proof vests and carry firearms, and many of their homes are equipped with bulletproof windows. [FN287] In fact, recently the National Abortion and Reproductive Rights Action League issued a new alert to clinics nationwide, urging doctors to wear bulletproof vests, to routinely change their driving routes, and to avoid leaving or entering their homes after dark. [FN288]

On the other hand, the issues targeted by *Phrack* and other commercial terrorism Web sites are far less contentious. [FN289] Frustration toward McDonald's and 7-Eleven does not invoke the impassioned activism and routine violence that the abortion issue does. Therefore, the danger that the nature of the issue will lead to incitement is much smaller with commercial terrorism Web sites than with political Web sites such as the Nuremberg Files Web site.

C. Evaluating Internet Incitement Under this Framework

Combined, these four considerations craft a framework for assessing *Brandenburg*'s incitement standard on the Internet. The amalgamation of these factors would enable a court to consider an Internet statement in its entirety and competently assess whether it constitutes "advocacy ... directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [FN290]

If this analysis is used on the potential instances of Internet incitement discussed in this Article, it seems that the Nuremberg Files Web site poses a far greater danger than the commercial terrorism Web sites. In fact, it seems likely that the Nuremberg Files Web site reaches a sufficiently egregious level to justify censorship, even under the rigorous ***465** *Brandenburg* standard. Because violence toward an abortion provider would undoubtedly constitute lawless action, the essential question asks whether the incitement is likely to occur and whether it would be imminent. The suggested factors answer this inquiry.

If a violent extremist accessed the Nuremberg Files Web site, the danger of incitement would be great. Given the enormous number of Internet users and the volatile nature of the abortion debate, it is probable that many violent extremists viewed the Web site when it was operating. The extremist saw a Web site with "baby butchers" as a heading, saw blood dripping down the page, and viewed the names, addresses, and photographs of these "butchers." [FN291] If the individual viewing of this page already possessed a strong loathing for these doctors and deemed violence as the appropriate solution, and if the individual had any penchant towards committing violence against these abortion providers, the Web site may incite that violence. Furthermore, the *de facto* instructions for injuring abortion providers listed on the Web site, such as the personal information including home and office addresses, facilitate the execution of this lawless activity. As a result, under the scrutiny proposed by this Article, the Nuremberg Files Web site would not receive constitutional protection.

The commercial terrorism Web sites, however, are less likely to reach the high level of dangerousness that

would justify censorship under *Brandenburg*. First, the audience of these Web sites is far more difficult to define than the audience of the Nuremberg Files Web site. Unlike the Nuremberg Files Web site, which is likely to attract certain types of viewers, the range of people who would read *Phrack* and other commercial terrorism Web sites seems endless. Moreover, although these Web sites present words that encourage lawless activity, they do so in a comical manner that is unlikely to be taken seriously. The tone of *Phrack* is one of humor, in contrast to the morbid and intimidating tone of the Nuremberg Files Web site. Lastly, commercial terrorism Web sites tend to involve issues that are not inherently violent. Aggression toward McDonald's employees has not been nearly as rampant as violence toward abortion providers. For these reasons, it seems doubtful that commercial terrorism Web sites, such as those discussed in this Article, would constitute incitement outside the safeguards of the First Amendment.

***466** CONCLUSION

Internet incitement is very real, as is the danger of violence surrounding many issues discussed in cyberspace. This hazard was confirmed as recently as October 23, 1998, when Dr. Bernard Slepian, an abortion provider whose personal information was listed on the Nuremberg Files Web site, was brutally murdered in his Buffalo home. [FN292] The nature of the Internet makes the opportunity for unlawful incitement greater. Operators of websites such as the Nuremberg Files Web site and *Phrack* possess newfound power to reach an enormous audience to present messages of incitement. Many members of this audience are highly impressionable and, depending on the nature of the issue and the content of the message, could very well be incited to unlawful action.

Judicial applications of the *Brandenburg* standard have succeeded in striking the appropriate balance between free speech and ordered society for traditional forms of incitement. In the twenty-first century, however, incitement is not only possible on street corners and at political rallies. Individuals wishing to present inciting messages now have new avenues for communication in cyberspace. The Internet is no less dangerous and no more worthy of constitutional protection than a speaker who incites a riotous crowd to vandalize the streets or attack police officers. The difference, however, is that incitement over the Internet is often more difficult to assess. The unique speaker-audience relationship in cyberspace requires courts to clarify the imminence requirement and to devise an incitement standard that meets the new demands of the Internet. If done carefully and wisely, it is possible to construct a standard that addresses the dangers of Internet incitement while remaining faithful to *Brandenburg*'s steadfast commitment to free speech.

[FNf1]. Law Clerk, The Honorable D. Barrington Parker, Jr. (Second Circuit) 2001-2002; Prospective Law Clerk, The Honorable Robert A. Katzmann (Second Circuit) 2002-2003. J.D., Yale Law School, 2001. I am indebted to Sterling Professor of Law, Owen M. Fiss, of the Yale Law School, for his invaluable insight and constructive comments on various drafts of this Article. I also thank Dan Deane, Angela Pegram, and the rest of the staff of the *Catholic University Law Review* for their superb editorial assistance. Any errors, of course, are attributable solely to the author.

[FN1]. The Internet has been described as a large environment, composed of “a patchwork of thousands of smaller networks across the world.” Michael Johns, Comment, *The First Amendment and Cyberspace: Trying To Teach Old Doctrines New Tricks*, 64 U. CIN. L. REV. 1383, 1383 n.7 (1996) (citing DOUGLAS E. COMER, THE INTERNET BOOK 69-70 (1994)). These networks communicate with each other by employing a consistent suite of software protocols. *Id.*

[FN2]. Sally Greenberg, *Threats, Harassment, and Hate On-line: Recent Developments*, 6 B.U. PUB. INT. L.J. 673, 673 (1997) (“The Internet allows people to connect with others around the world to exchange ideas and information for very little cost.”); Johns, *supra* note 1 at 1384 (“[C]yberspace represents the new frontier for unparalleled freedom of expression.”) (citing HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER 14 (1993)).

[FN3]. Reno v. ACLU, 929 F. Supp. 824, 881 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

[FN4]. Sarah B. Hogan, Note, *To Net or Not to Net: Singapore's Regulation of the Internet*, 51 FED. COMM. L.J. 429, 432 (1999) (citing Arul Louis, *Answernet*, DAILY NEWS, Oct. 27, 1996, at 46).

[FN5]. Tom Kirchofer, *Web Privacy Products Get Notice — Target Users Wary About Cyberspace Tracking*, BOSTON HERALD, Aug. 13, 2000, at 31; *see also* Hogan, *supra* note 4, at 432 (citing *Reno*, 929 F. Supp. at 831).

[FN6]. George A. Chidi, Jr., *Survey? 52% of U.S. Has Home Web Access*, NETWORK WORLD FUSION, Aug. 18, 2000, at 1.

[FN7]. Johns, *supra* note 1 at 1383 (citing RHEINGOLD, *supra* note 2, at 118-25); *see also* HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 106 (17th ed. 2001) (defining bulletin boards).

[FN8]. *See* Greenberg, *supra* note 2, at 673.

[FN9]. *Id.* at 688.

[FN10]. Dennis McCafferty, *Hate on the Web: Is It Free Speech? Or Does It Incite Violence*?, USA TODAY, Mar. 28, 1999.

[FN11]. Greenberg, *supra* note 2, at 688.

[FN12]. *Id.*

[FN13]. *See* Keith W. Watters, *On-Line Racism*, NAT'L B. ASS'N MAG., Feb. 10, 1996, at 1; *see also* Greenberg, *supra* note 2, at 688.

[FN14]. Owen M. Fiss, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 9 (1996); *see also, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("[E]ach person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."); NAACP v. Button, 371 U.S. 415, 433 (1963) (noting that first Amendment freedoms are "supremely precious in our society").

[FN15]. *See* New York Times v. Sullivan, 376 U.S. 254, 270 (1964); *see also supra* notes 5-6 and accompanying text.

[FN16]. Greenberg, *supra* note 2, at 673.

[FN17]. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925). The Supreme Court stated that:

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

Id.

[FN18]. *Id.* at 667; *see also* Osborne v. Ohio, 495 U.S. 103, 110 (1999).

[FN19]. Justice Kennedy articulated this challenge in his concurrence in *Texas v. Johnson*, 491 U.S. 397, 420-21

(1989) (Kennedy, J., concurring) (stating that the First Amendment protected the defendant's burning of an American flag during a protest rally). Justice Kennedy said that "sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." *Id.* (Kennedy, J., concurring). It is a well-established tenet of constitutional law that the distaste we may feel toward the content or message of a protected expression "cannot ... detain us from discharging our duty as guardians of the Constitution." United States v. United States Dist. Ct. for Cent. Dist. of Cal., 858 F.2d 534, 541 (9th Cir. 1988) (citations omitted).

[FN20]. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 120 (Jamie Kalven ed., 1988).

[FN21]. *Id.* at 119.

[FN22]. *Id.* at 119-20.

[FN23]. 395 U.S. 444 (1969).

[FN24]. *Id.* at 447.

[FN25]. Prior to *Brandenburg*, the Court had recognized that the right of free speech does not protect utterances that tend to incite a crime. *See, e.g.*, Fox v. Washington, 236 U.S. 273, 277-78 (1915) (upholding a Washington statute prohibiting inciteful acts to commit a crime), Musser v. Utah, 333 U.S. 95 (1948) (vacating convictions for conspiring to commit acts injurious to public morals by counseling, advising, and practicing polygamous or plural marriage and holding that it was impossible to determine whether convicted on the grounds that the conspiracy was intended to incite immediate violation of the law). *But see* De Jonge v. Oregon, 299 U.S. 353, 356, 366 (1937) (reversing conviction for violating the Criminal Syndicalism Law of Oregon and holding that the defendant did not incite to violence or crime).

[FN26]. *Brandenberg*, 395 U.S. at 444-45 (citing OHIO REV. CODE ANN. § 2923.13). The Ohio Criminal Syndicalism statute, in pertinent part, criminalized "'advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."' *Id.*

[FN27]. The speech included statements such as "bury the n******" and "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Brandenburg*, 395 U.S. at 446 & n.1.

[FN28]. *Id.* at 449 (overruling Whitney v. California, 274 U.S. 352, 371-72 (1927)).

[FN29]. *Id.* at 447 (citing Dennis v. United States, 341 U.S. 494 (1950)).

[FN30]. *Id.* at 448-49.

[FN31]. *Id.*

[FN32]. KALVEN, *supra* note 20, at 123-24.

[FN33]. *Id.*

[FN34]. *Id.* at 121.

[FN35]. Fiss, *supra* note 14, at 12.

[FN36]. *Id.* at 12-13.

[FN37]. *See id.* at 12.

[FN38]. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917)).

[FN39]. The Espionage Act provided:

> Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Id. at 536 (quoting Espionage Act).
[FN40]. *See* KALVEN, *supra* note 20, at 126.

[FN41]. *Id.*

[FN42]. *Masses*, 244 F. at 540.

[FN43]. *Id.*

[FN44]. *See* Fiss, *supra* note 14, at 12.

[FN45]. Dennis v. United States, 341 U.S. 494, 503 (1951) ("No important case involving free speech was decided by this Court prior to *Schenck v. United States*.").

[FN46]. 249 U.S. 47, 49-52 (1919).

[FN47]. *Id.* at 49-51.

[FN48]. *Id.* at 48-49.

[FN49]. *Id.* at 52 (concluding that "[i]t is a question of proximity and degree").

[FN50]. *Id.*

[FN51]. *Id.* at 52-53.

[FN52]. *Id.*

[FN53]. *See* KALVEN, *supra* note 20, at 131.

[FN54]. *Id.* (internal quotation marks omitted).

[FN55]. *Id.* at 132.

[FN56]. *Id.* at 133.

[FN57]. 249 U.S. 211, 216-17 (1919).

[FN58]. *Id.* at 212-16.

[FN59]. KALVEN, *supra* note 20, at 135.

[FN60]. *Debs*, 249 U.S. at 215.

[FN61]. KALVEN, *supra* note 20, at 136 (noting that "[I]f Eugene Debs can be sent to jail for a public speech, what, if anything can the ordinary man safely say against the war?").

[FN62]. *Id.*

[FN63]. 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (arguing that "nobody can suppose that the surreptitious publishing of a silly leaflet, by an unknown man, without more, would present an immediate danger that its opinions would hinder the success of the government").

[FN64]. *Id.* at 616-22.

[FN65]. *Id.* at 618-19, 624. The Court, in *Abrams*, wrote,

> [I]t is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment.
>
> This contention is sufficiently discussed and is definitely negatived in *Schenck v. United States* ....

Id. at 618-19.

[FN66]. *See* KALVEN, *supra* note 20, at 141.

[FN67]. *Abrams*, 250 U.S. at 627-30 (Holmes, J., dissenting).

[FN68]. *Id.* at 627-28.

[FN69]. KALVEN, *supra* note 20, at 143.

[FN70]. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

[FN71]. *Id.* at 629 (Holmes, J., dissenting).

[FN72]. KALVEN, *supra* note 20, at 143. This reading of the "clear and present danger" test explains the outcomes in *Schenck* and *Debs*. Although danger was lacking in *Schenck* and *Debs*, a jury could have concluded that the requisite intent was present. *Id.* at 143-44.

[FN73]. *See id.*

[FN74]. *Id.*

[FN75]. *See* Whitney v. California, 274 U.S. 357, 371-72 (1927); Gitlow v. New York, 268 U.S. 652, 668-70 (1925).

[FN76]. *See, e.g., Whitney*, 274 U.S. at 374-76; *Gitlow*, 268 U.S. at 672-73.

[FN77]. 268 U.S. 652 (1925).

[FN78]. *Id.* at 654-55. The relevant terms of the statute were:

> [Section] 160. *Criminal anarchy defined*. Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.
>
> [Section] 161. *Advocacy of criminal anarchy*. Any person who:
>
> By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,
>
> Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means, ...
>
> Is guilty of a felony and punishable by imprisonment or fine, or both.

Id. (quoting N.Y. PENAL LAW §§ 160, 161).

[FN79]. *Id.* at 667.

[FN80]. *Id.* at 672-73 (Holmes, J., dissenting).

[FN81]. *Id.* at 673 (Holmes, J., dissenting) (distinguishing rhetoric that may create an uprising "at some indefinite time in the future" from a present danger).

[FN82]. 274 U.S. 357 (1927). Justice Brandeis concurred in the judgment of the Court, but did so after concluding that the conduct constituted a clear and present danger. *Id.* at 373, 376-79 (Brandeis, J., concurring).

[FN83]. *Id.* at 364.

[FN84]. *Id.* at 360, 364-66. The Criminal Syndicalism Act provided, in relevant parts:

> Section 1. The term "criminal syndicalism" as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby de-

fined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

Section 2. Any person who: ... 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; ...

Is guilty of a felony and punishable by imprisonment.

Id. at 359-60 (quoting the California Criminal Syndicalism Act).
[FN85]. *Id.* at 367.

[FN86]. *Gitlow*, 268 U.S. at 668.

[FN87]. *Whitney*, 274 U.S. at 371 (declaring only statutes that are an arbitrary or unreasonable attempt to execute authority shall be deemed unconstitutional).

[FN88]. *Id.* at 373-80 (Brandeis, J., concurring).

[FN89]. KALVEN, *supra* note 20, at 167.

[FN90]. 283 U.S. 359, 369-70 (1931) (holding that the first clause of the California statute unconstitutional because of its vagueness and indefinite terms).

[FN91]. KALVEN, *supra* note 20, at 167.

[FN92]. *Stromberg*, 283 U.S. at 361, 365. The statute in *Stromberg* provided:

Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.

Id. at 361 (quoting CAL. PENAL CODE § 403).
[FN93]. *Id.* at 369.

[FN94]. *See id.* at 369-70.

[FN95]. Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 706.

[FN96]. 341 U.S. 494 (1951).

[FN97]. *Id.* at 507-08.

[FN98]. *Id.* at 516-17. The Smith Act provided, in relevant part:

Sec. 2. (a) It shall be unlawful for any person —

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propri-

ety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

(2) with intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Sec. 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of this title.

Id. at 496-97 (quoting Smith Act Sections 2 and 3, 54 Stat. 671, 18 U.S.C. §§ 10-11 (1946)).
[FN99]. *Id.* at 507-08.

[FN100]. *Id.* at 510 (quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950)).

[FN101]. KALVEN, *supra* note 20, at 190-91.

[FN102]. *Id.* at 124; *see also* Brandenberg v. Ohio, 395 U.S. 444, 449-50 (1969).

[FN103]. KALVEN, *supra* note 20, at 123; *see also* Rice v. Paladin Enters., 128 F.3d 233, 243 (4th Cir. 1997).

[FN104]. *Id.*

[FN105]. KALVEN, *supra* note 20, at 123-24.

[FN106]. *Brandenberg*, 394 U.S. at 749, 752.

[FN107]. Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997).

[FN108]. *Id.*

[FN109]. KALVEN, *supra* note 20, at 124 (citing *Brandenburg*, 395 U.S. at 447).

[FN110]. *See id.* at 123-24.

[FN111]. *See supra* text accompanying notes 38-43.

[FN112]. Masses Publ'n Co. v. Patten, 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

[FN113]. *Brandenberg*, 395 U.S. at 447-48.

[FN114]. *Id.* at 447 n.2.

[FN115]. KALVEN, *supra* note 20, at 120-21.

[FN116]. *Id.* at 121.

[FN117]. *Id.*

[FN118]. *See, e.g.*, NAACP v. Clairbore Hardware Co., 458 U.S. 886, 928-29 (1982); Hess v. Indiana, 414 U.S. 105, 108-09 (1973).

[FN119]. 414 U.S. 105 (1973).

[FN120]. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 111 (1992).

[FN121]. The statute provided: "Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct ...." *Hess*, 414 U.S. at 105 n.1 (citing IND. CODE § 35-27-2-1 (1971), IND. CODE STAT. § 10-1510 (Supp. 1972) (repealed 1976)).

[FN122]. *Id.* at 105-07.

[FN123]. Hess v. Indiana, 297 N.E.2d 413, 415 (Ind. 1973), *rev'd*, 414 U.S. 105 (1973).

[FN124]. *Hess*, 414 U.S. at 108-09.

[FN125]. *Id.* at 109.

[FN126]. *Id.* at 108.

[FN127]. *Id.* at 108-09.

[FN128]. 458 U.S. 886 (1982).

[FN129]. *Id.* at 898.

[FN130]. *Id.* at 928 (noting that "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause").

[FN131]. *Id.*

[FN132]. *Id.*

[FN133]. John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Li-*

ability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine, 10 HASTINGS COMM. & ENT. L.J. 969, 970-72 (1988); *e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 929 (1982) (holding that when appeals to a crowd "do not incite lawless action, they must be regarded as protected speech"); United States v. Poocha, 259 F.3d 1077, 1085 (9th Cir. 2001) (inquiring into whether defendant's statements were intended to or likely to incite a crowd to violence); Glen v. Hongisto, 438 F. Supp. 10, 18 (N.D. Cal. 1977) (interpreting *Brandenburg* standard as "require[ing] not only imminence and the likelihood of evil, but also an element of intent, as the speech must be 'directed to' inciting or producing imminent lawless action"); In re Welfare of M.A.H. and J.L.W., 572 N.W. 2d 752, 759 (Minn. Ct. App. 1997) (considering the context of the circumstances to determine whether words were "intended to and likely to produce imminent lawless action" by others nearby); New York v. Prisinzano, 648 N.Y.2d 267 (N.Y. Crim. Ct. 1996) (applying *Brandenburg* as imposing four elements: "(1) the content of the speech advocates the use of force or violation of law; (2) the speaker intends to incite or produce a violation of law; (3) there exists a likelihood that lawless response will occur; and (4) such a lawless response is imminent"); *see* United States v. Slavin, No. 89 Cr. 310, 1990 WL 71479, at *6 (S.D.N.Y. May 23, 1990) (stating that prior cases "stand for the proposition that rhetorical threats or advocacy of violence in the context of a speech can be proscribed only if the speech is likely to produce imminent lawless action").

[FN134]. Diamond & Primm, *supra* note 133, at 972.

[FN135]. ACLU v. Reno, 929 F. Supp. 824, 843 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

[FN136]. Bruce Braun et al., *WWW.Commercial—Terrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet*, 37 HARV. J. ON LEGIS. 159, 159 (2000).

[FN137]. Kirchofer, *supra* note 5, at 31.

[FN138]. Johns, *supra* note 1, at 1389 n.55.

[FN139]. HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 641 (17th ed. 2001).

[FN140]. *Id.* at 352.

[FN141]. *Id.* at 106.

[FN142]. *Id.* at 142.

[FN143]. Chidi, *supra* note 6, at 1.

[FN144]. *See id.*

[FN145]. Kirchofer, *supra* note 5, at 31.

[FN146]. *See infra* Part II.B.2.

[FN147]. *See supra* Part I.

[FN148]. The Southern Poverty Law Center estimates that the number of Web sites featuring hate speech stands at 250. McCafferty, *supra* note 10, at 6.

[FN149]. *See The Nuremberg Files, at* http:// 209.41.174.82/atrocity/aborts.html (last visited Nov. 5, 2001).

[FN150]. *See* Patrick McMahon, *Anti-Abortion Site Kicked Off Web*, USA TODAY, Feb. 8, 1999, at 2A (noting Horsley testified that he developed the Web site); Lynne K. Varner, *Tension Rises for Abortion Doctors*, SEATTLE TIMES, Oct. 30, 1998, at B1. The Web site draws its name from the trial of Nazis war criminals at Nuremberg. Explaining the purpose of the Web site, the operators contended that they planned to use the information collected on the Web site to prosecute the doctors and pro-choice activists. The Web site read:

> One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes.

The Nuremberg Files, at http://209.41.174.82/atrocity/aborts.html (last visited Nov. 5, 2001). The original Nuremberg Files Web site was removed from the Internet following the jury verdict in a lawsuit that featured the Web site. *See infra* text accompanying notes 155-159.

[FN151]. *Baby Butchers on Trial, at* http:// 209.41.174.82.atrocity/aborts.html (last visited Nov. 5, 2001); Brief for the ACLU of Oregon at 9, Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998), *vacated and remanded*, 244 F.3d 1007 (9th Cir. 2001); James C. Goodale, *Can Planned Parenthood Silence a ProLife Web Site*?, N.Y. L.J., Apr. 2, 1999, at 3 (stating that 200 doctors were listed on the Web site at the time of the article); Jacqueline Soteropoulos, *Florida Doctors Named on Web Site Fear for Lives*, TAMPA TRIB., Feb. 3, 1999, at 12.

[FN152]. *Baby Butchers on Trial, supra* note 151; Michele Mandel, *Fanning the Flames of Hatred*, TORONTO SUN, Apr. 4, 1999, at 5 (describing the Web site); Varner, *supra* note 150 (describing the Web site).

[FN153]. *See* Editorial, *Free Speech or Threats*?, CLEVELAND PLAIN DEALER, Feb. 5, 1999, at 8B. The Web site itself provided a legend to understand the typefaces used. *Baby Butchers on Trial, supra* note 151.

[FN154]. *Planned Parenthood*, 23 F. Supp. 2d at 1188-94.

[FN155]. *See* Mandel, *supra* note 152, at 5. FACE, in pertinent part, makes liable for civil and criminal penalties whoever:

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248 (a)(1) (1994).

[FN156]. RICO, in pertinent part, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1994).

[FN157]. Jules Crittenden, *Jury Clamps Down on Anti-Abortion Web Site*, BOSTON HERALD, Feb. 3, 1999, at 1 (discussing jury verdict); Patrick McMahon, *Jury Hits Abortion Web Site Awards $107M, Says Doctors Were Threatened*, USA TODAY, Feb. 3, 1999, at 1A (same); Kim Murphy, *Anti-Abortion Web Site Fined $107 Million Courts: Gruesome Internet Destination Constitutes Threat to Doctors, Ruling Says*, L.A. TIMES, Feb. 3, 1999, at A1 (same); Rene Sanchez, *Doctors Win Suit Over Antiabortion Web Site: Jury Finds "Hit List," Awards $107 Million*, WASH. POST, Feb. 3, 1999, at A1 (same).

[FN158]. The Supreme Court developed the "true threat" standard for free speech in the seminal case, *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). In *Watts*, the Court pronounced that only the most serious and dangerous threats would be punished, emphasizing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

[FN159]. *See, e.g.*, John P. Cronan, Note, *Free Speech on the Internet: Does the First Amendment Protect the "Nuremberg [sic] Files"*?, 2 YALE SYMP. L. & TECH 5 (2000), *at* http://lawtech.law.yale.edu/symposium/00/comment-cronan.htm; John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens*, 8 TEX. J. WOMEN & L. 207, 218-24 (1999) (contrasting the Nuremberg Files Web site with the threat found in *United States v. Khorumm*, 895 F.2d 1186 (7th Cir. 1996)); Elaine Lafferty, *Ruling Against Anti-Abortion Website Raises Storm in US over Rights*, IRISH TIMES, Feb. 4, 1999, at 14 (observing that several legal experts fear that the judge interpreted the threats too liberally and that the American Civil Liberties Union plans to join in an appeal). *But see* Melanie C. Hagan, Note, *The Freedom of Access to Clinic Entrances Act and The Nuremberg Files Web Site: Is the Site Properly Prohibited or Protected Speech*?, 51 HASTINGS L.J. 411 (2000) (arguing that the jury verdict should be affirmed on appeal because of the jurisprudence regarding FACE).

[FN160]. Planned Parenthood of the Columbia/Williamette Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007, 1019-20 (9th Cir. 2001).

[FN161]. *Id.* at 1018.

[FN162]. *Id.* at 1015.

[FN163]. *See supra* Part I.

[FN164]. *See The Nuremberg Files*, *at* http:// 209.41.174.821/atrocity/aborts.html (last visited Nov. 5, 2001) (identifying those providers that have been injured or killed).

[FN165]. *See, e.g.*, Mandel *supra* note 152.

[FN166]. *See, e.g.*, RedBoxChiliPepper, *How to Turn the Work Life of a Local 7-Eleven Employee into a Living Hell*, *at* http://www.student.uit.no/~ paalde/revenge/Scripts/7-11.html (last visited Aug. 31, 2000); Charlie X., *Screwing Over Your Local McDonald's*, 5 PHRACK INC. MAG. 45 (Mar. 30, 1994), *at* http://www.phrack.org/show.php?p=22&a=4.

[FN167]. *See, e.g.*, RedBoxChiliPepper, *Ruining Someone's Life*, *at* http:// www.student.uit.no/~paalde/revenge/Scripts/PLA003.html (last visited Sept. 13, 2000).

[FN168]. *See, e.g.*, Charlie X., *Screwing Over Your Local McDonald's*, 5 PHRACK INC. MAG. 45 (Mar. 30, 1994), *at* http://www.phrack.org/show.php? p=22&a=4; Black Knight from 713, *Hacking Voice Mail Systems*, PHRACK INC. MAG. 11 (Feb. 17, 1987), *at* http://www.phrack.org/show.php?p=11&a=4.

[FN169]. *See, e.g.*, CO/der DEC/oder of Dark Side Research, *Fraudulent Applications of "900" Services*, 18 PHRACK INC. MAG. 45 (Mar. 30, 1994), *at* http:/www.phrack.org/show.php?p=45&a=18; Gin Fizz & Ninja NYC, *How to Pick Master Locks*, 1 PHRACK INC. MAG. 6 (Nov. 17, 1985), *at* http://

phrack.org/show.php?p=1&a=6.

[FN170]. For a discussion of "commercial terrorism" and a proposed federal statute to address the problem, see generally Braun et al., *supra* note 136.

[FN171]. *See id.* at 161-62.

[FN172]. *See* Introduction, 1 PHRACK INC. MAG. 1 (Nov. 17, 1985) *at* http://www.phrack.org/show.php?p=1&a=1.

[FN173]. *See* PHRACK INC. MAG., *at* http://www.phrack.org/show.php (last visited Nov. 6, 2001) (listing the volumes and articles published).

[FN174]. Charlie X, *Screwing Over Your Local McDonald's*, 5 PHRACK INC. MAG., 45 (Mar. 30, 1994), *at* http://www.phrack.org/show.php?p=45&a=1g.

[FN175]. *Id.*

[FN176]. *Id.*

[FN177]. *Id.*

[FN178]. *Id.*

[FN179]. The Mentor, *A Novice's Guide to Hacking—1989 Edition*, 4 PHRACK INC. MAG. 22 (Dec. 23, 1988), *at* http://www.phrack.org/show.php?p=22&a=4.

[FN180]. The Gatsby, *A Hacker's Guide to the Internet*, 3 PHRACK INC. MAG. 33 (Sept. 15, 1991), *at* http://www.phrack.org/show.php?p=33&a=3.

[FN181]. Black Knight from 713, *Hacking Voice Mail Systems*, PHRACK INC. MAG. 11 (Feb. 17, 1987), *at* http://www.phrack.org/show.php?p=11&a=4.

[FN182]. CO/der DEC/oder of Dark Side Research, *Fraudulent Application of '900' Services*, 18 PHRACK INC. MAG. 45 (Mar. 30, 1994), *at* www.phrack.org/show.php?p=45&a=18.

[FN183]. Gin Fizz & Ninja NYC, *How to Pick Master Locks*, 1 PHRACK INC. MAG. 6 (Nov. 17, 1985), *at* http://www.phrack.org/show.php?p=1&a=6.

[FN184]. RedBoxChiliPepper, *How To Turn the Work Life of a Local 7-Eleven Employee into a Living Hell*, *at* http://www.student.uit.no/~ paalde/revenge/Scripts/7-11.html (last visited Aug. 31, 2000).

[FN185]. *See id.*

[FN186]. *See id.*

[FN187]. *Id.*

[FN188]. *See, e.g.*, Pal D. Ekran, *The Avenger, at* http:// www.ikran.no/html/revenge (last visited Sept. 13, 2000); RedBoxChiliPepper, *Ruining Someone's Life, at* http://www.student.uit.no/~ paalde/revenge/Scripts/PLA003.html (last visited Sept. 13, 2000).

[FN189]. *See* RedBoxChiliPepper, *Ruining Someone's Life, at* http:// www.student.uit.no/~paalde/revenge/Scripts/PLA003.html (last visited Sept. 13, 2000).

[FN190]. The Web site operator's real name is Pal D. Ekran. *See* Pal D. Ekran, *The Avenger, at* http://www.ekran.no/html/revenge (last visited Sept. 13, 2000).

[FN191]. *Id.*

[FN192]. *Id.*

[FN193]. Brandenberg v. Ohio, 395 U.S. 444 (1969); *see also* Reno v. ACLU, 521 U.S. 844 (1997).

[FN194]. *See* NAACP v. Clairborne Hardware Co., 458 U.S. 886, 928 (1982); Hess v. Indiana, 414 U.S. 105, 108-09 (1973).

[FN195]. *See* John F. Wirenius, *Giving the Devil the Benefit of Law: Pornographers, the Feminist Attack on Free Speech and the First Amendment*, 20 FORDHAM URB. L.J. 27, 70-71 (1992); John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement that Threatens*, 8 TEX. J. WOMEN & L. 207, 217 (1999).

[FN196]. *See infra* Part III.A.

[FN197]. *See infra* Part III.B.

[FN198]. Chat rooms allow participants to have a real time conversation with other individuals sharing similar interests. *See AOL Anywhere: People & Chat Directory, at* http://www.aol.com/community/directory.html (last visited Mar. 5, 2002) (listing popular chat rooms for America Online users); *MSN People and Chat, at* http://communities.msn.com/people (Mar. 5, 2002) (instructing that MSN users can "create a community or join a community listed in our directory"); *Yahoo! Chat, at* http://chat.yahoo.com/?room=Chat%20Central::160032456 (last visited Mar. 5, 2002) (listing "Chat Categories" for Yahoo! Users).

[FN199]. Yahoo! explains that its instant messenger service allows participants to "quickly exchange messages" with other individuals online and "[u]nlike email, instant messages appear as soon as they're sent." *Yahoo Messenger, at* http://www.messenger.yahoo.com (last visited Mar. 5, 2002); *see also MSN Messenger Service-Features, at* http:// messenger.msn.com/support/features.asp?client=1 (last visited Mar. 5, 2002) (explaining MSN's instant messenger service); *AOL Instant Messenger: Help/FAQs: Starting Out, at* http://www.aim.com/help_faq/starting_out/getstarted.adp? aolperm=h (last visited Mar. 5, 2002) (answering frequently asked questions about America Online's instant messenger service).

[FN200]. *E.g., Hess*, 414 U.S. at 108-09 (advocating "illegal action at some indefinite or future time" does not constitute unconstitutional incitement); Byers v. Edmondson, 712 So. 2d 681 (La. App. 1 Cir. 1998) (holding that "[s]peech directed to action at some indefinite time in the future will not satisfy [*Brandenburg*'s] test").

[FN201]. *See, e.g., Hess*, 414 U.S. at 108.

[FN202]. *See* Rothchild, *supra* note 195, at 217.

[FN203]. *Hess*, 414 U.S. at 108-09.

[FN204]. *Id.*

[FN205]. *See id.* at 106-09.

[FN206]. *See* Rothchild, *supra* note 195, at 211.

[FN207]. *See Hess*, 414 U.S. at 108-09.

[FN208]. *Id.*

[FN209]. *See id.* at 108.

[FN210]. *See id.*

[FN211]. Wirenius, *infra* note 195, at 70-71.

[FN212]. *Id.* at 49.

[FN213]. Brandenburg v. Ohio, 395 U.S. 444, 445-47 (1969) (articulating standard in case involving statements made at a Klu Klux Clan rally); *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 900-06 (1982) (applying *Brandenburg* to statements made during a meeting to organize a civil rights boycott); Hess v. Indiana, 414 U.S. 105, 106-07 (1973) (applying *Brandenburg* test to an antiwar demonstration at Indiana University); United States v. Poocha, 259 F.3d 1077, 1078-79 (9th Cir. 2001) (applying incitement standard to comments made in front of a crowd of spectators that gathered as the defendant was arrested); New York v. Prisinzano, 648 N.Y.2d 267 (N.Y. Crim. Ct. 1996) (applying *Brandenburg* to speech at a union protest).

[FN214]. *See* John F. McGuire, Note, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 758-60, 759 n.42 (1999) (citing Dawn L. Johnson, Comment, *It's 1996: Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet*, 15 J. MARSHALL J. COMPUTER & INFO. L. 51, 79-85 (1996)).

[FN215]. *See id.*

[FN216]. 521 U.S. 844 (1997)

[FN217]. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996); *see also Reno*, 521 U.S. at 874-77, 885.

[FN218]. *Reno*, 521 U.S. at 849, 868, 874-75.

[FN219]. *Id.* at 849-53.

[FN220]. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1611 (1998).

[FN221]. *Id.* Soon after *Reno*, Congress passed, and President Clinton signed, the Child Online Protection Act (COPA), which requires those engaged in selling materials on the Web that is harmful to minors restrict access to such material to people aged eighteen and older, under penalty of criminal conviction and heavy civil fines. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (to be codified at 47 U.S.C. §§ 230-31). It remains unclear whether COPA will pass constitutional muster.

The vast majority of academic literature on free speech in cyberspace has examined similar topics, focusing government regulation of indecent material on the Internet. *See, e.g.*, Johns, *supra* note 1, at 1384-86, 1395, 1409-23 (examining the legal doctrines of obscenity and "true threats" in relation to cyberspace); Timothy Zick, *Congress, the Internet, and the Intractable Pornography Problem: The Child Online Protection Act of 1998*, 32 CREIGHTON L. REV. 1147 (1999) (assessing the constitutionality of COPA and proposing an approach for future legislation seeking to protect children from harmful material on the Internet).

[FN222]. 890 F. Supp. 1375, 1380-82 (E.D. Mich. 1995), *aff'd, subnom.* United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997).

[FN223]. 394 U.S. 705, 708 (1969); *Baker*, 890 F. Supp. at 1380-82.

[FN224]. *See* Greenberg, *supra* note 2, at 680 (stating that *Baker* "illustrated the reluctance of courts to punish all but the most egregious threats under this 'true threat' standard").

[FN225]. 534 F.2d 1020 (2d Cir. 1976) (affirming the conviction of the leader of a radical group who made explicit threats to assassinate Yasser Arafat).

[FN226]. *Baker*, 890 F. Supp. at 1382. *Kelner* held that the only threats that transgress the bounds of the First Amendment are those "so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027.

[FN227]. *See supra* Part I.B.

[FN228]. *See id.*

[FN229]. *See supra* Part III.A.

[FN230]. Hess v. Indiana, 414 U.S. 105, 108 (1973).

[FN231]. *See supra* Part III.A.

[FN232]. *See* Brandenberg v. Ohio, 395 U.S. 444, 448-49 (1969).

[FN233]. *Id.* at 447.

[FN234]. *Id.* at 449.

[FN235]. *Id.* at 448-49.

[FN236]. *Id.* at 448.

[FN237]. *See id.* at 447.

[FN238]. *See* NAACP v. Clairborne Hardware Co., 458 U.S. 886, 928-29 (1982).

[FN239]. *Id.*

[FN240]. *Id.* at 928-29.

[FN241]. KALVEN, *supra* note 20, at 121.

[FN242]. *Id.*

[FN243]. *See* Hess v. Indiana, 414 U.S. 105, 107-109 (1973).

[FN244]. Statements that are not interpreted as legitimate calls for lawless action do not constitute incitement. *See* Hess v. Indiana, 414 U.S. 105, 109 (1973) (holding that the defendant's words, at most, "could be taken as counsel for present moderation" and thus were protected speech); United States v. Poocha, 259 F.3d 1077, 1082 (9th Cir. 2001) (holding that even obscenities criticizing the police shouted at an emotional crowd were protected absent evidence that those words "constitute an incitement to riot").

[FN245]. *See supra* Part I.B.

[FN246]. *See supra* Part II.B.2.

[FN247]. Introduction, PHRACK INC. MAG., *at* http://www.phrack.org/show.php? p=1&a=1.

[FN248]. *See* http://www.phonelosers.org/rbcp/ (last visited Nov. 7, 2001).

[FN249]. *See, e.g.*, RedBoxChiliPepper, How to Turn the Work Life of a Local 7-Eleven Employee into a Living Hell (Dec. 27, 1995), *at* http:// www.phonelosers.org/issue/pla008.html.

[FN250]. *See id.*

[FN251]. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[FN252]. *The Nuremberg Files*, *at* http://209.41.174.82/atrocity/ (last visited Nov. 5, 2001).

[FN253]. *See id.*

[FN254]. Marie Elena Baca, *Minnesota Doctor on Web Site Moves About With Care*, STAR TRIB., Feb. 3, 1999, at 6A (quoting Dr. Mildren Hansen as stating "this [Web site] is not freedom of speech, this is terrorist activity").

[FN255]. *See* Mandel, *supra* note 152, at 5.

[FN256]. *See supra* Part II.D.1; *see also* Varner, *supra* note 150.

[FN257]. *See* Brief for the American Civil Liberties Union Foundation of Oregon, at 9, Planned Parenthood of the Columbia/Williamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1185 (D. Ore. 1998).

[FN258]. *The Nuremberg Files, at* http:// www.209.41.174.82/atrocity/index.html (last visited Nov. 7, 2001).

[FN259]. *Id.*

[FN260]. *Id.*

[FN261]. *Id.*

[FN262]. *Id.*

[FN263]. *Id.*

[FN264]. *Id.*

[FN265]. Soteropoulos, *supra* note 151, at 12; Carol Ness, *More Abortion Violence Is Feared in Light of Trophy List on Foes' Internet Site*, DETROIT NEWS, Nov. 15, 1999; Associated Press, *Jury to be Selected in Suit Against Anti-abortion Web Site*, BOSTON GLOBE, Jan. 7, 1999, at A11.

[FN266]. *Jury to be Selected, supra* note 265.

[FN267]. Masses Publ'n Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F.24 (2d Cir. 1917); *see also* text accompanying *supra* note 112.

[FN268]. KALVEN, *supra* note 20, at 121.

[FN269]. *See* Hess v. Indiana, 414 U.S. 105, 108-09 (1973).

[FN270]. *See supra* note 5.

[FN271]. *See* NEWTON, NEWTON'S TELECOM DICTIONARY 610 (17th ed. 2001).

[FN272]. *See id.*

[FN273]. The Pennsylvania Pro-Life Federation, for example, has consistently condemned violence against individuals who perform abortions, and has criticized the killing of Dr. Bernard Slepian. *See* Shirley Geoghan, President Pennsylvania Pro-Life Federation, Letter to the Editor, *Speaking in Favor of Pro-life Doesn't Cause Violence*, PATRIOT-NEWS HARRISBURG, Nov. 1, 1998, at B12.

[FN274]. The most recent count estimates that approximately 200 million persons worldwide access the Internet. *See* Hogan, *supra* note 4, at 432.

[FN275]. All these words were used on the first page of the Nuremberg Files Web site. Therefore, a search using those words would likely result in finding the Nuremberg Files Web site. *See The Nuremberg Files, at* http:// 209.41.174.82/atrocity/index.html (last visited Nov. 7, 2001).

[FN276]. *See, e.g.*, The Mentor, *A Novice's Guide to Hacking—1989 Edition*, 4 PHRACK INC. MAG. *at* http://www.phrack.org/show.php?p=22&a=4; The Gatsby, *A Hacker's Guide to the Internet*, 3 PHRACK INC.

MAG. 33 (Sept. 15, 1991, *at* http://www.phrack.com/show.php?p=33&a=3; Black Knight from 713, *Hacking Voice Mail Systems*, 4 PHRACK INC. MAG., 11 (Feb. 17, 1987), *at* http:// www.phrack.org/show.php?p=11&a=4; *see also* Introduction, 1 PHRACK INC. MAG. 1, *at* http://www.phrack.com/org/show.php?p=1&a=1 (providing an overview of the subject matter of *Phrack Magazine*).

[FN277]. *See, e.g.*, DONALD P. JUDGES, HARD CHOICES, LOST VOICES 4 (1993) (describing abortion as one of the most divisive issues of our day, with some persons viewing abortion as a slaughter and others as a test of society's commitment to individual liberty, personal autonomy, and women's welfare); Allen Buchanan, *Ethical Responsibilities of Patients and Clinical Geneticists*, 1 J. HEALTH CARE L. & POL'Y 391, 393 (1998) (identifying the morality of abortion as "one of the most divisive issues our society has known"). For example, a 1998 poll revealed that forty percent of Americans would not vote for a candidate who had different views on abortion. Michael Griffin, 2 *Issues Heat up Governor's Race Poll: Vouchers, Abortion Divide Voters*, ORLANDO SENTINEL, July 23, 1998, at D1 (reporting poll data indicating forty-three percent of potential voters considered abortion to be a "very important" issue in the Florida 1998 governor's election).

[FN278]. *See, e.g.*, National Abortion and Reproductive Action League (NARAL), *at* http://www.naral.org (last visited Oct 29, 2001); People for Life, *at* http://www.peopleforlife.org (last visited Oct. 26, 2001); Pro-Woman, Pro-Life, *at* http://www.gargaro.com/noabort.html (last visited Sept. 20, 2000).

[FN279]. For a comprehensive discussion of recent violence against abortion providers, see Amicus Brief of ACLU at 3-6, Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182 (D. Or. 1998) (95-1671-10).

[FN280]. For example, the American Coalition of Life Activists (ACLA), a defendant in the law suit, was created in 1994 as a result of a split in the anti-abortion movement over the controversy surrounding "justifiable homicide" of abortion providers. A number of anti-abortion activists left "Operation Rescue" to form the ACLA as an organization of individuals who believed that violence, including murder, against abortion providers was legally, morally, or religiously justifiable. *See id.* at 5 (citing Plaintiffs' Memorandum, at 10-11).

Although violence initiated by anti-abortion extremists gains most of the headlines, pro-choice activists have been accused of resorting to violence as well. *See* Pro-Abortion Violence, *at* http://www.mttu.com/proabort-violence.htm (last visited Oct. 2, 2000).

[FN281]. *See* Varner, *supra* note 150, at 14A.

[FN282]. *See* Lafferty, *supra* note 159, at 14. In January 1997, for example, an abortion clinic in Birmingham, Alabama was bombed, killing an off-duty police officer and maiming a nurse. *See* Judy L. Thomas, *Area Doctor Pressing Abortion Lawsuit: He'll Join Others Around the Country Trying to Rein in Militant Opponents*, KANSAS CITY STAR, Jan. 4, 1999, at B1.

[FN283]. *See* Varner, *supra* note 150, at 14A.

[FN284]. *See* Mandel, *supra* note 152.

[FN285]. *Id.*

[FN286]. *See* Brad Knickerbocker, *Anti-Abortion Web Sites: Free Speech or 'Threats'? Oregon Case Examines Impact of Publicizing Information About Doctors*, CHRISTIAN SCIENCE MONITOR, Jan. 12, 1999, at 1; Varner, *supra* note 150, at 14A.

[FN287]. *See, e.g.*, Baca, *supra* note 254, at 6A (describing life of abortion provider, Dr. Mildren Hansen); Varner,

supra note 150, at 14A.

[FN288]. *See* Varner, *supra* note 150, at 14A.

[FN289]. Charlie X, *Screwing Over Your Local McDonalds*, 45 PHRACK INC. MAG. 19 (Mar. 30, 1994) *at* http://www.phrack.org/show.php?p=45&9=19.

[FN290]. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[FN291]. *The Nuremberg Files*, *at* http://209.41.174.82/atrocity (last visited Nov. 5, 2001).

[FN292]. *See* Knickerbocker, *supra* note 286.

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(Cite as: 130 S.Ct. 876)

Supreme Court of the United States
CITIZENS UNITED, Appellant,
v.
FEDERAL ELECTION COMMISSION.

No. 08-205.
Argued March 24, 2009.
Reargued Sept. 9, 2009.
Decided Jan. 21, 2010.

Background: Nonprofit corporation brought action against Federal Election Commission (FEC) for declaratory and injunctive relief, asserting that it feared it could be subject to civil and criminal penalties if it made through video-on-demand, within 30 days of primary elections, a film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election. The United States District Court for the District of Columbia, A. Raymond Randolph, Circuit Judge, and Royce C. Lamberth and Richard W. Roberts, District Judges, 2008 WL 2788753, denied corporation's motion for preliminary injunction and granted summary judgment to Commission. Probable jurisdiction was noted.

Holdings: The Supreme Court, Justice Kennedy, held that:
(1) government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity, overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652;
(2) federal statute barring independent corporate expenditures for electioneering communications violated First Amendment, overruling *McConnell v. Federal Election Com'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491;
(3) disclaimer and disclosure provisions of Bipartisan Campaign Reform Act of 2002 did not violate First Amendment, as applied to nonprofit corporation's film and three advertisements for the film.

Affirmed in part, reversed in part, and remanded.

Justice Thomas joined as to all of Justice Kennedy's opinion except for Part IV.

Justices Stevens, Ginsburg, Breyer, and Sotomayor, JJ., joined as to Part IV of Justice Kennedy's opinion.

Chief Justice Roberts filed a concurring opinion, in which Justice Alito joined.

Justice Scalia filed a concurring opinion, in which Justice Alito joined and Justice Thomas joined in part.

Justice Stevens filed an opinion concurring in part and dissenting in part, in which Justices Ginsburg, Breyer, and Sotomayor, joined.

Justice Thomas filed an opinion concurring in part and dissenting in part.

West Headnotes

[1] Federal Courts 170B 479

170B Federal Courts
170BVII Supreme Court
170BVII(C) Review of Decisions of District Courts
170Bk479 k. Questions not presented below. Most Cited Cases

Supreme Court would consider contention of nonprofit corporation that its film, regarding a candidate seeking nomination as a political party's candidate in the next Presidential election, did not qualify as an “electioneering communication” under federal statute prohibiting corporations from using their general treasury funds to make independent expenditures for electioneering communications within 30 days of a primary election or 60 days of general election for federal office, though nonprofit corporation raised the contention for the first time before the Supreme Court, where the district court had addressed it in its decision granting summary judgment to Federal Election Commission (FEC) with respect to nonprofit corporation's claims for declaratory and injunctive relief. Federal Election Campaign Act of 1971, §§

130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73
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304(f)(3)(A)(i), 316(b)(2), 2 U.S.C.A. §§ 434(f)(3)(A)(i), 441b(b)(2); 11 C.F.R. § 100.29(a)(2), (b)(3)(ii).

[2] Elections 144 311.1

144 Elections
144XI Violations of Election Laws
144k311.1 k. Campaign literature, publicity, or advertising. Most Cited Cases

Nonprofit corporation's film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election, which the nonprofit corporation wished to distribute on cable television through video-on-demand, was an "electioneering communication," for purposes of federal statute prohibiting corporations from using their general treasury funds to make independent expenditures for electioneering communications within 30 days of a primary election or 60 days of general election for federal office; the film was a cable communication that referred to a clearly identified candidate for federal office, and distribution through video-on-demand could allow the communication to be received by 50,000 persons or more. Federal Election Campaign Act of 1971, §§ 304(f)(3)(A)(i), 316(b)(2), 2 U.S.C.A. §§ 434(f)(3)(A)(i), 441b(b)(2); 11 C.F.R. § 100.29(a)(2), (b)(3)(ii), (b)(7)(i)(G), (b)(7)(ii).

[3] Constitutional Law 92 1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In general. Most Cited Cases

Prolix laws chill speech, for First Amendment purposes, for the same reason that vague laws chill speech, i.e., people of common intelligence must necessarily guess at the law's meaning and differ as to its application. U.S.C.A. Const.Amend. 1.

[4] Elections 144 311.1

144 Elections
144XI Violations of Election Laws
144k311.1 k. Campaign literature, publicity, or advertising. Most Cited Cases

Nonprofit corporation's film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election, which the nonprofit corporation wished to distribute on cable television through video-on-demand, was functionally equivalent to express advocacy for or against a specific candidate, for purposes of federal statute barring corporations from using general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections; the film was, in essence, a feature-length negative advertisement that urged viewers to vote against the candidate, and in light of its historical footage, interviews with persons critical of candidate, and voiceover narration, the film would be understood by most viewers as an extended criticism of the candidate's character and her fitness for the office of the Presidency. Federal Election Campaign Act of 1971, § 316, 2 U.S.C.A. § 441b.

[5] Elections 144 311.1

144 Elections
144XI Violations of Election Laws
144k311.1 k. Campaign literature, publicity, or advertising. Most Cited Cases

The test for determining whether a communication is functionally equivalent to express advocacy for the election or defeat of a candidate, for purposes of federal statute barring corporations from using general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections, is an objective test, under which a court should find that a communication is the functional equivalent of express advocacy only if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Federal Election Campaign Act of 1971, § 316, 2 U.S.C.A. § 441b.

[6] Constitutional Law 92 1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and

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Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In general. Most Cited Cases

First Amendment standards must give the benefit of any doubt to protecting rather than stifling speech. U.S.C.A. Const.Amend. 1.

[7] Federal Courts 170B 479

170B Federal Courts
170BVII Supreme Court
170BVII(C) Review of Decisions of District Courts
170Bk479 k. Questions not presented below. Most Cited Cases

Nonprofit corporation did not waive, for purposes of direct review by Supreme Court of decision of three-judge district court panel granting summary judgment to Federal Election Commission (FEC) in nonprofit corporation's action for declaratory and injunctive relief, its facial constitutional challenge, on grounds of violation of First Amendment protection of political speech, to federal statute prohibiting corporations from using their general treasury funds to make independent expenditures for electioneering communications within 30 days of a primary election or 60 days of general election for federal office, though in the district court the corporation had stipulated to the dismissal of the count in its complaint asserting the facial challenge and had proceeded on another count asserting an as-applied constitutional challenge, where the district court panel had addressed the facial challenge by noting that nonprofit corporation could prevail in the facial challenge only if the Supreme Court overruled controlling precedent. U.S.C.A. Const.Amend. 1; Federal Election Campaign Act of 1971, 316, 2 U.S.C.A. § 441b.

[8] Federal Courts 170B 479

170B Federal Courts
170BVII Supreme Court
170BVII(C) Review of Decisions of District Courts
170Bk479 k. Questions not presented below. Most Cited Cases

The Supreme Court's practice permits review of an issue not pressed below, so long as it has been passed upon.

[9] Federal Courts 170B 479

170B Federal Courts
170BVII Supreme Court
170BVII(C) Review of Decisions of District Courts
170Bk479 k. Questions not presented below. Most Cited Cases

Once a federal claim is properly presented on appeal, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.

[10] Constitutional Law 92 656

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k656 k. Facial invalidity. Most Cited Cases

Constitutional Law 92 657

92 Constitutional Law
92V Construction and Operation of Constitutional Provisions
92V(F) Constitutionality of Statutory Provisions
92k657 k. Invalidity as applied. Most Cited Cases

Constitutional Law 92 966

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k964 Form and Sufficiency of Objection, Allegation, or Pleading
92k966 k. Pleading. Most Cited Cases

130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73
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The distinction between facial constitutional challenges and as-applied constitutional challenges goes to the breadth of the remedy employed by the court, not what must be pleaded in a complaint.

[11] Constitutional Law 92 1681

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1681 k. Political speech, beliefs, or activity in general. Most Cited Cases

First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law 92 1681

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1681 k. Political speech, beliefs, or activity in general. Most Cited Cases

Laws that burden political speech are subject to strict scrutiny for a violation of the First Amendment, which level of scrutiny requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law 92 1490

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1490 k. In general. Most Cited Cases

Constitutional Law 92 1507

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1507 k. Viewpoint or idea discrimination. Most Cited Cases

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints, and prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law 92 1681

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1681 k. Political speech, beliefs, or activity in general. Most Cited Cases

Political speech does not lose First Amendment protection simply because its source is a corporation. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law 92 1435

92 Constitutional Law
92XV Right to Petition for Redress of Grievances
92k1435 k. In general. Most Cited Cases

First Amendment protects the right of corporations to petition legislative and administrative bodies. U.S.C.A. Const.Amend. 1.

[16] Courts 106 90(6)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(6) k. Erroneous or injudicious decisions. Most Cited Cases

Supreme Court precedent is to be respected by the Court unless the most convincing of reasons

demonstrates that adherence to it puts the Court on a course that is sure error.

[17] Courts 106 89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In general. Most Cited Cases

Beyond workability, the relevant factors in deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake, and whether the decision was well reasoned.

[18] Courts 106 89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In general. Most Cited Cases

Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision.

[19] Courts 106 89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In general. Most Cited Cases

When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through stare decisis is diminished.

[20] Courts 106 89

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 k. In general. Most Cited Cases

With respect to stare decisis, reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions.

[21] Constitutional Law 92 1681

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1681 k. Political speech, beliefs, or activity in general. Most Cited Cases

Government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity; overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652. U.S.C.A. Const.Amend. 1.

[22] Constitutional Law 92 1707

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1702 Expenditures
92k1707 k. Corporate expenditures. Most Cited Cases

Elections 144 311

144 Elections
144XI Violations of Election Laws
144k311 k. Constitutional and statutory provisions. Most Cited Cases

Federal statute barring corporations from using general treasury funds to make independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections, and, as amended by Bipartisan Campaign Reform Act of 2002 (BCRA), barring corporations from using gen-

130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73
(Cite as: 130 S.Ct. 876)

eral treasury funds to make independent expenditures for electioneering communications within 30 days of a primary election or 60 days of general election for federal office, violated First Amendment political speech rights of nonprofit corporation that wished to distribute on cable television, through video-on-demand, a film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election; overruling *McConnell v. Federal Election Com'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491. U.S.C.A. Const.Amend. 1; Federal Election Campaign Act of 1971, § 316, 2 U.S.C.A. § 441b.

[23] Constitutional Law 92 1707

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1702 Expenditures
92k1707 k. Corporate expenditures. Most Cited Cases

Constitutional Law 92 1709

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(F) Politics and Elections
92k1709 k. Advertisements. Most Cited Cases

Elections 144 311

144 Elections
144XI Violations of Election Laws
144k311 k. Constitutional and statutory provisions. Most Cited Cases

Provisions of Bipartisan Campaign Reform Act of 2002 (BCRA) requiring televised electioneering communications funded by anyone other than a candidate to include a disclaimer identifying the person or entity responsible for the content of the advertising, and requiring any person spending more than $10,000 on electioneering communications within a calendar year to file a disclosure statement with the Federal Election Commission (FEC), did not violate First Amendment protection of political speech, as applied to a nonprofit corporation that wished to distribute on cable television, through video-on-demand, a film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election, and that wished to run three advertisements for the film. U.S.C.A. Const.Amend. 1; Federal Election Campaign Act of 1971, §§ 304(f)(1, 2), 318(a)(3), (d)(2), 2 U.S.C.A. §§ 434(f)(1, 2), 441d(a)(3), (d)(2).

[24] Elections 144 311.1

144 Elections
144XI Violations of Election Laws
144k311.1 k. Campaign literature, publicity, or advertising. Most Cited Cases

Three advertisements for nonprofit corporation's film regarding a candidate seeking nomination as a political party's candidate in the next Presidential election, which film the nonprofit corporation wished to distribute on cable television through video-on-demand shortly before primary election, were "electioneering communications," for purposes of provisions of Bipartisan Campaign Reform Act of 2002 (BCRA) requiring televised electioneering communications funded by anyone other than a candidate to include a disclaimer identifying the person or entity responsible for the content of the advertising; the advertisements referred to the candidate by name and contained pejorative references to her candidacy. Federal Election Campaign Act of 1971, § 318(a)(3), (d)(2), 2 U.S.C.A. § 441d(a)(3), (d)(2); 11 C.F.R. § 100.29.

West Codenotes
Held Unconstitutional2 U.S.C.A. § 441b
Prior Version Recognized as Unconstitutional18 U.S.C.A. § 608(e)

***880** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

As amended by § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibits corporations and unions from using their gen-

eral treasury***881** funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. 2 U.S.C. § 441b. An electioneering communication is "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary election, § 434(f)(3)(A), and that is "publicly distributed," 11 CFR § 100.29(a)(2), which in "the case of a candidate for nomination for President ... means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days," § 100.29(b)(3)(ii). Corporations and unions may establish a political action committee (PAC) for express advocacy or electioneering communications purposes. 2 U.S.C. § 441b(b)(2). In *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203-209, 124 S.Ct. 619, 157 L.Ed.2d 491, this Court upheld limits on electioneering communications in a facial challenge, relying on the holding in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, that political speech may be banned based on the speaker's corporate identity.

In January 2008, appellant Citizens United, a nonprofit corporation, released a documentary (hereinafter *Hillary*) critical of then-Senator Hillary Clinton, a candidate for her party's Presidential nomination. Anticipating that it would make *Hillary* available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced television ads to run on broadcast and cable television. Concerned about possible civil and criminal penalties for violating § 441b, it sought declaratory and injunctive relief, arguing that (1) § 441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer, disclosure, and reporting requirements, BCRA §§ 201 and 311, were unconstitutional as applied to *Hillary* and the ads. The District Court denied Citizens United a preliminary injunction and granted appellee Federal Election Commission (FEC) summary judgment.

Held:

1. Because the question whether § 441b applies to *Hillary* cannot be resolved on other, narrower grounds without chilling political speech, this Court must consider the continuing effect of the speech suppression upheld in *Austin*. Pp. 888 - 896.

(a) Citizen United's narrower arguments-that *Hillary* is not an "electioneering communication" covered by § 441b because it is not "publicly distributed" under 11 CFR § 100.29(a)(2); that § 441b may not be applied to *Hillary* under *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 *(WRTL)*, which found § 441b unconstitutional as applied to speech that was not "express advocacy or its functional equivalent," *id.*, at 481, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.), determining that a communication "is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.*, at 469-470, 127 S.Ct. 2652; that § 441b should be invalidated as applied to movies shown through video-on-demand because this delivery system has a lower risk of distorting the political process than do television ads; and that there should be an exception to § 441b's ban for nonprofit corporate political speech funded overwhelming by individuals-are not sustainable under a fair reading of the statute. Pp. 888 - 892.

(b) Thus, this case cannot be resolved on a narrower ground without chilling political***882** speech, speech that is central to the First Amendment's meaning and purpose. Citizens United did not waive this challenge to *Austin* when it stipulated to dismissing the facial challenge below, since (1) even if such a challenge could be waived, this Court may reconsider *Austin* and § 441b's facial validity here because the District Court "passed upon" the issue, *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379, 115 S.Ct. 961, 130 L.Ed.2d 902; (2) throughout the litigation, Citizens United has asserted a claim that the FEC has violated its right to free speech; and (3) the parties cannot enter into a stipulation that prevents the Court from considering remedies necessary to resolve a claim that has been preserved. Because Citizen United's narrower arguments are not sustainable, this Court must, in an exercise of its judicial responsibility, consider § 441b's facial validity. Any other course would prolong the substantial, nationwide chilling effect caused by § 441b's corporate expenditure ban. This conclusion is further supported by the following: (1) the uncertainty caused by the Government's litigating position; (2) substantial time would be required to clarify § 441b's

application on the points raised by the Government's position in order to avoid any chilling effect caused by an improper interpretation; and (3) because speech itself is of primary importance to the integrity of the election process, any speech arguably within the reach of rules created for regulating political speech is chilled. The regulatory scheme at issue may not be a prior restraint in the strict sense. However, given its complexity and the deference courts show to administrative determinations, a speaker wishing to avoid criminal liability threats and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. The restrictions thus function as the equivalent of a prior restraint, giving the FEC power analogous to the type of government practices that the First Amendment was drawn to prohibit. The ongoing chill on speech makes it necessary to invoke the earlier precedents that a statute that chills speech can and must be invalidated where its facial invalidity has been demonstrated. Pp. 892 - 896.

2. *Austin* is overruled, and thus provides no basis for allowing the Government to limit corporate independent expenditures. Hence, § 441b's restrictions on such expenditures are invalid and cannot be applied to *Hillary*. Given this conclusion, the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on independent corporate expenditures is also overruled. Pp. 896 - 914.

(a) Although the First Amendment provides that "Congress shall make no law ... abridging the freedom of speech," § 441b's prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions. It is a ban notwithstanding the fact that a PAC created by a corporation can still speak, for a PAC is a separate association from the corporation. Because speech is an essential mechanism of democracy-it is the means to hold officials accountable to the people-political speech must prevail against laws that would suppress it by design or inadvertence. Laws burdening such speech are subject to strict scrutiny, which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, 551 U.S., at 464, 127 S.Ct. 2652. This language provides a sufficient framework for protecting the interests in this case. Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which ***883** may be a means to control content. The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead to this conclusion. Pp. 896 - 899.

(b) The Court has recognized that the First Amendment applies to corporations, *e.g.*, *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14, 98 S.Ct. 1407, 55 L.Ed.2d 707, and extended this protection to the context of political speech, see, *e.g.*, *NAACP v. Button*, 371 U.S. 415, 428-429, 83 S.Ct. 328, 9 L.Ed.2d 405. Addressing challenges to the Federal Election Campaign Act of 1971, the *Buckley* Court upheld limits on direct contributions to candidates, 18 U.S.C. § 608(b), recognizing a governmental interest in preventing *quid pro quo* corruption. 424 U.S., at 25-26, 96 S.Ct. 612. However, the Court invalidated § 608(e)'s expenditure ban, which applied to individuals, corporations, and unions, because it "fail[ed] to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47-48, 96 S.Ct. 612. While *Buckley* did not consider a separate ban on corporate and union independent expenditures found in § 610, had that provision been challenged in *Buckley* ' s wake, it could not have been squared with the precedent's reasoning and analysis. The *Buckley* Court did not invoke the overbreadth doctrine to suggest that § 608(e)'s expenditure ban would have been constitutional had it applied to corporations and unions but not individuals. Notwithstanding this precedent, Congress soon recodified § 610's corporate and union expenditure ban at 2 U.S.C. § 441b, the provision at issue. Less than two years after *Buckley*, *Bellotti* reaffirmed the First Amendment principle that the Government lacks the power to restrict political speech based on the speaker's corporate identity. 435 U.S., at 784-785, 98 S.Ct. 1407. Thus the law stood until *Austin* upheld a corporate independent expenditure restriction, bypassing *Buckley* and *Bellotti* by recognizing a new governmental interest in preventing "the corrosive and distorting effects of immense aggregations of [corporate] wealth ... that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S., at 660, 110 S.Ct. 1391. Pp. 899 - 903.

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(c) This Court is confronted with conflicting lines of precedent: a pre- *Austin* line forbidding speech restrictions based on the speaker's corporate identity and a post- *Austin* line permitting them. Neither *Austin* 's antidistortion rationale nor the Government's other justifications support § 441b's restrictions. Pp. 903 - 911.

(1) The First Amendment prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech, but *Austin*'s antidistortion rationale would permit the Government to ban political speech because the speaker is an association with a corporate form. Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation." *Bellotti, supra*, at 777, 98 S.Ct. 1407 (footnote omitted). This protection is inconsistent with *Austin*' s rationale, which is meant to prevent corporations from obtaining " 'an unfair advantage in the political marketplace' " by using " 'resources amassed in the economic marketplace.' " 494 U.S., at 659, 110 S.Ct. 1391. First Amendment protections do not depend on the speaker's "financial ability to engage in public discussion." *Buckley, supra*, at 49, 96 S.Ct. 612. These conclusions were reaffirmed when the Court invalidated***884** a BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. *Davis v. Federal Election Comm'n*, 554 U.S. ----, ----, 128 S.Ct. 2759, 171 L.Ed.2d 737. Distinguishing wealthy individuals from corporations based on the latter's special advantages of, *e.g.*, limited liability, does not suffice to allow laws prohibiting speech. It is irrelevant for First Amendment purposes that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Austin, supra*, at 660, 110 S.Ct. 1391. All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech. Under the antidistortion rationale, Congress could also ban political speech of media corporations. Although currently exempt from § 441b, they accumulate wealth with the help of their corporate form, may have aggregations of wealth, and may express views "hav[ing] little or no correlation to the public's support" for those views. Differential treatment of media corporations and other corporations cannot be squared with the First Amendment, and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' political speech. *Austin* interferes with the "open marketplace" of ideas protected by the First Amendment. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665. Its censorship is vast in its reach, suppressing the speech of both for-profit and nonprofit, both small and large, corporations. Pp. 903 - 908.

(2) This reasoning also shows the invalidity of the Government's other arguments. It reasons that corporate political speech can be banned to prevent corruption or its appearance. The *Buckley* Court found this rationale "sufficiently important" to allow contribution limits but refused to extend that reasoning to expenditure limits, 424 U.S., at 25, 96 S.Ct. 612, and the Court does not do so here. While a single *Bellotti* footnote purported to leave the question open, 435 U.S., at 788, n. 26, 98 S.Ct. 1407, this Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ----, 129 S.Ct. 2252, 173 L.Ed.2d 1208, distinguished. Pp. 908 - 911.

(3) The Government's asserted interest in protecting shareholders from being compelled to fund corporate speech, like the antidistortion rationale, would allow the Government to ban political speech even of media corporations. The statute is underinclusive; it only protects a dissenting shareholder's interests in certain media for 30 or 60 days before an election when such interests would be implicated in any media at any time. It is also overinclusive because it covers all corporations, including those with one shareholder. P. 911.

(4) Because § 441b is not limited to corporations or associations created in foreign countries or funded predominately by foreign shareholders, it would be overbroad even if the Court were to recognize a compelling governmental interest in limiting foreign influence over the Nation's political process. P. 911.

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(d) The relevant factors in deciding whether to adhere to *stare decisis*, beyond workability-the precedent's antiquity, the reliance interests at stake, and whether ***885** the decision was well reasoned-counsel in favor of abandoning *Austin,* which itself contravened the precedents of *Buckley* and *Bellotti.* As already explained, *Austin* was not well reasoned. It is also undermined by experience since its announcement. Political speech is so ingrained in this country's culture that speakers find ways around campaign finance laws. Rapid changes in technology-and the creative dynamic inherent in the concept of free expression-counsel against upholding a law that restricts political speech in certain media or by certain speakers. In addition, no serious reliance issues are at stake. Thus, due consideration leads to the conclusion that *Austin* should be overruled. The Court returns to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech based on the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. Pp. 911 - 913.

3. BCRA §§ 201 and 311 are valid as applied to the ads for *Hillary* and to the movie itself. Pp. 913 - 917.

(a) Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley,* 424 U.S., at 64, 96 S.Ct. 612, or " ' "prevent anyone from speaking," ' " *McConnell, supra,* at 201, 124 S.Ct. 619. The *Buckley* Court explained that disclosure can be justified by a governmental interest in providing "the electorate with information" about election-related spending sources. The *McConnell* Court applied this interest in rejecting facial challenges to §§ 201 and 311. 540 U.S., at 196, 124 S.Ct. 619. However, the Court acknowledged that as-applied challenges would be available if a group could show a " 'reasonable probability' " that disclosing its contributors' names would " 'subject them to threats, harassment, or reprisals from either Government officials or private parties.' " *Id.,* at 198, 124 S.Ct. 619. Pp. 913 - 914.

(b) The disclaimer and disclosure requirements are valid as applied to Citizens United's ads. They fall within BCRA's "electioneering communication" definition: They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. Section 311 disclaimers provide information to the electorate, *McConnell, supra,* at 196, 124 S.Ct. 619, and "insure that the voters are fully informed" about who is speaking, *Buckley, supra,* at 76, 96 S.Ct. 612. At the very least, they avoid confusion by making clear that the ads are not funded by a candidate or political party. Citizens United's arguments that § 311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising and that § 311 decreases the quantity and effectiveness of the group's speech were rejected in *McConnell.* This Court also rejects their contention that § 201's disclosure requirements must be confined to speech that is the functional equivalent of express advocacy under *WRTL's* test for restrictions on independent expenditures, 551 U.S., at 469-476, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). Disclosure is the less-restrictive alternative to more comprehensive speech regulations. Such requirements have been upheld in *Buckley* and *McConnell.* Citizens United's argument that no informational interest justifies applying § 201 to its ads is similar to the argument this Court rejected with regard to disclaimers. Citizens United finally claims that disclosure requirements can chill donations by exposing donors to retaliation, but offers no evidence that its members face the type of threats, harassment, or reprisals that might make § 201 unconstitutional as applied. Pp. 914 - 916.

***886** (c) For these same reasons, this Court affirms the application of the §§ 201 and 311 disclaimer and disclosure requirements to *Hillary*. Pp. 916 - 917.

Reversed in part, affirmed in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA and ALITO, JJ., joined, in which THOMAS, J., joined as to all but Part IV, and in which STEVENS, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined as to Part IV. ROBERTS, C.J., filed a concurring opinion, in which ALITO, J., joined. SCALIA, J., filed a concurring opinion, in which ALITO, J., joined, and in which THOMAS, J., joined in part. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part.

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For U.S. Supreme Court Briefs, See:2009 WL 2564711 (Reply.Brief)2009 WL 693638 (Reply.Brief)2009 WL 2219301 (Appellant.Brief)2009 WL 61467 (Appellant.Brief)2009 WL 2219300 (Appellee.Brief)

Justice KENNEDY delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203-209, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that " *Austin* was a significant departure from ancient First Amendment principles," *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) *(WRTL)* (SCALIA, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation. It brought this action in the United States District Court for the District of ***887** Columbia. A three-judge court later convened to hear the cause. The resulting judgment gives rise to this appeal.

Citizens United has an annual budget of about $12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of $1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." App. 255a-257a. Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address. *Id.*, at 26a-27a.

Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited-and still does prohibit-corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U.S.C. § 441b (2000 ed.); see *McConnell, supra*, at 204, and n. 87, 124 S.Ct. 619; *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) *(MCFL).* BCRA § 203 amended § 441b to prohibit any "electioneering communication" as well. 2 U.S.C. § 441b(b)(2) (2006 ed.). An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. § 434(f)(3)(A). The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is "publicly distributed." 11 CFR § 100.29(a)(2) (2009). "In the case of a candidate for nomination for President ... *publicly distributed* means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days." § 100.29(b)(3)(ii). Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. ***888**2 U.S.C. § 441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b is unconstitutional as applied to *Hillary;* and (2) BCRA's disclaimer and disclosure requirements, BCRA §§ 201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United's motion for a preliminary injunction, 530 F.Supp.2d 274 (D.D.C.2008) *(per curiam),* and then granted the FEC's motion for summary judgment, App. 261a-262a. See *id.*, at 261a ("Based on the reasoning of our prior opinion, we find that the [FEC] is entitled to judgment as a matter of law. *See Citizen[s] United v. FEC*, 530 F.Supp.2d 274 (D.D.C.2008) (denying Citizens United's request for a preliminary injunction)"). The court held that § 441b was facially constitutional under *McConnell,* and that § 441b was constitutional as applied to *Hillary* because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." 530 F.Supp.2d, at 279. The court also rejected Citizens United's challenge to BCRA's disclaimer and disclosure requirements. It noted that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.*, at 281.

We noted probable jurisdiction. 555 U.S. ----, 128 S.Ct. 1471, 170 L.Ed.2d 294 (2008). The case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing whether we should overrule either or both *Austin* and the part of *McConnell* which addresses the facial validity of 2 U.S.C. § 441b. See 557 U.S. ----, 128 S.Ct. 1732, 170 L.Ed.2d 511 (2009).

II

Before considering whether *Austin* should be overruled, we first address whether Citizens United's claim that § 441b cannot be applied to *Hillary* may be resolved on other, narrower grounds.

A

[1][2] Citizens United contends that § 441b does not cover *Hillary*, as a matter of statutory interpretation, because the film does not qualify as an "elec-

tioneering communication." § 441b(b)(2). Citizens United raises this issue for the first time before us, but we consider the issue because "it was addressed by the court below." *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 379, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995); see 530 F.Supp.2d, at 277, n. 6. Under the definition of electioneering communication, the video-on-demand showing of *Hillary* on cable television would have been a "cable ... communication" that "refer[red] to a clearly identified candidate for Federal office" and that was made within 30 days of a primary election. 2 U.S.C. § 434(f)(3)(A)(i). Citizens United, however, argues that *Hillary* was not "publicly ***889** distributed," because a single video-on-demand transmission is sent only to a requesting cable converter box and each separate transmission, in most instances, will be seen by just one household-not 50,000 or more persons. 11 CFR § 100.29(a)(2); see § 100.29(b)(3)(ii).

This argument ignores the regulation's instruction on how to determine whether a cable transmission "[c]an be received by 50,000 or more persons." § 100.29(b)(3)(ii). The regulation provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area. §§ 100.29(b)(7)(i)(G), (ii). Here, Citizens United wanted to use a cable video-on-demand system that had 34.5 million subscribers nationwide. App. 256a. Thus, *Hillary* could have been received by 50,000 persons or more.

One *amici* brief asks us, alternatively, to construe the condition that the communication "[c]an be received by 50,000 or more persons," § 100.29(b)(3)(ii)(A), to require "a plausible likelihood that the communication will be viewed by 50,000 or more potential voters"-as opposed to requiring only that the communication is "technologically capable" of being seen by that many people, Brief for Former Officials of the American Civil Liberties Union as *Amici Curiae* 5. Whether the population and demographic statistics in a proposed viewing area consisted of 50,000 registered voters-but not "infants, pre-teens, or otherwise electorally ineligible recipients"-would be a required determination, subject to judicial challenge and review, in any case where the issue was in doubt. *Id.*, at 6.

[3] In our view the statute cannot be saved by limiting the reach of 2 U.S.C. § 441b through this suggested interpretation. In addition to the costs and burdens of litigation, this result would require a calculation as to the number of people a particular communication is likely to reach, with an inaccurate estimate potentially subjecting the speaker to criminal sanctions. The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The Government may not render a ban on political speech constitutional by carving out a limited exemption through an amorphous regulatory interpretation. We must reject the approach suggested by the *amici*. Section 441b covers *Hillary*.

B

[4][5] Citizens United next argues that § 441b may not be applied to *Hillary* under the approach taken in *WRTL*. *McConnell* decided that § 441b(b)(2)'s definition of an "electioneering communication" was facially constitutional insofar as it restricted speech that was "the functional equivalent of express advocacy" for or against a specific candidate. 540 U.S., at 206, 124 S.Ct. 619. *WRTL* then found an unconstitutional application of § 441b where the speech was not "express advocacy or its functional equivalent." 551 U.S., at 481, 127 S.Ct. 2652 (opinion of ROBERTS, C. J.). As explained by THE CHIEF JUSTICE's controlling opinion in *WRTL*, the functional-equivalent test is objective: "a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal ***890** to vote for or against a specific candidate." *Id.*, at 469-470, 127 S.Ct. 2652.

Under this test, *Hillary* is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President. In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton's character and her fitness for the office of the Presidency. The narrative may contain

more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton's qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton "Machiavellian," App. 64a, and asks whether she is "the most qualified to hit the ground running if elected President," *id.*, at 88a. The narrator reminds viewers that "Americans have never been keen on dynasties" and that "a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House," *id.*, at 143a-144a.

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." Brief for Appellant 35. We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. The narrator begins by asking "could [Senator Clinton] become the first female President in the history of the United States?" App. 35a. And the narrator reiterates the movie's message in his closing line: "Finally, before America decides on our next president, voters should need no reminders of ... what's at stake-the well being and prosperity of our nation." *Id.*, at 144a-145a.

As the District Court found, there is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in *WRTL*, the film qualifies as the functional equivalent of express advocacy.

C

Citizens United further contends that § 441b should be invalidated as applied to movies shown through video-on-demand, arguing that this delivery system has a lower risk of distorting the political process than do television ads. Cf. *McConnell, supra*, at 207, 124 S.Ct. 619. On what we might call conventional television, advertising spots reach viewers who have chosen a channel or a program for reasons unrelated to the advertising. With video-on-demand, by contrast, the viewer selects a program after taking "a series of affirmative steps": subscribing to cable; navigating through various menus; and selecting the program. See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 867, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 639, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

***891** [6] Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL*, 551 U.S., at 469, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

D

Citizens United also asks us to carve out an exception to § 441b's expenditure ban for nonprofit corporate political speech funded overwhelmingly by individuals. As an alternative to reconsidering *Austin*, the Government also seems to prefer this approach. This line of analysis, however, would be unavailing.

In *MCFL*, the Court found unconstitutional § 441b's restrictions on corporate expenditures as applied to nonprofit corporations that were formed for the sole purpose of promoting political ideas, did not engage in business activities, and did not accept contributions from for-profit corporations or labor unions. 479 U.S., at 263-264, 107 S.Ct. 616; see also 11 CFR § 114.10. BCRA's so-called Wellstone Amend-

ment applied § 441b's expenditure ban to all nonprofit corporations. See 2 U.S.C. § 441b(c)(6); *McConnell*, 540 U.S., at 209, 124 S.Ct. 619. *McConnell* then interpreted the Wellstone Amendment to retain the *MCFL* exemption to § 441b's expenditure prohibition. 540 U.S., at 211, 124 S.Ct. 619. Citizens United does not qualify for the *MCFL* exemption, however, since some funds used to make the movie were donations from for-profit corporations.

The Government suggests we could find BCRA's Wellstone Amendment unconstitutional, sever it from the statute, and hold that Citizens United's speech is exempt from § 441b's ban under BCRA's Snowe-Jeffords Amendment, § 441b(c)(2). See Tr. of Oral Arg. 37-38 (Sept. 9, 2009). The Snowe-Jeffords Amendment operates as a backup provision that only takes effect if the Wellstone Amendment is invalidated. See *McConnell, supra*, at 339, 124 S.Ct. 619 (KENNEDY, J., concurring in judgment in part and dissenting in part). The Snowe-Jeffords Amendment would exempt from § 441b's expenditure ban the political speech of certain nonprofit corporations if the speech were funded "exclusively" by individual donors and the funds were maintained in a segregated account. § 441b(c)(2). Citizens United would not qualify for the Snowe-Jeffords exemption, under its terms as written, because *Hillary* was funded in part with donations from for-profit corporations.

Consequently, to hold for Citizens United on this argument, the Court would be required to revise the text of *MCFL*, sever BCRA's Wellstone Amendment, § 441b(c)(6), and ignore the plain text of BCRA's Snowe-Jeffords Amendment, § 441b(c)(2). If the Court decided to create a *de minimis* exception to *MCFL* or the Snowe-Jeffords Amendment, the result would be to allow for-profit corporate general treasury funds to be spent for independent expenditures that support candidates. There is no principled basis ***892** for doing this without rewriting *Austin*'s holding that the Government can restrict corporate independent expenditures for political speech.

Though it is true that the Court should construe statutes as necessary to avoid constitutional questions, the series of steps suggested would be difficult to take in view of the language of the statute. In addition to those difficulties the Government's suggestion is troubling for still another reason. The Government does not say that it agrees with the interpretation it wants us to consider. See Supp. Brief for Appellee 3, n. 1 ("Some courts" have implied a *de minimis* exception, and "appellant would appear to be covered by these decisions"). Presumably it would find textual difficulties in this approach too. The Government, like any party, can make arguments in the alternative; but it ought to say if there is merit to an alternative proposal instead of merely suggesting it. This is especially true in the context of the First Amendment. As the Government stated, this case "would require a remand" to apply a *de minimis* standard. Tr. of Oral Arg. 39 (Sept. 9, 2009). Applying this standard would thus require case-by-case determinations. But archetypical political speech would be chilled in the meantime. " 'First Amendment freedoms need breathing space to survive.' " *WRTL, supra*, at 468-469, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)). We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned, especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject.

E

As the foregoing analysis confirms, the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. See *Morse v. Frederick*, 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin*.

[7] Citizens United stipulated to dismissing count 5 of its complaint, which raised a facial challenge to § 441b, even though count 3 raised an as-applied challenge. See App. 23a (count 3: "As applied to *Hillary*, [§ 441b] is unconstitutional under the First Amendment guarantees of free expression and association"). The Government argues that Citizens United waived its challenge to *Austin* by dis-

missing count 5. We disagree.

[8] First, even if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from reconsidering *Austin* or addressing the facial validity of § 441b in this case. "Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon....' " *Lebron*, 513 U.S., at 379, 115 S.Ct. 961 (quoting *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992); first alteration in original). And here, the District Court addressed Citizens United's facial challenge. See 530 F.Supp.2d, at 278 ("Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional burden on the First Amendment right to ***893** freedom of speech"). In rejecting the claim, it noted that it "would have to overrule *McConnell* " for Citizens United to prevail on its facial challenge and that "[o]nly the Supreme Court may overrule its decisions." *Ibid.* (citing *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). The District Court did not provide much analysis regarding the facial challenge because it could not ignore the controlling Supreme Court decisions in *Austin* or *McConnell*. Even so, the District Court did " 'pas[s] upon' " the issue. *Lebron, supra*, at 379, 115 S.Ct. 961. Furthermore, the District Court's later opinion, which granted the FEC summary judgment, was "[b]ased on the reasoning of [its] prior opinion," which included the discussion of the facial challenge. App. 261a (citing 530 F.Supp.2d 274). After the District Court addressed the facial validity of the statute, Citizens United raised its challenge to *Austin* in this Court. See Brief for Appellant 30 (" *Austin* was wrongly decided and should be overruled"); *id.*, at 30-32. In these circumstances, it is necessary to consider Citizens United's challenge to *Austin* and the facial validity of § 441b's expenditure ban.

[9] Second, throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And " '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Lebron, supra*, at 379, 115 S.Ct. 961 (quoting *Yee v. Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); alteration in original). Citizens United's argument that *Austin* should be overruled is "not a new claim." *Lebron*, 513 U.S., at 379, 115 S.Ct. 961. Rather, it is-at most-"a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment." *Ibid.*

[10] Third, the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. See *United States v. Treasury Employees*, 513 U.S. 454, 477-478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (contrasting "a facial challenge" with "a narrower remedy"). The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its First Amendment challenge to § 441b as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise-the permissibility of restricting corporate political speech-that is itself in doubt. See Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L.Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"); *id.*, at 1327-1328. As our request for supplemental briefing implied, Citizens United's claim implicates the validity of *Austin*, which in turn implicates the facial validity of § 441b.

When the statute now at issue came before the Court in *McConnell*, both the majority and the dissenting opinions considered the question of its facial validity. The holding and validity of *Austin* were ***894** essential to the reasoning of the *McConnell* majority opinion, which upheld BCRA's extension of § 441b. See 540 U.S., at 205, 124 S.Ct. 619 (quoting *Austin*, 494 U.S., at 660, 110 S.Ct. 1391). *McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections. See 540 U.S., at 203-209, 124 S.Ct. 619. Four Members of the *McConnell* Court would have overruled *Austin*, including Chief Justice Rehnquist, who had

joined the Court's opinion in *Austin* but reconsidered that conclusion. See 540 U.S., at 256-262, 124 S.Ct. 619 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part); *id.*, at 273-275, 124 S.Ct. 619 (THOMAS, J., concurring in part, concurring in result in part, concurring in judgment in part, and dissenting in part); *id.*, at 322-338, 124 S.Ct. 619 (opinion of KENNEDY, J., joined by Rehnquist, C.J., and Scalia, J.). That inquiry into the facial validity of the statute was facilitated by the extensive record, which was "over 100,000 pages" long, made in the three-judge District Court. *McConnell v. Federal Election Comm'n*, 251 F.Supp.2d 176, 209 (D.D.C.2003) *(per curiam)* *(McConnell I)*. It is not the case, then, that the Court today is premature in interpreting § 441b " 'on the basis of [a] factually barebones recor[d].' " *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (quoting *Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004)).

The *McConnell* majority considered whether the statute was facially invalid. An as-applied challenge was brought in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410, 411-412, 126 S.Ct. 1016, 163 L.Ed.2d 990 (2006) *(per curiam)*, and the Court confirmed that the challenge could be maintained. Then, in *WRTL*, the controlling opinion of the Court not only entertained an as-applied challenge but also sustained it. Three Justices noted that they would continue to maintain the position that the record in *McConnell* demonstrated the invalidity of the Act on its face. 551 U.S., at 485-504, 127 S.Ct. 2652 (opinion of SCALIA, J.). The controlling opinion in *WRTL*, which refrained from holding the statute invalid except as applied to the facts then before the Court, was a careful attempt to accept the essential elements of the Court's opinion in *McConnell*, while vindicating the First Amendment arguments made by the *WRTL* parties. 551 U.S., at 482, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.).

As noted above, Citizens United's narrower arguments are not sustainable under a fair reading of the statute. In the exercise of its judicial responsibility, it is necessary then for the Court to consider the facial validity of § 441b. Any other course of decision would prolong the substantial, nation-wide chilling effect caused by § 441b's prohibitions on corporate expenditures. Consideration of the facial validity of § 441b is further supported by the following reasons.

First is the uncertainty caused by the litigating position of the Government. As discussed above, see Part II-D, *supra*, the Government suggests, as an alternative argument, that an as-applied challenge might have merit. This argument proceeds on the premise that the nonprofit corporation involved here may have received only *de minimis* donations from for-profit corporations and that some nonprofit corporations may be exempted from the operation of the statute. The Government also suggests that an as-applied challenge to § 441b's ban on books may be successful, although it would defend § 441b's ban as applied to almost every other form of media***895** including pamphlets. See Tr. of Oral Arg. 65-66 (Sept. 9, 2009). The Government thus, by its own position, contributes to the uncertainty that § 441b causes. When the Government holds out the possibility of ruling for Citizens United on a narrow ground yet refrains from adopting that position, the added uncertainty demonstrates the necessity to address the question of statutory validity.

Second, substantial time would be required to bring clarity to the application of the statutory provision on these points in order to avoid any chilling effect caused by some improper interpretation. See Part II-C, *supra*. It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held. There are short timeframes in which speech can have influence. The need or relevance of the speech will often first be apparent at this stage in the campaign. The decision to speak is made in the heat of political campaigns, when speakers react to messages conveyed by others. A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot because the issue is "capable of repetition, yet evading review." *WRTL, supra*, at 462, 126 S.Ct. 1016 (opinion of ROBERTS, C.J.) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911)). Here, Citizens United decided to litigate

its case to the end. Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary-long after the opportunity to persuade primary voters has passed.

Third is the primary importance of speech itself to the integrity of the election process. As additional rules are created for regulating political speech, any speech arguably within their reach is chilled. See Part II-A, *supra*. Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities." Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11-12. These entities are subject to separate rules for 33 different types of political speech. *Id.*, at 14-15, n. 10. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. See *id.*, at 6, n. 7. In fact, after this Court in *WRTL* adopted an objective "appeal to vote" test for determining whether a communication was the functional equivalent of express advocacy, 551 U.S., at 470, 127 S.Ct. 2652 (opinion of ROBERTS, C. J.), the FEC adopted a two-part, 11-factor balancing test to implement *WRTL* 's ruling. See 11 CFR § 114.15; Brief for Wyoming Liberty Group et al. as *Amici Curiae* 17-27 (filed Jan. 15, 2009).

This regulatory scheme may not be a prior restraint on speech in the strict sense of that term, for prospective speakers are not compelled by law to seek an advisory opinion from the FEC before the speech takes place. Cf. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712-713, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. See 2 U.S.C. § 437f; 11 CFR § 112.1. These onerous ***896** restrictions thus function as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit. See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002); *Lovell v. City of Griffin*, 303 U.S. 444, 451-452, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Near, supra*, at 713-714, 51 S.Ct. 625. Because the FEC's "business is to censor, there inheres the danger that [it] may well be less responsive than a court-part of an independent branch of government-to the constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57-58, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). When the FEC issues advisory opinions that prohibit speech, "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech-harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (citation omitted). Consequently, "the censor's determination may in practice be final." *Freedman, supra*, at 58, 85 S.Ct. 734.

This is precisely what *WRTL* sought to avoid. *WRTL* said that First Amendment standards "must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.' " 551 U.S., at 469, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995); alteration in original). Yet, the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech.

The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated. See *WRTL, supra*, at 482-483, 127 S.Ct. 2652 (ALITO, J., concurring); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). For these reasons we find it necessary to reconsider *Austin*.

130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73
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III

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." Laws enacted to control or suppress speech may operate at different points in the speech process. The following are just a few examples of restrictions that have been attempted at different stages of the speech process-all laws found to be invalid: restrictions requiring a permit at the outset, *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 153, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108, 123, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); seeking to exact a cost after the speech occurs, *New York Times Co. v. Sullivan*, 376 U.S., at 267, 84 S.Ct. 710; and subjecting the speaker to ***897** criminal penalties, *Brandenburg v. Ohio*, 395 U.S. 444, 445, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)*.

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations-including nonprofit advocacy corporations-either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. See *McConnell*, 540 U.S., at 330-333, 124 S.Ct. 619 (opinion of KENNEDY, J.). A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak-and it does not-the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days. See *id.*, at 330-332, 124 S.Ct. 619 (quoting *MCFL*, 479 U.S., at 253-254, 107 S.Ct. 616).

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur:

> " 'These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over $200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.' " 540 U.S., at 331-332, 124 S.Ct. 619 (quoting *MCFL, supra*, at 253-254, 107 S.Ct. 616).

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. See Brief for Seven Former Chairmen of FEC et al. as *Amici Curiae* 11 (citing FEC, Summary of PAC Activity 1990-2006, online at http:// www. fec. gov/ press/ press 2007/ 20071009pac/sumhistory.pdf); IRS, Statistics of Income: 2006, Corporation***898** Income Tax Returns 2 (2009) (hereinafter Statistics of Income) (5.8 million for-profit corporations filed 2006 tax returns). PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views

known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*. Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell, supra*, at 251, 124 S.Ct. 619 (opinion of SCALIA, J.) (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

[11] Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra*, at 14-15, 96 S.Ct. 612 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971)); see *Buckley, supra*, at 14, 96 S.Ct. 612 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution").

[12] For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL*, 551 U.S., at 464, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, see *Simon & Schuster*, 502 U.S., at 124, 112 S.Ct. 501 (KENNEDY, J., concurring in judgment), the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

[13] Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. See, *e.g.*, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (striking down content-based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See ***899***First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. See, *e.g.*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (protecting the "function of public school education"); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (furthering "the legitimate pe-

nological objectives of the corrections system" (internal quotation marks omitted)); *Parker v. Levy*, 417 U.S. 733, 759, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) (ensuring "the capacity of the Government to discharge its [military] responsibilities" (internal quotation marks omitted)); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 557, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) ("[F]ederal service should depend upon meritorious performance rather than political service"). The corporate independent expenditures at issue in this case, however, would not interfere with governmental functions, so these cases are inapposite. These precedents stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech. By contrast, it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes. At least before *Austin*, the Court had not allowed the exclusion of a class of speakers from the general public dialogue.

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

A

1

The Court has recognized that First Amendment protection extends to corporations. *Bellotti, supra*, at 778, n. 14, 98 S.Ct. 1407 (citing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971) *(per curiam)*; *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; ***900***Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y.*, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952)); see, *e.g.*, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996); *Turner*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497; *Simon & Schuster*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476; *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989); *Florida Star v. B.J. F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970).

[14] This protection has been extended by explicit holdings to the context of political speech. See, *e.g.*, *Button*, 371 U.S., at 428-429, 83 S.Ct. 328; *Grosjean v. American Press Co.*, 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936). Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." *Bellotti, supra*, at 784, 98 S.Ct. 1407; see *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting *Bellotti*, 435 U.S., at 783, 98 S.Ct. 1407)). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons." *Id.*, at 776, 98 S.Ct. 1407; see *id.*, at 780, n. 16, 98 S.Ct. 1407. Cf. *id.*, at 828, 98 S.Ct. 1407 (Rehnquist, J., dissenting).

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. See B. Smith, Unfree Speech: The Folly of Campaign Finance Reform 23 (2001). Yet not until

1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management Relations Act 1947, 61 Stat. 159 (codified at 2 U.S.C. § 251 (1946 ed., Supp. I)). In passing this Act Congress overrode the veto of President Truman, who warned that the expenditure ban was a "dangerous intrusion on free speech." Message from the President of the United States, H.R. Doc. No. 334, 89th Cong., 1st Sess., 9 (1947).

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. See *WRTL*, 551 U.S., at 502, 127 S.Ct. 2652 (opinion of SCALIA, J.). The question was in the background of *United States v. CIO*, 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948). There, a labor union endorsed a congressional candidate in its weekly periodical. The Court stated that "the gravest doubt would arise in our minds as to [the federal expenditure prohibition's] constitutionality" if it were construed to suppress that writing. *Id.*, at 121, 68 S.Ct. 1349. The Court engaged in statutory interpretation***901** and found the statute did not cover the publication. *Id.*, at 121-122, and n. 20, 68 S.Ct. 1349. Four Justices, however, said they would reach the constitutional question and invalidate the Labor Management Relations Act's expenditure ban. *Id.*, at 155, 68 S.Ct. 1349 (Rutledge, J., joined by Black, Douglas, and Murphy, JJ., concurring in result). The concurrence explained that any " 'undue influence' " generated by a speaker's "large expenditures" was outweighed "by the loss for democratic processes resulting from the restrictions upon free and full public discussion." *Id.*, at 143, 68 S.Ct. 1349.

In *United States v. Automobile Workers*, 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957), the Court again encountered the independent expenditure ban, which had been recodified at 18 U.S.C. § 610 (1952 ed.). See 62 Stat. 723-724. After holding only that a union television broadcast that endorsed candidates was covered by the statute, the Court "[r]efus[ed] to anticipate constitutional questions" and remanded for the trial to proceed. 352 U.S., at 591, 77 S.Ct. 529. Three Justices dissented, arguing that the Court should have reached the constitutional question and that the ban on independent expenditures was unconstitutional:

> "Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important-vitally important-that all channels of communications be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *Id.*, at 593, 77 S.Ct. 529 (opinion of Douglas, J., joined by Warren, C.J., and Black, J.).

The dissent concluded that deeming a particular group "too powerful" was not a "justificatio[n] for withholding First Amendment rights from any group-labor or corporate." *Id.*, at 597, 77 S.Ct. 529. The Court did not get another opportunity to consider the constitutional question in that case; for after a remand, a jury found the defendants not guilty. See Hayward, Revisiting the Fable of Reform, 45 Harv. J. Legis. 421, 463 (2008).

Later, in *Pipefitters v. United States*, 407 U.S. 385, 400-401, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972), the Court reversed a conviction for expenditure of union funds for political speech-again without reaching the constitutional question. The Court would not resolve that question for another four years.

2

In *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. These amendments created 18 U.S.C. § 608(e) (1970 ed., Supp. V), see 88 Stat. 1265, an independent expenditure ban separate from § 610 that applied to individuals as well as corporations and labor unions, *Buckley*, 424 U.S., at 23, 39, and n. 45, 96 S.Ct. 612.

Before addressing the constitutionality of § 608(e)'s independent expenditure ban, *Buckley* first upheld § 608(b), FECA's limits on direct contributions to candidates. The *Buckley* Court recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption." *Id.*, at 25, 96 S.Ct. 612; see *id.*, at 26, 96 S.Ct. 612. This followed from the Court's concern that large contributions could be given "to secure a political *quid pro quo*." *Ibid.*

The *Buckley* Court explained that the potential

for *quid pro quo* corruption distinguished***902** direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.*, at 47-48, 96 S.Ct. 612, because "[t]he absence of prearrangement and coordination ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *id.*, at 47, 96 S.Ct. 612. *Buckley* invalidated § 608(e)'s restrictions on independent expenditures, with only one Justice dissenting. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 105 S.Ct. 1459, 84 L.Ed.2d 455, n. 3 (1985) *(NCPAC).*

Buckley did not consider § 610's separate ban on corporate and union independent expenditures, the prohibition that had also been in the background in *CIO*, *Automobile Workers*, and *Pipefitters*. Had § 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent. See *WRTL*, *supra*, at 487, 127 S.Ct. 2652 (opinion of SCALIA, J.) (" *Buckley* might well have been the last word on limitations on independent expenditures"); *Austin*, 494 U.S., at 683, 110 S.Ct. 1391 (SCALIA, J., dissenting). The expenditure ban invalidated in *Buckley*, § 608(e), applied to corporations and unions, 424 U.S., at 23, 39, n. 45, 96 S.Ct. 612; and some of the prevailing plaintiffs in *Buckley* were corporations, *id.*, at 8., 96 S.Ct. 612 The *Buckley* Court did not invoke the First Amendment's overbreadth doctrine, see *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), to suggest that § 608(e)'s expenditure ban would have been constitutional if it had applied only to corporations and not to individuals, 424 U.S., at 50, 96 S.Ct. 612. *Buckley* cited with approval the *Automobile Workers* dissent, which argued that § 610 was unconstitutional. 424 U.S., at 43, 96 S.Ct. 612 (citing 352 U.S., at 595-596, 77 S.Ct. 529 (opinion of Douglas, J.)).

Notwithstanding this precedent, Congress recodified § 610's corporate and union expenditure ban at 2 U.S.C. § 441b four months after *Buckley* was decided. See 90 Stat. 490. Section 441b is the independent expenditure restriction challenged here.

Less than two years after *Buckley*, *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

> "We thus find no support in the First ... Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.... [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.
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> "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.*, at 784-785, 98 S.Ct. 1407.

***903** It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

Bellotti did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti* 's central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity. See *ibid.*

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Thus the law stood until *Austin*. *Austin* "uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history." 494 U.S., at 695, 110 S.Ct. 1391 (KENNEDY, J., dissenting). There, the Michigan

Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S., at 660, 110 S.Ct. 1391; see *id.*, at 659, 110 S.Ct. 1391 (citing *MCFL*, 479 U.S., at 257, 107 S.Ct. 616; *NCPAC*, 470 U.S., at 500-501, 105 S.Ct. 1459).

B

The Court is thus confronted with conflicting lines of precedent: a pre- *Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post- *Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. Before *Austin* Congress had enacted legislation for this purpose, and the Government urged the same proposition before this Court. See *MCFL, supra*, at 257, 107 S.Ct. 616 (FEC posited that Congress intended to "curb the political influence of 'those who exercise control over large aggregations of capital' " (quoting *Automobile Workers, supra*, at 585, 77 S.Ct. 529)); *California Medical Assn. v. Federal Election Comm'n*, 453 U.S. 182, 201, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (Congress believed that "differing structures and purposes" of corporations and unions "may require different forms of regulation in order to protect the integrity of the electoral process"). In neither of these cases did the Court adopt the proposition.

In its defense of the corporate-speech restrictions in § 441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*'s holding that corporate expenditure restrictions are constitutional: an anticorruption interest, see 494 U.S., at 678, 110 S.Ct. 1391 (STEVENS, J., concurring), and a shareholder-protection interest, see *id.*, at 674-675, 110 S.Ct. 1391 (Brennan, J., concurring). We consider the three points in turn.

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As for *Austin*'s antidistortion rationale, the Government does little to defend it. See Tr. of Oral Arg. 45-48 (Sept. 9, 2009). And with good reason, for the rationale cannot support § 441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. See Part II-E, *supra;* Tr. of Oral Arg. 66 (Sept. 9, 2009); see also *id.*, at 26-31 (Mar. 24, 2009). If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." Tr. of Oral Arg. 65 (Sept. 9, 2009). This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is "indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Bellotti*, 435 U.S., at 777, 98 S.Ct. 1407 (footnote omitted); see *ibid.* (the worth of speech "does not depend upon the identity of its source, whether corporation, association, union, or individual"); *Buckley*, 424 U.S., at 48-49, 96 S.Ct. 612 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *Automobile Workers*, 352 U.S., at 597, 77 S.Ct. 529 (Douglas, J., dissenting); *CIO*, 335 U.S., at 154-155, 68 S.Ct. 1349 (Rutledge, J., concurring in result). This protection for speech is inconsistent with *Austin* 's antidistortion rationale. *Austin* sought to defend the antidistortion rationale as

a means to prevent corporations from obtaining " 'an unfair advantage in the political marketplace' " by using " 'resources amassed in the economic marketplace.' " 494 U.S., at 659, 110 S.Ct. 1391 (quoting *MCFL, supra*, at 257, 107 S.Ct. 616). But *Buckley* rejected the premise that the Government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48, 96 S.Ct. 612; see *Bellotti, supra*, at 791, n. 30, 98 S.Ct. 1407. *Buckley* was specific in stating that "the skyrocketing cost of political campaigns" could not sustain the governmental prohibition. 424 U.S., at 26, 96 S.Ct. 612. The First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion." *Id.*, at 49, 96 S.Ct. 612.

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. See *Davis v. Federal Election Comm'n*, 554 U.S. ----, ----, 128 S.Ct. 2759, 2774, 171 L.Ed.2d 737 (2008) ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence ***905** the voters' choices"). The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.

Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages-such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." 494 U.S., at 658-659, 110 S.Ct. 1391. This does not suffice, however, to allow laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights." *Id.*, at 680, 110 S.Ct. 1391 (SCALIA, J., dissenting).

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Id.*, at 660, 110 S.Ct. 1391 (majority opinion). All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas. See *id.*, at 707, 110 S.Ct. 1391 (KENNEDY, J., dissenting) ("Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary").

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. See *McConnell*, 540 U.S., at 283, 124 S.Ct. 619 (opinion of THOMAS, J.) ("The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press"). Cf. *Tornillo*, 418 U.S., at 250, 94 S.Ct. 2831 (alleging the existence of "vast accumulations of unreviewable power in the modern media empires"). Media corporations are now exempt from § 441b's ban on corporate expenditures. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. *Austin*, 494 U.S., at 660, 110 S.Ct. 1391. Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Id.*, at 691, 110 S.Ct. 1391 (SCALIA, J., dissenting) (citing *Bellotti*, 435 U.S., at 782, 98 S.Ct. 1407); see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784, 105 S.Ct. 2939, 86 L.Ed.2d 593

(1985) (Brennan, J., joined by Marshall, Blackmun, and STEVENS, JJ., dissenting); *id.*, at 773, 105 S.Ct. 2939 (White, J., concurring in judgment). With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to ***906** comment on political and social issues becomes far more blurred.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. The Framers may not have anticipated modern business and media corporations. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360-361, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (Thomas, J., concurring in judgment). Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies. See *McConnell*, 540 U.S., at 252-253, 124 S.Ct. 619 (opinion of SCALIA, J.); *Grosjean*, 297 U.S., at 245-248, 56 S.Ct. 444; *Near*, 283 U.S., at 713-714, 51 S.Ct. 625. The great debates between the Federalists and the Anti-Federalists over our founding document were published and expressed in the most important means of mass communication of that era-newspapers owned by individuals. See *McIntyre*, 514 U.S., at 341-343, 115 S.Ct. 1511; *id.*, at 367, 115 S.Ct. 1511 (THOMAS, J., concurring in judgment). At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge. See B. Bailyn, Ideological Origins of the American Revolution 5 (1967) ("Any number of people could join in such proliferating polemics, and rebuttals could come from all sides"); G. Wood, Creation of the American Republic 1776-1787, p. 6 (1969) ("[I]t is not surprising that the intellectual sources of [the Americans'] Revolutionary thought were profuse and various"). The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.

Austin interferes with the "open marketplace" of ideas protected by the First Amendment. *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008); see *ibid.* (ideas "may compete" in this marketplace "without government interference"); *McConnell*, *supra*, at 274, 124 S.Ct. 619 (opinion of THOMAS, J.). It permits the ***907** Government to ban the political speech of millions of associations of citizens. See Statistics of Income 2 (5.8 million for-profit corporations filed 2006 tax returns). Most of these are small corporations without large amounts of wealth. See Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 1, 3 (96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees); M. Keightley, Congressional Research Service Report for Congress, Business Organizational Choices: Taxation and Responses to Legislative Changes 10 (2009) (more than 75% of corporations whose income is taxed under federal law, see 26 U.S.C. § 301, have less than $1 million in receipts per year). This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." *Austin*, 494 U.S., at 660, 110 S.Ct. 1391. It is not even aimed at amassed wealth.

130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73
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The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." *McConnell, supra,* at 257-258, 124 S.Ct. 619 (opinion of SCALIA, J.). And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." *CIO,* 335 U.S., at 144, 68 S.Ct. 1349 (Rutledge, J., concurring in result). By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." The Federalist No. 10, p. 130 (B. Wright ed.1961) (J. Madison). Factions should be checked by permitting them all to speak, see *ibid.,* and by entrusting the people to judge what is true and what is false.

[15] The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." *Bellotti,* 435 U.S., at 792, n. 31, 98 S.Ct. 1407 (citing *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510-511, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)). Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An *amici* brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications with elected officials occur on a regular basis. Brief for State of Montana et al. as *Amici Curiae* 19. When that phenomenon is coupled with § 441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that § 441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation of this law. Rhetoric ought not obscure reality.

***908** Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. See, *e.g.*, *WRTL,* 551 U.S., at 503-504, 127 S.Ct. 2652 (opinion of SCALIA, J.) ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to [26 U.S.C. § 527 organizations]"). Yet certain disfavored associations of citizens-those that have taken on the corporate form-are penalized for engaging in the same political speech.

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley,* the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits. 424 U.S., at 25, 96 S.Ct. 612. When *Buckley* examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." *Id.,* at 45, 96 S.Ct. 612.

With regard to large direct contributions, *Buckley* reasoned that they could be given "to secure a political *quid pro quo*," *id.,* at 26, 96 S.Ct. 612, and that "the scope of such pernicious practices can never be reliably ascertained," *id.,* at 27, 96 S.Ct. 612. The practices *Buckley* noted would be covered by bribery laws, see, *e.g.,* 18 U.S.C. § 201, if a *quid pro quo* arrangement were proved. See *Buckley, supra,* at 27,

and n. 28, 96 S.Ct. 612 (citing *Buckley v. Valeo*, 519 F.2d 821, 839-840, and nn. 36-38 (CADC 1975) (en banc) *(per curiam)*). The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. *MCFL*, 479 U.S., at 260, 107 S.Ct. 616; *NCPAC*, 470 U.S., at 500, 105 S.Ct. 1459; *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) *(NRWC)*. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

"The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S., at 47, 96 S.Ct. 612; see *ibid.* (independent expenditures have a "substantially diminished potential for abuse"). Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures***909** by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States. See Supp. Brief for Appellee 18, n. 3; Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 8-9, n. 5.

A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. 435 U.S., at 788, n. 26, 98 S.Ct. 1407. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. Dicta in *Bellotti*'s footnote suggested that "a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." *Ibid.* Citing the portion of *Buckley* that invalidated the federal independent expenditure ban, 424 U.S., at 46, 96 S.Ct. 612, and a law review student comment, *Bellotti* surmised that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." 435 U.S., at 788, n. 26, 98 S.Ct. 1407. *Buckley*, however, struck down a ban on independent expenditures to support candidates that covered corporations, 424 U.S., at 23, 39, n. 45, 96 S.Ct. 612, and explained that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," *id.*, at 42, 96 S.Ct. 612. *Bellotti* 's dictum is thus supported only by a law review student comment, which misinterpreted *Buckley*. See Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. Pa. L.Rev. 386, 408 (1977) (suggesting that "corporations and labor unions should be held to different and more stringent standards than an individual or other associations under a regulatory scheme for campaign financing").

Seizing on this aside in *Bellotti*'s footnote, the Court in *NRWC* did say there is a "sufficient" governmental interest in "ensur[ing] that substantial aggregations of wealth amassed" by corporations would not "be used to incur political debts from legislators who are aided by the contributions." 459 U.S., at 207-208, 103 S.Ct. 552 (citing *Automobile Workers*, 352 U.S., at 579, 77 S.Ct. 529); see 459 U.S., at 210, and n. 7, 103 S.Ct. 552; *NCPAC, supra*, at 500-501, 105 S.Ct. 1459 (*NRWC* suggested a governmental interest in restricting "the influence of political war chests funneled through the corporate form"). *NRWC*, however, has little relevance here. *NRWC* decided no more than that a restriction on a corporation's ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. 459 U.S., at 206, 103 S.Ct. 552. *NRWC* thus involved contribution limits, see *NCPAC, supra*, at 495-496, 105 S.Ct. 1459, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption, see *McConnell*, 540 U.S., at 136-138, and n. 40, 124 S.Ct. 619; *MCFL, supra*, at 259-260, 107 S.Ct. 616. Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.

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When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. See *McConnell, supra*, at 296-298, 124 S.Ct. 619 (opinion of ***910** KENNEDY, J.) (citing *Buckley, supra*, at 26-28, 30, 46-48, 96 S.Ct. 612); *NCPAC*, 470 U.S., at 497, 105 S.Ct. 1459 ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors"); *id.*, at 498, 105 S.Ct. 1459. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

> "Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *McConnell*, 540 U.S., at 297, 124 S.Ct. 619 (opinion of KENNEDY, J.).

Reliance on a "generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.*, at 296, 124 S.Ct. 619.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. See *Buckley, supra*, at 46, 96 S.Ct. 612. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse " 'to take part in democratic governance' " because of additional political speech made by a corporation or any other speaker. *McConnell, supra*, at 144, 124 S.Ct. 619 (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 390, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)).

Caperton v. A.T. Massey Coal Co., 556 U.S. ----, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.*, at ----, 129 S.Ct., at 2263-2264. The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. See *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). *Caperton* 's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

The *McConnell* record was "over 100,000 pages" long, *McConnell I*, 251 F.Supp.2d, at 209, yet it "does not have any direct examples of votes being exchanged for ... expenditures," *id.*, at 560 (opinion of Kollar-Kotelly, J.). This confirms *Buckley* 's reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. See 251 F.Supp.2d, at 555-557 (opinion of Kollar-Kotelly, J.). Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials. *McConnell, supra*, at 125, 130-131, 146-152, 124 S.Ct. 619; see *McConnell I*, 251 F.Supp.2d, at 471-481, 491-506 (opinion of Kollar-Kotelly, J.); *id.*, at 842-843, 858-859 (opinion of Leon, J.). This case, however, is about ***911** independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*'s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. See *supra*, at 905 - 906. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. See *Austin*, 494 U.S., at 687, 110 S.Ct. 1391 (SCALIA, J., dissenting). Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy." *Bellotti*, 435 U.S., at 794, 98 S.Ct. 1407; see *id.*, at 794, n. 34, 98 S.Ct. 1407.

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to "foreign national[s]"). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo*, that the Government has a compelling interest in limiting foreign influence over our political process. See *Broadrick*, 413 U.S., at 615, 93 S.Ct. 2908.

C

[16][17] Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us ***912** on a course that is sure error. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. ----, ----, 129 S.Ct. 2079, 2088-2089, 173 L.Ed.2d 955 (2009) (overruling *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)). We have also examined whether "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. ----, ----, 129 S.Ct. 808, 816, 172 L.Ed.2d 565 (2009) (overruling *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

[18] These considerations counsel in favor of rejecting *Austin*, which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *WRTL*, 551 U.S., at 500, 127 S.Ct. 2652 (opinion of SCALIA, J.). "*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

[19] For the reasons above, it must be concluded that *Austin* was not well reasoned. The Government defends *Austin*, relying almost entirely on "the quid pro quo interest, the corruption interest or the shareholder interest," and not *Austin*'s expressed antidistortion rationale. Tr. of Oral Arg. 48 (Sept. 9, 2009); see *id.*, at 45-46. When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished. *Austin* abandoned First Amendment principles, furthermore, by relying on language in some of our precedents that traces back to the *Automobile Workers* Court's flawed historical account of campaign finance laws, see Brief for Campaign Finance Scholars as *Amici Curiae;* Hayward, 45 Harv. J. Legis. 421; R. Mutch, Campaigns, Congress, and Courts 33-35, 153-157 (1988). See *Austin*, *supra*, at 659, 110 S.Ct. 1391 (quoting *MCFL*, 479 U.S., at 257-258, 107 S.Ct. 616;

NCPAC, 470 U.S., at 500-501, 105 S.Ct. 1459); *MCFL*, *supra*, at 257, 107 S.Ct. 616 (quoting *Automobile Workers*, 352 U.S., at 585, 77 S.Ct. 529); *NCPAC*, *supra*, at 500, 105 S.Ct. 1459 (quoting *NRWC*, 459 U.S., at 210, 103 S.Ct. 552); *id.*, at 208, 103 S.Ct. 552 ("The history of the movement to regulate the political contributions and expenditures of corporations and labor unions is set forth in great detail in *[Automobile Workers]*, *supra*, at 570-584, 77 S.Ct. 529, and we need only summarize the development here").

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. See, *e.g.*, *McConnell*, 540 U.S., at 176-177, 124 S.Ct. 619 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives ... to exploit [26 U.S.C. § 527] organizations will only increase"). Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology-and the creative dynamic inherent in the concept of ***913** free expression-counsel against upholding a law that restricts political speech in certain media or by certain speakers. See Part II-C, *supra*. Today, 30-second television ads may be the most effective way to convey a political message. See *McConnell*, *supra*, at 261, 124 S.Ct. 619 (opinion of SCALIA, J.). Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, § 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. See 2 U.S.C. § 441b(a); *MCFL*, *supra*, at 249, 107 S.Ct. 616. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

[20] No serious reliance interests are at stake. As the Court stated in *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), reliance interests are important considerations in property and contract cases, where parties may have acted in conformance with existing legal rules in order to conduct transactions. Here, though, parties have been prevented from acting-corporations have been banned from making independent expenditures. Legislatures may have enacted bans on corporate expenditures believing that those bans were constitutional. This is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent us from overruling our own precedents, thereby interfering with our duty "to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803).

[21] Due consideration leads to this conclusion: *Austin*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

D

[22] *Austin* is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* "effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy." Brief for Appellee 33, n. 12. Section 441b's restrictions on corporate independent expenditures are therefore invalid and cannot be applied to *Hillary*.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures. See 540 U.S., at 203-209, 124 S.Ct. 619. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin*, see 540 U.S., at 205, 124 S.Ct. 619, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

IV

A

[23] Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that ***914** " '_____ is responsible for the content of this advertising.' " 2 U.S.C. § 441d(d)(2). The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. *Ibid*. It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S., at 64, 96 S.Ct. 612, and "do not prevent anyone from speaking," *McConnell*, *supra*, at 201, 124 S.Ct. 619 (internal quotation marks and brackets omitted). The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Buckley*, *supra*, at 64, 66, 96 S.Ct. 612 (internal quotation marks omitted); see *McConnell*, *supra*, at 231-232, 124 S.Ct. 619.

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 U.S., at 66, 96 S.Ct. 612. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. 540 U.S., at 196, 124 S.Ct. 619. There was evidence in the record that independent groups were running election-related advertisements " 'while hiding behind dubious and misleading names.' " *Id.*, at 197, 124 S.Ct. 619 (quoting *McConnell I*, 251 F.Supp.2d, at 237). The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens " 'make informed choices in the political marketplace.' " 540 U.S., at 197, 124 S.Ct. 619 (quoting *McConnell I*, *supra*, at 237); see 540 U.S., at 231, 124 S.Ct. 619.

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a " 'reasonable probability' " that disclosure of its contributors' names " 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.' " *Id.*, at 198, 124 S.Ct. 619 (quoting *Buckley*, *supra*, at 74, 96 S.Ct. 612).

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. Under FEC regulations, a communication that "[p]roposes a commercial transaction" was not subject to 2 U.S.C. § 441b's restrictions on corporate or union funding of electioneering communications. 11 CFR § 114.15(b)(3)(ii). The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311. See 72 Fed.Reg. 72901 (2007).

[24] Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate does not justify requiring disclaimers for ***915** any commercial advertisements, including the ones at issue here. We disagree. The ads fall within BCRA's definition of an "electioneering communication": They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. See 530 F.Supp.2d, at 276, nn. 2-4. The disclaimers required by § 311 "provid[e] the electorate with information," *McConnell*, *supra*, at 196, 124 S.Ct. 619, and "insure that the voters are fully informed" about the person or group who is speaking, *Buckley*, *supra*, at 76, 96 S.Ct. 612; see also *Bellotti*, 435 U.S., at 792, n. 32, 98 S.Ct. 1407 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to

evaluate the arguments to which they are being subjected"). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.

Citizens United argues that § 311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising. It asserts that § 311 decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer. We rejected these arguments in *McConnell, supra*, at 230-231, 124 S.Ct. 619. And we now adhere to that decision as it pertains to the disclosure provisions.

As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. 551 U.S., at 469-476, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention.

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. See, *e.g.*, *MCFL*, 479 U.S., at 262, 107 S.Ct. 616. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U.S., at 75-76, 96 S.Ct. 612. In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U.S., at 321, 124 S.Ct. 619 (opinion of KENNEDY, J., joined by Rehnquist, C.J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Citizens United also disputes that an informational interest justifies the application of § 201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational***916** interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government's other asserted interests.

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. See Brief for Institute for Justice as *Amicus Curiae* 13-16; Brief for Alliance Defense Fund as *Amicus Curiae* 16-22. In *McConnell*, the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. 540 U.S., at 198, 124 S.Ct. 619. The examples cited by *amici* are cause for concern. Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

Shareholder objections raised through the procedures of corporate democracy, see *Bellotti, supra*, at 794, and n. 34, 98 S.Ct. 1407, can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. See *McConnell*, 540 U.S., at 128, 124 S.Ct. 619 ("[T]he public may not have been fully informed about the sponsorship of so-called issue ads"); *id.*, at 196-197, 124 S.Ct. 619 (quoting *McConnell I*, 251 F.Supp.2d, at 237). With the advent of the Internet, prompt disclosure of ex-

penditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are " 'in the pocket' of so-called moneyed interests." 540 U.S., at 259, 124 S.Ct. 619 (opinion of SCALIA, J.); see *MCFL, supra*, at 261, 107 S.Ct. 616. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

C

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

V

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. See Smoodin, "Compulsory" Viewing for Every Citizen: *Mr. Smith* and the Rhetoric of Reception, 35 Cinema Journal 3, 19, and n. 52 (Winter 1996) (citing Mr. Smith Riles Washington, Time, Oct. 30, 1939, p. 49); Nugent, Capra's Capitol Offense, N.Y. Times, Oct. 29, 1939, p. X5. Under *Austin*, though, officials could have done more than discourage***917** its distribution-they could have banned the film. After all, it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. 2 U.S.C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell, supra*, at 341, 124 S.Ct. 619 (opinion of KENNEDY, J.).

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. § 441b's restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice ALITO joins, concurring.

The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations-as the

major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.

I

Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to ***918** perform." *Blodgett v. Holden*, 275 U.S. 142, 147-148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. See *Ashwander v. TVA*, 297 U.S. 288, 346-348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice " 'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)).

The majority and dissent are united in expressing allegiance to these principles. *Ante*, at 892; *post*, at 936 - 937 (STEVENS, J., concurring in part and dissenting in part). But I cannot agree with my dissenting colleagues on how these principles apply in this case.

The majority's step-by-step analysis accords with our standard practice of avoiding broad constitutional questions except when necessary to decide the case before us. The majority begins by addressing-and quite properly rejecting-Citizens United's statutory claim that 2 U.S.C. § 441b does not actually cover its production and distribution of *Hillary: The Movie* (hereinafter *Hillary*). If there were a valid basis for deciding this statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so. Indeed, that is precisely the approach the Court took just last Term in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. ----, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009), when eight Members of the Court agreed to decide the case on statutory grounds instead of reaching the appellant's broader argument that the Voting Rights Act is unconstitutional.

It is only because the majority rejects Citizens United's statutory claim that it proceeds to consider the group's various constitutional arguments, beginning with its narrowest claim (that *Hillary* is not the functional equivalent of express advocacy) and proceeding to its broadest claim (that *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) should be overruled). This is the same order of operations followed by the controlling opinion in *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (*WRTL*). There the appellant was able to prevail on its narrowest constitutional argument because its broadcast ads did not qualify as the functional equivalent of express advocacy; there was thus no need to go on to address the broader claim that *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), should be overruled. *WRTL*, 551 U.S., at 482, 127 S.Ct. 2652; *id.*, at 482-483, 127 S.Ct. 2652 (ALITO, J., concurring). This case is different-not, as the dissent suggests, because the approach taken in *WRTL* has been deemed a "failure," *post*, at 935, but because, in the absence of any valid narrower ground of decision, there is no way to avoid Citizens United's broader constitutional argument.

The dissent advocates an approach to addressing Citizens United's claims that I find quite perplexing. It presumably agrees with the majority that Citizens United's narrower statutory and constitutional arguments lack merit-otherwise its conclusion that the group should lose this case would make no sense. Despite agreeing***919** that these narrower arguments fail, however, the dissent argues that the majority should nonetheless latch on to one of them in order to avoid reaching the broader constitutional question of whether *Austin* remains good law. It even suggests that the Court's failure to adopt one of these concededly meritless arguments is a sign that the majority is not "serious about judicial restraint." *Post*, at 938.

This approach is based on a false premise: that

our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law. It should go without saying, however, that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right. Thus while it is true that "[i]f it is not necessary to decide more, it is necessary not to decide more," *post,* at 937 (internal quotation marks omitted), sometimes it *is* necessary to decide more. There is a difference between judicial restraint and judicial abdication. When constitutional questions are "indispensably necessary" to resolving the case at hand, "the court must meet and decide them." *Ex parte Randolph*, 20 F. Cas. 242, 254 (No. 11, 558) (CC Va. 1833) (Marshall, C.J.).

Because it is necessary to reach Citizens United's broader argument that *Austin* should be overruled, the debate over whether to consider this claim on an as-applied or facial basis strikes me as largely beside the point. Citizens United has standing-it is being injured by the Government's enforcement of the Act. Citizens United has a constitutional claim-the Act violates the First Amendment, because it prohibits political speech. The Government has a defense-the Act may be enforced, consistent with the First Amendment, against corporations. Whether the claim or the defense prevails is the question before us.

Given the nature of that claim and defense, it makes no difference of any substance whether this case is resolved by invalidating the statute on its face or only as applied to Citizens United. Even if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United-because corporations as well as individuals enjoy the pertinent First Amendment rights-would mean that any other corporation raising the same challenge would also win. Likewise, a conclusion that the Act may be applied to Citizens United-because it is constitutional to prohibit corporate political speech-would similarly govern future cases. Regardless whether we label Citizens United's claim a "facial" or "as-applied" challenge, the consequences of the Court's decision are the same.[FN1]

FN1. The dissent suggests that I am "much too quick" to reach this conclusion because I "ignore" Citizens United's narrower arguments. *Post,* at 936, n. 12. But in fact I do not ignore those arguments; on the contrary, I (and my colleagues in the majority) appropriately consider and reject them on their merits, before addressing Citizens United's broader claims. *Supra,* at 918 - 919; *ante,* at 888 - 892.

II

The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union. What makes this case difficult is the need to confront our prior decision in *Austin.*

This is the first case in which we have been asked to overrule *Austin,* and thus it is also the first in which we have had reason to consider how much weight to give *stare decisis* in assessing its continued validity. The dissent erroneously declares ***920** that the Court "reaffirmed" *Austin*'s holding in subsequent cases-namely, *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003); *McConnell* ; and *WRTL*. *Post,* at 956 - 957. Not so. Not a single party in any of those cases asked us to overrule *Austin,* and as the dissent points out, *post,* at 931 - 932, the Court generally does not consider constitutional arguments that have not properly been raised. *Austin*'s validity was therefore not directly at issue in the cases the dissent cites. The Court's unwillingness to overturn *Austin* in those cases cannot be understood as a *reaffirmation* of that decision.

A

Fidelity to precedent-the policy of *stare decisis*-is vital to the proper exercise of the judicial function. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

At the same time, *stare decisis* is neither an "inexorable command," *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), nor "a mechanical formula of adherence to the latest

decision," *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940), especially in constitutional cases, see *United States v. Scott*, 437 U.S. 82, 101, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), overruled by *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Adkins v. Children's Hospital of D. C.*, 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), overruled by *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). As the dissent properly notes, none of us has viewed *stare decisis* in such absolute terms. *Post*, at 938 - 939; see also, *e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 274-281, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting) (urging the Court to overrule its invalidation of limits on independent expenditures on political speech in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*)).

Stare decisis is instead a "principle of policy." *Helvering, supra*, at 119, 60 S.Ct. 444. When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." Jackson, Decisional Law and *Stare Decisis*, 30 A.B.A.J. 334 (1944).

In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." ***921** *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). Its greatest purpose is to serve a constitutional ideal-the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Thus, for example, if the precedent under consideration itself departed from the Court's jurisprudence, returning to the " 'intrinsically sounder' doctrine established in prior cases" may "better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); see also *Helvering, supra*, at 119, 60 S.Ct. 444; *Randall, supra*, at 274, 126 S.Ct. 2479 (STEVENS, J., dissenting). Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent's validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent's underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake. See, *e.g.*, *Pearson v. Callahan*, 555 U.S. ----, ----, 129 S.Ct. 808, 817, 172 L.Ed.2d 565 (2009); *Montejo v. Louisiana*, 556 U.S. ----, ----, 129 S.Ct. 2079, 2088-2089, 173 L.Ed.2d 955 (2009) (*stare decisis* does not control when adherence to the prior decision requires "fundamentally revising its theoretical basis").

B

These considerations weigh against retaining our decision in *Austin*. First, as the majority explains, that decision was an "aberration" insofar as it departed from the robust protections we had granted political speech in our earlier cases. *Ante*, at 907; see also *Buckley, supra*; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). *Austin* undermined the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech. *Buckley* rejected the asserted government interest in regulating independent expenditures, concluding that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S.,

at 48-49, 96 S.Ct. 612; see also *Bellotti, supra,* at 790-791, 98 S.Ct. 1407; *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 295, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). *Austin,* however, allowed the Government to prohibit these same expenditures out of concern for "the corrosive and distorting effects of immense aggregations of wealth" in the marketplace of ideas. 494 U.S., at 660, 110 S.Ct. 1391. *Austin*'s reasoning was-and remains-inconsistent with *Buckley*'s explicit repudiation of any government interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48-49, 96 S.Ct. 612.

Austin was also inconsistent with *Bellotti*'s clear rejection of the idea that "speech that otherwise would be within the protection of the First Amendment loses that ***922** protection simply because its source is a corporation." 435 U.S., at 784, 98 S.Ct. 1407. The dissent correctly points out that *Bellotti* involved a referendum rather than a candidate election, and that *Bellotti* itself noted this factual distinction, *id.*, at 788, n. 26, 98 S.Ct. 1407; *post,* at 958. But this distinction does not explain why corporations may be subject to prohibitions on speech in candidate elections when individuals may not.

Second, the validity of *Austin*'s rationale-itself adopted over two "spirited dissents," *Payne,* 501 U.S., at 829, 111 S.Ct. 2597-has proved to be the consistent subject of dispute among Members of this Court ever since. See, *e.g.*, *WRTL,* 551 U.S., at 483, 127 S.Ct. 2652 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment); *McConnell,* 540 U.S., at 247, 264, 286, 124 S.Ct. 619 (opinions of SCALIA, THOMAS, and KENNEDY, JJ.); *Beaumont,* 539 U.S., at 163, 164, 123 S.Ct. 2200 (opinions of KENNEDY and THOMAS, JJ.). The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent's ability to contribute to the stable and orderly development of the law. In such circumstances, it is entirely appropriate for the Court-which in this case is squarely asked to reconsider *Austin* 's validity for the first time-to address the matter with a greater willingness to consider new approaches capable of restoring our doctrine to sounder footing.

Third, the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court's decisions even outside the particular context of corporate express advocacy. The First Amendment theory underlying *Austin*'s holding is extraordinarily broad. *Austin*'s logic would authorize government prohibition of political speech by a category of speakers in the name of equality-a point that most scholars acknowledge (and many celebrate), but that the dissent denies. Compare, *e.g.*, Garrett, New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics, 52 Howard L.J. 655, 669 (2009) (*Austin* "has been understood by most commentators to be an opinion driven by equality considerations, albeit disguised in the language of 'political corruption' ") with *post,* at 970 (*Austin*'s rationale "is manifestly not just an 'equalizing' ideal in disguise").[FN2]

> FN2. See also, *e.g.*, R. Hasen, The Supreme Court and Election Law: Judging Equality from *Baker v. Carr* to *Bush v. Gore* 114 (2003) (" *Austin* represents the first and only case [before *McConnell*] in which a majority of the Court accepted, in deed if not in word, the equality rationale as a permissible state interest"); Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L.Rev. 1369, 1369, and n. 1 (1994) (noting that *Austin*'s rationale was based on equalizing political speech); Ashdown, Controlling Campaign Spending and the "New Corruption": Waiting for the Court, 44 Vand. L.Rev. 767, 781 (1991); Eule, Promoting Speaker Diversity: *Austin* and *Metro Broadcasting*, 1990 S.Ct. Rev. 105, 108-111.

It should not be surprising, then, that Members of the Court have relied on *Austin*'s expansive logic to justify greater incursions on the First Amendment, even outside the original context of corporate advocacy on behalf of candidates running for office. See, *e.g.*, *Davis v. Federal Election Comm'n,* 554 U.S. ----, ----, 128 S.Ct. 2759, 2780, 171 L.Ed.2d 737 (2008) (STEVENS, J., concurring in part and dissenting in part) (relying on *Austin* and other cases to justify restrictions on campaign spending by individual candidates, explaining that "there is no reason that their logic-specifically, their concerns about the corrosive and distorting effects of wealth on our political process-is not ***923** equally applicable in the context of individual wealth"); *McConnell, supra,* at 203-209, 124 S.Ct. 619 (extending *Austin* beyond its original

context to cover not only the "functional equivalent" of express advocacy by corporations, but also electioneering speech conducted by labor unions). The dissent in this case succumbs to the same temptation, suggesting that *Austin* justifies prohibiting corporate speech because such speech might unduly influence "the market for legislation." *Post,* at 975. The dissent reads *Austin* to permit restrictions on corporate speech based on nothing more than the fact that the corporate form may help individuals coordinate and present their views more effectively. *Post,* at 975. A speaker's ability to persuade, however, provides no basis for government regulation of free and open public debate on what the laws should be.

If taken seriously, *Austin*'s logic would apply most directly to newspapers and other media corporations. They have a more profound impact on public discourse than most other speakers. These corporate entities are, for the time being, not subject to § 441b's otherwise generally applicable prohibitions on corporate political speech. But this is simply a matter of legislative grace. The fact that the law currently grants a favored position to media corporations is no reason to overlook the danger inherent in accepting a theory that would allow government restrictions on their political speech. See generally *McConnell, supra,* at 283-286, 124 S.Ct. 619 (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part).

These readings of *Austin* do no more than carry that decision's reasoning to its logical endpoint. In doing so, they highlight the threat *Austin* poses to First Amendment rights generally, even outside its specific factual context of corporate express advocacy. Because *Austin* is so difficult to confine to its facts-and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly-the costs of giving it *stare decisis* effect are unusually high.

Finally and most importantly, the Government's own effort to defend *Austin*-or, more accurately, to defend something that is not quite *Austin*-underscores its weakness as a precedent of the Court. The Government concedes that *Austin* "is not the most lucid opinion," yet asks us to reaffirm its holding. Tr. of Oral Arg. 62 (Sept. 9, 2009). But while invoking *stare decisis* to support this position, the Government never once even *mentions* the compelling interest that *Austin* relied upon in the first place: the need to diminish "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S., at 660, 110 S.Ct. 1391.

Instead of endorsing *Austin* on its own terms, the Government urges us to reaffirm *Austin*'s specific holding on the basis of two new and potentially expansive interests-the need to prevent actual or apparent *quid pro quo* corruption, and the need to protect corporate shareholders. See Supp. Brief for Appellee 8-10, 12-13. Those interests may or may not support the *result* in *Austin,* but they were plainly not part of the *reasoning* on which *Austin* relied.

To its credit, the Government forthrightly concedes that *Austin* did not embrace either of the new rationales it now urges upon us. See, *e.g.*, Supp. Brief for Appellee 11 ("The Court did not decide in *Austin* ... whether the compelling interest in preventing actual or apparent corruption provides a constitutionally sufficient justification***924** for prohibiting the use of corporate treasury funds for independent electioneering"); Tr. of Oral Arg. 45 (Sept. 9, 2009) (" *Austin* did not articulate what we believe to be the strongest compelling interest"); *id*., at 61 ("[The Court:] I take it we have never accepted your shareholder protection interest. This is a new argument. [The Government:] I think that that's fair"); *id*., at 64 ("[The Court:] In other words, you are asking us to uphold *Austin* on the basis of two arguments, two principles, two compelling interests we have never accepted in [the context of limits on political expenditures]. [The Government:] [I]n this particular context, fair enough").

To be clear: The Court in *Austin* nowhere relied upon the only arguments the Government now raises to support that decision. In fact, the only opinion in *Austin* endorsing the Government's argument based on the threat of *quid pro quo* corruption was Justice STEVENS's concurrence. 494 U.S., at 678, 110 S.Ct. 1391. The Court itself did not do so, despite the fact that the concurrence highlighted the argument. Moreover, the Court's only discussion of shareholder protection in *Austin* appeared in a section of the opinion that sought merely to distinguish *Austin*'s facts from those of *Federal Election Comm'n v. Massachusetts*

Citizens for Life, Inc., 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). *Austin, supra,* at 663, 110 S.Ct. 1391. Nowhere did *Austin* suggest that the goal of protecting shareholders is itself a compelling interest authorizing restrictions on First Amendment rights.

To the extent that the Government's case for reaffirming *Austin* depends on radically reconceptualizing its reasoning, that argument is at odds with itself. *Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.

Doing so would undermine the rule-of-law values that justify *stare decisis* in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own. This approach would allow the Court's past missteps to spawn future mistakes, undercutting the very rule-of-law values that *stare decisis* is designed to protect.

None of this is to say that the Government is barred from making new arguments to support the outcome in *Austin.* On the contrary, it is free to do so. And of course the Court is free to accept them. But the Government's new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent. They are, as grounds to support *Austin,* literally *un* precedented. Moreover, to the extent the Government relies on new arguments-and declines to defend *Austin* on its own terms-we may reasonably infer that it lacks confidence in that decision's original justification.

Because continued adherence to *Austin* threatens to subvert the "principled and intelligible" development of our First Amendment jurisprudence, *Vasquez,* 474 U.S., at 265, 106 S.Ct. 617, I support the Court's determination to overrule that decision.

* * *

We have had two rounds of briefing in this case, two oral arguments, and 54 *amicus****925*** briefs to help us carry out our obligation to decide the necessary constitutional questions according to law. We have also had the benefit of a comprehensive dissent that has helped ensure that the Court has considered all the relevant issues. This careful consideration convinces me that Congress violates the First Amendment when it decrees that some speakers may not engage in political speech at election time, when it matters most.

Justice SCALIA, with whom Justice ALITO joins, and with whom Justice THOMAS joins in part, concurring.

I join the opinion of the Court.[FN1]

FN1. Justice THOMAS does not join Part IV of the Court's opinion.

I write separately to address Justice STEVENS' discussion of "*Original Understandings*," *post,* at 948 (opinion concurring in part and dissenting in part) (hereinafter referred to as the dissent). This section of the dissent purports to show that today's decision is not supported by the original understanding of the First Amendment. The dissent attempts this demonstration, however, in splendid isolation from the text of the First Amendment. It never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

Instead of taking this straightforward approach to determining the Amendment's meaning, the dissent embarks on a detailed exploration of the Framers' views about the "role of corporations in society." *Post,* at 949. The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted-not, as the dissent suggests, as a freestanding substitute for that text. But the dissent's distortion of proper analysis is even worse than that. Though faced with a constitutional text that makes no distinction between types of

speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on petitioners to bring forward statements showing that they *are* ("there is not a scintilla of evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form," *post*, at 948).

Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised. If so, how came there to be so many of them? The dissent's statement that there were few business corporations during the eighteenth century-"only a few hundred during all of the 18th century"-is misleading. *Post*, at 949, n. 53. There were approximately 335 charters issued to business corporations in the United States by the end of the 18th century.[FN2] See 2 J. & Davis, ***926** Essays in the Earlier History of American Corporations 24 (1917) (reprint 2006) (hereinafter Davis). This was a "considerable extension of corporate enterprise in the field of business," Davis 8, and represented "unprecedented growth," *id.*, at 309. Moreover, what seems like a small number by today's standards surely does not indicate the relative importance of corporations when the Nation was considerably smaller. As I have previously noted, "[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 256, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting C. Cooke, Corporation Trust and Company 92 (1951) (hereinafter Cooke)).

> FN2. The dissent protests that 1791 rather than 1800 should be the relevant date, and that "[m]ore than half of the century's total business charters were issued between 1796 and 1800." *Post*, at 949, n. 53. I used 1800 only because the dissent did. But in any case, it is surely fanciful to think that a consensus of hostility towards corporations was transformed into general favor at some magical moment between 1791 and 1796.

Even if we thought it proper to apply the dissent's approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations; modern corporations might not qualify for exclusion. Most of the Founders' resentment towards corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed.[FN3] Modern corporations do not have such privileges, and would probably have been favored by most of our enterprising Founders-excluding, perhaps, Thomas Jefferson and others favoring perpetuation of an agrarian society. Moreover, if the Founders' specific intent with respect to corporations is what matters, why does the dissent ignore the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations? At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today. [FN4] See Davis 16-17; R. Seavoy, Origins of the American Business Corporation, 1784-1855, p. 5 (1982); Cooke 94. There were also small unincorporated business associations, which some have argued were the " 'true progenitors' " of today's business corporations. Friedman 200 (quoting S. Livermore, Early American Land Companies: Their Influence on Corporate Development 216 (1939)); see also Davis 33. Were all of these silently excluded from the protections of the First Amendment?

> FN3. "[P]eople in 1800 identified corporations with franchised monopolies." L. Friedman, A History of American Law 194 (2d ed.1985) (hereinafter Friedman). "The chief cause for the changed popular attitude towards business corporations that marked the opening of the nineteenth century was the elimination of their inherent monopolistic character. This was accomplished primarily by an extension of the principle of free incorporation under general laws." 1 W. Fletcher, Cyclopedia of the Law of Corporations § 2, p. 8 (rev. ed.2006).

> FN4. At times (though not always) the dissent seems to exclude such non-"business corporations" from its denial of free speech rights. See *post*, at 949 - 950. Finding in a seemingly categorical text a distinction between the rights of business corporations and the rights of non-business corporations

> is even more imaginative than finding a distinction between the rights of *all* corporations and the rights of other associations.

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter, see 1 W. Blackstone, Commentaries on the Laws of England 455-473 (1765); 1 S. Kyd, A ***927** Treatise on the Law of Corporations 1-32, 63 (1793) (reprinted 2006), and as I have discussed, the practice of incorporation only expanded in the United States. Both corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets. For example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in 1790. W. diGiacomantonio, "For the Gratification of a Volunteering Society": Antislavery and Pressure Group Politics in the First Federal Congress, 15 J. Early Republic 169 (1995). The New York Sons of Liberty sent a circular to colonies farther south in 1766. P. Maier, From Resistance to Revolution 79-80 (1972). And the Society for the Relief and Instruction of Poor Germans circulated a biweekly paper from 1755 to 1757. Adams, The Colonial German-language Press and the American Revolution, in The Press & the American Revolution 151, 161-162 (B. Bailyn & J. Hench eds.1980). The dissent offers no evidence-none whatever-that the First Amendment's unqualified text was originally understood to exclude such associational speech from its protection. [FN5]

> FN5. The best the dissent can come up with is that "[p]ostratification practice" supports its reading of the First Amendment. *Post,* at 951, n. 56. For this proposition, the dissent cites Justice White's statement (in dissent) that "[t]he common law was generally interpreted as prohibiting corporate political participation," *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 819, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). The sole authority Justice White cited for this proposition, *id.,* at 819, n. 14, 98 S.Ct. 1407, was a law-review note that made no such claim. To the contrary, it stated that the cases dealing with the propriety of corporate political expenditures were "few." Note, Corporate Political Affairs Programs, 70 Yale L. J. 821, 852 (1961). More specifically, the note cites only two holdings to that effect, one by a Federal District Court, and one by the Supreme Court of Montana. *Id.,* at 852, n. 197. Of course even if the common law was "generally interpreted" to prohibit corporate political expenditures as ultra vires, that would have nothing to do with whether political expenditures that *were* authorized by a corporation's charter could constitutionally be suppressed.
>
> As additional "[p]ostratification practice," the dissent notes that the Court "did not recognize *any* First Amendment protections for corporations until the middle part of the 20th century." *Post,* at 951, n. 56. But it did that in *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), a case involving freedom of the press-which the dissent acknowledges *did* cover corporations from the outset. The relative recency of that first case is unsurprising. All of our First Amendment jurisprudence was slow to develop. We did not consider application of the First Amendment to speech restrictions other than prior restraints until 1919, see *Schenck v. United States,* 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919); we did not invalidate a state law on First Amendment grounds until 1931, see *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), and a federal law until 1965, see *Lamont v. Postmaster General,* 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965).

Historical evidence relating to the textually similar clause "the freedom of ... the press" also provides no support for the proposition that the First Amendment excludes conduct of artificial legal entities from the scope of its protection. The freedom of "the press" was widely understood to protect the publishing activities of individual editors and printers. See *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 360, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (THOMAS, J., concurring in judgment); see also

130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73
(Cite as: 130 S.Ct. 876)

McConnell, 540 U.S., at 252-253, 124 S.Ct. 619 (opinion of SCALIA, J.). But these individuals often acted through newspapers, which (much like corporations) had their own names, outlived the individuals who had founded them, could be bought and sold, were sometimes owned by more than one person, and were operated for profit. See generally F. ***928** Mott, American Journalism: A History of Newspapers in the United States Through 250 Years 3-164 (1941); J. Smith, Freedom's Fetters (1956). Their activities were not stripped of First Amendment protection simply because they were carried out under the banner of an artificial legal entity. And the notion which follows from the dissent's view, that modern newspapers, since they are incorporated, have free-speech rights only at the sufferance of Congress, boggles the mind.[FN6]

FN6. The dissent seeks to avoid this conclusion (and to turn a liability into an asset) by interpreting the Freedom of the Press Clause to refer to the institutional press (thus demonstrating, according to the dissent, that the Founders "did draw distinctions-explicit distinctions-between types of 'speakers,' or speech outlets or forms"). *Post*, at 951 - 952 and n. 57. It is passing strange to interpret the phrase "the freedom of speech, or of the press" to mean, not everyone's right to speak or publish, but rather everyone's right to speak or the institutional press's right to publish. No one thought that is what it meant. Patriot Noah Webster's 1828 dictionary contains, under the word "press," the following entry:

> "*Liberty of the press*, in civil policy, is the free right of publishing books, pamphlets, or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state." 2 American Dictionary of the English Language (1828) (reprinted 1970).

As the Court's opinion describes, *ante*, at 905 - 906, our jurisprudence agrees with Noah Webster and contradicts the dissent.

> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.... The press in its historical connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

In passing, the dissent also claims that the Court's conception of corruption is unhistorical. The Framers "would have been appalled," it says, by the evidence of corruption in the congressional findings supporting the Bipartisan Campaign Reform Act of 2002. *Post*, at 963. For this proposition, the dissent cites a law review article arguing that "corruption" was originally understood to include "moral decay" and even actions taken by citizens in pursuit of private rather than public ends. Teachout, The Anti-Corruption Principle, 94 Cornell L.Rev. 341, 373, 378 (2009). It is hard to see how this has anything to do with what sort of corruption can be combated by restrictions on political speech. Moreover, if speech can be prohibited because, in the view of the Government, it leads to "moral decay" or does not serve "public ends," then there is no limit to the Government's censorship power.

The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." *Post*, at 950. That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women-not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different-or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American." [FN7]

FN7. The dissent says that " 'speech' " re-

> fers to oral communications of human beings, and since corporations are not human beings they cannot speak. *Post*, at 950, n. 55. This is sophistry. The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association-just as the spokesman of an unincorporated association speaks on behalf of its members. The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation's enjoying the freedom of the press.
>
> The same footnote asserts that "it has been 'claimed that the notion of institutional speech ... did not exist in post-revolutionary America.' " This is quoted from a law-review article by a Bigelow Fellow at the University of Chicago (Fagundes, State Actors as First Amendment Speakers, 100 Nw. U.L.Rev. 1637, 1654 (2006)), which offers as the sole support for its statement a treatise dealing with government speech, M. Yudof, When Government Speaks 42-50 (1983). The cited pages of that treatise provide no support whatever for the statement-unless, as seems overwhelmingly likely, the "institutional speech" referred to was speech by the subject of the law-review article, governmental institutions.
>
> The other authority cited in the footnote, a law-review article by a professor at Washington and Lee Law School, Bezanson, Institutional Speech, 80 Iowa L.Rev. 735, 775 (1995), in fact contradicts the dissent, in that it would accord free-speech protection to associations.

***929** But to return to, and summarize, my principal point, which is the conformity of today's opinion with the original meaning of the First Amendment. The Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals-and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the "inherent worth of the speech" and "its capacity for informing the public," *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

Justice STEVENS, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in part and dissenting in part.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned," *ante*, at 886. All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite ***930** the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its

shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.*, 459 U.S. 197, 209, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982) *(NRWC)*, and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.*, at 209-210, 103 S.Ct. 552. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) *(WRTL)*, *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *FEC v. Beaumont*, 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) *(MCFL)*, *NRWC*, 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364, and *California Medical Assn. v. FEC*, 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981).

In his landmark concurrence in *Ashwander v. TVA*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936), Justice Brandeis stressed the importance of adhering to rules the Court has "developed ... for its own governance" when deciding constitutional questions. Because departures from those rules always enhance the risk of error, I shall review the background of this case in some detail before explaining why the Court's analysis rests on a faulty understanding of *Austin* and *McConnell* and ***931** of our campaign finance jurisprudence more generally.[FN1] I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. Although I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding.

FN1. Specifically, Part I, *infra*, at 931 - 938, addresses the procedural history of the case and the narrower grounds of decision the majority has bypassed. Part II, *infra*, at 938 - 942, addresses *stare decisis*. Part III, *infra*, at 942 - 961, addresses the Court's assumptions that BCRA "bans" corporate speech, that identity-based distinctions may not be drawn in the political realm, and that *Austin* and *McConnell* were outliers in our First Amendment tradition. Part IV, *infra*, at 961 - 979, addresses the Court's treatment of the anticorruption, antidistortion, and shareholder protection rationales for regulating corporate electioneering.

I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell*, it is important to explain why the Court should not be deciding that question.

Scope of the Case

The first reason is that the question was not properly brought before us. In declaring § 203 of

BCRA facially unconstitutional on the ground that corporations' electoral expenditures may not be regulated any more stringently than those of individuals, the majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. This procedure is unusual and inadvisable for a court.[FN2] Our colleagues' suggestion that "we are asked to reconsider *Austin* and, in effect, *McConnell*," *ante*, at 886, would be more accurate if rephrased to state that "we have asked ourselves" to reconsider those cases.

> FN2. See *Yee v. Escondido*, 503 U.S. 519, 535, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) ("[U]nder this Court's Rule 14.1(a), only questions set forth in the petition, or fairly included therein, will be considered by the Court" (internal quotation marks and alteration omitted)); *Wood v. Allen*, --- U.S. ----, 130 S.Ct. 841, --- L.Ed.2d ----, 2010 WL 173369 *5 ("[T]he fact that petitioner discussed [an] issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review" (internal quotation marks and brackets omitted)); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169, 125 S.Ct. 577, 160 L.Ed.2d 548 (2004) ("We ordinarily do not decide in the first instance issues not decided below" (internal quotation marks omitted)).

In the District Court, Citizens United initially raised a facial challenge to the constitutionality of § 203. App. 23a-24a. In its motion for summary judgment, however, Citizens United expressly abandoned its facial challenge, 1:07-cv-2240-RCL-RWR, Docket Entry No. 52, pp. 1-2 (May 16, 2008), and the parties stipulated to the dismissal of that claim, *id.*, Nos. 53 (May 22, 2008), 54 (May 23, 2008), App. 6a. The District Court therefore resolved the case on alternative grounds,[FN3] and in its jurisdictional ***932** statement to this Court, Citizens United properly advised us that it was raising only "an as-applied challenge to the constitutionality of ... BCRA § 203." Juris. Statement 5. The jurisdictional statement never so much as cited *Austin*, the key case the majority today overrules. And not one of the questions presented suggested that Citizens United was surreptitiously raising the facial challenge to § 203 that it previously agreed to dismiss. In fact, not one of those questions raised an issue based on Citizens United's corporate status. Juris. Statement (i). Moreover, even in its merits briefing, when Citizens United injected its request to overrule *Austin*, it never sought a declaration that § 203 was facially unconstitutional as to all corporations and unions; instead it argued only that the statute could not be applied to it because it was "funded overwhelmingly by individuals." Brief for Appellant 29; see also *id.*, at 10, 12, 16, 28 (affirming "as applied" character of challenge to § 203); Tr. of Oral Arg. 4-9 (Mar. 24, 2009) (counsel for Citizens United conceding that § 203 could be applied to General Motors); *id.*, at 55 (counsel for Citizens United stating that "we accept the Court's decision in *Wisconsin Right to Life* ").

> FN3. The majority states that, in denying Citizens United's motion for a preliminary injunction, the District Court "addressed" the facial validity of BCRA § 203. *Ante*, at 892 - 893. That is true, in the narrow sense that the court observed the issue was foreclosed by *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). See 530 F.Supp.2d 274, 278 (D.D.C.2008) *(per curiam)*. Yet as explained above, Citizens United subsequently dismissed its facial challenge, so that by the time the District Court granted the Federal Election Commission's (FEC) motion for summary judgment, App. 261a-262a, any question about statutory validity had dropped out of the case. That latter ruling by the District Court was the "final decision" from which Citizens United appealed to this Court under BCRA § 403(a)(3). As regards the lower court decision that has come before us, the claim that § 203 is facially unconstitutional was neither pressed nor passed upon in any form.

" 'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed,' " *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) *(per curiam)* (quoting *Duignan v. United States*, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927)), and it is "only in the most exceptional cases" that we will consider issues outside the questions

presented, *Stone v. Powell*, 428 U.S. 465, 481, n. 15, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). The appellant in this case did not so much as assert an exceptional circumstance, and one searches the majority opinion in vain for the mention of any. That is unsurprising, for none exists.

Setting the case for reargument was a constructive step, but it did not cure this fundamental problem. Essentially, five Justices were unhappy with the limited nature of the case before us, so they changed the case to give themselves an opportunity to change the law.

As-Applied and Facial Challenges

This Court has repeatedly emphasized in recent years that "[f]acial challenges are disfavored." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); see also *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact' " (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); alteration in original)). By declaring § 203 facially unconstitutional, our colleagues have turned an as-applied challenge into a facial challenge, in defiance of this principle.

This is not merely a technical defect in the Court's decision. The unnecessary resort to a facial inquiry "run[s] contrary to the fundamental principle of judicial restraint***933** that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange*, 552 U.S., at 450, 128 S.Ct. 1184 (internal quotation marks omitted). Scanting that principle "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.*, at 451, 128 S.Ct. 1184. These concerns are heightened when judges overrule settled doctrine upon which the legislature has relied. The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well.

The problem goes still deeper, for the Court does all of this on the basis of pure speculation. Had Citizens United maintained a facial challenge, and thus argued that there are virtually no circumstances in which BCRA § 203 can be applied constitutionally, the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual burdens and its actual benefits, on *all* manner of corporations and unions. [FN4] "Claims of facial invalidity often rest on speculation," and consequently "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Id.*, at 450, 128 S.Ct. 1184 (internal quotation marks omitted). In this case, the record is not simply incomplete or unsatisfactory; it is nonexistent. Congress crafted BCRA in response to a virtual mountain of research on the corruption that previous legislation had failed to avert. The Court now negates Congress' efforts without a shred of evidence on how § 203 or its state-law counterparts have been affecting any entity other than Citizens United.[FN5]

FN4. Shortly before Citizens United mooted the issue by abandoning its facial challenge, the Government advised the District Court that it "require[d] time to develop a factual record regarding [the] facial challenge." 1:07-cv-2240-RCL-RWR, Docket Entry No. 47, p. 4 (Mar. 26, 2008). By reinstating a claim that Citizens United abandoned, the Court gives it a perverse litigating advantage over its adversary, which was deprived of the opportunity to gather and present information necessary to its rebuttal.

FN5. In fact, we do not even have a good evidentiary record of how § 203 has been affecting Citizens United, which never submitted to the District Court the details of *Hillary*'s funding or its own finances. We likewise have no evidence of how § 203 and comparable state laws were expected to affect corporations and unions in the future.

It is true, as the majority points out, that the *McConnell* Court evaluated the facial

validity of § 203 in light of an extensive record. See *ante*, at 893 - 894. But that record is not before us in this case. And in any event, the majority's argument for striking down § 203 depends on its contention that the statute has proved too "chilling" in practice-and in particular on the contention that the controlling opinion in *WRTL*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007), failed to bring sufficient clarity and "breathing space" to this area of law. See *ante*, at 892, 894 - 897. We have no record with which to assess that claim. The Court complains at length about the burdens of complying with § 203, but we have no meaningful evidence to show how regulated corporations and unions have experienced its restrictions.

Faced with this gaping empirical hole, the majority throws up its hands. Were we to confine our inquiry to Citizens United's as-applied challenge, it protests, we would commence an "extended" process of "draw[ing], and then redraw[ing], constitutional***934** lines based on the particular media or technology used to disseminate political speech from a particular speaker." *Ante*, at 891. While tacitly acknowledging that some applications of § 203 might be found constitutional, the majority thus posits a future in which novel First Amendment standards must be devised on an ad hoc basis, and then leaps from this unfounded prediction to the unfounded conclusion that such complexity counsels the abandonment of all normal restraint. Yet it is a pervasive feature of regulatory systems that unanticipated events, such as new technologies, may raise some unanticipated difficulties at the margins. The fluid nature of electioneering communications does not make this case special. The fact that a Court can hypothesize situations in which a statute might, at some point down the line, pose some unforeseen as-applied problems, does not come close to meeting the standard for a facial challenge.[FN6]

FN6. Our cases recognize a "type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (internal quotation marks omitted). Citizens United has not made an overbreadth argument, and "[w]e generally do not apply the strong medicine of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law," *ibid.* (internal quotation marks omitted). If our colleagues nonetheless concluded that § 203's fatal flaw is that it affects too much protected speech, they should have invalidated it for overbreadth and given guidance as to which applications are permissible, so that Congress could go about repairing the error.

The majority proposes several other justifications for the sweep of its ruling. It suggests that a facial ruling is necessary because, if the Court were to continue on its normal course of resolving as-applied challenges as they present themselves, that process would itself run afoul of the First Amendment. See, *e.g.*, *ante*, at 890 (as-applied review process "would raise questions as to the courts' own lawful authority"); *ibid.* ("Courts, too, are bound by the First Amendment"). This suggestion is perplexing. Our colleagues elsewhere trumpet "our duty 'to say what the law is,' " even when our predecessors on the bench and our counterparts in Congress have interpreted the law differently. *Ante*, at 913 (quoting *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803)). We do not typically say what the law *is not* as a hedge against future judicial error. The possibility that later courts will misapply a constitutional provision does not give us a basis for pretermitting litigation relating to that provision.[FN7]

FN7. Also perplexing is the majority's attempt to pass blame to the Government for its litigating position. By "hold[ing] out the possibility of ruling for Citizens United on a narrow ground yet refrain[ing] from adopting that position," the majority says, the Government has caused "added uncertainty [that] demonstrates the necessity to address the question of statutory validity." *Ante*, at 895. Our colleagues have apparently never heard of an alternative argument. Like every litigant, the Government would prefer to win its case outright; failing that, it would prefer

> to lose on a narrow ground. The fact that there are numerous different ways this case could be decided, and that the Government acknowledges as much, does not demonstrate anything about the propriety of a facial ruling.

The majority suggests that a facial ruling is necessary because anything less would chill too much protected speech. See *ante*, at 890 - 891, 892, 894 - 897. In addition to begging the question what types of corporate spending are constitutionally protected and to what extent, this claim rests on the assertion that some significant number of corporations have ***935** been cowed into quiescence by FEC " 'censor[ship].' " *Ante*, at 895 - 896. That assertion is unsubstantiated, and it is hard to square with practical experience. It is particularly hard to square with the legal landscape following *WRTL*, which held that a corporate communication could be regulated under § 203 only if it was "susceptible of *no* reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S., at 470, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (emphasis added). The whole point of this test was to make § 203 as simple and speech-protective as possible. The Court does not explain how, in the span of a single election cycle, it has determined THE CHIEF JUSTICE's project to be a failure. In this respect, too, the majority's critique of line-drawing collapses into a critique of the as-applied review method generally.[FN8]

> FN8. The majority's "chilling" argument is particularly inapposite with respect to 2 U.S.C. § 441b's longstanding restriction on the use of corporate general treasury funds for express advocacy. If there was ever any significant uncertainty about what counts as the functional equivalent of express advocacy, there has been little doubt about what counts as express advocacy since the "magic words" test of *Buckley v. Valeo*, 424 U.S. 1, 44, n. 52, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*. Yet even though Citizens United's briefs never once mention § 441b's restriction on express advocacy; even though this restriction does not generate chilling concerns; and even though no one has suggested that *Hillary* counts as express advocacy; the majority nonetheless reaches out to opine that this statutory provision is "invalid" as well. *Ante*, at 913.

The majority suggests that, even though it expressly dismissed its facial challenge, Citizens United nevertheless preserved it-not as a freestanding "claim," but as a potential argument in support of "a claim that the FEC has violated its First Amendment right to free speech." *Ante*, at 892 - 893; see also *ante*, at 919 (ROBERTS, C.J., concurring) (describing Citizens United's claim as: "[T]he Act violates the First Amendment"). By this novel logic, virtually any submission could be reconceptualized as "a claim that the Government has violated my rights," and it would then be available to the Court to entertain any conceivable issue that might be relevant to that claim's disposition. Not only the as-applied/facial distinction, but the basic relationship between litigants and courts, would be upended if the latter had free rein to construe the former's claims at such high levels of generality. There would be no need for plaintiffs to argue their case; they could just cite the constitutional provisions they think relevant, and leave the rest to us.[FN9]

> FN9. The majority adds that the distinction between facial and as-applied challenges does not have "some automatic effect" that mechanically controls the judicial task. *Ante*, at 893. I agree, but it does not follow that in any given case we should ignore the distinction, much less invert it.

Finally, the majority suggests that though the scope of Citizens United's claim may be narrow, a facial ruling is necessary as a matter of remedy. Relying on a law review article, it asserts that Citizens United's dismissal of the facial challenge does not prevent us " 'from making broader pronouncements of invalidity in properly "as-applied" cases.' " *Ante*, at 893 (quoting Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L.Rev. 1321, 1339 (2000) (hereinafter Fallon)); accord, *ante*, at 919 (opinion of ROBERTS, C.J.) ("Regardless whether we label Citizens United's claim a 'facial' or 'as-applied' challenge, the consequences of the Court's decision are the same"). The majority is on firmer conceptual ground here. Yet even if one accepts this part of Professor Fallon's thesis, one must proceed***936** to ask *which* as-applied challenges, if successful, will "properly" invite or entail invalidation of the underlying statute.[FN10] The paradigmatic

case is a judicial determination that the legislature acted with an impermissible purpose in enacting a provision, as this carries the necessary implication that all future as-applied challenges to the provision must prevail. See Fallon 1339-1340.

> FN10. Professor Fallon proposes an intricate answer to this question that the majority ignores. Fallon 1327-1359. It bears mention that our colleagues have previously cited Professor Fallon's article for the exact opposite point from the one they wish to make today. In *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007), the Court explained that "[i]t is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop," and "[f]or this reason, '[a]s-applied challenges are the basic building blocks of constitutional adjudication.' " *Id.*, at 168, 127 S.Ct. 1610 (opinion for the Court by KENNEDY, J.) (quoting Fallon 1328 (second alteration in original)).

Citizens United's as-applied challenge was not of this sort. Until this Court ordered reargument, its contention was that BCRA § 203 could not lawfully be applied to a feature-length video-on-demand film (such as *Hillary*) or to a nonprofit corporation exempt from taxation under 26 U.S.C. § 501(c)(4) [FN11] and funded overwhelmingly by individuals (such as itself). See Brief for Appellant 16-41. Success on either of these claims would not necessarily carry any implications for the validity of § 203 as applied to other types of broadcasts, other types of corporations, or unions. It certainly would not invalidate the statute as applied to a large for-profit corporation. See Tr. of Oral Arg. 8, 4 (Mar. 24, 2009) (counsel for Citizens United emphasizing that appellant is "a small, nonprofit organization, which is very much like [an *MCFL* corporation]," and affirming that its argument "definitely would not be the same" if *Hillary* were distributed by General Motors).[FN12] There is no legitimate basis for resurrecting a facial challenge that dropped out of this case 20 months ago.

> FN11. Internal Revenue Code section 501(c)(4) applies, *inter alia*, to nonprofit organizations "operated exclusively for the promotion of social welfare, ... the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes."

> FN12. THE CHIEF JUSTICE is therefore much too quick when he suggests that, "[e]ven if considered in as-applied terms, a holding in this case that the Act may not be applied to Citizens United-because corporations as well as individuals enjoy the pertinent First Amendment rights-would mean that any other corporation raising the same challenge would also win." *Ante*, at 919 (concurring opinion). That conclusion would only follow if the Court were to ignore Citizens United's plausible as-applied arguments and instead take the implausible position that *all* corporations and *all* types of expenditures enjoy the same First Amendment protections, which *always* trump the interests in regulation. At times, the majority appears to endorse this extreme view. At other times, however, it appears to suggest that nonprofit corporations have a better claim to First Amendment protection than for-profit corporations, see *ante*, at 897, 907, "advocacy" organizations have a better claim than other nonprofits, *ante*, at 897, domestic corporations have a better claim than foreign corporations, *ante*, at 911 - 912, small corporations have a better claim than large corporations, *ante*, at 906 - 908, and printed matter has a better claim than broadcast communications, *ante*, at 904. The majority never uses a multinational business corporation in its hypotheticals.

Narrower Grounds

It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens ***937** United, without toppling statutes and precedents. Which is to say, the majority has transgressed yet another "cardinal" principle of the judicial process: "[I]f it is not necessary to decide more, it is necessary not to decide more," *PDK Labs., Inc. v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (C.A.D.C.2004) (Roberts, J., concurring in part and concurring in judgment).

Consider just three of the narrower grounds of decision that the majority has bypassed. First, the Court could have ruled, on statutory grounds, that a feature-length film distributed through video-on-demand does not qualify as an "electioneering communication" under § 203 of BCRA, 2 U.S.C. § 441b. BCRA defines that term to encompass certain communications transmitted by "broadcast, cable, or satellite." § 434(f)(3)(A). When Congress was developing BCRA, the video-on-demand medium was still in its infancy, and legislators were focused on a very different sort of programming: short advertisements run on television or radio. See *McConnell*, 540 U.S., at 207, 124 S.Ct. 619. The sponsors of BCRA acknowledge that the FEC's implementing regulations do not clearly apply to video-on-demand transmissions. See Brief for Senator John McCain et al. as *Amici Curiae* 17-19. In light of this ambiguity, the distinctive characteristics of video-on-demand, and "[t]he elementary rule ... that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality," *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895), the Court could have reasonably ruled that § 203 does not apply to *Hillary*.[FN13]

FN13. The Court entirely ignores this statutory argument. It concludes that § 203 applies to *Hillary* on the basis of the film's content, *ante*, at 889 - 890, without considering the possibility that § 203 does not apply to video-on-demand transmissions generally.

Second, the Court could have expanded the *MCFL* exemption to cover § 501(c)(4) nonprofits that accept only a *de minimis* amount of money from for-profit corporations. Citizens United professes to be such a group: Its brief says it "is funded predominantly by donations from individuals who support [its] ideological message." Brief for Appellant 5. Numerous Courts of Appeal have held that *de minimis* business support does not, in itself, remove an otherwise qualifying organization from the ambit of *MCFL*.[FN14] This Court could have simply followed their lead.[FN15]

FN14. See *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1148 (C.A.10 2007) (adopting this rule and noting that "every other circuit to have addressed this issue" has done likewise); Brief for Independent Sector as *Amicus Curiae* 10-11 (collecting cases). The Court rejects this solution in part because the Government "merely suggest[s] it" and "does not say that it agrees with the interpretation." *Ante*, at 892. Our colleagues would thus punish a defendant for showing insufficient excitement about a ground it has advanced, at the same time that they decide the case on a ground the plaintiff expressly abandoned. The Court also protests that a *de minimis* standard would "requir[e] intricate case-by-case determinations." *Ante*, at 892. But *de minimis* tests need not be intricate at all. A test that granted *MCFL* status to § 501(c)(4) organizations if they received less than a fixed dollar amount of business donations in the previous year, or if such donations represent less than a fixed percentage of their total assets, would be perfectly easy to understand and administer.

FN15. Another bypassed ground, not briefed by the parties, would have been to revive the Snowe-Jeffords Amendment in BCRA § 203(c), allowing certain nonprofit corporations to pay for electioneering communications with general treasury funds, to the extent they can trace the payments to individual contributions. See Brief for National Rifle Association as *Amicus Curiae* 5-15 (arguing forcefully that Congress intended this result).

Finally, let us not forget Citizens United's as-applied constitutional challenge. ***938** Precisely because Citizens United looks so much like the *MCFL* organizations we have exempted from regulation, while a feature-length video-on-demand film looks so unlike the types of electoral advocacy Congress has found deserving of regulation, this challenge is a substantial one. As the appellant's own arguments show, the Court could have easily limited the breadth of its constitutional holding had it declined to adopt the novel notion that speakers and speech acts must always be treated identically-and always spared expenditures restrictions-in the political realm. Yet the Court nonetheless turns its back on the as-applied review process that has been a staple of campaign finance litigation since *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*,

and that was affirmed and expanded just two Terms ago in *WRTL*, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329.

This brief tour of alternative grounds on which the case could have been decided is not meant to show that any of these grounds is ideal, though each is perfectly "valid," *ante*, at 892 (majority opinion).[FN16] It is meant to show that there were principled, narrower paths that a Court that was serious about judicial restraint could have taken. There was also the straightforward path: applying *Austin* and *McConnell*, just as the District Court did in holding that the funding of Citizens United's film can be regulated under them. The only thing preventing the majority from affirming the District Court, or adopting a narrower ground that would retain *Austin*, is its disdain for *Austin*.

> FN16. THE CHIEF JUSTICE finds our discussion of these narrower solutions "quite perplexing" because we suggest that the Court should "latch on to one of them in order to avoid reaching the broader constitutional question," without doing the same ourselves. *Ante*, at 918 - 919. There is nothing perplexing about the matter, because we are not similarly situated to our colleagues in the majority. We do not share their view of the First Amendment. Our reading of the Constitution would not lead us to strike down any statutes or overturn any precedents in this case, and we therefore have no occasion to practice constitutional avoidance or to vindicate Citizens United's as-applied challenge. Each of the arguments made above is surely at least as strong as the statutory argument the Court accepted in last year's Voting Rights Act case, *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. ----, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009).

II

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 864, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.[FN17]

> FN17. I will have more to say shortly about the merits-about why *Austin* and *McConnell* are not doctrinal outliers, as the Court contends, and why their logic is not only defensible but also compelling. For present purposes, I limit the discussion to *stare-decisis*-specific considerations.

The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. The opinion "was not well reasoned," our colleagues assert, and it conflicts with First Amendment ***939** principles. *Ante*, at 912. This, of course, is the Court's merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of *Austin*, as I explain at length in Parts III and IV, *infra*, at 942 - 979, and restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.

Perhaps in recognition of this point, the Court supplements its merits case with a smattering of assertions. The Court proclaims that " *Austin* is undermined by experience since its announcement." *Ante*, at 912. This is a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its *ipse dixit* that the real world has not been kind to *Austin*. Nor does the majority bother to specify in what sense *Austin* has been "undermined." Instead it treats the reader to a string of non sequiturs: "Our Nation's speech dynamic is changing," *ante*, at 912; "[s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages," *ibid.*; "[c]orporations ... do not have monolithic views," *ibid.* How any of these ruminations weakens the force of *stare decisis*, escapes my

comprehension.[FN18]

FN18. THE CHIEF JUSTICE suggests that *Austin* has been undermined by subsequent dissenting opinions. *Ante,* at 934. Under this view, it appears that the more times the Court stands by a precedent in the face of requests to overrule it, the weaker that precedent becomes. THE CHIEF JUSTICE further suggests that *Austin* "is uniquely destabilizing because it threatens to subvert our Court's decisions even outside" its particular facts, as when we applied its reasoning in *McConnell.* *Ante,* at 922. Once again, the theory seems to be that the more we utilize a precedent, the more we call it into question. For those who believe *Austin* was correctly decided-as the Federal Government and the States have long believed, as the majority of Justices to have served on the Court since *Austin* have believed, and as we continue to believe-there is nothing "destabilizing" about the prospect of its continued application. It is gutting campaign finance laws across the country, as the Court does today, that will be destabilizing.

The majority also contends that the Government's hesitation to rely on *Austin*'s antidistortion rationale "diminishe[s]" "the principle of adhering to that precedent." *Ante,* at 912; see also *ante,* at 923 (opinion of ROBERTS, C.J.) (Government's litigating position is "most importan[t]" factor undermining *Austin*). Why it diminishes the value of *stare decisis* is left unexplained. We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we. Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering since *Austin.* The task of evaluating the continued viability of precedents falls to this Court, not to the parties.[FN19]

FN19. Additionally, the majority cites some recent scholarship challenging the historical account of campaign finance law given in *United States v. Automobile Workers,* 352 U.S. 567, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957). *Ante,* at 912. *Austin* did not so much as allude to this historical account, much less rely on it. Even if the scholarship cited by the majority is correct that certain campaign finance reforms were less deliberate or less benignly motivated than *Automobile Workers* suggested, the point remains that this body of law has played a significant and broadly accepted role in American political life for decades upon decades.

***940** Although the majority opinion spends several pages making these surprising arguments, it says almost nothing about the standard considerations we have used to determine *stare decisis* value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. It is also conspicuously silent about *McConnell,* even though the *McConnell* Court's decision to uphold BCRA § 203 relied not only on the antidistortion logic of *Austin* but also on the statute's historical pedigree, see, *e.g.,* 540 U.S., at 115-132, 223-224, 124 S.Ct. 619, and the need to preserve the integrity of federal campaigns, see *id.,* at 126-129, 205-208, and n. 88, 124 S.Ct. 619.

We have recognized that "*[s]tare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.' " *Hubbard v. United States,* 514 U.S. 695, 714, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) (quoting *Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991)). *Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today's decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin,* for more than a century. [FN20] The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating BCRA. The total record it compiled was *100,000 pages* long.[FN21] Pulling out the rug beneath Congress after affirming the constitutionality of § 203 six years ago shows great disrespect for a co-

equal branch.

FN20. See Brief for State of Montana et al. as *Amici Curiae* 5-13; see also Supp. Brief for Senator John McCain et al. as *Amici Curiae* 1a-8a (listing 24 States that presently limit or prohibit independent electioneering expenditures from corporate general treasuries).

FN21. Magleby, The Importance of the Record in *McConnell v. FEC,* 3 Election L. J. 285 (2004).

By removing one of its central components, today's ruling makes a hash out of BCRA's "delicate and interconnected regulatory scheme." *McConnell,* 540 U.S., at 172, 124 S.Ct. 619. Consider just one example of the distortions that will follow: Political parties are barred under BCRA from soliciting or spending "soft money," funds that are not subject to the statute's disclosure requirements or its source and amount limitations. 2 U.S.C. § 441i; *McConnell,* 540 U.S., at 122-126, 124 S.Ct. 619. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions-and the narrow interests they represent-vis-à-vis the role of political parties-and the broad coalitions they represent-in determining who will hold public office.[FN22]

FN22. To be sure, the majority may respond that Congress can correct the imbalance by removing BCRA's soft-money limits. Cf. Tr. of Oral Arg. 24 (Sept. 9, 2009) (query of KENNEDY, J.). But this is no response to any legislature that takes campaign finance regulation seriously. It merely illustrates the breadth of the majority's deregulatory vision.

Beyond the reliance interests at stake, the other *stare decisis* factors also cut against the Court. Considerations of antiquity***941** are significant for similar reasons. *McConnell* is only six years old, but *Austin* has been on the books for two decades, and many of the statutes called into question by today's opinion have been on the books for a half-century or more. The Court points to no intervening change in circumstances that warrants revisiting *Austin.* Certainly nothing relevant has changed since we decided *WRTL* two Terms ago. And the Court gives no reason to think that *Austin* and *McConnell* are unworkable.

In fact, no one has argued to us that *Austin*'s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked us to overrule it. Quite to the contrary, leading groups representing the business community,[FN23] organized labor,[FN24] and the nonprofit sector,[FN25] together with more than half of the States,[FN26] urge that we preserve *Austin.* As for *McConnell,* the portions of BCRA it upheld may be prolix, but all three branches of Government have worked to make § 203 as user-friendly as possible. For instance, Congress established a special mechanism for expedited review of constitutional challenges, see note following 2 U.S.C. § 437h; the FEC has established a standardized process, with clearly defined safe harbors, for corporations to claim that a particular electioneering communication is permissible under *WRTL*, see 11 CFR § 114.15 (2009); [FN27] and, as noted above, THE CHIEF JUSTICE crafted his controlling opinion in *WRTL* with the express goal of maximizing clarity and administrability, 551 U.S., at 469-470, 473-474, 127 S.Ct. 2652. The case for *stare decisis* may be bolstered, we have said, when subsequent rulings "have reduced the impact" of a precedent "while reaffirming the decision's core ruling." *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).[FN28]

FN23. See Brief for Committee for Economic Development as *Amicus Curiae;* Brief for American Independent Business Alliance as *Amicus Curiae*. But see Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae*.

FN24. See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* 3, 9.

FN25. See Brief for Independent Sector as *Amicus Curiae* 16-20.

FN26. See Brief for State of Montana et al. as *Amici Curiae*.

FN27. The FEC established this process following the Court's June 2007 decision in that case, 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329. In the brief interval between the establishment of this process and the 2008 election, corporations and unions used it to make $108.5 million in electioneering communications. Supp. Brief for Appellee 22-23; FEC, Electioneering Communication Summary, online at http:// fec. gov/ finance/ disclosure/ ECSummary. shtml (all Internet materials as visited Jan. 18, 2010, and available in Clerk of Court's case file).

FN28. Concededly, *Austin* and *McConnell* were constitutional decisions, and we have often said that "claims of *stare decisis* are at the weakest in that field, where our mistakes cannot be corrected by Congress." *Vieth v. Jubelirer*, 541 U.S. 267, 305, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion). As a general matter, this principle is a sound one. But the principle only takes on real force when an earlier ruling has obstructed the normal democratic process; it is the fear of making "mistakes [that] cannot be corrected by Congress," *ibid.*, that motivates us to review constitutional precedents with a more critical eye. *Austin* and *McConnell* did not obstruct state or congressional legislative power in any way. Although it is unclear how high a bar today's decision will pose to future attempts to regulate corporate electioneering, it will clearly restrain much legislative action.

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results.***942** Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

III

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.

The So-Called "Ban"

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. *Ante*, at 910. Indeed, the majority invokes the specter of a "ban" on nearly every page of its opinion. *Ante*, at 886 - 887, 889, 891 - 892, 894, 896 - 898, 900 - 907, 909 - 912, 915, 916. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Our cases have repeatedly pointed out that, "[c]ontrary to the [majority's] critical assumptions," the statutes upheld in *Austin* and *McConnell* do "not impose an *absolute* ban on all forms of corporate political spending." *Austin*, 494 U.S., at 660, 110 S.Ct. 1391; see also *McConnell*, 540 U.S., at 203-204, 124 S.Ct. 619; *Beaumont*, 539 U.S., at 162-163, 123 S.Ct. 2200. For starters, both statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes. See 2 U.S.C. § 441b(b)(2)(C); Mich. Comp. Laws Ann. § 169.255 (West 2005). "The ability to form and administer separate segregated funds," we observed in *McConnell*, "has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view." 540 U.S., at 203, 124 S.Ct. 619.

Under BCRA, any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. 2 U.S.C. § 441b(b)(4)(A)(i). A significant and growing number of corporations avail themselves of this option; FN29 during the most recent election cycle, corporate and

union PACs raised nearly a billion dollars.[FN30] Administering***943** a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds, see *ante*, at 914, and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding, see *ante*, at 897 - 898. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's. If ideologically aligned individuals wish to make unlimited expenditures through the corporate form, they may utilize an *MCFL* organization that has policies in place to avoid becoming a conduit for business or union interests. See *MCFL*, 479 U.S., at 263-264, 107 S.Ct. 616.

FN29. See FEC, Number of Federal PAC's Increases, http:// fec. gov/ press/ press2008/20080812paccount.shtml.

FN30. See Supp. Brief for Appellee 16 (citing FEC statistics placing this figure at $840 million). The majority finds the PAC option inadequate in part because "[a] PAC is a separate association from the corporation." *Ante*, at 897. The formal "separateness" of PACs from their host corporations-which administer and control the PACs but which cannot funnel general treasury funds into them or force members to support them-is, of course, the whole point of the PAC mechanism.

The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech. Consider the statutory provision we are ostensibly evaluating in this case, BCRA § 203. It has no application to genuine issue advertising-a category of corporate speech Congress found to be far more substantial than election-related advertising, see *McConnell*, 540 U.S., at 207, 124 S.Ct. 619-or to Internet, telephone, and print advocacy. [FN31] Like numerous statutes, it exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate.[FN32] See 2 U.S.C. § 434(f)(3)(B)(i); *McConnell*, 540 U.S., at 208-209, 124 S.Ct. 619; see also *Austin*, 494 U.S., at 666-668, 110 S.Ct. 1391. It also allows corporations to spend unlimited sums on political communications with their executives and shareholders, § 441b(b)(2)(A); 11 CFR § 114.3(a)(1), to fund additional PAC activity through trade associations, 2 U.S.C. § 441b(b)(4)(D), to distribute voting guides and voting records, 11 CFR §§ 114.4(c)(4)-***944** (5), to underwrite voter registration and voter turnout activities, § 114.3(c)(4); § 114.4(c)(2), to host fundraising events for candidates within certain limits, § 114.4(c); § 114.2(f)(2), and to publicly endorse candidates through a press release and press conference, § 114.4(c)(6).

FN31. Roaming far afield from the case at hand, the majority worries that the Government will use § 203 to ban books, pamphlets, and blogs. *Ante*, at 896, 904, 912 - 913. Yet by its plain terms, § 203 does not apply to printed material. See 2 U.S.C. § 434(f)(3)(A)(i); see also 11 CFR § 100.29(c)(1) ("[E]lectioneering communication does not include communications appearing in print media"). And in light of the ordinary understanding of the terms "broadcast, cable, [and] satellite," § 434(f)(3)(A)(i), coupled with Congress' clear aim of targeting "a virtual torrent of televised election-related ads," *McConnell*, 540 U.S., at 207, 124 S.Ct. 619, we highly doubt that § 203 could be interpreted to apply to a Web site or book that happens to be transmitted at some stage over airwaves or cable lines, or that the FEC would ever try to do so. See 11 CFR § 100.26 (exempting most Internet communications from regulation as advertising); § 100.155 (exempting uncompensated Internet activity from regulation as an expenditure); Supp. Brief for Center for Independent Media et al. as *Amici Curiae* 14 (explaining that "the FEC has consistently construed [BCRA's] media exemption to apply to a variety of nontraditional media"). If it should, the Government acknowledges "there would be quite [a] good as-applied challenge." Tr. of Oral Arg. 65 (Sept. 9, 2009).

FN32. As the Government points out, with a media corporation there is also a lesser risk that investors will not understand, learn about, or support the advocacy messages that the corporation disseminates. Supp. Reply Brief for Appellee 10. Everyone knows and expects that media outlets may seek to influence elections in this way.

At the time Citizens United brought this lawsuit, the only types of speech that could be regulated under § 203 were: (1) broadcast, cable, or satellite communications; [FN33] (2) capable of reaching at least 50,000 persons in the relevant electorate; [FN34] (3) made within 30 days of a primary or 60 days of a general federal election; [FN35] (4) by a labor union or a non-*MCFL*, nonmedia corporation; [FN36] (5) paid for with general treasury funds; [FN37] and (6) "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." [FN38] The category of communications meeting all of these criteria is not trivial, but the notion that corporate political speech has been "suppress[ed] ... altogether," *ante*, at 886, that corporations have been "exclu[ded] ... from the general public dialogue," *ante*, at 899, or that a work of fiction such as *Mr. Smith Goes to Washington* might be covered, *ante*, at 916 - 917, is nonsense.[FN39] Even the plaintiffs in *McConnell*, who had every incentive to depict BCRA as negatively as possible, declined to argue that § 203's prohibition on certain uses of general treasury funds amounts to a complete ban. See 540 U.S., at 204, 124 S.Ct. 619.

FN33. 2 U.S.C. § 434(f)(3)(A)(i).

FN34. § 434(f)(3)(C).

FN35. § 434(f)(3)(A)(i)(II).

FN36. § 441b(b); *McConnell*, 540 U.S., at 211, 124 S.Ct. 619.

FN37. § 441b(b)(2)(C).

FN38. *WRTL*, 551 U.S. 449, 470, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007) (opinion of Roberts, C.J.).

FN39. It is likewise nonsense to suggest that the FEC's " 'business is to censor.' " *Ante*, at 896 (quoting *Freedman v. Maryland*, 380 U.S. 51, 57, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965)). The FEC's business is to administer and enforce the campaign finance laws. The regulatory body at issue in *Freedman* was a state *Board of Censors* that had virtually unfettered discretion to bar distribution of motion picture films it deemed not to be "moral and proper." See *id.*, at 52-53, and n. 2, 85 S.Ct. 734. No movie could be shown in the State of Maryland that was not first approved and licensed by the Board of Censors. *Id.*, at 52, n. 1, 85 S.Ct. 734. It is an understatement to say that *Freedman* is not on point, and the majority's characterization of the FEC is deeply disconcerting.

In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America," Citizens United Political Victory Fund, http:// www. cupvf. org/. [FN40]

FN40. Citizens United has administered this PAC for over a decade. See Defendant FEC's Memorandum in Opposition to Plaintiff's Second Motion for Preliminary Injunction in No. 07-2240 (ARR, RCL, RWR) (DC), p. 20. Citizens United also operates multiple "527" organizations that engage in partisan political activity. See Defendant FEC's Statement of Material Facts as to Which There Is No Genuine Dispute in No. 07-2240(DC), ¶¶ 22-24.

So let us be clear: Neither *Austin* nor *McConnell* held or implied that corporations may be silenced; the FEC is not a "censor"; and in the years since these ***945** cases were decided, corporations have continued to play a major role in the national dialogue. Laws such as § 203 target a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the

views of individual citizens, and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter, demanding careful scrutiny. But the majority's incessant talk of a "ban" aims at a straw man.

Identity-Based Distinctions

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's ... identity." *Ante*, at 902; accord, *ante*, at 886, 898, 900, 902 - 904, 912 - 913. The case on which it relies for this proposition is *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As I shall explain, *infra*, at 958 - 960, the holding in that case was far narrower than the Court implies. Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

"Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment. *WRTL*, 551 U.S., at 482, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students,[FN41] prisoners,[FN42] members of the Armed Forces,[FN43] foreigners,[FN44] and its own employees.[FN45] When such restrictions are justified by a legitimate governmental interest,***946** they do not necessarily raise constitutional problems.[FN46] In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers,[FN47] cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) ("[D]ifferential treatment" is constitutionally suspect "*unless* justified by some special characteristic" of the regulated class of speakers (emphasis added)), and that the constitutional rights of certain categories of speakers, in certain contexts, " 'are not automatically coextensive with the rights' " that are normally accorded to members of our society, *Morse v. Frederick*, 551 U.S. 393, 396-397, 404, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)).

FN41. See, *e.g.*, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

FN42. See, *e.g.*, *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) ("In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" (internal quotation marks omitted)).

FN43. See, *e.g.*, *Parker v. Levy*, 417 U.S. 733, 758, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections").

FN44. See, *e.g.*, 2 U.S.C. § 441e(a)(1) (foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election).

FN45. See, *e.g.*, *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding statute prohibiting Executive Branch employees from taking "any active part in political management or in political campaigns" (internal quotation marks omitted)); *Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (same); *United States v. Wurzbach*, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930) (upholding statute prohibiting federal employees from making contributions to Members of Congress for "any political purpose whatever" (internal quotation marks omitted)); *Ex*

parte Curtis, 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882) (upholding statute prohibiting certain federal employees from giving money to other employees for political purposes).

FN46. The majority states that the cases just cited are "inapposite" because they "stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Ante*, at 899. The majority's creative suggestion that these cases stand only for that one proposition is quite implausible. In any event, the proposition lies at the heart of this case, as Congress and half the state legislatures have concluded, over many decades, that their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds.

FN47. Outside of the law, of course, it is a commonplace that the identity and incentives of the speaker might be relevant to an assessment of his speech. See Aristotle, Poetics 43-44 (M. Heath transl. 1996) ("In evaluating any utterance or action, one must take into account not just the moral qualities of what is actually done or said, but also the identity of the agent or speaker, the addressee, the occasion, the means, and the motive"). The insight that the identity of speakers is a proper subject of regulatory concern, it bears noting, motivates the disclaimer and disclosure provisions that the Court today upholds.

The free speech guarantee thus does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy; society could scarcely function if it did. It is fair to say that our First Amendment doctrine has "frowned on" certain identity-based distinctions, *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 47, n. 4, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999) (STEVENS, J., dissenting), particularly those that may reflect invidious discrimination or preferential treatment of a politically powerful group. But it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close.

The election context is distinctive in many ways, and the Court, of course, is right that the First Amendment closely guards political speech. But in this context, too, the authority of legislatures to enact viewpoint-neutral regulations based on content and identity is well settled. We have, for example, allowed state-run broadcasters to exclude independent candidates from televised debates. *Arkansas Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998).[FN48] We have upheld statutes that prohibit the distribution or display of campaign materials near a polling place. ***947***Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992).[FN49] Although we have not reviewed them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals. See, *e.g.*, 2 U.S.C. § 441e(a)(1). And we have consistently approved laws that bar Government employees, but not others, from contributing to or participating in political activities. See n. 45, *supra*. These statutes burden the political expression of one class of speakers, namely, civil servants. Yet we have sustained them on the basis of longstanding practice and Congress' reasoned judgment that certain regulations which leave "untouched full participation ... in political decisions at the ballot box," *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 556, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (internal quotation marks omitted), help ensure that public officials are "sufficiently free from improper influences," *id.*, at 564, 93 S.Ct. 2880, and that "confidence in the system of representative Government is not ... eroded to a disastrous extent," *id.*, at 565, 93 S.Ct. 2880.

FN48. I dissented in *Forbes* because the broadcaster's decision to exclude the respondent from its debate was done "on the basis of entirely subjective, ad hoc judgments," 523 U.S., at 690, 118 S.Ct. 1633, that suggested anticompetitive viewpoint discrimination, *id.*, at 693-694, 118 S.Ct. 1633, and lacked a compelling justification. Needless to say, my concerns do not apply to the instant case.

FN49. The law at issue in *Burson* was far from unusual. "[A]ll 50 States," the Court

observed, "limit access to the areas in or around polling places." 504 U.S., at 206, 112 S.Ct. 1846; see also Note, 91 Ky. L. J. 715, 729, n. 89, 747-769 (2003) (collecting statutes). I dissented in *Burson* because the evidence adduced to justify Tennessee's law was "exceptionally thin," 504 U.S., at 219, 112 S.Ct. 1846, and "the reason for [the] restriction [had] disappear[ed]" over time, *id.*, at 223, 112 S.Ct. 1846. "In short," I concluded, "Tennessee ha[d] failed to point to any legitimate interest that would justify its selective regulation of campaign-related expression." *Id.*, at 225, 112 S.Ct. 1846. These criticisms are inapplicable to the case before us.

The same logic applies to this case with additional force because it is the identity of corporations, rather than individuals, that the Legislature has taken into account. As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. *NRWC*, 459 U.S., at 209-210, 103 S.Ct. 552.[FN50] Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information," *Beaumont*, 539 U.S., at 161, n. 8, 123 S.Ct. 2200 (citation omitted). Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.

FN50. They are likewise entitled to regulate media corporations differently from other corporations "to ensure that the law 'does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.' " *McConnell*, 540 U.S., at 208, 124 S.Ct. 619 (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)).

If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations***948** controlled by foreigners as to individual Americans: To do otherwise, after all, could " 'enhance the relative voice' " of some (*i.e.*, humans) over others (*i.e.*, nonhumans). *Ante*, at 904 (quoting *Buckley*, 424 U.S., at 49, 96 S.Ct. 612).[FN51] Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.[FN52]

FN51. The Court all but confesses that a categorical approach to speaker identity is untenable when it acknowledges that Congress might be allowed to take measures aimed at "preventing foreign individuals or associations from influencing our Nation's political process." *Ante*, at 911. Such measures have been a part of U.S. campaign finance law for many years. The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose "obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country." Teachout, The Anti-Corruption Principle, 94 Cornell L.Rev. 341, 393, n. 245 (2009) (hereinafter Teachout); see also U.S. Const., Art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust ... shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"). Professor Teachout observes that a corporation might be analogized to a foreign power in this respect, "inasmuch as its legal loyalties neces-

sarily exclude patriotism." Teachout 393, n. 245.

FN52. See A. Bickel, The Supreme Court and the Idea of Progress 59-60 (1978); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 39-40 (1965); Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 Mich. L.Rev. 2409, 2508-2509 (2003). Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless communicative acts aimed at influencing electoral outcomes. Cf. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L.Rev. 1369, 1383-1384 (1994) (hereinafter Strauss).

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

Our First Amendment Tradition

A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, "aberration[s]," in our First Amendment tradition. *Ante*, at 907; see also *ante*, at 910, 916 - 917 (professing fidelity to "our law and our tradition"). The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view.

1. *Original Understandings*

Let us start from the beginning. The Court invokes "ancient First Amendment principles," *ante*, at 886 (internal quotation marks omitted), and original understandings, *ante*, at 906 - 907, to defend today's ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. ***949** L.J. 1, 22 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter.[FN53] Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation's powers and purposes and "authoritatively fixed the scope and content of corporate organization," including "the internal structure of the corporation." J. Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970, pp. 15-16 (1970) (reprint 2004). Corporations were created, supervised, and conceptualized as quasi-public entities, "designed to serve a social function for the state." Handlin & Handlin, Origin of the American Business Corporation, 5 J. Econ. Hist. 1, 22 (1945). It was "assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare." R. Seavoy, Origins of the American Business Corporation, 1784-1855, p. 5 (1982).

FN53. Scholars have found that only a handful of business corporations were issued charters during the colonial period, and only a few hundred during all of the 18th century. See E. Dodd, American Business Corporations Until 1860, p. 197 (1954); L. Friedman, A History of American Law 188-189 (2d ed. 1985); Baldwin, American Business Corporations Before 1789, 8 Am. Hist. Rev. 449, 450-459 (1903). Justice SCALIA quibbles with these figures; whereas we say that "a few hundred" charters were issued to business corporations during the 18th century, he says that the number is "approximately 335." *Ante*, at 925 (concurring opinion). Justice SCALIA also raises the more serious point that it is improper to assess these figures by today's standards, *ante*, at 926, though I believe he fails to substantiate his claim that "the corporation was a famil-

> iar figure in American economic life" by the century's end, *ibid.* (internal quotation marks omitted). His formulation of that claim is also misleading, because the relevant reference point is not 1800 but the date of the First Amendment's ratification, in 1791. And at that time, the number of business charters must have been significantly smaller than 335, because the pace of chartering only began to pick up steam in the last decade of the 18th century. More than half of the century's total business charters were issued between 1796 and 1800. Friedman, History of American Law, at 189.

The individualized charter mode of incorporation reflected the "cloud of disfavor under which corporations labored" in the early years of this Nation. 1 W. Fletcher, Cyclopedia of the Law of Corporations § 2, p. 8 (rev. ed.2006); see also *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-549, 53 S.Ct. 481, 77 L.Ed. 929 (1933) (Brandeis, J., dissenting) (discussing fears of the "evils" of business corporations); L. Friedman, A History of American Law 194 (2d ed.1985) ("The word 'soulless' constantly recurs in debates over corporations.... Corporations, it was feared, could concentrate the worst urges of whole groups of men"). Thomas Jefferson famously fretted that corporations would subvert the Republic.[FN54] General incorporation statutes, and widespread acceptance of business corporations as socially useful actors, did not emerge until the 1800's. See Hansmann & Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 440 (2001) (hereinafter Hansmann & Kraakman) ("[A]ll general business corporation statutes appear to date from well after 1800").

> FN54. See Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), in 12 The Works of Thomas Jefferson 42, 44 (P. Ford ed. 1905) ("I hope we shall ... crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country").

The Framers thus took it as a given that corporations could be comprehensively ***950** regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.[FN55] While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even "the notion that business corporations could invoke the First Amendment would probably have been quite a novelty," given that "at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign." Shelledy, Autonomy, Debate, and Corporate Speech, 18 Hastings Const. L.Q. 541, 578 (1991); cf. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819) (Marshall, C.J.) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"); Eule, Promoting Speaker Diversity: Austin and Metro Broadcasting, 1990 S.Ct. Rev. 105, 129 ("The framers of the First Amendment could scarcely have anticipated its application to the corporation form. That, of course, ought not to be dispositive. What is compelling, however, is an understanding of who was supposed to be the beneficiary of the free speech guaranty-the individual"). In light of these background practices and understandings, it seems to me implausible that the Framers believed "the freedom of speech" would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.

> FN55. In normal usage then, as now, the term "speech" referred to oral communications by individuals. See, *e.g.*, 2 S. Johnson, Dictionary of the English Language 1853-1854 (4th ed. 1773) (reprinted 1978) (listing as primary definition of "speech": "The power of articulate utterance; the power of expressing thoughts by vocal words"); 2 N. Webster, American Dictionary of the English Language (1828) (reprinted 1970) (listing as primary definition of "speech": "The faculty of uttering articulate sounds or words, as in human beings; the faculty of expressing thoughts by words or articulate sounds. *Speech* was given to man by his Creator for the noblest purposes"). Indeed, it has been "claimed that the notion of institutional speech ... did not exist in post-

> revolutionary America." Fagundes, State Actors as First Amendment Speakers, 100 Nw. U. L. Rev. 1637, 1654 (2006); see also Bezanson, Institutional Speech, 80 Iowa L. Rev. 735, 775 (1995) ("In the intellectual heritage of the eighteenth century, the idea that free speech was individual and personal was deeply rooted and clearly manifest in the writings of Locke, Milton, and others on whom the framers of the Constitution and the Bill of Rights drew"). Given that corporations were conceived of as artificial entities and do not have the technical capacity to "speak," the burden of establishing that the Framers and ratifiers understood "the freedom of speech" to encompass corporate speech is, I believe, far heavier than the majority acknowledges.

The Court observes that the Framers drew on diverse intellectual sources, communicated through newspapers, and aimed to provide greater freedom of speech than had existed in England. *Ante,* at 906. From these (accurate) observations, the Court concludes that "[t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media." *Ibid.* This conclusion is far from certain, given that many historians believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to "prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare." ***951** *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 714, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Yet, even if the majority's conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech *in* certain media. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures *by* corporations, *and to what extent.*

As a matter of original expectations, then, it seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy. As a matter of original meaning, it likewise seems baseless-unless one evaluates the First Amendment's "principles," *ante,* at 886, 912, or its "purpose," *ante,* at 919 -920 (opinion of ROBERTS, C.J.), at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task. This case sheds a revelatory light on the assumption of some that an impartial judge's application of an originalist methodology is likely to yield more determinate answers, or to play a more decisive role in the decisional process, than his or her views about sound policy.

Justice SCALIA criticizes the foregoing discussion for failing to adduce statements from the founding era showing that corporations were understood to be excluded from the First Amendment's free speech guarantee. *Ante,* at 925 - 926, 929. Of course, Justice SCALIA adduces no statements to suggest the contrary proposition, or even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrining. Although Justice SCALIA makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, cf. *MCFL,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, he does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no "common cause." *Ante,* at 928. Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights (not that they "despised" corporations, *ante,* at 925), and that they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition-if not also the very notion of "corporate speech"-was inconceivable.[FN56]

> FN56. Postratification practice bolsters the conclusion that the First Amendment, "as originally understood," *ante,* at 906, did not give corporations political speech rights on a par with the rights of individuals. Well into the modern era of general incorporation statutes, "[t]he common law was generally interpreted as prohibiting corporate political participation," *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 819, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (White, J., dissenting), and this Court did not recognize *any* First Amendment protections for corporations until the middle part of the 20th century, see *ante,* at 899 - 900 (listing cases).

Justice SCALIA also emphasizes the unqualified nature of the First Amendment text. *Ante,* at 925, 928 - 929. Yet he would seemingly read out the Free Press Clause: How else could he claim that my purported views on newspapers must track my views on corporations generally? *Ante,* at 927.[FN57] Like virtually all modern lawyers, Justice ***952** SCALIA presumably believes that the First Amendment restricts the Executive, even though its language refers to Congress alone. In any event, the text only leads us back to the questions who or what is guaranteed "the freedom of speech," and, just as critically, what that freedom consists of and under what circumstances it may be limited. Justice SCALIA appears to believe that because corporations are created and utilized by individuals, it follows (as night the day) that their electioneering must be equally protected by the First Amendment and equally immunized from expenditure limits. See *ante,* at 928 - 929. That conclusion certainly does not follow as a logical matter, and Justice SCALIA fails to explain why the original public meaning leads it to follow as a matter of interpretation.

> FN57. In fact, the Free Press Clause might be turned against Justice SCALIA, for two reasons. First, we learn from it that the drafters of the First Amendment did draw distinctions-explicit distinctions-between types of "speakers," or speech outlets or forms. Second, the Court's strongest historical evidence all relates to the Framers' views on the press, see *ante,* at 906 - 907; *ante,* at 926 - 928 (SCALIA, J., concurring), yet while the Court tries to sweep this evidence into the Free Speech Clause, the Free Press Clause provides a more natural textual home. The text and history highlighted by our colleagues suggests why one type of corporation, those that are part of the press, might be able to claim special First Amendment status, and therefore why some kinds of "identity"-based distinctions might be permissible after all. Once one accepts that much, the intellectual edifice of the majority opinion crumbles.

The truth is we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment.[FN58] I have given several reasons why I believe the Constitution would have been understood then, and ought to be understood now, to permit reasonable restrictions on corporate electioneering, and I will give many more reasons in the pages to come. The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.

> FN58. Cf. L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 4 (1960) ("The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us" as the Free Speech and Press Clause).

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, see *Randall v. Sorrell,* 548 U.S. 230, 280, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting), whose political universe differed profoundly from that of today. We have long since held that corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation. But "historical context is usually relevant," *ibid.* (internal quotation marks omitted), and in light of the Court's effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today's outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.

2. *Legislative and Judicial Interpretation*

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any ***953** argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S.Rep. No.

3056, 59th Cong., 1st Sess., 2 (1906). President Roosevelt, in his 1905 annual message to Congress, declared:

> " 'All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.' " *United States v. Automobile Workers*, 352 U.S. 567, 572, 77 S.Ct. 529, 1 L.Ed.2d 563 (1957) (quoting 40 Cong. Rec. 96).

The Court has surveyed the history leading up to the Tillman Act several times, see *WRTL*, 551 U.S., at 508-510, 127 S.Ct. 2652 (Souter, J., dissenting); *McConnell*, 540 U.S., at 115, 124 S.Ct. 619; *Automobile Workers*, 352 U.S., at 570-575, 77 S.Ct. 529, and I will refrain from doing so again. It is enough to say that the Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed. See *ibid.*; *United States v. CIO*, 335 U.S. 106, 113, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948); Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 Geo. L.J. 871 (2004).

Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. Justice Souter recently traced these developments at length.[FN59] *WRTL*, 551 U.S., at 507-519, 127 S.Ct. 2652 (dissenting opinion); see also *McConnell*, 540 U.S., at 115-133, 124 S.Ct. 619; *McConnell*, 251 F.Supp.2d, at 188-205. The Taft-Hartley Act of 1947 is of special significance for this case. In that Act passed more than 60 years ago, Congress extended the prohibition on corporate support of candidates to cover not only direct contributions, but independent expenditures as well. Labor Management Relations Act, 1947, § 304, 61 Stat. 159. The bar on contributions "was being so narrowly construed" that corporations were easily able to defeat the purposes of the Act by supporting candidates through other means. *WRTL*, 551 U.S., at 511, 127 S.Ct. 2652 (Souter, J., dissenting) (citing S.Rep. No. 1, 80th Cong., 1st Sess., 38-39 (1947)).

> FN59. As the majority notes, there is some academic debate about the precise origins of these developments. *Ante*, at 912; see also n. 19, *supra*. There is *always* some academic debate about such developments; the motives of legislatures are never entirely clear or unitary. Yet the basic shape and trajectory of 20th-century campaign finance reform are clear, and one need not take a naïve or triumphalist view of this history to find it highly relevant. The Court's skepticism does nothing to mitigate the absurdity of its claim that *Austin* and *McConnell* were outliers. Nor does it alter the fact that five Justices today destroy a longstanding American practice.

Our colleagues emphasize that in two cases from the middle of the 20th century, several Justices wrote separately to criticize the expenditure restriction as applied to unions, even though the Court declined to pass on its constitutionality. *Ante*, at 900 - 901. Two features of these cases are of far greater relevance. First, those Justices were writing separately; which is to ***954** say, their position failed to command a majority. Prior to today, this was a fact we found significant in evaluating precedents. Second, each case in this line expressed support for the principle that corporate and union political speech financed with PAC funds, collected voluntarily from the organization's stockholders or members, receives greater protection than speech financed with general treasury funds.[FN60]

> FN60. See *Pipefitters v. United States*, 407 U.S. 385, 409, 414-415, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972) (reading the statutory bar on corporate and union campaign spending not to apply to "the voluntary donations of employees," when maintained in a separate account, because "[t]he dominant [legislative] concern in requiring that contributions be voluntary was, after all, to protect the dissenting stockholder or union member"); *Automobile Workers*, 352 U.S., at 592, 77

S.Ct. 529 (advising the District Court to consider on remand whether the broadcast in question was "paid for out of the general dues of the union membership or [whether] the funds [could] be fairly said to have obtained on a voluntary basis"); *United States v. CIO*, 335 U.S. 106, 123, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948) (observing that "funds voluntarily contributed [by union members or corporate stockholders] for election purposes" might not be covered by the expenditure bar). Both the *Pipefitters* and the *Automobile Workers* Court approvingly referenced Congress' goal of reducing "the effect of aggregated wealth on federal elections," understood as wealth drawn from a corporate or union general treasury without the stockholders' or members' "free and knowing choice." *Pipefitters*, 407 U.S., at 416, 92 S.Ct. 2247; see *Automobile Workers*, 352 U.S., at 582, 77 S.Ct. 529.

> The two dissenters in *Pipefitters* would not have read the statutory provision in question, a successor to § 304 of the Taft-Hartley Act, to allow such robust use of corporate and union funds to finance otherwise prohibited electioneering. "This opening of the door to extensive corporate and union influence on the elective and legislative processes," Justice Powell wrote, "must be viewed with genuine concern. This seems to me to be a regressive step as contrasted with the numerous legislative and judicial actions in recent years designed to assure that elections are indeed free and representative." 407 U.S., at 450, 92 S.Ct. 2247 (opinion of Powell, J., joined by Burger, C.J.).

This principle was carried forward when Congress enacted comprehensive campaign finance reform in the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, which retained the restriction on using general treasury funds for contributions and expenditures, 2 U.S.C. § 441b(a). FECA codified the option for corporations and unions to create PACs to finance contributions and expenditures forbidden to the corporation or union itself. § 441b(b).

By the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of the Act in *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, *id.*, at 58-59, 96 S.Ct. 612, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures. "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S., at 203, 124 S.Ct. 619.

Thus, it was unremarkable, in a 1982 case holding that Congress could bar nonprofit corporations from soliciting nonmembers for PAC funds, that then-Justice Rehnquist wrote for a unanimous Court ***955** that Congress' "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations ... warrants considerable deference," and "reflects a permissible assessment of the dangers posed by those entities to the electoral process." *NRWC*, 459 U.S., at 209, 103 S.Ct. 552 (internal quotation marks and citation omitted). "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized," the unanimous Court observed, "and there is no reason why it may not ... be accomplished by treating ... corporations ... differently from individuals." *Id.*, at 210-211, 103 S.Ct. 552.

The corporate/individual distinction was not questioned by the Court's disposition, in 1986, of a challenge to the expenditure restriction as applied to a distinctive type of nonprofit corporation. In *MCFL*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, we stated again "that 'the special characteristics of the corporate structure require particularly careful regulation,' " *id.*, at 256, 107 S.Ct. 616 (quoting *NRWC*, 459 U.S., at 209-210, 103 S.Ct. 552), and again we acknowledged that the Government has a legitimate interest in "regulat[ing] the substantial aggregations

of wealth amassed by the special advantages which go with the corporate form," 479 U.S., at 257, 107 S.Ct. 616 (internal quotation marks omitted). Those aggregations can distort the "free trade in ideas" crucial to candidate elections, *ibid.*, at the expense of members or shareholders who may disagree with the object of the expenditures, *id.*, at 260, 107 S.Ct. 616 (internal quotation marks omitted). What the Court held by a 5-to-4 vote was that a limited class of corporations must be allowed to use their general treasury funds for independent expenditures, because Congress' interests in protecting shareholders and "restrict[ing] 'the influence of political war chests funneled through the corporate form,' " *id.*, at 257, 107 S.Ct. 616 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 501, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) *(NCPAC)*), did not apply to corporations that were structurally insulated from those concerns.[FN61]

> FN61. Specifically, these corporations had to meet three conditions. First, they had to be formed "for the express purpose of promoting political ideas," so that their resources reflected political support rather than commercial success. *MCFL*, 479 U.S., at 264, 107 S.Ct. 616. Next, they had to have no shareholders, so that "persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." *Ibid.* Finally, they could not be "established by a business corporation or a labor union," nor "accept contributions from such entities," lest they "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *Ibid.*

It is worth remembering for present purposes that the four *MCFL* dissenters, led by Chief Justice Rehnquist, thought the Court was carrying the First Amendment *too far*. They would have recognized congressional authority to bar general treasury electioneering expenditures even by this class of nonprofits; they acknowledged that "the threat from corporate political activity will vary depending on the particular characteristics of a given corporation," but believed these "distinctions among corporations" were "distinctions in degree," not "in kind," and thus "more properly drawn by the Legislature than by the Judiciary." 479 U.S., at 268, 107 S.Ct. 616 (opinion of Rehnquist, C.J.) (internal quotation marks omitted). Not a single Justice suggested that regulation of corporate***956** political speech could be no more stringent than of speech by an individual.

Four years later, in *Austin*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, we considered whether corporations falling outside the *MCFL* exception could be barred from using general treasury funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of "the integrity of the marketplace of political ideas" in candidate elections, *MCFL*, 479 U.S., at 257, 107 S.Ct. 616, we noted that corporations have "special advantages-such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," 494 U.S., at 658-659, 110 S.Ct. 1391-that allow them to spend prodigious general treasury sums on campaign messages that have "little or no correlation" with the beliefs held by actual persons, *id.*, at 660, 110 S.Ct. 1391. In light of the corrupting effects such spending might have on the political process, *ibid.*, we permitted the State of Michigan to limit corporate expenditures on candidate elections to corporations' PACs, which rely on voluntary contributions and thus "reflect actual public support for the political ideals espoused by corporations," *ibid.* Notwithstanding our colleagues' insinuations that *Austin* deprived the public of general "ideas," "facts," and "knowledge," *ante*, at 906 - 907, the decision addressed only candidate-focused expenditures and gave the State no license to regulate corporate spending on other matters.

In the 20 years since *Austin*, we have reaffirmed its holding and rationale a number of times, see, *e.g.*, *Beaumont*, 539 U.S., at 153-156, 123 S.Ct. 2200, most importantly in *McConnell*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491, where we upheld the provision challenged here, § 203 of BCRA.[FN62] Congress crafted § 203 in response to a problem created by *Buckley*. The *Buckley* Court had construed FECA's definition of prohibited "expenditures" narrowly to avoid any problems of constitutional vagueness, holding it applicable only to "communications that expressly advocate the election or defeat of a clearly identified candidate," 424 U.S., at 80, 96 S.Ct. 612, *i.e.*, statements containing so-called "magic words" like " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'de-

feat,' [or] 'reject,' " *id.*, at 43-44, and n. 52, 96 S.Ct. 612. After *Buckley*, corporations and unions figured out how to circumvent the limits on express advocacy by using sham "issue ads" that "eschewed the use of magic words" but nonetheless "advocate[d] the election or defeat of clearly ***957** identified federal candidates." *McConnell*, 540 U.S., at 126, 124 S.Ct. 619. "Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads." *Id.*, at 127, 124 S.Ct. 619. Congress passed § 203 to address this circumvention, prohibiting corporations and unions from using general treasury funds for electioneering communications that "refe[r] to a clearly identified candidate," whether or not those communications use the magic words. 2 U.S.C. § 434(f)(3)(A)(i)(I).

> FN62. According to THE CHIEF JUSTICE, we are "erroneou[s]" in claiming that *McConnell* and *Beaumont* " 'reaffirmed' " *Austin*. *Ante*, at 919 - 920. In both cases, the Court explicitly relied on *Austin* and quoted from it at length. See 540 U.S., at 204-205, 124 S.Ct. 619, 539 U.S., at 153-155, 158, 160, 163, 123 S.Ct. 2200; see also *ante*, at 893 - 894 ("The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion"); Brief for Appellants National Rifle Association et al., O.T. 2003, No. 02-1675, p. 21 (" *Beaumont* reaffirmed ... the *Austin* rationale for restricting expenditures"). The *McConnell* Court did so in the teeth of vigorous protests by Justices in today's majority that *Austin* should be overruled. See *ante*, at 893 - 894 (citing relevant passages); see also *Beaumont*, 539 U.S., at 163-164, 123 S.Ct. 2200 (KENNEDY, J., concurring in judgment). Both Courts also heard criticisms of *Austin* from parties or *amici*. See Brief for Appellants Chamber of Commerce of the United States et al., O.T.2003, No. 02-1756, p. 35, n. 22; Reply Brief for Appellants/Cross-Appellees Senator Mitch McConnell et al., O.T. 2003, No. 02-1674, pp. 13-14; Brief for Pacific Legal Foundation as *Amicus Curiae* in *FEC v. Beaumont*, O.T. 2002, No. 02-403, *passim*. If this does not qualify as reaffirmation of a precedent, then I do not know what would.

When we asked in *McConnell* "whether a compelling governmental interest justifie[d]" § 203, we found the question "easily answered": "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' " 540 U.S., at 205, 124 S.Ct. 619 (quoting *Austin*, 494 U.S., at 660, 110 S.Ct. 1391). These precedents "represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." 540 U.S., at 205, 124 S.Ct. 619 (internal quotation marks omitted). "Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against ' "circumvention of [valid] contribution limits." ' " *Ibid.* (quoting *Beaumont*, 539 U.S., at 155, 123 S.Ct. 2200, in turn quoting *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456, and n. 18, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001) *(Colorado II)*; alteration in original). BCRA, we found, is faithful to the compelling governmental interests in " 'preserving the integrity of the electoral process, preventing corruption, ... sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government,' " and maintaining " 'the individual citizen's confidence in government.' " 540 U.S., at 206-207, n. 88, 124 S.Ct. 619 (quoting *Bellotti*, 435 U.S., at 788-789, 98 S.Ct. 1407; some internal quotation marks and brackets omitted). What made the answer even easier than it might have been otherwise was the option to form PACs, which give corporations, at the least, "a constitutionally sufficient opportunity to engage in" independent expenditures. 540 U.S., at 203, 124 S.Ct. 619.

3. *Buckley and Bellotti*

Against this extensive background of congressional regulation of corporate campaign spending, and our repeated affirmation of this regulation as constitutionally sound, the majority dismisses *Austin* as "a significant departure from ancient First Amendment principles," *ante*, at 886 (internal quotation marks omitted). How does the majority attempt to justify this claim? Selected passages from two cases, *Buckley*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, and *Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, do all of the work. In the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural per-

sons in the 1970's; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.

The majority emphasizes *Buckley* 's statement that " '[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.' " *Ante,* at 904 (quoting 424 U.S., at 48-49, 96 S.Ct. 612); *ante,* at 921 (opinion of ROBERTS, ***958** C.J.). But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous "restrictions on the speech of some in order to prevent a few from drowning out the many": for example, restrictions on ballot access and on legislators' floor time. *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). For another, the *Buckley* Court used this line in evaluating "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48, 96 S.Ct. 612. It is not apparent why this is relevant to the case before us. The majority suggests that *Austin* rests on the foreign concept of speech equalization, *ante,* at 904 - 905; *ante,* at 921 - 922 (opinion of ROBERTS, C.J.), but we made it clear in *Austin* (as in several cases before and since) that a restriction on the way corporations spend their money is no mere exercise in disfavoring the voice of some elements of our society in preference to others. Indeed, we *expressly* ruled that the compelling interest supporting Michigan's statute was not one of " 'equaliz [ing] the relative influence of speakers on elections,' " *Austin,* 494 U.S., at 660, 110 S.Ct. 1391 (quoting *id.,* at 705, 110 S.Ct. 1391 (KENNEDY, J., dissenting)), but rather the need to confront the distinctive corrupting potential of corporate electoral advocacy financed by general treasury dollars, *id.,* at 659-660, 110 S.Ct. 1391.

For that matter, it should go without saying that when we made this statement in *Buckley,* we could not have been casting doubt on the restriction on corporate expenditures in candidate elections, which had not been challenged as "foreign to the First Amendment," *ante,* at 904 (quoting *Buckley,* 424 U.S., at 49, 96 S.Ct. 612), or for any other reason. *Buckley* 's independent expenditure analysis was focused on a very different statutory provision, 18 U.S.C. § 608(e)(1) (1970 ed., Supp. V). It is implausible to think, as the majority suggests, *ante,* at 901 - 902, that *Buckley* covertly invalidated FECA's separate corporate and union campaign expenditure restriction, § 610 (now codified at 2 U.S.C. § 441b), even though that restriction had been on the books for decades before *Buckley* and would remain on the books, undisturbed, for decades after.

The case on which the majority places even greater weight than *Buckley,* however, is *Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, claiming it "could not have been clearer" that *Bellotti*'s holding forbade distinctions between corporate and individual expenditures like the one at issue here, *ante,* at 902. The Court's reliance is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority's position. *Bellotti* ruled, in an explicit limitation on the scope of its holding, that "our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U.S., at 788, n. 26, 98 S.Ct. 1407; see also *id.,* at 787-788, 98 S.Ct. 1407 (acknowledging that the interests in preserving public confidence in Government and protecting dissenting shareholders may be "weighty ... in the context of partisan candidate elections"). *Bellotti,* in other words, did not touch the question presented in *Austin* and *McConnell,* and the opinion squarely disavowed the proposition for which the majority cites it.

The majority attempts to explain away the distinction *Bellotti* drew-between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office-***959** as inconsistent with the rest of the opinion and with *Buckley.* *Ante,* at 903, 909 - 910. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections, the "importance" of which "has never been doubted," 435 U.S., at 788, n. 26, 98 S.Ct. 1407, do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation. Cf. *Austin,* 494 U.S., at 678,

110 S.Ct. 1391 (STEVENS, J., concurring); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 299, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). The majority likewise overlooks the fact that, over the past 30 years, our cases have repeatedly recognized the candidate/issue distinction. See, *e.g.*, *Austin*, 494 U.S., at 659, 110 S.Ct. 1391; *NCPAC*, 470 U.S., at 495-496, 105 S.Ct. 1459; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 371, n. 9, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); *NRWC*, 459 U.S., at 210, n. 7, 103 S.Ct. 552. The Court's critique of *Bellotti*'s footnote 26 puts it in the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley*. *Bellotti*, apparently, is both the font of all wisdom and internally incoherent.

The *Bellotti* Court confronted a dramatically different factual situation from the one that confronts us in this case: a state statute that barred business corporations' expenditures on some referenda but not others. Specifically, the statute barred a business corporation "from making contributions or expenditures 'for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation,' " 435 U.S., at 768, 98 S.Ct. 1407 (quoting Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp.1977); alteration in original), and it went so far as to provide that referenda related to income taxation would not " 'be deemed materially to affect the property, business or assets of the corporation,' " 435 U.S., at 768, 98 S.Ct. 1407. As might be guessed, the legislature had enacted this statute in order to limit corporate speech on a proposed state constitutional amendment to authorize a graduated income tax. The statute was a transparent attempt to prevent corporations from spending money to defeat this amendment, which was favored by a majority of legislators but had been repeatedly rejected by the voters. See *id.*, at 769-770, and n. 3, 98 S.Ct. 1407. We said that "where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.*, at 785-786, 98 S.Ct. 1407 (footnote omitted).

Bellotti thus involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome. Even Justice Rehnquist, in dissent, had to acknowledge that "a very persuasive argument could be made that the [Massachusetts Legislature], desiring to impose a personal income tax but more than once defeated in that desire by the combination of the Commonwealth's referendum provision and corporate expenditures in opposition to such a tax, simply decided to muzzle corporations on this sort of issue so that it could succeed in its desire." *Id.*, at 827, n. 6, 98 S.Ct. 1407. To make matters worse, the law at issue did not make any allowance for corporations to spend money through PACs. *Id.*, at 768, n. 2, 98 S.Ct. 1407 (opinion of the Court). This really was a ***960** complete ban on a specific, preidentified subject. See *MCFL*, 479 U.S., at 259, n. 12, 107 S.Ct. 616 (stating that 2 U.S.C. § 441b's expenditure restriction "is *of course distinguishable* from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in ... *Bellotti*" (emphasis added)).

The majority grasps a quotational straw from *Bellotti*, that speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. *Ante*, at 902 - 903. Of course not, but no one suggests the contrary and neither *Austin* nor *McConnell* held otherwise. They held that even though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. See *McConnell*, 540 U.S., at 205, 124 S.Ct. 619; *Austin*, 494 U.S., at 658, 660, 110 S.Ct. 1391. We acknowledged in *Bellotti* that numerous "interests of the highest importance" can justify campaign finance regulation. 435 U.S., at 788-789, 98 S.Ct. 1407. But we found no evidence that these interests were served by the Massachusetts law. *Id.*, at 789, 98 S.Ct. 1407. We left open the possibility that our decision might have been different if there had been "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Ibid.*

Austin and *McConnell*, then, sit perfectly well with *Bellotti*. Indeed, all six Members of the *Austin* majority had been on the Court at the time of *Bellotti*, and none so much as hinted in *Austin* that they saw any tension between the decisions. The difference between the cases is not that *Austin* and *McConnell* rejected First Amendment protection for corporations

whereas *Bellotti* accepted it. The difference is that the statute at issue in *Bellotti* smacked of viewpoint discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.

* * *

In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to " '[p]reserv[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,' " protect the expressive interests of shareholders, and " '[p]reserv[e] ... the individual citizen's confidence in government.' " *McConnell*, 540 U.S., at 206-207, n. 88, 124 S.Ct. 619 (quoting *Bellotti*, 435 U.S., at 788-789, 98 S.Ct. 1407; first alteration in original). These understandings provided the combined impetus behind the Tillman Act in 1907, see *Automobile Workers*, 352 U.S., at 570-575, 77 S.Ct. 529, the Taft-Hartley Act in 1947, see *WRTL*, 551 U.S., at 511, 127 S.Ct. 2652 (Souter, J., dissenting), FECA in 1971, see *NRWC*, 459 U.S., at 209-210, 103 S.Ct. 552, and BCRA in 2002, see *McConnell*, 540 U.S., at 126-132, 124 S.Ct. 619. Continuously for over 100 years, this line of "[c]ampaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries." *WRTL*, 551 U.S., at 522, 127 S.Ct. 2652 (Souter, J., dissenting). Time and again, we have recognized these realities in approving ***961** measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives.

IV

Having explained why this is not an appropriate case in which to revisit *Austin* and *McConnell* and why these decisions sit perfectly well with "First Amendment principles," *ante*, at 886, 912, I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. *Ante*, at 903 - 911. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

The Anticorruption Interest

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption." *Ante*, at 909 - 910. This is the same "crabbed view of corruption" that was espoused by Justice KENNEDY in *McConnell* and squarely rejected by the Court in that case. 540 U.S., at 152, 124 S.Ct. 619. While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an " 'undue influence on an officeholder's judgment' " and from creating " 'the appearance of such influence,' " beyond the sphere of *quid pro quo* relationships. *Id.*, at 150, 124 S.Ct. 619; see also, *e.g.*, *id.*, at 143-144, 152-154, 124 S.Ct. 619; *Colorado II*, 533 U.S., at 441, 121 S.Ct. 2351; *Shrink Missouri*, 528 U.S., at 389, 120 S.Ct. 897. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs—and which amply supported Congress' determination to target a limited set of especially destructive practices.

The District Court that adjudicated the initial

challenge to BCRA pored over this record. In a careful analysis, Judge Kollar-Kotelly made numerous findings about the corrupting consequences of corporate and union independent expenditures in the years preceding BCRA's passage. See *McConnell*, 251 F.Supp.2d, at 555-560, 622-625; see also *id.*, at 804-805, 813, n. 143 (Leon, J.) (indicating agreement). As summarized in her own words:

> "The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. The record also indicates***962** that Members express appreciation to organizations for the airing of these election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as 'above the fray.' Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress.
>
> "The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. After the election, these organizations often seek credit for their support.... Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations." *Id.*, at 623-624 (citations and footnote omitted).

Many of the relationships of dependency found by Judge Kollar-Kotelly seemed to have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.

Our "undue influence" cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues ... on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"-or expenditures-"valued by the officeholder." *McConnell*, 540 U.S., at 153, 124 S.Ct. 619.[FN63] When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly "from what is pure or correct" in the conduct of Government, Webster's Third New International Dictionary 512 (1966) (defining "corruption"), that it amounts to a "subversion ... of the electoral***963** process," *Automobile Workers*, 352 U.S., at 575, 77 S.Ct. 529. At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves," *WRTL*, 551 U.S., at 507, 127 S.Ct. 2652 (Souter, J., dissenting). "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.' " *McConnell*, 540 U.S., at 144, 124 S.Ct. 619 (quoting *Shrink Missouri*, 528 U.S., at 390, 120 S.Ct. 897).[FN64]

> FN63. Cf. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (recognizing "the broader threat from politicians too compliant with the wishes of large contributors"). Though discrete in scope, these experiments must impose some meaningful limits if they are to have a chance at functioning effectively and preserving the public's trust. "Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither

easily detected nor practical to criminalize." *McConnell*, 540 U.S., at 153, 124 S.Ct. 619. There should be nothing controversial about the proposition that the influence being targeted is "undue." In a democracy, officeholders should not make public decisions with the aim of placating a financial benefactor, except to the extent that the benefactor is seen as representative of a larger constituency or its arguments are seen as especially persuasive.

FN64. The majority declares by fiat that the appearance of undue influence by high-spending corporations "will not cause the electorate to lose faith in our democracy." *Ante*, at 910. The electorate itself has consistently indicated otherwise, both in opinion polls, see *McConnell v. FEC*, 251 F.Supp.2d 176, 557-558, 623-624 (D.D.C.2003) (opinion of Kollar-Kotelly, J.), and in the laws its representatives have passed, and our colleagues have no basis for elevating their own optimism into a tenet of constitutional law.

The cluster of interrelated interests threatened by such undue influence and its appearance has been well captured under the rubric of "democratic integrity." *WRTL*, 551 U.S., at 522, 127 S.Ct. 2652 (Souter, J., dissenting). This value has underlined a century of state and federal efforts to regulate the role of corporations in the electoral process.[FN65]

FN65. Quite distinct from the interest in preventing improper influences on the electoral process, I have long believed that "a number of [other] purposes, both legitimate and substantial, may justify the imposition of reasonable limitations on the expenditures permitted during the course of any single campaign." *Davis v. FEC*, 554 U.S. ----, ----, 128 S.Ct. 2759, 2779, 171 L.Ed.2d 737 (2008) (opinion concurring in part and dissenting in part). In my judgment, such limitations may be justified to the extent they are tailored to "improving the quality of the exposition of ideas" that voters receive, *ibid.*, "free[ing] candidates and their staffs from the interminable burden of fundraising," *ibid.* (internal quotation marks omitted), and "protect[ing] equal access to the political arena," *Randall v. Sorrell*, 548 U.S. 230, 278, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting) (internal quotation marks omitted). I continue to adhere to these beliefs, but they have not been briefed by the parties or *amici* in this case, and their soundness is immaterial to its proper disposition.

Unlike the majority's myopic focus on *quid pro quo* scenarios and the free-floating "First Amendment principles" on which it rests so much weight, *ante*, at 886, 912, this broader understanding of corruption has deep roots in the Nation's history. "During debates on the earliest [campaign finance] reform acts, the terms 'corruption' and 'undue influence' were used nearly interchangeably." Pasquale, Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform, 2008 U. Ill. L.Rev. 599, 601. Long before *Buckley*, we appreciated that "[t]o say that Congress is without power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *Burroughs v. United States*, 290 U.S. 534, 545, 54 S.Ct. 287, 78 L.Ed. 484 (1934). And whereas we have no evidence to support the notion that the Framers would have wanted corporations to have the same rights as natural persons in the electoral context, we have ample evidence to suggest that they would have been appalled by the evidence of corruption that Congress unearthed in developing BCRA and that the Court today discounts to irrelevance. It is fair to say that "[t]he Framers were obsessed with corruption," ***964** Teachout 348, which they understood to encompass the dependency of public officeholders on private interests, see *id.*, at 373-374; see also *Randall*, 548 U.S., at 280, 126 S.Ct. 2479 (STEVENS, J., dissenting). They discussed corruption "more often in the Constitutional Convention than factions, violence, or instability." Teachout 352. When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.

Quid Pro Quo *Corruption*

There is no need to take my side in the debate over the scope of the anticorruption interest to see that the Court's merits holding is wrong. Even under

the majority's "crabbed view of corruption," *McConnell*, 540 U.S., at 152, 124 S.Ct. 619, the Government should not lose this case.

"The importance of the governmental interest in preventing [corruption through the creation of political debts] has never been doubted." *Bellotti*, 435 U.S., at 788, n. 26, 98 S.Ct. 1407. Even in the cases that have construed the anticorruption interest most narrowly, we have never suggested that such *quid pro quo* debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder. See *McConnell*, 540 U.S., at 143, 124 S.Ct. 619 ("We have not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges. In *Buckley*, we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws 'deal[t] with only the most blatant and specific attempts of those with money to influence governmental action' " (quoting 424 U.S., at 28, 96 S.Ct. 612; alteration in original)). It has likewise never been doubted that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption." *Id.*, at 27, 96 S.Ct. 612. Congress may "legitimately conclude that the avoidance of the appearance of improper influence is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.* (internal quotation marks omitted; alteration in original). A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

In theory, our colleagues accept this much. As applied to BCRA § 203, however, they conclude "[t]he anticorruption interest is not sufficient to displace the speech here in question." *Ante*, at 908.

Although the Court suggests that *Buckley* compels its conclusion, *ante*, at 908 - 910, *Buckley* cannot sustain this reading. It is true that, in evaluating FECA's ceiling on independent expenditures by all persons, the *Buckley* Court found the governmental interest in preventing corruption "inadequate." 424 U.S., at 45, 96 S.Ct. 612. But *Buckley* did not evaluate corporate expenditures specifically, nor did it rule out the possibility that a future Court might find otherwise. The opinion reasoned that an expenditure limitation covering only express advocacy (*i.e.*, magic words) would likely be ineffectual, *ibid.*, a problem that Congress tackled in BCRA, and it concluded that "the independent advocacy restricted by [FECA § 608(e)(1)] *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions," *id.*, at 46, 96 S.Ct. 612 (emphasis added). *Buckley* expressly contemplated that an anticorruption***965** rationale might justify restrictions on independent expenditures at a later date, "because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.' " *WRTL*, 551 U.S., at 478, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.) (quoting *Buckley*, 424 U.S., at 45, 96 S.Ct. 612). Certainly *Buckley* did not foreclose this possibility with respect to electioneering communications made with corporate general treasury funds, an issue the Court had no occasion to consider.

The *Austin* Court did not rest its holding on *quid pro quo* corruption, as it found the broader corruption implicated by the antidistortion and shareholder protection rationales a sufficient basis for Michigan's restriction on corporate electioneering. 494 U.S., at 658-660, 110 S.Ct. 1391. Concurring in that opinion, I took the position that "the danger of either the fact, or the appearance, of *quid pro quo* relationships [also] provides an adequate justification for state regulation" of these independent expenditures. *Id.*, at 678, 110 S.Ct. 1391. I did not see this position as inconsistent with *Buckley* 's analysis of individual expenditures. Corporations, as a class, tend to be more attuned to the complexities of the legislative process and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes. See Supp. Brief for Appellee 17 (stating that the Fortune 100 companies earned revenues of $13.1 trillion during the last election cycle). Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend

unrestricted sums on elections.

It is with regret rather than satisfaction that I can now say that time has borne out my concerns. The legislative and judicial proceedings relating to BCRA generated a substantial body of evidence suggesting that, as corporations grew more and more adept at crafting "issue ads" to help or harm a particular candidate, these nominally independent expenditures began to corrupt the political process in a very direct sense. The sponsors of these ads were routinely granted special access after the campaign was over; "candidates and officials knew who their friends were," *McConnell*, 540 U.S., at 129, 124 S.Ct. 619. Many corporate independent expenditures, it seemed, had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements. In an age in which money and television ads are the coin of the campaign realm, it is hardly surprising that corporations deployed these ads to curry favor with, and to gain influence over, public officials.

The majority appears to think it decisive that the BCRA record does not contain "direct examples of votes being exchanged for ... expenditures." *Ante*, at 910 (internal quotation marks omitted). It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote. Yet, even if "[i]ngratiation and access ... are not corruption" themselves, *ibid.*, they are necessary prerequisites to it; they can create both the opportunity for, and the appearance of, *quid pro quo* arrangements. The influx of unlimited corporate money into the electoral***966** realm also creates new opportunities for the mirror image of *quid pro quo* deals: threats, both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests. The majority both misreads the facts and draws the wrong conclusions when it suggests that the BCRA record provides "only scant evidence that independent expenditures ... ingratiate," and that, "in any event," none of it matters. *Ibid.*

In her analysis of the record, Judge Kollar-Kotelly documented the pervasiveness of this ingratiation and explained its significance under the majority's own touchstone for defining the scope of the anticorruption rationale, *Buckley*. See *McConnell*, 251 F.Supp.2d, at 555-560, 622-625. Witnesses explained how political parties and candidates used corporate independent expenditures to circumvent FECA's "hard-money" limitations. See, *e.g.*, *id.*, at 478-479. One former Senator candidly admitted to the District Court that " '[c]andidates whose campaigns benefit from [phony "issue ads"] greatly appreciate the help of these groups. In fact, Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation.' " *Id.*, at 556 (quoting declaration of Sen. Dale Bumpers). One prominent lobbyist went so far as to state, in uncontroverted testimony, that " 'unregulated expenditures-whether soft money donations to the parties or issue ad campaigns-can sometimes generate *far more* influence than direct campaign contributions.' " *Ibid.* (quoting declaration of Wright Andrews; emphasis added). In sum, Judge Kollar-Kotelly found, "[t]he record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting." *Id.*, at 622-623. She concluded that the Government's interest in preventing the appearance of corruption, as that concept was defined in *Buckley*, was itself sufficient to uphold BCRA § 203. 251 F.Supp.2d, at 622-625. Judge Leon agreed. See *id.*, at 804-805 (dissenting only with respect to the Wellstone Amendment's coverage of *MCFL* corporations).

When the *McConnell* Court affirmed the judgment of the District Court regarding § 203, we did not rest our holding on a narrow notion of *quid pro quo* corruption. Instead we relied on the governmental interest in combating the unique forms of corruption threatened by corporations, as recognized in *Austin*'s antidistortion and shareholder protection rationales, 540 U.S., at 205, 124 S.Ct. 619 (citing *Austin*, 494 U.S., at 660, 110 S.Ct. 1391), as well as the interest in preventing circumvention of contribution limits, 540 U.S., at 128-129, 205, 206, n. 88, 124 S.Ct. 619. Had we felt constrained by the view of today's Court that *quid pro quo* corruption and its appearance are the only interests that count in this field, *ante*, at 903 - 911, we of course would have looked closely at that issue. And as the analysis by Judge Kollar-Kotelly reflects, it is a very real possi-

bility that we would have found one or both of those interests satisfied and § 203 appropriately tailored to them.

The majority's rejection of the *Buckley* anticorruption rationale on the ground that independent corporate expenditures "do not give rise to [*quid pro quo*] corruption or the appearance of corruption," *ante,* at 909, is thus unfair as well as unreasonable. Congress and outside experts have generated significant evidence corroborating this rationale, and the only reason we do not have any of the relevant materials before us is that the Government had no reason ***967** to develop a record at trial for a facial challenge the plaintiff had abandoned. The Court cannot both *sua sponte* choose to relitigate *McConnell* on appeal and then complain that the Government has failed to substantiate its case. If our colleagues were really serious about the interest in preventing *quid pro quo* corruption, they would remand to the District Court with instructions to commence evidentiary proceedings.[FN66]

> FN66. In fact, the notion that the "electioneering communications" covered by § 203 can breed *quid pro quo* corruption or the appearance of such corruption has only become more plausible since we decided *McConnell.* Recall that THE CHIEF JUSTICE's controlling opinion in *WRTL* subsequently limited BCRA's definition of "electioneering communications" to those that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S., at 470, 127 S.Ct. 2652. The upshot was that after *WRTL*, a corporate or union expenditure could be regulated under § 203 only if everyone would understand it as an endorsement of or attack on a particular candidate for office. It does not take much imagination to perceive why this type of advocacy might be especially apt to look like or amount to a deal or a threat.

The insight that even technically independent expenditures can be corrupting in much the same way as direct contributions is bolstered by our decision last year in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. ----, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). In that case, Don Blankenship, the chief executive officer of a corporation with a lawsuit pending before the West Virginia high court, spent large sums on behalf of a particular candidate, Brent Benjamin, running for a seat on that court. "In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to 'And For The Sake Of The Kids,' " a § 527 corporation that ran ads targeting Benjamin's opponent. *Id.*, at ----, 129 S.Ct., at 2257. "This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures ... ' "to support ... Brent Benjamin." ' " *Id.*, at ----, 129 S.Ct., at 2257 (second alteration in original). Applying its common sense, this Court accepted petitioners' argument that Blankenship's "pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias" when Benjamin later declined to recuse himself from the appeal by Blankenship's corporation. *Id.*, at ----, 129 S.Ct., at 2262. "Though n[o] ... bribe or criminal influence" was involved, we recognized that "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected." *Ibid.* "The difficulties of inquiring into actual bias," we further noted, "simply underscore the need for objective rules," *id.*, at ----, 129 S.Ct., at 2263-rules which will perforce turn on the appearance of bias rather than its actual existence.

In *Caperton*, then, we accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption. Indeed, this premise struck the Court as so intuitive that it repeatedly referred to Blankenship's spending on behalf of Benjamin-spending that consisted of 99.97% independent expenditures ($3 million) and 0.03% direct contributions ($1,000)-as a "contribution." See, *e.g.*, *id.*, at ----, 129 S.Ct., at 2257 ("The basis for the [recusal] motion was that the justice had received campaign contributions in an extraordinary amount from" Blankenship); *id.*, at ----, 129 S.Ct., at 2258 (referencing "Blankenship's $3 million in contributions"); *id.*, at ----, 129 S.Ct., at 2264 ("Blankenship contributed some $3 million to unseat the incumbent and replace ***968** him with Benjamin"); *id.*, at ----, 129 S.Ct., at 2264 ("Blankenship's campaign contributions ... had a significant and disproportionate influence on the electoral outcome"). The reason the Court so thoroughly conflated expenditures and contributions, one assumes, is that it realized that some expenditures may be functionally equivalent to con-

tributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes.

Caperton is illuminating in several additional respects. It underscores the old insight that, on account of the extreme difficulty of proving corruption, "prophylactic measures, reaching some [campaign spending] not corrupt in purpose or effect, [may be] nonetheless required to guard against corruption." *Buckley*, 424 U.S., at 30, 96 S.Ct. 612; see also *Shrink Missouri*, 528 U.S., at 392, n. 5, 120 S.Ct. 897. It underscores that "certain restrictions on corporate electoral involvement" may likewise be needed to "hedge against circumvention of valid contribution limits." *McConnell*, 540 U.S., at 205, 124 S.Ct. 619 (internal quotation marks and brackets omitted); see also *Colorado II*, 533 U.S., at 456, 121 S.Ct. 2351 ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption"). It underscores that for-profit corporations associated with electioneering communications will often prefer to use nonprofit conduits with "misleading names," such as And For The Sake Of The Kids, "to conceal their identity" as the sponsor of those communications, thereby frustrating the utility of disclosure laws. *McConnell*, 540 U.S., at 128, 124 S.Ct. 619; see also *id.*, at 196-197, 124 S.Ct. 619.

And it underscores that the consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, *e.g.*, O'Connor, Justice for Sale, Wall St. Journal, Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as *Amici Curiae* 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps " *Caperton* motions" will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.

Deference and Incumbent Self-Protection

Rather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis.[FN67] Today's opinion provides no clear rationale for being so dismissive of Congress, but the prior individual opinions on which it relies have offered one: the incentives of the legislators who passed BCRA. Section 203, our colleagues have suggested, may be little more than "an incumbency protection plan," *McConnell*, 540 U.S., at 306, 124 S.Ct. 619 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *id.*, at 249-250, 260-263, 124 S.Ct. 619 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part), a disreputable attempt at legislative***969** self-dealing rather than an earnest effort to facilitate First Amendment values and safeguard the legitimacy of our political system. This possibility, the Court apparently believes, licenses it to run roughshod over Congress' handiwork.

> FN67. "We must give weight" and "due deference" to Congress' efforts to dispel corruption, the Court states at one point. *Ante*, at 911. It is unclear to me what these maxims mean, but as applied by the Court they clearly do not entail "deference" in any normal sense of that term.

In my view, we should instead start by acknowledging that "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 650, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (STEVENS, J., dissenting). Many of our campaign finance precedents explicitly and forcefully affirm the propriety of such presumptive deference. See, *e.g.*, *McConnell*, 540 U.S., at 158, 124 S.Ct. 619; *Beaumont*, 539 U.S., at 155-156, 123 S.Ct. 2200; *NRWC*, 459 U.S., at 209-210, 103 S.Ct. 552. Moreover, "[j]udicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of careful legislative adjustment." *Beaumont*, 539 U.S., at 162, n. 9, 123 S.Ct. 2200 (internal quotation marks omitted); cf. *Shrink Missouri*, 528 U.S., at 391, 120 S.Ct. 897 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). In America, incumbent legislators pass the laws that govern campaign finance, just like all other laws. To apply a level of scrutiny that effectively bars them from regu-

lating electioneering whenever there is the faintest whiff of self-interest, is to deprive them of the ability to regulate electioneering.

This is not to say that deference would be appropriate if there were a solid basis for believing that a legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process.[FN68] See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 447, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (STEVENS, J., concurring in part and dissenting in part); *Vieth v. Jubelirer*, 541 U.S. 267, 317, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (STEVENS, J., dissenting). Along with our duty to balance competing constitutional concerns, we have a vital role to play in ensuring that elections remain at least minimally open, fair, and competitive. But it is the height of recklessness to dismiss Congress' years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition. "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes even-handed restrictions." *Buckley*, 424 U.S., at 31, 96 S.Ct. 612.

> FN68. Justice BREYER has suggested that we strike the balance as follows: "We should defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process. But we should not defer in respect to whether its solution ... insulates legislators from effective electoral challenge." *Shrink Missouri*, 528 U.S., at 403-404, 120 S.Ct. 897 (concurring opinion).

We have no record evidence from which to conclude that BCRA § 203, or any of the dozens of state laws that the Court today calls into question, reflects or fosters such invidious discrimination. Our colleagues have opined that " '*any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.' " *McConnell*, 540 U.S., at 249, 124 S.Ct. 619 (opinion of SCALIA, J.). This kind of airy speculation could easily be turned on its head. The electioneering prohibited by ***970** § 203 might well tend to favor incumbents, because incumbents have pre-existing relationships with corporations and unions, and groups that wish to procure legislative benefits may tend to support the candidate who, as a sitting officeholder, is already in a position to dispense benefits and is statistically likely to retain office. If a corporation's goal is to induce officeholders to do its bidding, the corporation would do well to cultivate stable, long-term relationships of dependency.

So we do not have a solid theoretical basis for condemning § 203 as a front for incumbent self-protection, and it seems equally if not more plausible that restrictions on corporate electioneering will be self-denying. Nor do we have a good empirical case for skepticism, as the Court's failure to cite any empirical research attests. Nor does the legislative history give reason for concern. Congress devoted years of careful study to the issues underlying BCRA; "[f]ew legislative proposals in recent years have received as much sustained public commentary or news coverage"; "[p]olitical scientists and academic experts ... with no self-interest in incumbent protectio[n] were central figures in pressing the case for BCRA"; and the legislation commanded bipartisan support from the outset. Pildes, The Supreme Court 2003 Term Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L.Rev. 28, 137 (2004). Finally, it is important to remember just how incumbent-friendly congressional races were prior to BCRA's passage. As the Solicitor General aptly remarked at the time, "the evidence supports overwhelmingly that incumbents were able to get re-elected under the old system just fine." Tr. of Oral Arg. in *McConnell v. FEC*, O.T. 2003, No. 02-1674, p. 61. "It would be hard to develop a scheme that could be better for incumbents." *Id.*, at 63.

In this case, then, "there is no convincing evidence that th[e] important interests favoring expenditure limits are fronts for incumbency protection." *Randall*, 548 U.S., at 279, 126 S.Ct. 2479 (STEVENS, J., dissenting). "In the meantime, a legislative judgment that 'enough is enough' should command the greatest possible deference from judges interpreting a constitutional provision that, at best, has an indirect relationship to activity that affects the quantity ... of repetitive speech in the marketplace of ideas." *Id.*, at 279-280, 126 S.Ct. 2479. The majority cavalierly ignores Congress' factual findings and its constitutional judgment: It acknowledges the validity

of the interest in preventing corruption, but it effectively discounts the value of that interest to zero. This is quite different from conscientious policing for impermissibly anticompetitive motive or effect in a sensitive First Amendment context. It is the denial of Congress' authority to regulate corporate spending on elections.

Austin and Corporate Expenditures

Just as the majority gives short shrift to the general societal interests at stake in campaign finance regulation, it also overlooks the distinctive considerations raised by the regulation of *corporate* expenditures. The majority fails to appreciate that *Austin*'s antidistortion rationale is itself an anticorruption rationale, see 494 U.S., at 660, 110 S.Ct. 1391 (describing "a different type of corruption"), tied to the special concerns raised by corporations. Understood properly, "antidistortion" is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an " 'equalizing' " ideal in disguise. *Ante*, at 904 (quoting *Buckley*, 424 U.S., at 48, 96 S.Ct. 612).[FN69]

FN69. THE CHIEF JUSTICE denies this, *ante*, at 921 - 923, citing scholarship that has interpreted *Austin* to endorse an equality rationale, along with an article by Justice Thurgood Marshall's former law clerk that states that Marshall, the author of *Austin*, accepted "equality of opportunity" and "equalizing access to the political process" as bases for campaign finance regulation, Garrett, New Voices in Politics: Justice Marshall's Jurisprudence on Law and Politics, 52 Howard L. J. 655, 667-668 (2009) (internal quotation marks omitted). It is fair to say that *Austin* can bear an egalitarian reading, and I have no reason to doubt this characterization of Justice Marshall's beliefs. But the fact that *Austin* can be read a certain way hardly proves THE CHIEF JUSTICE's charge that there is nothing more to it. Many of our precedents can bear multiple readings, and many of our doctrines have some "equalizing" implications but do not rest on an equalizing theory: for example, our takings jurisprudence and numerous rules of criminal procedure. More important, the *Austin* Court expressly declined to rely on a speech-equalization rationale, see 494 U.S., at 660, 110 S.Ct. 1391, and we have never understood *Austin* to stand for such a rationale. Whatever his personal views, Justice Marshall simply did not write the opinion that THE CHIEF JUSTICE suggests he did; indeed, he "would have viewed it as irresponsible to write an opinion that boldly staked out a rationale based on equality that no one other than perhaps Justice White would have even considered joining," Garrett, 52 Howard L. J., at 674.

***971** 1. *Antidistortion*

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets ... that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." 494 U.S., at 658-659, 110 S.Ct. 1391. Unlike voters in U.S. elections, corporations may be foreign controlled. [FN70] Unlike other interest groups, business corporations have been "effectively delegated responsibility for ensuring society's economic welfare"; [FN71] they inescapably structure the life of every citizen. " '[T]he resources in the treasury of a business corporation,' " furthermore, " 'are not an indication of popular support for the corporation's political ideas.' " *Id.*, at 659, 110 S.Ct. 1391 (quoting *MCFL*, 479 U.S., at 258, 107 S.Ct. 616). " 'They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.' " 494 U.S., at 659, 110 S.Ct. 1391 (quoting *MCFL*, 479 U.S., at 258, 107 S.Ct. 616). [FN72]

FN70. In state elections, even domestic corporations may be "foreign"-controlled in the sense that they are incorporated in another jurisdiction and primarily owned and operated by out-of-state residents.

FN71. Regan, Corporate Speech and Civic

Virtue, in Debating Democracy's Discontent 289, 302 (A. Allen & M. Regan eds.1998) (hereinafter Regan).

FN72. Nothing in this analysis turns on whether the corporation is conceptualized as a grantee of a state concession, see, *e.g.*, *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819) (Marshall, C. J.), a nexus of explicit and implicit contracts, see, *e.g.*, F. Easterbrook & D. Fischel, The Economic Structure of Corporate Law 12 (1991), a mediated hierarchy of stakeholders, see, *e.g.*, Blair & Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247 (1999) (hereinafter Blair & Stout), or any other recognized model. *Austin* referred to the structure and the advantages of corporations as "state-conferred" in several places, 494 U.S., at 660, 665, 667, 110 S.Ct. 1391, but its anti-distortion argument relied only on the basic descriptive features of corporations, as sketched above. It is not necessary to agree on a precise theory of the corporation to agree that corporations differ from natural persons in fundamental ways, and that a legislature might therefore need to regulate them differently if it is human welfare that is the object of its concern. Cf. Hansmann & Kraakman 441, n. 5.

***972** It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to "protec[t] the individual's interest in self-expression." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 530, 534, n. 2, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); see also *Bellotti*, 435 U.S., at 777, n. 12, 98 S.Ct. 1407. Freedom of speech helps "make men free to develop their faculties," *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), it respects their "dignity and choice," *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), and it facilitates the value of "individual self-realization," Redish, The Value of Free Speech, 130 U. Pa. L.Rev. 591, 594 (1982). Corporate speech, however, is derivative speech, speech by proxy. A regulation such as BCRA § 203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. "Within the realm of [campaign spending] generally," corporate spending is "furthest from the core of political expression." *Beaumont*, 539 U.S., at 161, n. 8, 123 S.Ct. 2200.

It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.

Corporate expenditures are distinguishable from individual expenditures in this respect. I have taken the view that a legislature may place reasonable restrictions on individuals' electioneering expenditures in the service of the governmental interests explained above, and in recognition of the fact that such restrictions are not direct restraints on speech but rather on its financing. See, *e.g.*, ***973***Randall*, 548 U.S., at 273, 126 S.Ct. 2479 (dissenting opinion). But those restrictions concededly present a tougher case, be-

cause the primary conduct of actual, flesh-and-blood persons is involved. Some of those individuals might feel that they need to spend large sums of money on behalf of a particular candidate to vindicate the intensity of their electoral preferences. This is obviously not the situation with business corporations, as their routine practice of giving "substantial sums to *both* major national parties" makes pellucidly clear. *McConnell*, 540 U.S., at 148, 124 S.Ct. 619. "[C]orporate participation" in elections, any business executive will tell you, "is more transactional than ideological." Supp. Brief for Committee for Economic Development as *Amicus Curiae* 10.

In this transactional spirit, some corporations have affirmatively urged Congress to place limits on their electioneering communications. These corporations fear that officeholders will shake them down for supportive ads, that they will have to spend increasing sums on elections in an ever-escalating arms race with their competitors, and that public trust in business will be eroded. See *id.*, at 10-19. A system that effectively forces corporations to use their shareholders' money both to maintain access to, and to avoid retribution from, elected officials may ultimately prove more harmful than beneficial to many corporations. It can impose a kind of implicit tax. [FN73]

> FN73. Not all corporations support BCRA § 203, of course, and not all corporations are large business entities or their tax-exempt adjuncts. Some nonprofit corporations are created for an ideological purpose. Some closely held corporations are strongly identified with a particular owner or founder. The fact that § 203, like the statute at issue in *Austin*, regulates some of these corporations' expenditures does not disturb the analysis above. See 494 U.S., at 661-665, 110 S.Ct. 1391. Small-business owners may speak in their own names, rather than the business', if they wish to evade § 203 altogether. Nonprofit corporations that want to make unrestricted electioneering expenditures may do so if they refuse donations from businesses and unions and permit members to disassociate without economic penalty. See *MCFL*, 479 U.S. 238, 264, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986). Making it plain that their decision is not motivated by a concern about BCRA's coverage of nonprofits that have ideological missions but lack *MCFL* status, our colleagues refuse to apply the Snowe-Jeffords Amendment or the lower courts' *de minimis* exception to *MCFL*. See *ante*, at 891 - 892.

In short, regulations such as § 203 and the statute upheld in *Austin* impose only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader "public dialogue," *ante*, at 899, but also because they leave untouched the speech of natural persons. Recognizing the weakness of a speaker-based critique of *Austin*, the Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say. The Court's central argument is that laws such as § 203 have " 'deprived [the electorate] of information, knowledge and opinion vital to its function,' " *ante*, at 907 (quoting *CIO*, 335 U.S., at 144, 68 S.Ct. 1349 (Rutledge, J., concurring in judgment)), and this, in turn, "interferes with the 'open marketplace' of ideas protected by the First Amendment," *ante*, at 906 (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008)).

There are many flaws in this argument. If the overriding concern depends on the interests of the audience, surely the public's perception of the value of corporate speech should be given important weight. That perception today is the same as it ***974** was a century ago when Theodore Roosevelt delivered the speeches to Congress that, in time, led to the limited prohibition on corporate campaign expenditures that is overruled today. See *WRTL*, 551 U.S., at 509-510, 127 S.Ct. 2652 (Souter, J., dissenting) (summarizing President Roosevelt's remarks). The distinctive threat to democratic integrity posed by corporate domination of politics was recognized at "the inception of the republic" and "has been a persistent theme in American political life" ever since. Regan 302. It is only certain Members of this Court, not the listeners themselves, who have agitated for more corporate electioneering.

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations "unfai[r] influence" in the electoral process, 494

U.S., at 660, 110 S.Ct. 1391, and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities," Brief for American Independent Business Alliance as *Amicus Curiae* 11; see also ALI, Principles of Corporate Governance: Analysis and Recommendations § 2.01(a), p. 55 (1992) ("[A] corporation ... should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). In a state election such as the one at issue in *Austin*, the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good, 494 U.S., at 660, 110 S.Ct. 1391. The opinions of real people may be marginalized. "The expenditure restrictions of [2 U.S.C.] § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas." *MCFL*, 479 U.S., at 259, 107 S.Ct. 616.

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate "domination" of electioneering, *Austin*, 494 U.S., at 659, 110 S.Ct. 1391, can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders " 'call the tune' " and a reduced " 'willingness of voters to take part in democratic governance.' " *McConnell*, 540 U.S., at 144, 124 S.Ct. 619 (quoting *Shrink Missouri*, 528 U.S., at 390, 120 S.Ct. 897). To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering***975** might diminish the ability of citizens to "hold officials accountable to the people," *ante*, at 898, and disserve the goal of a public debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response.

The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' "war chests" and their special "advantages" in the legal realm, *Austin*, 494 U.S., at 659, 110 S.Ct. 1391, may translate into special advantages in the market for legislation. When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation." Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L.Rev. 1103, 1113 (2002). Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of. *Ibid.* It is for reasons such as these that our campaign finance jurisprudence has long appreciated that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.' " *NRWC*, 459 U.S., at 210, 103 S.Ct. 552 (quoting *California Medical Assn.*, 453 U.S., at 201, 101 S.Ct. 2712).

The Court's facile depiction of corporate electioneering assumes away all of these complexities. Our colleagues ridicule the idea of regulating expen-

ditures based on "nothing more" than a fear that corporations have a special "ability to persuade," *ante,* at 923 (opinion of ROBERTS, C.J.), as if corporations were our society's ablest debaters and viewpoint-neutral laws such as § 203 were created to suppress their best arguments. In their haste to knock down yet another straw man, our colleagues simply ignore the fundamental concerns of the *Austin* Court and the legislatures that have passed laws like § 203: to safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process. All of the majority's theoretical arguments turn on a proposition with undeniable surface appeal but little grounding in evidence or experience, "that there is no such thing as too much speech," *Austin,* 494 U.S., at 695, 110 S.Ct. 1391 (SCALIA, J., dissenting). [FN74] If individuals in our society had infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere; and if broadcast advertisements had no special ability to influence elections apart from the merits of their arguments (to the extent they make any); and if legislators always operated with nothing less than perfect virtue; then I suppose the majority's premise would be sound. In the real world, we have seen, corporate domination of the airwaves prior to an election may decrease the average listener's exposure to ***976** relevant viewpoints, and it may diminish citizens' willingness and capacity to participate in the democratic process.

> FN74. Of course, no presiding person in a courtroom, legislature, classroom, polling place, or family dinner would take this hyperbole literally.

None of this is to suggest that corporations can or should be denied an opportunity to participate in election campaigns or in any other public forum (much less that a work of art such as *Mr. Smith Goes to Washington* may be banned), or to deny that some corporate speech may contribute significantly to public debate. What it shows, however, is that *Austin* 's "concern about corporate domination of the political process," 494 U.S., at 659, 110 S.Ct. 1391, reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to *facilitate* **First Amendment** values by preserving some **breathing room** around the electoral "marketplace" of ideas, *ante,* at 896, 904, 906, 914, 915, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws such as § 203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective, *ante,* at 886, 912, it becomes necessary to consider how listeners will actually be affected.

In critiquing *Austin*'s antidistortion rationale and campaign finance regulation more generally, our colleagues place tremendous weight on the example of media corporations. See *ante,* at 905 - 907, 911; *ante,* at 917, 923 (opinion of ROBERTS, C.J.); *ante,* at 927 - 928 (opinion of SCALIA, J.). Yet it is not at all clear that *Austin* would permit § 203 to be applied to them. The press plays a unique role not only in the text, history, and structure of the First Amendment but also in facilitating public discourse; as the *Austin* Court explained, "media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public," 494 U.S., at 667, 110 S.Ct. 1391. Our colleagues have raised some interesting and difficult questions about Congress' authority to regulate electioneering by the press, and about how to define what constitutes the press. *But that is not the case before us.* Section 203 does not apply to media corporations, and even if it did, Citizens United is not a media corporation. There would be absolutely no reason to consider the issue of media corporations if the majority did not, first, transform Citizens United's as-applied challenge into a facial challenge and, second, invent the theory that legislatures must eschew all "identity"-based distinctions and treat a local nonprofit news outlet exactly the same as General Motors.[FN75] This calls to mind George Berkeley's description of philosophers: "[W]e have first raised a dust and then complain we cannot see." Principles of Human Knowledge/Three Dialogues 38, ¶ 3 (R. Woolhouse ed.1988).

> FN75. Under the majority's view, the legislature is thus damned if it does and damned if it doesn't. If the legislature gives media corporations an exemption from electioneer-

> ing regulations that apply to other corporations, it violates the newly minted First Amendment rule against identity-based distinctions. If the legislature does not give media corporations an exemption, it violates the First Amendment rights of the press. The only way out of this invented bind: no regulations whatsoever.

It would be perfectly understandable if our colleagues feared that a campaign finance***977** regulation such as § 203 may be counterproductive or self-interested, and therefore attended carefully to the choices the Legislature has made. But the majority does not bother to consider such practical matters, or even to consult a record; it simply stipulates that "enlightened self-government" can arise only in the absence of regulation. *Ante,* at 898. In light of the distinctive features of corporations identified in *Austin,* there is no valid basis for this assumption. The marketplace of ideas is not actually a place where items-or laws-are meant to be bought and sold, and when we move from the realm of economics to the realm of corporate electioneering, there may be no "reason to think the market ordering is intrinsically good at all," Strauss 1386.

The Court's blinkered and aphoristic approach to the First Amendment may well promote corporate power at the cost of the individual and collective self-expression the Amendment was meant to serve. It will undoubtedly cripple the ability of ordinary citizens, Congress, and the States to adopt even limited measures to protect against corporate domination of the electoral process. Americans may be forgiven if they do not feel the Court has advanced the cause of self-government today.

2. *Shareholder Protection*

There is yet another way in which laws such as § 203 can serve First Amendment values. Interwoven with *Austin*'s concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not "reflec [t] [their] support." 494 U.S., at 660-661, 110 S.Ct. 1391. When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.

The PAC mechanism, by contrast, helps assure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas. *Ibid.* It " 'allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.' " *McConnell,* 540 U.S., at 204, 124 S.Ct. 619 (quoting *Beaumont,* 539 U.S., at 163, 123 S.Ct. 2200). A rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded shareholders; it also curbs the rent seeking behavior of executives and respects the views of dissenters. *Austin*'s acceptance of restrictions on general treasury spending "simply allows people who have invested in the business corporation for purely economic reasons"-the vast majority of investors, one assumes-"to avoid being taken advantage of, without sacrificing their economic objectives." Winkler, Beyond *Bellotti,* 32 Loyola (LA) L.Rev. 133, 201 (1998).

The concern to protect dissenting shareholders and union members has a long history in campaign finance reform. It provided a central motivation for the Tillman Act in 1907 and subsequent legislation, see *Pipefitters v. United States,* 407 U.S. 385, 414-415, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972); Winkler, 92 Geo. L. J., at 887-900, and it has been endorsed in a long line of our cases, see, *e.g.*, *McConnell,* 540 U.S., at 204-205, 124 S.Ct. 619; *Beaumont,* 539 U.S., at 152-154, 123 S.Ct. 2200; *MCFL,* 479 U.S., at 258, 107 S.Ct. 616; *NRWC,* 459 U.S., at 207-208, 103 S.Ct. 552; ***978***Pipefitters,* 407 U.S., at 414-416, 92 S.Ct. 2247; see also n. 60, *supra*. Indeed, we have unanimously recognized the governmental interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC,* 459 U.S., at 207-208, 103 S.Ct. 552.

The Court dismisses this interest on the ground that abuses of shareholder money can be corrected "through the procedures of corporate democracy," *ante,* at 911 (internal quotation marks omitted), and, it seems, through Internet-based disclosures, *ante,* at

916.[FN76] I fail to understand how this addresses the concerns of dissenting union members, who will also be affected by today's ruling, and I fail to understand why the Court is so confident in these mechanisms. By "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. Blair & Stout 320; see also *id.*, at 298-315; Winkler, 32 Loyola (LA) L.Rev., at 165-166, 199-200. Modern technology may help make it easier to track corporate activity, including electoral advocacy, but it is utopian to believe that it solves the problem. Most American households that own stock do so through intermediaries such as mutual funds and pension plans, see Evans, A Requiem for the Retail Investor? 95 Va. L.Rev. 1105 (2009), which makes it more difficult both to monitor and to alter particular holdings. Studies show that a majority of individual investors make no trades at all during a given year. *Id.*, at 1117. Moreover, if the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.

> FN76. I note that, among the many other regulatory possibilities it has left open, ranging from new versions of § 203 supported by additional evidence of *quid pro quo* corruption or its appearance to any number of tax incentive or public financing schemes, today's decision does not require that a legislature rely solely on these mechanisms to protect shareholders. Legislatures remain free in their incorporation and tax laws to condition the types of activity in which corporations may engage, including electioneering activity, on specific disclosure requirements or on prior express approval by shareholders or members.

If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their pension plan, or the like. The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular shareholder might disapprove. But those expenditures do not implicate the selection of public officials, an area in which "the interests of unwilling ... corporate shareholders [in not being] forced to subsidize that speech" "are at their zenith." *Austin*, 494 U.S., at 677, 110 S.Ct. 1391 (Brennan, J., concurring). And in any event, the question is whether shareholder protection provides a basis for regulating expenditures in the weeks before an election, not whether additional types of corporate communications ***979** might similarly be conditioned on voluntariness.

Recognizing the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the antidistortion rationale, in two main ways. First, the problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others. See, *e.g.*, *id.*, at 663, 110 S.Ct. 1391 (discussing risk that corporation's "members may be ... reluctant to withdraw as members even if they disagree with [its] political expression"). Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these "expenditures reflect actual public support for the political ideas espoused," *id.*, at 660, 110 S.Ct. 1391. The shareholder protection rationale, in other words, bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

V

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential hold-

ings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle "elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." *Bellotti*, 435 U.S., at 817, n. 13, 98 S.Ct. 1407 (White, J., dissenting). At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

Justice THOMAS, concurring in part and dissenting in part.

I join all but Part IV of the Court's opinion.

***980** Political speech is entitled to robust protection under the First Amendment. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) has never been reconcilable with that protection. By striking down § 203, the Court takes an important first step toward restoring full constitutional protection to speech that is "indispensable to the effective and intelligent use of the processes of popular government." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 265, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (internal quotation marks omitted). I dissent from Part IV of the Court's opinion, however, because the Court's constitutional analysis does not go far enough. The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional. See *id.*, at 275-277, and n. 10, 124 S.Ct. 619.

Congress may not abridge the "right to anonymous speech" based on the " 'simple interest in providing voters with additional relevant information,' " *id.*, at 276, 124 S.Ct. 619 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)). In continuing to hold otherwise, the Court misapprehends the import of "recent events" that some *amici* describe "in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation." *Ante*, at 916. The Court properly recognizes these events as "cause for concern," *ibid.*, but fails to acknowledge their constitutional significance. In my view, *amici*'s submissions show why the Court's insistence on upholding §§ 201 and 311 will ultimately prove as misguided (and ill fated) as was its prior approval of § 203.

Amici's examples relate principally to Proposition 8, a state ballot proposition that California voters narrowly passed in the 2008 general election. Proposition 8 amended California's constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, § 7.5. Any donor who gave more than $100 to any committee supporting or opposing Proposition 8 was required to disclose his full name, street address, occupation, employer's name (or business name, if self-employed), and the total amount of his contributions.[FN1] See Cal. Govt.Code Ann. § 84211(f) (West 2005). The California Secretary of State was then required to post this information on the Internet. See §§ 84600-84601; §§ 84602-84602.1 (West Supp.2010); §§ 84602.5-84604 (West 2005); § 85605 (West Supp.2010); §§ 84606-84609 (West 2005).

FN1. BCRA imposes similar disclosure re-

> quirements. See, *e.g.*, 2 U.S.C. § 434(f)(2)(F) ("Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year" must disclose "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement").

Some opponents of Proposition 8 compiled this information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property damage, or threats of physical violence or death, as a result. They cited these incidents in a complaint they filed after the 2008 election, seeking to invalidate California's mandatory disclosure laws. Supporters recounted being told: "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter," or, "we have plans for you and your friends." Complaint in *ProtectMarriage.com-Yes on 8 v. Bowen*, Case No. ***981** 2:09-cv-00058-MCE-DAD (ED Cal.), ¶ 31. Proposition 8 opponents also allegedly harassed the measure's supporters by defacing or damaging their property. *Id.*, ¶ 32. Two religious organizations supporting Proposition 8 reportedly received through the mail envelopes containing a white powdery substance. *Id.*, ¶ 33.

Those accounts are consistent with media reports describing Proposition 8-related retaliation. The director of the nonprofit California Musical Theater gave $1,000 to support the initiative; he was forced to resign after artists complained to his employer. Lott & Smith, Donor Disclosure Has Its Downsides, Wall Street Journal, Dec. 26, 2008, p. A13. The director of the Los Angeles Film Festival was forced to resign after giving $1,500 because opponents threatened to boycott and picket the next festival. *Ibid.* And a woman who had managed her popular, family-owned restaurant for 26 years was forced to resign after she gave $100, because "throngs of [angry] protesters" repeatedly arrived at the restaurant and "shout[ed] 'shame on you' at customers." Lopez, Prop. 8 Stance Upends Her Life, Los Angeles Times, Dec. 14, 2008, p. B1. The police even had to "arriv[e] in riot gear one night to quell the angry mob" at the restaurant. *Ibid.* Some supporters of Proposition 8 engaged in similar tactics; one real estate businessman in San Diego who had donated to a group opposing Proposition 8 "received a letter from the Prop. 8 Executive Committee threatening to publish his company's name if he didn't also donate to the 'Yes on 8' campaign." Donor Disclosure, *supra*, at A13.

The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights. Before the 2008 Presidential election, a "newly formed nonprofit group ... plann[ed] to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions." Luo, Group Plans Campaign Against G.O.P. Donors, N.Y. Times, Aug. 8, 2008, p. A15. Its leader, "who described his effort as 'going for the jugular,' " detailed the group's plan to send a "warning letter ... alerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure and watchdog groups digging through their lives." *Ibid.*

These instances of retaliation sufficiently demonstrate why this Court should invalidate mandatory disclosure and reporting requirements. But *amici* present evidence of yet another reason to do so-the threat of retaliation from *elected officials*. As *amici*'s submissions make clear, this threat extends far beyond a single ballot proposition in California. For example, a candidate challenging an incumbent state attorney general reported that some members of the State's business community feared donating to his campaign because they did not want to cross the incumbent; in his words, " 'I go to so many people and hear the same thing: "I sure hope you beat [the incumbent], but I can't afford to have my name on your records. He might come after me next." ' " Strassel, Challenging Spitzerism at the Polls, Wall Street Journal, Aug. 1, 2008, p. A11. The incumbent won reelection in 2008.

My point is not to express any view on the merits of the political controversies I describe. Rather, it is to demonstrate-using real-world, recent examples-the fallacy in the Court's conclusion that "[d]isclaimer and disclosure requirements ... impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Ante*, at 914 (internal quotation marks and citations omitted). Of ***982** course they do.

130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73
(Cite as: 130 S.Ct. 876)

Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.

The Court nevertheless insists that as-applied challenges to disclosure requirements will suffice to vindicate those speech rights, as long as potential plaintiffs can "show a reasonable probability that disclosure ... will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Ante,* at 914 (internal quotation marks omitted). But the Court's opinion itself proves the irony in this compromise. In correctly explaining why it must address the facial constitutionality of § 203, see *ante,* at 888 - 897, the Court recognizes that "[t]he First Amendment does not permit laws that force speakers to ... seek declaratory rulings before discussing the most salient political issues of our day," *ante,* at 889; that as-applied challenges to § 203 "would require substantial litigation over an extended time" and result in an "interpretive process [that] itself would create an inevitable, pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable," *ante,* at 891; that "a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling," *ante,* at 892; and that avoiding a facial challenge to § 203 "would prolong the substantial, nation-wide chilling effect" that § 203 causes, *ante,* at 894. This logic, of course, applies equally to as-applied challenges to §§ 201 and 311.

Irony aside, the Court's promise that as-applied challenges will adequately protect speech is a hollow assurance. Now more than ever, §§ 201 and 311 will chill protected speech because-as California voters can attest-"the advent of the Internet" enables "prompt disclosure of expenditures," which "provide[s]" political opponents "with the information needed" to intimidate and retaliate against their foes. *Ante,* at 916. Thus, "disclosure permits citizens ... to react to the speech of [their political opponents] in a proper"-or undeniably *improper*-"way" long before a plaintiff could prevail on an as-applied challenge.[FN2] *Ibid.*

FN2. But cf. *Hill v. Colorado,* 530 U.S. 703, 707-710, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (approving a statute restricting speech "within 100 feet" of abortion clinics because it protected women seeking an abortion from " 'sidewalk counseling,' " which "consists of efforts 'to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech,' " and which "sometimes" involved "strong and abusive language in face-to-face encounters").

I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or preemptive and threatening warning letters as the price for engaging in "core political speech, the 'primary object of First Amendment protection.' " *McConnell,* 540 U.S., at 264, 124 S.Ct. 619 (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 410-411, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (THOMAS, J., dissenting)). Accordingly, I respectfully dissent from the Court's judgment upholding BCRA §§ 201 and 311.

U.S.,2010.
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130 S.Ct. 876, 187 L.R.R.M. (BNA) 2961, 175 L.Ed.2d 753, 78 USLW 4078, 159 Lab.Cas. P 10,166, 10 Cal. Daily Op. Serv. 776, 2010 Daily Journal D.A.R. 949, 22 Fla. L. Weekly Fed. S 73

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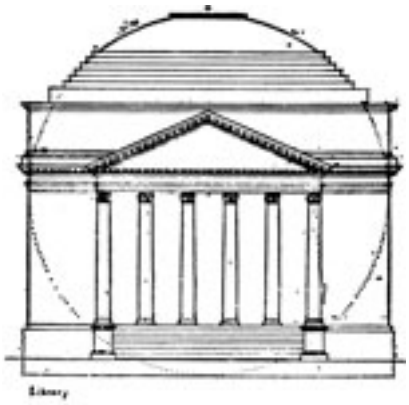

"TRUE THREATS" AND THE ISSUE OF INTENT

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[*] J.D. expected May 2007, University of Virginia School of Law; M.A. History expected May 2007, University of Virginia. First, I would like to thank Josh Wheeler for introducing me to the case of *Virginia v. Black* and the area of "true threats." This Note would not exist if not for his guidance. I also would like to thank Dean John Jeffries, Jr., and Professor John Harrison; their teachings have greatly influenced my thoughts not only on this topic specifically but on the law more generally. Additionally, I am grateful to Professor Robert O'Neil for his helpful suggestions. I also owe a debt of gratitude to the talented editors of the Virginia Law Review, especially Angela Harris, for their helpful comments. Finally, a special thanks to my best editor, Alison Ferland, for her love and support.

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat.
>
> –Justice O'Connor's opinion of the Court in *Virginia v. Black*[1]

INTRODUCTION: WADING THROUGH MUDDIED WATERS

SOME Supreme Court decisions clarify a murky area of the law. Others further muddy an area in need of clarification. Unfortunately, the Court's decision in *Virginia v. Black* has proven to be another instance of the latter. For the first time, the Court in *Black* defined the term "true threat";[2] however, in providing a definition, the Court created more confusion than elucidation. Instead of clearly articulating the contours of what constitutes a "true threat," the Court's definition (and opinion) spawned as many questions as answers.[3] One critical question the Court's ambiguous language failed to answer is what intent, if any, the government must prove a speaker had in order for his communication to qualify as a "true threat" and, thus, unprotected speech. Put another way, what is the required mens rea for threatening speech to be constitutionally criminalized? A brief comparison of two recent (post-*Black*) lower court opinions demonstrates the uncertainty underlying this specific area of "true threats" jurisprudence.

In *United States v. Bly*,[4] a federal district court refused to dismiss an indictment against a defendant charged with, inter alia, mailing a threatening communication in violation of federal law.[5] The court

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[1] 538 U.S. 343, 359–60 (2003) (internal citations omitted).

[2] See id. and accompanying text.

[3] See Steven G. Gey, A Few Questions About Cross Burning, Intimidation, and Free Speech, 80 Notre Dame L. Rev. 1287, 1290 (2005) ("The mark of a badly written opinion is that the reader has more questions about the state of the law after reading the opinion than before. By that measure Justice O'Connor's *Black* opinion is very badly written.") [hereinafter Gey, A Few Questions].

[4] No. CRIM. 3:04CR00011, 2005 WL 2621996 (W.D. Va. Oct. 14, 2005).

[5] 18 U.S.C. § 876 (2000) ("Whoever knowingly so deposits or causes to be delivered as aforesaid [in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing

held that to meet its burden, the government did not need to "allege an intent to intimidate."[6] For the defendant's letter to constitute a "true threat," and thus fall outside the ambit of First Amendment protection, the government only needed to prove that "'an ordinary, reasonable recipient who is familiar with the context of [the] letter would interpret it as a threat of injury.'"[7] Whether the defendant intended for the communication to be threatening was immaterial. Conversely, in *United States v. Magleby* (decided only two months prior to *Bly*), the United States Court of Appeals for the Tenth Circuit posited that true threats "must be made 'with the intent of placing the victim in fear of bodily harm or death.'"[8] According to this court, absent the speaker's intent to threaten, the communication could not constitute a "true threat" and was therefore constitutionally protected under the First Amendment.

Such disparate conceptions have significant consequences: a communication considered a "true threat" in one jurisdiction may be deemed protected speech in another. While this doctrinal split is important in its own right, perhaps more significant is that each court relied on the same source as justification for its approach—the *Black* Court's aforementioned definition of "true threats." Notably, both courts in *Bly* and *Magleby* claimed their respective interpretations of *Black* as the legal high ground.[9]

A main purpose of this Note is to explain why (and how) lower courts, such as the two discussed above, have taken various approaches—based on their different interpretations of *Black*—to the intent standard of the "true threats" doctrine. Consequently, the impact of *Black* on the true threats jurisprudence will be explored. More generally, this Note will focus on the role of intent in defining "true threats." It will examine the various intent standards that

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any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.").

[6] *Bly*, 2005 WL 2621996, at *2.

[7] Id. (quoting United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973)).

[8] 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 U.S. at 360).

[9] The district court in *Bly*, which held that the speaker does not need to have the intent to threaten for his words to constitute a "true threat," stated that "*Black* could not be clearer on this point." 2005 WL 2621996, at *2. Similarly, the Tenth Circuit in *Magleby*, which held that the speaker does need to have the intent to threaten for his words to constitute a "true threat," directly quoted and cited the definition provided in *Black* when outlining its own interpretation of "true threats." 420 F.3d at 1139.

have been proposed and how courts have treated them. By analyzing the jurisprudence from both a pre- and post-*Black* perspective, this Note hopes to achieve a more comprehensive understanding of the issue of intent, and its disputed place in the "true threats" doctrine, than has been achieved in earlier (albeit limited) scholarship.[10]

Because the focus of this Note is on the issue of intent, other unresolved matters related to the true threats doctrine will not be discussed. For instance, the degree of immediacy[11] or specificity[12] re-

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[10] While the area of "true threats" has received relatively little attention, the most incisive articles examining the doctrine and its various intent standards were written before *Black* was decided. See, e.g., G. Robert Blakey & Brian J. Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 BYU L. Rev. 829, 937–1010 (providing an impressive compilation of each circuit's approach to "true threats"); Steven G. Gey, The *Nuremberg Files* and the First Amendment Value of Threats, 78 Tex. L. Rev. 541, 565–98 (2000) [hereinafter Gey, *Nuremberg Files*]; Jordan Strauss, Context is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment, 32 Sw. U. L. Rev. 231 (2003).

Articles written after *Black* either give cursory treatment to the issue of intent or focus on other topics, such as the Court's language concerning intimidation or its holding on the legality of cross-burning. See, e.g., Gey, A Few Questions, supra note 3, at 1325–56; Roger C. Hartley, Cross Burning—Hate Speech as Free Speech: A Comment on *Virginia v. Black*, 54 Cath. U. L. Rev. 1 (2004); W. Wat Hopkins, Cross Burning Revisited: What the Supreme Court Should Have Done in *Virginia v. Black* and Why It Didn't, 26 Hastings Comm. & Ent. L.J. 269 (2004).

Interestingly, most of the articles written after *Black* are more concerned with the ramifications of the Ninth Circuit's 2002 en banc decision in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), than the Supreme Court's 2003 *Black* opinion. See, e.g., Jennifer Elrod, Expressive Activity, True Threats, and the First Amendment, 36 Conn. L. Rev. 541, 544, 585–608 (2004); Matthew G.T. Martin, Comment, True Threats, Militant Activists, and the First Amendment, 82 N.C. L. Rev. 280, 297–325 (2003); Lori Weiss, Note, Is the True Threats Doctrine Threatening the First Amendment? *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists* Signals the Need to Remedy an Inadequate Doctrine, 72 Fordham L. Rev. 1283 (2004).

[11] See, e.g., *Planned Parenthood*, 290 F.3d at 1105–07 (Berzon, J., dissenting) (explaining that she "would not include the imminence or immediacy of the threatened action as a prerequisite to finding a true threat"); United States v. Baker, 890 F. Supp. 1375, 1385–86 (E.D. Mich. 1995) (discussing an immediacy requirement for the communication to constitute a true threat); State v. DeLoreto, 827 A.2d 671, 682 (Conn. 2003) (citing *Black* for the proposition that "[i]mminence, however, is not a requirement under the true threats doctrine").

[12] See, e.g., United States v. Fulmer, 108 F.3d 1486, 1492 (1st Cir. 1997) ("The use of ambiguous language does not preclude a statement from being a threat."); United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) ("An absence of explicitly threatening language does not preclude the finding of a threat...."); United States v. Carmichael, 326 F. Supp. 2d 1267, 1281–84 (M.D. Ala. 2004) (discussing whether a website

quired for the communication to constitute a true threat will not be addressed. Other issues regarding the actus reus of a "true threat," such as defining what constitutes a truly threatening statement, also fall outside the scope of this Note. Similarly, the area of electronic threats, an emerging subset of the "true threats" jurisprudence, will be dealt with only where it raises a pertinent intent issue.[13] This Note is focused on one question: what is the minimum mens rea required for threatening speech to be constitutionally prohibited?

This Note will proceed in five Parts. Part I will serve as a short introduction to the category of true threats and its place within First Amendment jurisprudence. Part II will examine the history of true threats and intent leading up to *Virginia v. Black*, highlighting the foundational opinion of *Watts v. United States* and the various intent approaches that became available in its wake. Part III will discuss the potential interpretations of the language in *Black*, and Part IV will explain how lower courts have treated the Court's definition of true threats in *Black*. Finally, Part V will address the normative arguments for each intent approach and suggest which standard the Court should adopt.

I. PUNISHING PURE SPEECH: THE PROSCRIPTION OF TRUE THREATS

Whenever pure speech is regulated, it must be done with caution and precision.[14] As the Court correctly explained in its first true threats case, *Watts v. United States*, "a statute . . . which makes criminal a form of pure speech[] must be interpreted with the commands of the First Amendment clearly in mind. What is a

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that lacks any explicitly threatening language constitutes a true threat); *Baker*, 890 F. Supp. at 1386, 1388–90 (analyzing the degree of specificity required for the communication to constitute a true threat).

For an influential opinion which addresses both the issues of immediacy and specificity, see *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976). Despite its relatively important contribution to the true threats jurisprudence more generally, the *Kelner* decision will receive scarce attention here because of its minimal discussion of intent.

[13] See, e.g., infra Section II.E. (discussing the Ninth Circuit's 2002 *Planned Parenthood* decision).

[14] See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("'precision of regulation' is demanded" in the "context of constitutionally protected activity") (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

threat must be distinguished from what is constitutionally protected speech."[15] Nevertheless, pure speech can be punished in a manner consistent with the First Amendment. In *Chaplinsky v. New Hampshire*, the Court reiterated that free speech is not absolute: "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[16] Such classes of speech include libel, obscenity, and fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[17] Although the Court in *Chaplinsky* did not refer to true threats in its list of exemplary categories, it later recognized threats as another exception in *Watts*. There, the Court held that, like libel and obscenity, true threats may be punished without violating the First Amendment.[18]

Even though *Watts* does not cite *Chaplinksy*, the classification of true threats as unprotected speech is clearly congruent with the latter's rationale of regulating expression that by its "very utterance inflict[s] injury."[19] According to the Court in *Black*, "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[20] Instead of conveying a fact, idea, or opinion, a true threat causes fear, disruption, and a risk of violence.[21] Its contribution to public debate and to the marketplace of ideas, the core values of

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[15] 394 U.S. 705, 707 (1969) (per curiam).

[16] 315 U.S. 568, 571–72 (1942); see also *Black*, 538 U.S. at 358 ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.") (citing *Chaplinsky*).

[17] *Chaplinsky*, 315 U.S. at 572.

[18] *Watts*, 394 U.S. at 707 (holding that a statute which punishes threatening speech is constitutional on its face).

[19] *Chaplinksy*, 315 U.S. at 572. The Court in *Watts* did not explicitly treat true threats as a categorical exception to the First Amendment, as the Court in *Chaplinsky* had treated libel and obscenity. However, subsequent cases made clear that *Watts* stands for the proposition that true threats are a categorical exception to the First Amendment. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[20] *Black*, 538 U.S. at 360 (alteration in original) (quoting *R.A.V.*, 505 U.S. at 388).

[21] See United States v. Aman, 31 F.3d 550, 555 (7th Cir. 1994) ("The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense.") (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991)).

the First Amendment, is de minimis. As Professor Steven Gey suggests, a true threat falls "outside the scope of First Amendment protection because it operates more like a physical action than a verbal or symbolic communication of ideas or emotions."[22] In addition to the personal costs associated with fear and disruption, true threats are responsible for the social costs of investigating and preventing potential violence.[23] This is most apparent when threats are directed at government officials and other public figures. Like the other classes of punishable speech, true threats serve "no essential part of any exposition of ideas, and are 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."[24]

While the reasons for proscribing true threats may be agreed upon, attempts at defining the scope of this First Amendment exception, and determining a proper intent standard, have proven more elusive. Unlike the *Chaplinsky* triumvirate of libel,[25] obscenity,[26] and fighting words,[27] the category of true threats suffers from

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[22] Gey, *Nuremberg Files*, supra note 10, at 593; see also State v. DeLoreto, 827 A.2d 671, 680 (Conn. 2003) ("It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved.") (internal quotations and citations omitted).

[23] Elrod, supra note 10, at 547–48 ("As proscribable acts, true threats have a number of detrimental impacts on society . . . [including] the cost of protecting against, reducing, preventing, or eliminating the threatened violence.").

[24] *Chaplinsky*, 315 U.S. at 572.

[25] Although complex (perhaps unnecessarily so), the constitutional law of libel, and the legal standards and tests associated with it, have been clearly defined. See generally N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (defining libel law for public officials and introducing the "actual malice" test); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defining libel law for public figures); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (defining libel law for non-public figures).

[26] See generally Miller v. California, 413 U.S. 15, 24 (1973) (limiting regulation of obscene material to works depicting or describing sexual conduct and "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value"); New York v. Ferber, 458 U.S. 747 (1982) (holding that child pornography is unprotected speech under the First Amendment).

[27] See generally *Chaplinsky*, 315 U.S. at 574 (holding that words which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace" are not protected speech); Cohen v. California, 403 U.S. 15, 20 (1971) ("This Court has also held that the States are free to ban . . . so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.") (citing *Chaplinsky*).

the lack of a clearly discernable definition. Part of the problem can be attributed to the relatively few times the Supreme Court has squarely addressed the issue (only twice—in *Watts* and in *Black*). Moreover, when the Court has confronted the meaning of true threats, it has done so ambiguously. As a result, especially when it comes to the issue of intent, the true threats jurisprudence as it currently stands does not represent, in the words of *Chaplinksy*, a "well-defined and narrowly limited class[] of speech."[28] Explaining how that happened is where this Note now turns.

II. DEVELOPING AN INTENT STANDARD: THE ROAD TO *BLACK*

A. The First Step: Watts v. United States

The Court first addressed the subject of true threats in *Watts*; however, it had little to offer when it came to the issue of intent. Robert Watts was convicted for violating a federal statute that prohibited "knowingly and willfully" making a threat "to take the life of or to inflict bodily harm upon the President of the United States."[29] In 1966, during a political debate at a public rally, Watts made the following statement regarding the receipt of his draft classification: "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[30] In a short per curiam opinion, the Court held that "the statute initially requires the Government to prove a true 'threat.'"[31] Because the Court did not

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[28] *Chaplinsky*, 315 U.S. at 571.

[29] Watts v. United States, 394 U.S. 705, 705 (1969). The federal statute under which Watts was prosecuted, still in force today in almost identical form, was 18 U.S.C. § 871(a) (1964). Because most circuit court opinions that address the issue of intent for true threats tend to be about threats against the President, most of the opinions and decisions considered in this Note are based on prosecutions under Section 871. However, because nearly every circuit (correctly, in the eyes of this author) applies the same intent standard for true threats, regardless of the alleged target, see infra note 75, this Note will treat cases involving threats against the President the same as, and interchangeably with, cases involving threats against private persons. Thus, this Note will specify that a case discussed involves a threat against the President only when such a fact seems particularly pertinent or interesting.

[30] *Watts*, 394 U.S. at 706.

[31] Id. at 708. This was the first time the Court had ever used the term "true threat." It most likely included the adjective "true" in order to distinguish threats that were not protected by the First Amendment from those threatening statements that were, such as Watts's "political hyperbole." The addition of such an adjective to distinguish similar concepts is common in the legal lexicon. The best example is perhaps the term

"believe that the kind of political hyperbole indulged in by [Watts] fits within that statutory term," it reversed the conviction.[32] The Court relied on three factors, which this Note will call the "*Watts* factors," in holding that Watts's statement was not a true threat: the statement (1) was made during a political debate, (2) was expressly conditional in nature, and (3) caused the listeners to laugh.[33] In addition to establishing a true threats exception, the lasting significance of *Watts*, at least when applied by future courts, has been the relevance of these three *Watts* factors.[34]

The Court in *Watts* had precious little to say on the issue of intent. In a brief discussion of the statute's use of the term "willfulness," the Court noted that the majority of the D.C. Circuit subscribed to the view, first espoused in *Ragansky v. United States*, that the willfulness requirement was met if "the speaker voluntarily uttered the charged words with 'an apparent determination to carry them into execution.'"[35] Skeptical of such an interpretation, the Court made the following observation: "[p]erhaps this interpretation is correct, although we have grave doubts about it."[36] Nevertheless, because the Court found Watts's speech to fall outside the scope of true threats, it reasoned that it need not conclusively decide the intent issue.[37] It is important to point out that the Court's

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"actual notice," commonly used in property and procedure law. "Actual notice" is the same thing as "notice" (just as "true threats" are "threats"), but the adjective, "actual," is included to distinguish "actual notice" from "constructive notice." Similarly, "true" threats are distinguished from those threats which constitute protected speech.

[32] Id.

[33] Id. at 707–08.

[34] See Strauss, supra note 10, at 242–43; see also, e.g., United States v. Cooper, 865 F.2d 83, 85 (4th Cir. 1989) (applying the *Watts* factors in affirming the defendant's conviction).

[35] *Watts*, 394 U.S. at 707–08 (quoting Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918)) (emphasis omitted).

[36] *Watts*, 394 U.S. at 708 (citing Watts v. United States, 402 F.2d 676, 686–93 (D.C. Cir. 1968) (Wright, J., dissenting) (rejecting the *Ragansky* approach and arguing that the government should have to prove that the defendant intended to carry out the threat)).

[37] There are several plausible explanations (or, more appropriately, speculations) as to why the Court addressed the meaning of true threats and the issue of intent in such an imprecise manner. The Court was closely divided, with three justices dissenting and one justice who would have denied the petition for certiorari. *Watts*, 394 U.S. at 708, 712. As noted above, the Court announced its decision in a short per curiam opinion. Perhaps the Court wrote per curiam because the majority could not agree on a rationale and, thus, could not provide a more detailed explanation for its judgment.

analysis throughout the opinion seems more concerned with statutory construction than with constitutional interpretation. Nevertheless, on the issue of intent, it was first down and the Court punted.

Subsequent Supreme Court decisions, until *Black*, usually addressed true threats tangentially and typically had nothing to say regarding the issue of intent.[38] As one commentator put it, writing on the eve of *Black*, "[f]or the Supreme Court, threat speech started, and apparently ended, with *Watts v. United States*."[39] Consequently, lower courts, left with little guidance, blindly searched for an answer to the following question: what mens rea, if any, must a speaker have for his communication to constitute a true threat?

Possible evidence of this is Justice Douglas's concurring opinion, in which no other justice joined, that focuses on the history of laws prohibiting threats against a country's leader. Id. at 709. Additionally, *Watts* was decided only a few years after the assassinations of President John F. Kennedy and Martin Luther King, Jr. With such a delicate history serving as the backdrop, perhaps the Court simply wanted to reach its decision as narrowly as possible without limiting the scope of the statute any more than necessary. Whatever the explanation for the Court's terse treatment of the issue, the opinion failed to provide any concrete guidance.

[38] In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court dealt with threatening speech but in the context of incitement. Relying on its incitement doctrine, the Court held that a speaker who threatened violence against boycott breakers could not be held liable for merchant losses because his speech did not incite imminent, lawless action (and thus was protected). Id. at 925–29. The Court also noted that the speaker's "'threats' of vilification or social ostracism . . . [were] constitutionally protected." Id. at 926.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992), the Court was bound by the Minnesota Supreme Court's interpretation of the statute at issue as prohibiting only fighting words (and not true threats). However, the Court did refer to the "true threats" exception as an example of what could constitute permissible viewpoint discrimination. Id. at 388. The Court explained that Congress could "criminalize only those threats of violence that are directed against the President" because "the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." Id. (citing *Watts*, 394 U.S. at 707, and 18 U.S.C. § 871 (1964)). Additionally, the *R.A.V.* decision was the first time the Court provided a specific set of reasons why true threats may be regulated. See supra note 20 and accompanying text. But, alas, the Court did not address the issue of intent.

Finally, in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994), the Court merely reiterated that threats, "however communicated, are proscribable under the First Amendment."

[39] Strauss, supra note 10, at 242.

B. Available Approaches: Objective and Subjective Standards and Why the Difference Matters

Before examining how lower courts after *Watts* addressed the issue of intent, it may be helpful to introduce the main approaches and explain why the differences between them are significant. The available standards generally fall into one of two categories: an objective test or a subjective test. An objective test defines a true threat as a communication that a reasonable person would find threatening. The test typically comes in one of three forms. The variations are based on whether the perspective of the test is that of a reasonable speaker, a reasonable listener, or a "neutral" reasonable person.[40]

All objective tests require one general intent element—the defendant must have knowingly made the statement. Therefore, the government must prove that the "statement was not the result of mistake, duress, or coercion."[41] For example, "a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat."[42] Similarly, if the speaker involuntarily made the statement, it would not pass the objective test. This is the only general intent element required by all forms of the objective test. As will be discussed below, the reasonable speaker test includes an additional general intent element.

Conversely, a subjective test requires the government to prove one general intent element and one specific intent element before the communication is considered unprotected speech. The subjec-

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[40] See Blakey & Murray, supra note 10, at 937–1002; Strauss, supra note 10, at 247–56. The aforementioned *Bly* opinion is an example of a reasonable listener objective test. See supra notes 4–7 and accompanying text.

[41] United States v. Hart, 457 F.2d 1087, 1091 (10th Cir. 1972) (emphasis omitted).

[42] Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918). The court in *United States v. Kosma*, 951 F.2d 549, 558 (3d Cir. 1991), provided two examples of how someone could make a threat unknowingly. First, if "a non-English speaker . . . unwittingly reads aloud a threatening statement in English, which he does not know to be a threat," he would not have knowingly made a true threat. Similarly, if "a person . . . writes a threatening letter to the President and places it in his desk with no intention of sending it, yet later finds that a family member has accidentally mailed the letter," he would not have knowingly mailed the communication. Id. Neither person would have made a true threat because the proscribed conduct in both circumstances was not done "knowingly." However, as one can see, only in rare circumstances will this "knowingly" requirement not be met.

tive test comes in two forms: the specific intent to carry out the threat test and the specific intent to threaten test. Like the objective tests, both subjective tests require that the defendant knowingly made the statement. In addition, the specific intent to carry out the threat version states that the government must also prove that the defendant actually intended to carry out the threat. The second type of subjective standard, the specific intent to threaten test, instead requires the government to show that the defendant also intended for the communication to be threatening (or intended for the recipient to feel threatened).[43]

The differences between the objective and subjective tests are significant in two respects. First, the defenses available to a defendant depend on which test the court applies. For instance, a defense that the speaker did not intend for the statement to be threatening would not be permitted in an objective test jurisdiction because it would be irrelevant. Similarly, defenses based on mental defect or voluntary intoxication, which are available in most jurisdictions as a defense to specific intent crimes, would only be available when a court applies a subjective test, not an objective test. In *United States v. Twine*, the court recognized such a distinction.[44] There, the defendant was convicted of violating two federal statutes which prohibited the making of threats.[45] In determining whether the defendant's diminished capacity defense was permissible, the court explained that it must first "determine whether the aforementioned statutes require proof of specific intent. This inquiry is necessary because diminished capacity, like voluntary intoxication, generally is only a defense when specific intent is at issue."[46] Another example is *United States v. Myers*, where the court held that a defendant who had been diagnosed with post-traumatic stress disorder could not raise a diminished capacity defense after the court applied an objective test in its true threats analysis.[47]

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[43] The aforementioned *Magleby* opinion adopts the specific intent to threaten test. See supra note 8 and accompanying text.

[44] 853 F.2d 676 (9th Cir. 1988).

[45] Id. at 677 (affirming conviction based on violations of 18 U.S.C. §§ 875(c), 876 (1982)).

[46] Id. at 679 (citing United States v. Brawner, 471 F.2d 969, 998–1002 (D.C. Cir. 1972)).

[47] 104 F.3d 76, 80–81 (5th Cir. 1997); see also United States v. Johnson, 14 F.3d 766, 771 (2d Cir. 1994) (holding that "evidence of diminished mental capacity" was prop-

The second important difference arises when a court is making a constitutional interpretation on the issue of intent. A court's constitutional determination establishes the baseline from which a legislature must operate.[48] Thus, if a court holds that the proper constitutional test for true threats is an objective one, the constitutional baseline is the objective test. Consequently, the legislature, when drafting a statute, can require the threat being regulated to meet either the objective or subjective intent test. If the legislature adopts a statute that meets the constitutional baseline of an objective test, a defendant can be prosecuted under the statute if his threatening communication passes either the objective or subjective standard. However, if a court adopts the subjective test as the constitutional baseline, any statute which does not require the specific intent to carry out the threat or specific intent for the statement to be taken as threatening (depending on which subjective test is adopted) would be unconstitutional. For instance, if a court adopts a subjective intent test, but its legislature passes a statute requiring that only the objective test be met, the statute will be found unconstitutional because it falls below the subjective test baseline. If, however, a court's interpretation is based on statutory construction, and is not one of constitutional proportion, then this issue will not arise. Under these circumstances, the legislature, not the court, will determine the meaning of true threats with regard to the respective statute.

C. Lower Courts and the Mens Rea of Subjective Tests

As mentioned earlier, the subjective test comes in two forms, both of which were almost uniformly rejected by the lower courts between the time of *Watts* and *Black*. The first version of the subjective test requires the government to prove that the speaker, in addition to knowingly making the statement, had the specific intent to carry out the threat. The Supreme Court alluded to this test in *Watts* when it cited Judge Wright's dissenting opinion from the

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erly excluded because only a showing of general intent was required); United States v. Richards, 415 F. Supp. 2d 547, 551 (E.D. Pa. 2005) (applying an objective test and holding that a defendant's "evident . . . mental health problems . . . do not prevent his threats from being 'true threats'").

[48] A court's constitutional determination will also influence future courts' interpretations of existing statutes.

D.C. Circuit's *Watts* decision.[49] In his dissent, Judge Wright asserted that the government should have to prove that the defendant intended to carry out the threat.[50] This test was apparently based on the belief that "only when the maker of the threat has a subjective intention of carrying it out is there an actual danger."[51] In its *Watts* opinion, the Supreme Court seemed to agree with Judge Wright (or, at the very least, shared his disapproval of the earlier *Ragansky* approach) when it expressed "grave doubts" about the contrary interpretation espoused by the D.C. Circuit majority.[52] However, as noted earlier, the Court refused to conclusively decide the issue. It was not long before the lower courts took advantage of the Court's indecisive language and discarded the notion that the government must prove the defendant's intention to carry out the threat.

In a case decided only four months after the Supreme Court's decision in *Watts*, the Ninth Circuit addressed the issue of intent in the same context, a threat made against the President of the United States in violation of 18 U.S.C. § 871. In *Roy v. United States*, the court held that the government was not required to show that the defendant actually intended to carry out the threat.[53] The court persuasively argued that this subjective standard, requiring the specific intent to carry out the threat, unduly interfered with the purposes associated with regulating true threats, namely eliminating the fear, disruption, and costs of investigation and prevention associated with threatening speech.[54] Regardless of whether the defendant intended to carry out the threat, the court posited that "an apparently serious threat may cause the mischief

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[49] See supra note 36.

[50] Watts v. United States, 402 F.2d 676, 686–89 (D.C. Cir. 1968) (Wright, J., dissenting).

[51] Roy v. United States, 416 F.2d 874, 878 n.15 (9th Cir. 1969) (characterizing Judge Wright's reasoning).

[52] See supra notes 35–36 and accompanying text.

[53] 416 F.2d at 878.

[54] Id. at 877 (If a true threat is made, "then the threat would tend to have a restrictive effect upon the free exercise of Presidential responsibilities, regardless of whether the person making the threat actually intends to assault the President."); see also id. at 878 ("Whether [the defendant] acted from an intention to assault the President or from youthful mischief, he necessarily set in motion emergency security measures that might have impeded the President's activities and movement and which certainly resulted in additional investigatory and precautionary activities.").

or evil" that the statute sought to avoid.[55] Based on this reasoning, the court adopted the reasonable speaker objective test. Like the Court in *Watts*, the circuit court in *Roy* was more concerned with proper statutory construction than constitutional interpretation.

The other circuits quickly followed suit in dismissing this version of the subjective test. For instance, in *United States v. Hart*, the Tenth Circuit noted the *Watts* citation to Judge Wright's dissenting opinion but agreed with *Roy* and held that the government did not need to prove that the "defendant actually intend[ed] to carry out the threat."[56] The only court of appeals which did not reject this subjective test outright was the Fourth Circuit. In *United States v. Patillo*, the court noted the language of *Watts* and expressly rejected the "*Raginsky* [sic] test of intention."[57] Instead, the court held that "an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements."[58] The court required the government to show the defendant had one of these three possible intents, but also said that the government could meet its burden if it were to prove that the speaker should have "anticipate[d] that [his statement] would be transmitted to law enforcement"—a form of an objective intent standard.[59] This interpretation, which was more statutory than constitutional, was seemingly limited only to threats made against the President in violation of 18 U.S.C. § 871. For example, two years later, in *United States v. Maisonet*, the Fourth Circuit adopted an objective test for prosecutions under Section 876.[60] Similarly, in *United States v. Darby*, the Fourth Circuit held that "in a prosecution under [S]ection 875(c), the government need not prove intent (or ability) to carry out the threat."[61] Although the specific intent to

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[55] Id. at 877.

[56] 457 F.2d 1087, 1090 (10th Cir. 1972); see also, e.g., United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982) (rejecting the subjective intent to carry out the threat test and adopting "the rule of the Ninth Circuit, set out in *Roy v. United States*"); United States v. Compton, 428 F.2d 18, 21 (2d Cir. 1970) (holding that it was "not necessary to establish an intention to carry out the threat").

[57] 438 F.2d 13, 14, 16 (4th Cir. 1971) (en banc).

[58] Id. at 16.

[59] Id.

[60] 484 F.2d 1356, 1358 (4th Cir. 1973). 18 U.S.C. § 876 (1970) prohibited the mailing of a letter containing a threat to injure the addressee.

[61] 37 F.3d 1059, 1064 n.3 (4th Cir. 1994). 18 U.S.C. § 875(c) (1988) read as follows: "Whoever transmits in interstate or foreign commerce any communication contain-

carry out the threat test was repeatedly and resoundingly rejected by nearly every court, it remained a favorite of hopeful defendants.

In *Rogers v. United States*, the Supreme Court "granted certiorari to resolve an apparent conflict among the Courts of Appeals concerning the elements of the offense proscribed by [Section] 871(a)."[62] This conflict centered on the opposing approaches of the *Roy* and *Patillo* courts regarding the intent requirement of Section 871. However, instead of resolving the mens rea question (at least with respect to this type of threat), the Court reversed the defendant's conviction based on a procedural error committed by the trial court and did not address the intent issue for which it had granted certiorari in the first place.[63] The Court held that this procedural violation was not harmless error because the judge's response was "fraught with potential prejudice";[64] notably, the violation was never raised by the defendant at any stage of the litigation.[65] It was second down, and the Court punted once again.

However, all was not lost when it came to the issue of intent. In a concurring opinion joined by Justice Douglas, Justice Marshall reached the merits question and provided a new approach to the mens rea required for threatening speech. According to Justice Marshall, only those "threats that the speaker intends to be interpreted as expressions of an intent to kill or injure" should be proscribed.[66] With this assertion, Justice Marshall introduced the second version of the subjective test: the specific intent to threaten test. In addition to proving that the defendant knowingly made the statement, the government would have to show an additional specific intent element—that the defendant intended for the statement to be threatening.

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ing . . . any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[62] 422 U.S. 35, 36 (1975). 18 U.S.C. § 871(a) is the statutory provision that prohibits threats against the President.

[63] As Justice Marshall stated in a concurrence, "[t]he Court today seizes on [the error] to reverse the conviction, leaving unresolved the issue that we granted certiorari to consider." Id. at 42 (Marshall, J., concurring).

[64] Id. at 41 (majority opinion).

[65] Id. The issue became known after the Solicitor General "confessed error." Id. at 42 (Marshall, J., concurring).

[66] Id. at 47 ("This construction requires proof that the defendant intended to make a threatening statement.").

Although Justice Marshall, like those before him, engaged mostly in statutory construction,[67] he did express a special concern for finding an interpretation consistent with the values of the First Amendment. Worried that an objective test approach, like that adopted in *Ragansky* and *Roy*, swept too broadly, Justice Marshall explained that courts "should be particularly wary of adopting such a standard for a statute that regulates pure speech."[68] Because the negligence standard of such an objective test, which "charg[es] the defendant with responsibility for the effect of his statements on his listeners," would have a chilling effect on speech, Justice Marshall believed an objective test "impose[d] an unduly stringent standard in this sensitive area."[69]

In addition to rejecting the negligence standard of an objective approach, Justice Marshall also dismissed the other version of the subjective test (the specific intent to carry out the threat standard): "I would . . . require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out."[70] This is because "threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out."[71] Justice Marshall believed his particular subjective test struck the proper balance between regulating threatening speech and protecting the values embodied in the First Amendment. For Justice Marshall, the specific intent to carry out the threat subjective standard did not offer enough protection against the harms of threatening speech; at the same time, the objective tests went too far in regulating pure

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[67] Marshall based his interpretation partly on the legislative history of § 871. See id. at 44–46.

[68] Id. at 47.

[69] Id. at 47–48. Justice Marshall also made the following observation:

> Statements deemed threatening in nature only upon "objective" consideration will be deterred only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence would have substantial costs in discouraging the "uninhibited, robust, and wide-open" debate the First Amendment is intended to protect.

Id. (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[70] *Rogers*, 422 U.S. at 48 (Marshall, J., concurring).

[71] Id. at 46–47. For instance, "[a] threat made with no present intention of carrying it out may still restrict the President's movements and require a reaction from those charged with protecting the President." Id. at 47.

speech. Although many commentators would follow Justice Marshall's lead, few courts did the same.[72]

Before *Black*, only one circuit adopted Justice Marshall's specific mens rea approach to threatening speech. In *United States v. Twine*, the Ninth Circuit held that for prosecutions under two federal threat statutes (18 U.S.C. §§ 875 and 876), the government must show that the defendant had "an intent to threaten," a specific intent element, when he made the threatening communication.[73] Like Justice Marshall, the *Twine* court rejected the subjective specific intent to carry out the threat test.[74] However, the court made clear that the application of the specific intent to threaten test did not conflict with the circuit's earlier statements in *Roy*. Because "[a] threat against the President . . . is qualitatively different from a threat against a private citizen or other public official," the court held that the objective test would continue to apply to prosecutions for threats made against the President.[75] Thus, the court's subjective test would only apply to charges under these two federal statutes. Other than this limited application, no other circuit adopted Justice Marshall's subjective test, and most either ig-

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[72] See, e.g., Blakey & Murray, supra note 10, at 1065 ("Justice Marshall once advanced a compelling argument in favor of such a standard [of a subjective test for intent]. We wholeheartedly agree with it."); see also infra notes 73–78 and accompanying text.

[73] 853 F.2d 676, 680 (9th Cir. 1988). 18 U.S.C. § 875(c) (1982) prohibited communications made in interstate or foreign commerce containing a threat to kidnap or injure any person. Similarly, 18 U.S.C. § 876 (1982) prohibited communications deposited in the mail containing a threat to kidnap or injure any person.

[74] *Twine*, 853 F.2d at 681 n.4 ("Our holding that specific intent to threaten and to transmit the threat are essential elements of the crimes defined by §§ 875(c) and 876 does not conflict or disagree with the clear pronouncement of other circuits that specific intent (or ability) to carry out the threat is not an essential element under these sections.").

[75] Id. at 681 (quoting Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969)) (emphasis omitted). The Ninth Circuit is the only court to have drawn such a distinction between threats made against the President and threats made against private citizens. Every other circuit (with the narrow and limited exception of the Fourth Circuit, see supra notes 57–61) has treated the intent required for a true threat to be the same regardless of whether the threat was directed at the President or at some other person. This author agrees with the majority of circuits that have applied the same intent standard across the board. The required mens rea should be the same for threats made against private persons and threats made against the President.

nored[76] or expressly rejected it.[77] Perhaps the Seventh Circuit provided the best explanation for why the subjective test proposed by Justice Marshall never gained much traction: "Although we owe the view of a single Justice great respect, we cannot treat it as stating the governing law. Here . . . the weight of authority is to the contrary. Therefore, . . . we reaffirm . . . the objective standard as the proper standard for [punishing threatening speech]."[78] By the time Justice Marshall articulated his approach, most circuits had already committed themselves to an objective test.

D. Lower Courts and the Mens Rea of Objective Tests

Between *Watts* and *Black*, the preferred approach of the lower courts, by an overwhelming margin, was the objective test. As mentioned earlier, there are three types of objective tests: reasonable speaker, reasonable listener, and reasonable neutral.[79] The first type, the reasonable speaker test, holds that a communication is a true threat if it was made "under such circumstances wherein a reasonable person would foresee that the statement would be inter-

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[76] See, e.g., United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (applying the reasonable speaker test with no mention of Justice Marshall's subjective standard); United States v. Schneider, 910 F.2d 1569, 1570 (7th Cir. 1990) (finding that "[t]he test for whether a statement *is* a threat is an objective one," with no reference to Justice Marshall's subjective standard); United States v. Orozco-Santillan, 903 F.2d 1262, 1265 n.3 (9th Cir. 1990) ("The only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat."); United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983) (applying the reasonable listener test and making no mention of Justice Marshall's subjective standard); United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982) (adopting the reasonable speaker test set forth in *Roy* with no reference to Justice Marshall's subjective standard).

[77] See, e.g., United States v. Francis, 164 F.3d 120, 122 (2d Cir. 1999) ("[E]very circuit to have addressed the question, with the exception of the Ninth, has construed Section 875(c) as a general-intent crime.") (citing United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997)); United States v. Myers, 104 F.3d 76, 81 (5th Cir. 1997); United States v. Himelwright, 42 F.3d 777, 782–83 (3d Cir. 1994); United States v. Darby, 37 F.3d 1059, 1063–66 (4th Cir. 1994); United States v. DeAndino, 958 F.2d 146, 149 (6th Cir. 1992)). Seemingly unfazed, the Ninth Circuit reaffirmed its approach a decade later in *United States v. King*, 122 F.3d 808, 809 (9th Cir. 1997).

[78] United States v. Aman, 31 F.3d 550, 556 (7th Cir. 1994).

[79] For a more in-depth analysis of each objective test and its respective following in the circuit courts before *Black*, see G. Robert Blakey and Brian J. Murray's impressive article that thoroughly details the area. Blakey & Murray, supra note 10, at 937–1010.

preted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm."[80] In addition to the intent element common to all objective tests (knowingly making the statement), the reasonable speaker test supplies an additional general intent requirement. Under the reasonable speaker test, the speaker must have acted negligently: the government must prove that the defendant knowingly made a statement that he should have known was threatening. However, this is a much easier test for the government to satisfy than Justice Marshall's specific intent to threaten test.

Before *Black*, the reasonable speaker test was the most popular standard and was adhered to by several circuits when interpreting a variety of statutes. The first court to adopt it was the Ninth Circuit in the aforementioned *Roy* case.[81] Interestingly, the court found that, although it was regulating pure speech, "[u]nlike the situation in *Watts v. United States*, there does not appear to be a free speech issue in this case."[82] The Sixth Circuit quickly followed suit in adopting the reasonable speaker test,[83] and the Second,[84] Third,[85] Seventh,[86] and Tenth[87] Circuits were not far behind. Notably, each of these circuits traced their reasonable speaker roots back to *Roy*.[88]

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[80] United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991) (quoting *Roy*) (emphasis omitted).

[81] 416 F.2d at 877–78. This approach was reaffirmed in *Orozco-Santillan*, 903 F.2d at 1265.

[82] *Roy*, 416 F.2d at 879 n.17 (internal citations omitted).

[83] United States v. Lincoln, 462 F.2d 1368, 1369 (6th Cir. 1972) ("We . . . adopt the construction of the Ninth Circuit in *Roy v. United States*."); see also United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982) (affirming *Lincoln* and the reasonable speaker test).

[84] United States v. Johnson, 14 F.3d 766, 768 (2d Cir. 1994) ("It is well settled that [Section] 871 requires only a showing of general intent. The Ninth Circuit, in the leading case on this question, [*Roy*,] held that [the reasonable speaker test applies].").

[85] *Kosma*, 951 F.2d at 557 (adopting the reasonable speaker test of *Roy*).

[86] United States v. Hoffman, 806 F.2d 703, 707 (7th Cir. 1986) (adopting the reasonable speaker test and quoting *Roy*); see also United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990) (reaffirming *Hoffman*).

[87] United States v. Hart, 457 F.2d 1087, 1090–91 (10th Cir. 1972) (adopting the reasonable speaker test of *Roy*).

[88] The importance of this fact will be discussed shortly. See infra notes 91–93 and accompanying text.

In *United States v. Fulmer*, the First Circuit joined its peers and adopted the reasonable speaker version of the objective test.[89] In a lengthy opinion, the court explained why the reasonable speaker test, and not the reasonable listener test, was "the appropriate standard under which a defendant may be convicted for making a threat":

> This standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the "reasonable-recipient standard," namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we to apply [the reasonable listener standard], a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.[90]

In addition to the intent element common to all objective tests, the *Fulmer* court wanted to require a showing of negligence, an element that does not appear in the reasonable listener test.

Interestingly, for the reasonable speaker test, what started as pure statutory construction morphed into a constitutional interpretation of true threats. Although the *Roy* decision expressly stated that it found no First Amendment issue when advocating the reasonable speaker test, future courts relied on *Roy*'s objective test as a constitutional standard. For instance, in *United States v. Merrill*, the Ninth Circuit affirmed its holding in *Roy* and dismissed the defendant's constitutional claim, noting that courts "interpreting 18 U.S.C. § 871 [as in *Roy*] . . . have uniformly concluded that 'true' threats, of the type proscribed by the statute, are not constitutionally protected speech."[91] Similarly, in *United States v. Orozco-Santillan*, the court held that the reasonable person standard, as stated in *Roy*, defined the scope of "a 'true' threat" as speech that "is unprotected by the [F]irst [A]mendment."[92] In perhaps the clearest example of this transition from pure statutory construction

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[89] 108 F.3d 1486, 1491 (1st Cir. 1997).

[90] Id. For a discussion of why courts such as the one in *Fulmer* adopted an objective test instead of a subjective test, see infra notes 206–12, 217, and accompanying text.

[91] 746 F.2d 458, 462 (9th Cir. 1984).

[92] 903 F.2d 1262, 1265–66 (9th Cir. 1990); see also *Fulmer*, 108 F.3d at 1492–93 (making the same assertions as the court in *Orozco-Santillan*).

to constitutional interpretation, the court in *United States v. Hanna* explained that "a statement is [a] true threat for the purposes of § 871(a) and the First Amendment if" it meets the reasonable speaker test first adopted in *Roy*.[93] Put simply, the extremely influential *Roy* standard, which was expressly decided without the First Amendment in mind, became a test of constitutional proportion. Until *Black* (and even after), it represented the majority approach to the meaning of true threats and its required intent.

The reasonable listener test, the second version of the objective test, takes a different perspective: a communication is a true threat if "an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury."[94] Unlike the reasonable speaker test, this test serves only as a jurisdiction's definition of a true threat and does not provide an additional intent element. In reasonable listener jurisdictions, the only intent element is that the statement was knowingly made. Even though it was not as widespread as the reasonable speaker standard, this test also enjoyed a significant following. Beginning with the Fourth Circuit's articulation of it in *United States v. Maisonet*,[95] panels from the Second,[96] Seventh,[97] Eighth,[98] and Eleventh[99] Circuits all adopted versions of the reasonable listener test. For instance, in *United States v. Malik*, the Second Circuit held that the test for determining whether a communication is a threat "is an objective one" and directly quoted the language of *Maisonet*.[100] Similarly, Judge Posner, writing for the Seventh Circuit, opined that

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[93] 293 F.3d 1080, 1087 (9th Cir. 2002).

[94] United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973).

[95] Id. Interestingly, the Fourth Circuit adopted a subjective test, at least partially, for threats made against the President, see United States v. Patillo, 438 F.2d 13, 16 (4th Cir. 1971), but an objective test for other forms of threatening speech. See supra notes 57–60 and accompanying text.

[96] United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994).

[97] United States v. Schneider, 910 F.2d 1569, 1570 (7th Cir. 1990); see also United States v. Aman, 31 F.3d 550, 553 (7th Cir. 1994) (affirming *Schneider*). Seemingly contradicting itself, the court in *Aman* also cited the reasonable speaker test as the definition of a threatening statement. Id. This exemplifies the confusion underlying the issue of intent and threatening speech.

[98] United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996); see also United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (affirming *Dinwiddie*).

[99] United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983).

[100] *Malik*, 16 F.3d at 49 (quoting United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973)).

"[t]he test for whether a statement *is* a threat is an objective one; it is not what the defendant intended but whether the recipient could reasonably have regarded the defendant's statement as a threat."[101] Although it was rarely (if ever) mentioned by the courts that adhered to the reasonable listener test, this version of the objective standard does have a link to the Court's pronouncement in *Watts*. Because one of the *Watts* factors was the reaction of the audience, it is plausible to construe the reasonable listener test as a particular application of this specific *Watts* factor.

Unlike *Roy* and the reasonable speaker test, the foundational opinion of the reasonable listener test did consider the First Amendment implications of its approach. In *Maisonet*, the Fourth Circuit held the following:

> Even when the defense is based on a claim of [F]irst [A]mendment rights, . . . [i]f there is substantial evidence that tends to show beyond a reasonable doubt that an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury, the court should submit the case to the jury.[102]

As time went on, the test became synonymous with the meaning of unprotected speech for these circuits. For example, in *United States v. Hart*, the Eighth Circuit held that "[t]o determine whether a true threat exists, a court must analyze the alleged threat in light of its entire factual context and determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future."[103] However, as noted above, the reasonable listener test did not require an additional showing of intent (negligence or otherwise) beyond the knowledge standard shared by all objective tests.

The third and final objective standard is the reasonable neutral test. It generally asserts that "a communication is a threat . . . if 'in its context [it] would have a reasonable tendency to create appre-

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[101] *Schneider*, 910 F.2d at 1570 ("A threat is not a state of mind in the threatener; it is an appearance to the victim.") (quoting United States v. Holzer, 816 F.2d 304, 310 (7th Cir. 1987)).

[102] *Maisonet*, 484 F.2d at 1358.

[103] 212 F.3d 1067, 1071 (8th Cir. 2000) (internal quotations omitted).

hension that its originator will act according to its tenor.'"[104] Like the reasonable listener test, this standard only identifies the meaning of a true threat—the actus reus—not any additional intent standard. Consequently, the only intent the government must prove is that the speaker knowingly made the statement. This version was the least popular of the objective tests and enjoyed a devoted following only in the Fifth Circuit.[105]

To summarize, with little guidance from the Supreme Court, the circuit courts fashioned four possible intent standards for true threats; two were based on a subjective test and two were based on an objective test. The first subjective test was the specific intent to carry out the threat test. Under this standard, the government must prove two intent elements: that the defendant knowingly made the statement and that he intended to carry out the threat. The specific intent to threaten standard, articulated by Justice Marshall, also required the government to prove two intent elements: the government had to show that the defendant knowingly made the statement and intended it to be threatening. The third intent standard was embodied by the reasonable speaker test. According to this approach, the government must prove two intent elements. Namely, the defendant must have knowingly made the statement and should have known of its threatening character. The final intent approach was used by the reasonable listener and reasonable neutral standards. Here, the government only needed to prove one intent element—that the defendant knowingly made the statement.

E. The Penultimate Step: Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists

In perhaps the most important, and certainly most controversial, true threats case between *Watts* and *Black*, a sharply fractured Ninth Circuit, sitting en banc, decided *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*.[106] Four physicians and two health clinics that provided abortions "brought suit under FACE [Freedom of Access to Clinic Entrances

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[104] United States v. Morales, 272 F.3d 284, 287 (5th Cir. 2001) (quoting United States v. Myers, 104 F.3d 76, 79 (5th Cir. 1997)) (alteration in original).

[105] See id.; see also supra notes 81–89, 95–101, and accompanying text.

[106] 290 F.3d 1058 (9th Cir. 2002) (en banc).

Act] claiming that they were targeted with threats by the American Coalition of Life Activists (ACLA)" and others.[107] The threats that allegedly targeted them included "GUILTY" posters which identified several doctors (including the plaintiffs) and the infamous "Nuremberg Files" website.[108] The trial court denied ACLA's summary judgment motion, and the jury returned a verdict against the defendants; the court then enjoined ACLA from publishing posters and other materials that threatened the plaintiffs.[109] A Ninth Circuit panel reversed the conviction, citing First Amendment concerns. However, the Ninth Circuit reheard the case en banc, disagreed with the earlier panel, and affirmed the jury's decision.[110]

Although this case presents a variety of important First Amendment and true threats issues, only the debate over intent will be discussed here. As the en banc court noted at the outset, "the first task is to define 'threat' for purposes of the [FACE] Act. This requires a definition that comports with the First Amendment, that is, a 'true threat.' The Supreme Court has provided benchmarks, but no definition."[111] After remarking on the lack of guidance from the Supreme Court, the majority made the following observation:

> Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before we first confronted the issue. Apart from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unpro-

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[107] Id. at 1062.

[108] Id. The website was a "compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity. The 'GUILTY' posters identifying specific physicians were circulated in the wake of a series of 'WANTED' and 'unWANTED' posters that had identified other doctors who performed abortions before they were murdered." Id.

[109] Id. at 1062–63 (citing Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1995 (D. Or. 1998) (denying summary judgment); Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1155–56 (D. Or. 1999) (issuing the injunction)).

[110] *Planned Parenthood*, 290 F.3d at 1063. Although it affirmed the jury's verdict, the Ninth Circuit did "remand for consideration of whether the punitive damages award comports with due process." Id.

[111] Id. at 1071.

> tected speech under the First Amendment. Shortly after *Watts* was rendered, we had to decide in *Roy v. United States* whether [the defendant] made a true threat.... We adopted a 'reasonable speaker' test... [and] have applied this test to threats statutes that are similar to FACE. Other circuits have, too. We see no reason not to apply the same test to FACE.[112]

Thus, the Ninth Circuit once again applied its familiar reasonable speaker standard, originally set forth in *Roy*, as the test for distinguishing protected from unprotected speech.

With regard to an additional subjective intent element, the court expressly held that "[i]t is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat."[113] Put simply, if the speaker knowingly made the statement and should have known of its threatening nature, then his speech is unprotected. According to the Ninth Circuit, this general intent standard was the best approach in light of the purposes supporting the prohibition of true threats.[114] Because the defendants knowingly made the statement and should have foreseen that it would be understood as a threat, the court held that the statement was not protected by the First Amendment and affirmed the jury's verdict.

As noted earlier, the Ninth Circuit was closely divided. The decision was 6-5, and three dissenting opinions were issued. The dissenting opinion of Judge Berzon, which three of the other dissenting judges joined in full and the other dissenter joined in part, articulated a new approach to the definition of true threats. Judge Berzon, a relative newcomer to the court (she was appointed in 2000), discarded the objective test traditionally adhered to by the

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[112] Id. at 1074–75 (internal citations omitted).

[113] Id. at 1075 (citing, inter alia, Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969)).

[114] Specifically, the court remarked:

> [The purpose of regulating threats] is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening.

Id. at 1076. The purposes are those outlined in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

Ninth Circuit and, most importantly for the purposes of this Note, proposed a subjective intent standard.

The motive behind her suggested standard was a belief that the reasonable speaker test espoused by the majority was "insufficiently cognizant of underlying First Amendment values."[115] Influenced by First Amendment libel jurisprudence, Judge Berzon wanted to devise constitutional standards that vary with the context of the communication, as opposed to the majority's unitary approach.[116] Towards this end, in the context of a public protest, where First Amendment concerns are heightened, Judge Berzon would require a showing of specific intent:

> Although this court's cases on threats have not generally set any state of mind requirements, I would . . . [require] in the public protest context the additional consideration whether the defendant subjectively intended the specific victims to understand the communication as an unequivocal threat that the speaker or his agents or coconspirators would physically harm them.[117]

This is a version of the "specific intent to threaten" subjective test; she pushed for "the inclusion of a 'specific intent' requirement with regard to the speaker's intent *to threaten*."[118] According to Judge Berzon, the negligence standard of the objective test weakens First Amendment protection "by holding speakers responsible for an impact they did not intend" and, consequently, has a chilling effect on speech.[119] By adding a specific intent element for speech made in the context of public protest, a proper balance, at least in Judge Berzon's eyes, is reached.

The split within the Ninth Circuit epitomized a larger division that existed across the lower courts over the proper intent standard for true threats.[120] As a result, the panoply of possible intent stan-

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[115] *Planned Parenthood*, 290 F.3d at 1101 (Berzon, J., dissenting).

[116] Id. at 1104.

[117] Id. at 1107.

[118] Id. at 1107 n.8.

[119] Id. at 1108 ("Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability.").

[120] See United States v. Hoffman, 806 F.2d 703, 718–19 (7th Cir. 1986) (Will, J., dissenting) ("Following *Watts*, the courts have developed various formulations to describe the degree of mens rea the government must prove to establish a 'true

dards was causing a cacophony in the jurisprudence.[121] This confusion was symptomatic of the Supreme Court's refusal to adopt a clear definition for true threats. As Professor Gey observed at the time, "the lack of clear guidance from the Supreme Court on this subject has fostered the proliferation of eclectic and contradictory standards."[122] The pending appeal from the *Planned Parenthood* case seemed like an opportune time for the Court to clarify the jurisprudence, including the issue of intent. As one commentator openly hoped, "[w]ith luck, the Supreme Court will soon take the opportunity to clarify matters, perhaps even with the *Planned Parenthood* case."[123] Instead, the Court denied certiorari.[124] But, as "luck" would have it, less than two weeks after the Ninth Circuit's *Planned Parenthood* decision, the Court granted certiorari in a group of cross-burning cases from Virginia, providing new hope that the Court would settle, once and for all, the meaning of true threats.[125]

III. THE COURT FINALLY SPEAKS: *VIRGINIA V. BLACK*

In *Virginia v. Black*, the Court finally provided a definition of true threats. Writing for a five-Justice majority, Justice O'Connor held that "'[t]rue threats' encompass those statements where the

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threat.'"); see also Gey, *Nuremberg Files*, supra note 10, at 545 ("[T]he lower courts cannot even agree on which factors should be the focal point of First Amendment cases dealing with threats, much less on how much protection the Constitution offers such speech.").

[121] See, e.g., United States v. Aman, 31 F.3d 550, 553 (7th Cir. 1994) (defining a "threat" using the reasonable listener standard but defining a threatening "statement" using the reasonable speaker test).

[122] Gey, *Nuremberg Files*, supra note 10, at 545; see also Strauss, supra note 10, at 232 ("Despite numerous opportunities to update the common law rule for threat speech, the Supreme Court has demonstrated an unfounded refusal to act. In light of this, several circuit courts of appeal and at least two state supreme courts have developed their own legal rules for dealing with threat speech. . . . An unclear and disparate approach to threat speech risks contradictory outcomes and exposes citizens to potentially unfair penalties for a simple slip of the tongue.").

[123] Strauss, supra note 10, at 273.

[124] Am. Coalition of Life Activists v. Planned Parenthood of the Columbia/Willamette, Inc., 539 U.S. 958 (2003). The petition for writ of certiorari was denied on June 27, 2003.

[125] Virginia v. Black, 535 U.S. 1094 (2002) (granting certiorari). The petition for writ of certiorari was granted on May 28, 2002; the Ninth Circuit's *Planned Parenthood* opinion was filed on May 16, 2002.

speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat."[126] She also explained that "[i]ntimidation in the constitutionally proscribable sense of the word is a *type* of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[127]

The Supreme Court's *Black* decision was based on three separate criminal prosecutions. Each defendant was charged with, and later convicted of, violating Virginia's cross-burning law. The statute, Section 18.2-423 of the Virginia Code, prohibited the burning of a cross "with the intent of intimidating any person or group of persons."[128] It also had a provision which stated that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate."[129] The namesake of the decision, Barry Black, was convicted under the statute for burning a cross at a Ku Klux Klan rally that he led. The cross was burned on private property with the owner's permission but could be seen from a public highway nearby. The two other defendants, Richard Elliott and Jonathan O'Mara, were convicted for attempting to burn a cross in the yard of an African American neighbor.[130] All three defendants appealed to the Supreme Court of Virginia, arguing that the cross-burning statute was unconstitutional under the First and Fourteenth Amendments. The Supreme Court of Virginia consolidated the cases for the purposes of appeal.

Relying on the Supreme Court's prior decision in *R.A.V. v. City of St. Paul*, the Supreme Court of Virginia declared the Virginia

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[126] *Black*, 538 U.S. at 359–60 (internal citations omitted).

[127] Id. at 360 (emphasis added).

[128] The statute read in full:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.

Va. Code Ann. § 18.2-423 (1996); see also *Black*, 538 U.S. at 348 (internal quotations omitted).

[129] Va. Code Ann. § 18.2-423 (1996); see also *Black*, 538 U.S. at 348.

[130] *Black*, 538 U.S. at 348, 350.

statute "analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*" and held that it discriminated on the basis of content since it "selectively chooses only cross burning because of its distinctive message."[131] In addition, the court found the prima facie clause overbroad.[132] Consequently, the court held the statute facially unconstitutional. Three justices dissented from the majority opinion and asserted that the statute was constitutionally permissible because it only proscribed true threats.[133] The dissenters also distinguished the Virginia statute from the ordinance of *R.A.V.* and had no problem with the prima facie provision because the burden of proof remained on the state.[134] The Commonwealth of Virginia petitioned the U.S. Supreme Court, which granted certiorari for the consolidated appeal.

As can be gleaned from the briefs and oral argument, the scope and contours of the true threats doctrine was not the focus of the parties or Justices involved.[135] Instead, the viewpoint and content discrimination analysis of *R.A.V.* and the statute's prima facie provision consumed much of the ink and spoken word of the appellate process. Thus, it is not surprising that the Court's definition of "true threats" consisted of only two sentences and the definition of "intimidation" a single sentence. In the briefs, during oral argu-

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[131] Black v. Commonwealth, 553 S.E.2d 738, 742, 744 (Va. 2001); see R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[132] *Black*, 553 S.E.2d at 738.

[133] Id. at 751 (Hassell, J., dissenting) ("Thus, applying the clear and unambiguous language in Code § 18.2-423 in conjunction with our established definition of intimidation, which the majority ignores, I conclude that Code § 18.2-423 only proscribes conduct which constitutes 'true threats.' . . . It is well established that true threats of violence can be proscribed by statute without infringing upon the First Amendment.").

[134] Id. at 753–56.

[135] For instance, the term "true threats" appeared only once in the Commonwealth of Virginia's appellate brief. Brief of Petitioner at 26, *Black*, 538 U.S. 343 (2003) (No. 01-1107). Similarly, it was substantively used only once in the amicus curiae brief filed by the United States. Brief for the United States as Amicus Curiae at 18–19, *Black*, 538 U.S. 343 (2003) (No. 01-1107). Although true threats received more attention in the respondent's appellate brief and the petitioner's reply brief, the true threats doctrine was completely overshadowed by the debate over viewpoint discrimination and *R.A.V.* See generally Brief on Merits for Respondents, *Black*, 583 U.S. 343 (2003) (No. 01-1107); Reply Brief of Petitioner, *Black*, 583 U.S. 343 (2003) (No. 01-1107). Similarly, at oral argument, the focus was on *R.A.V.* and the essence of viewpoint discrimination, not on the meaning of true threats. See generally Oral Argument Transcript, *Black*, 583 U.S. 343 (2003) (No. 01-1107).

ments, and in the Court's opinion, the discussion of the true threats doctrine served an ancillary purpose—providing the foundation from which the content discrimination analysis of *R.A.V.* could begin.

In *R.A.V.*, the Court posited that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[136] In order to apply this exception to the general prohibition on content discrimination, the Court in *Black* first needed to define true threats (and intimidation); then, it could determine whether the present statute successfully proscribed only those threats which are "a particularly virulent form of intimidation."[137] The Court held that:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.[138]

Although the Court held that Virginia could constitutionally prohibit cross burning done with the intent to intimidate, a plurality found the statute unconstitutional because of its prima facie clause.[139] Interestingly, the Court affirmed the Virginia Supreme

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[136] *R.A.V.*, 505 U.S. at 388. For instance, "the Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." Id.

[137] *Black*, 538 U.S. at 363.

[138] Id.

[139] Id. at 364 ("The prima facie evidence provision, as interpreted by the jury instruction [in Barry Black's trial], renders the statute unconstitutional."). Justice Scalia, a member of the five justice majority in Parts I–III of Justice O'Connor's opinion of the Court, dissented from this part of the decision regarding the prima facie provision. He preferred remanding the judgment to the Virginia Supreme Court and allowing that court to construe the prima facie provision; he believed that "there is no justification for the plurality's apparent decision to invalidate that provision." *Black*, 538 U.S. at 368 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). Three Justices who concurred in the judgment in part and dissented in part—in an opinion written by Justice Souter—agreed that the prima facie provision was problematic, but they would have held the statute unconstitutional regardless of how the prima facie provision was construed. They believed the statute clearly violated *R.A.V.*

Court's dismissal of Barry Black's conviction but only vacated the judgments of Elliott and O'Mara and remanded their cases for further proceedings.[140]

Because the Court's focus was not on carefully defining true threats, but on providing a basis for its content discrimination analysis,[141] the Court left a variety of viable interpretations in its wake. Most importantly, at least for the purpose of this Note, the Court's language failed to clearly settle the issue of intent. Although the Court did hold that the specific intent to carry out the threat was not required for the communication to constitute a true threat, little else with respect to intent was conclusively resolved.[142] There are three plausible interpretations of the Court's language regarding the constitutionally required intent for true threats; this Note will articulate each in turn.[143]

First, the Court could have been adopting one of the objective test approaches, which only require the defendant to have knowingly made the statement (and, for the reasonable speaker test, that the defendant should have known of its threatening nature). According to this interpretation, the phrase "means to communicate" used by the Court in *Black* is synonymous with the "knowingly" intent standard, which simply requires that the "statement

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and did not meet any of its exceptions. *Black*, 538 U.S. at 380–82 (Souter, J., concurring in the judgment in part and dissenting in part).

[140] Further proceedings included the determination of whether the prima facie clause was severable from the rest of the statute and whether two of the defendants, Elliott and O'Mara, could be retried. *Black*, 538 U.S. at 367–68.

[141] See also Gey, A Few Questions, supra note 3, at 1294–95 ("Having found a First Amendment pigeonhole into which she could shove the speech at issue in the Virginia statute, Justice O'Connor chose not to investigate the nature of that pigeonhole or to analyze whether cross burning is analogous to other forms of speech already lodged in the 'true threats' slot.").

[142] *Black*, 538 U.S. at 359–60 ("The speaker need not actually intend to carry out the threat.").

[143] For the convenience of the reader, the Court's definitions of true threats and intimidation are reprinted here:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. . . . Intimidation in the constitutionally proscribable sense of the word is a *type* of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. at 359–60 (internal citations omitted) (emphasis added).

was not the result of mistake, duress, or coercion."[144] The definition's second clause, "a serious expression of an intent to commit an act of unlawful violence," could be interpreted as only necessitating a showing that the statement was objectively a "serious expression of an intent to commit an act of unlawful violence" (for instance, as understood by a reasonable person).[145] Furthermore, as noted above, the Court clearly rejected one of the two subjective tests—the specific intent to carry out the threat standard. This has led at least one commentator to assert that "the *Black* majority indicates that the relevant intent [for true threats] is merely the intent to utter whatever words are found to be threatening. . . . Thus, it is sufficient to satisfy the Constitution if the speaker intended to say the thing that created fear in a listener," even if he did not intend to create the fear.[146]

Although the constitutional concept of intimidation does include the specific intent to threaten standard, the Court stated that intimidation is merely a "*type* of true threat."[147] Thus, an objective test interpretation would posit that because intimidation is merely a type of true threat, the specific intent to threaten requirement does not necessarily apply to all true threats but only to all proscribable intimidation speech. Moreover, the Court was certainly aware of this subjective test and knew how to include it as a requirement (since it did so for intimidation). Consequently, if the Court wanted such a specific intent showing for all true threats, it could have easily said so. Instead, the Court provided no such requirement when it came to the definition of true threats. Finally, as was discussed earlier, the objective test approach (in one of its forms) was the predominant standard in *all* of the federal circuit courts. If the Court wanted to change the landscape of the juris-

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[144] *Black*, 538 U.S. at 359; United States v. Hart, 457 F.2d 1087, 1090–91 (10th Cir. 1972) (emphasis omitted); see also supra notes 41–42 and accompanying text.

[145] *Black*, 538 U.S. at 359. For instance, a pre-*Black* court that adopted an objective test approach used strikingly similar language when articulating its own standard: "[a]ll the courts to have reached the issue [of the meaning of true threats] have consistently adopted an *objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm.*" Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (emphasis added).

[146] Gey, A Few Questions, supra note 3, at 1346.

[147] *Black*, 438 U.S. at 360 (emphasis added).

prudence so dramatically, and adopt a specific intent to threaten requirement, it would have done so in a more straightforward fashion. It is unlikely, according to this interpretation, that the Court would reject every circuit court's position in two sentences of fairly ambiguous language. For all these reasons, the Court's definition could be interpreted as espousing an objective test approach.[148]

Second, the Court could have been adopting the subjective "specific intent to threaten" standard for the entire category of true threats. This interpretation is based on a different understanding of the Court's use of the words "means to."[149] Instead of modifying only "communicate," it applies to the entire phrase "communicate a serious expression of an intent to commit an act of unlawful violence."[150] The defendant must intend to (mean to) communicate an expression which is threatening. In other words, he must have the specific intent to place the victim in fear of bodily harm or death. The constitutional meaning of "intimidation" requires such a showing of intent. As the Court explained, for speech to be proscribed as intimidating, the speaker must "direct[] a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm."[151] The Court also noted that intimidation is a "type of true threat."[152] From the perspective of the subjective test interpretation, this could mean that intimidation is a type of true threat *because* it requires the specific intent to threaten. According to this

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[148] Even proponents of this interpretation, however, would be hard-pressed to determine the objective test, if any, for which the Court expressed a preference.

[149] The phrase "means to communicate" had only appeared in a Supreme Court reporter three times prior to *Black*. Notably, none of these instances were opinions of the Court. The phrase was used twice in dissenting opinions. See Metromedia v. San Diego, 453 U.S. 490, 555–56 (1981) (Burger, C.J., dissenting) ("Relying on simplistic platitudes about content, subject matter, and the dearth of other means to communicate, the billboard industry attempts to escape the real and growing problems . . . in protecting safety and preserving the environment in an urban area."); Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972) (Marshall, J., dissenting) ("It becomes harder and harder for citizens to find means to communicate with other citizens."). The third time the phrase appears in the reporter is during the description of defense counsel's oral argument. Smith v. Turner, 48 U.S. (7 How.) 283, 338 (1849). The opinion in *Black* was the only time the term "means" has referred to intent instead of capability or availability. Thus, prior Supreme Court usage provides no additional guidance as to the potential meaning of "means to communicate."

[150] *Black*, 538 U.S. at 359.

[151] Id. at 360.

[152] Id.

understanding, the unifying theme of true threats, in all its forms, would be the specific intent to threaten. For instance, harassment may be considered another form of a true threat, different from intimidation, but similar in that the speaker must have the specific intent to cause fear.[153] Furthermore, the Court clearly held that the other form of subjective intent, the specific intent to carry out the threat, was not required. If the Court wanted to make the same statement regarding the specific intent to threaten as it relates to true threats generally, it could have easily done so. Instead, the Court only rejected the specific intent "to carry out the threat" standard and included the specific intent to threaten standard for intimidation, a type of true threat.

Finally, the Court's distaste for the prima facie provision also suggests its preference for a specific intent standard that requires the showing of an intent to threaten for true threats. Although the prima facie clause was discussed in light of the Court's definition of intimidation, which clearly requires the intent to threaten, the language and tone of the opinion suggests a more expansive vision of Justice Marshall's subjective test. The plurality explains that its problem with the prima facie provision is that it fails to distinguish constitutionally protected speech from unprotected speech.[154] Accordingly, "the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.... The First Amendment does not permit such a shortcut."[155] Even though such statements were made in the context of intimidation, the language certainly suggests a more expansive interpretation—one that requires that the specific intent to threaten be an element for all true threats, not just intimidation. Such inferences have convinced one commentator that "*Black* now

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[153] The author is not aware of any such example of harassing speech being proscribed as a true threat; it is merely a hypothetical example.

[154] *Black*, 538 U.S. at 366 ("The prima facie provision makes no effort to distinguish ... between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of *threatening* or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn.") (emphasis added). Here, the Court is clearly contrasting the case of Barry Black with that of Elliott and O'Mara.

[155] Id. at 365, 367.

confirms that proof of specific intent (aim) must be proved also in threat cases."[156]

The third possible interpretation of the true threats language in *Black* is basically no interpretation at all. This understanding suggests that the *Black* opinion has little application outside the context of cross-burning, intimidation, and content discrimination. The Court's opinion takes up six United States Reports pages discussing the history of cross burning,[157] four pages analyzing the statute in light of *R.A.V.* and its statements on content discrimination,[158] five pages scrutinizing the constitutionality of the prima facie provision,[159] and a single paragraph examining the meaning of true threats.[160] Because the decision did not require an in-depth analysis of true threats or a more thorough discussion of the doctrine's scope and content, the Court may not have been attempting to provide a complete definition of true threats, including what, if any, intent standard is constitutionally required. In order to decide the constitutionality of the statute, the Court needed only to decide the meaning of intimidation and whether the statute's selection of cross burning constituted impermissible content discrimination. In fact, any discussion of an intent standard for true threats could technically be classified as dictum. Thus, proponents of this interpretation believe that the Court was not trying to or did not definitively decide the issue of intent for true threats. As one observer, who would likely endorse this understanding, explained: "although the Supreme Court's decision in *Virginia v. Black* represents an expansion and enrichment in First Amendment analysis, this case should, and likely will, be restricted to its facts."[161] Given the prevalence of the objective intent standard before *Black*, this interpretation would not affect its pervasiveness.

Provided with a third opportunity to define the meaning of true threats and to establish a constitutionally required intent standard, the Court did not punt. However, this time it threw an incomplete

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[156] Hartley, supra note 10, at 33.
[157] *Black*, 538 U.S. at 352–57.
[158] Id. at 360–63.
[159] Id. at 363–67.
[160] Id. at 359–60.
[161] Eric John Nies, Note, The Fiery Cross: *Virginia v. Black*, History, and the First Amendment, 50 S.D. L. Rev. 182, 217 (2005).

pass, failing to advance the issue beyond the original line of scrimmage.

IV. SO THE COURT SPOKE, BUT WHAT DID THE LOWER COURTS HEAR?

As discussed above, the lower courts charged with the task of interpreting *Black* had three viable options when it came to the constitutional intent standard for true threats. Each approach has found its adherents.

A. The Objective Test Interpretations

Following *Black*, the vast majority of courts continued to use one of the objective intent standards that saturated the pre-*Black* landscape. For some, the language in *Black* expressly sanctioned their traditional objective test approach. In *United States v. Ellis*, the defendant, who was charged with making a threat against the President, requested that the court interpret *Black* as establishing a subjective intent standard for true threats.[162] The court rejected the motion and held that the definition in *Black* was not inconsistent with the reasonable speaker test adopted by the Third Circuit a decade earlier in *United States v. Kosma*:

> While *Black* does appear to provide a definition of a "true threat," we do not agree with Defendant's interpretation of that definition.... The language [of the definition in *Black*] merely restates the Third Circuit's requirement that the speaker must have some intent to communicate the statement, meaning that the statement may not be a product of accident, coercion or duress.[163]

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[162] No. CR. 02-687-1, 2003 WL 22271671, at *1 (E.D. Pa. July 15, 2003). The defendant claimed that "his actual intent was not to threaten, rather it was to communicate the symptoms of his mental illness for the purposes of getting treatment." Id.

[163] Id. at *4; see also United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991). The court in *Ellis* also made the following observations:

> In addition, the *Black* court specifically recognized that the speaker need not actually intend to carry out the threat.... As the Supreme Court pointed out, intimidating speech is only one type of "true threat." Obviously, the concerns when dealing with a statute that prohibits threats against the President of the

According to this court, *Black* was consistent with the reasonable speaker standard.

In *Porter v. Ascension Parish School Board*,[164] another court reached a similar conclusion. One of the issues was whether a student's drawing constituted a true threat or was protected speech. After holding that speech is unprotected as a true threat "if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm," the court asserted that the speech must first be "knowingly communicated to either the object of the threat or a third person."[165] Thus, the court understood the language in *Black* to stand solely for the proposition that the speaker must have knowingly made the statement. After finding that the student did not knowingly communicate the drawing, the court held the speech to be protected by the First Amendment.[166]

This interpretation of *Black* has not been limited to federal courts. In *Citizen Publishing Co. v. Miller*, the Supreme Court of Arizona, in deciding whether a letter to the editor of a newspaper constituted a true threat, observed that an Arizona appellate court "has adopted a substantially similar test for determining a 'true threat' under the First Amendment" as the standard adopted in *Black*.[167] That approach was the reasonable speaker test. The court found that the letter was protected speech because it did "not believe that a reasonable person could view that letter as 'a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'"[168] The court simply

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United States are quite different than the concerns when dealing with a cross burning statute.

Ellis, 2003 WL 22271671, at *4 (internal quotations omitted).

[164] 393 F.3d 608 (5th Cir. 2004).

[165] Id. at 616 (citing, inter alia, *Black*, 538 U.S. at 359) (emphasis and internal quotations omitted).

[166] Id. at 618.

[167] Citizen Publ'g Co. v. Miller, 115 P.3d 107, 114 (Ariz. 2005) (holding that "'true threats' are those statements made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of [a person]'") (alteration in original) (quoting In re Kyle M., 27 P.3d 804, 808 (Ariz. Ct. App. 2001)).

[168] *Miller*, 115 P.3d at 115 (quoting *Black*, 538 U.S. at 359); see also Austad v. S.D. Bd. of Pardons & Paroles, No. 23914, 2006 WL 2036166, at *5 (S.D. July 19, 2006)

substituted the phrase "a reasonable person could view" in place of *Black*'s "means to communicate" and applied an objective intent standard.

Finally, the court in *United States v. Bly* recently opined that the language in *Black* not only supported an objective test but also explicitly rejected any specific intent requirement.[169] The court held that the Fourth Circuit's reasonable listener test was still the guiding precedent for determining whether speech constituted a true threat.[170] Responding to the defendant's motion that the definition in *Black* required a showing of specific intent, the court posited that such an interpretation was clearly incorrect. The court held that the government was not required "to allege an intent to intimidate or injure," adding, "*Black* could not be clearer on this point."[171] Notably, the court cites the *Black* opinion's rejection of *one* subjective intent standard, the intent to carry out the threat, as a signal that the Court rejected *both* specific intent tests—the intent to carry out the threat and the intent to threaten.[172]

In addition to these courts, which held that the *Black* definition affirmatively supported an objective intent standard, some courts have continued to apply the objective test by ignoring or minimizing the application of *Black* in their true threats analyses. Amazingly, the *Black* opinion is frequently left out of the true threats discussion. For instance, in *United States v. Fuller*, the Seventh Circuit extolled the virtues of an objective test for true threats in a case involving threats made against the President.[173] Although the court discussed *Watts*, it failed to even mention or cite the more re-

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(quoting *Black* and applying the reasonable recipient objective test based on pre-*Black* Eighth Circuit precedent).

[169] No. CRIM. 3:04CR00011, 2005 WL 2621996, at *2 (W.D. Va. Oct. 14, 2005); see supra notes 4–7, 9 and accompanying text.

[170] *Bly*, 2005 WL 2621996, at *1.

[171] Id. at *2.

[172] Id. Another court has made the same assumption. In *Sheehan v. Gregoire*, the court held that "a true threat does not turn on the subjective intent of the speaker." 272 F. Supp. 2d 1135, 1141 (W.D. Wash. 2003) (citing *Black*, 538 U.S. at 359–60; Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1075–76 (9th Cir. 2002) ("It is not necessary that the defendant intend to, or be able to carry out his threat, the *only intent requirement* for a true threat is that the defendant intentionally or knowingly communicate the threat.")) (emphasis added).

[173] 387 F.3d 643, 646–48 (7th Cir. 2004).

cent *Black* opinion; it simply adopted the reasonable person standard, based on *Roy*, and upheld the conviction.[174] Opinions by the First,[175] Fourth,[176] and Eleventh[177] Circuits have all discussed the meaning of true threats without a single citation to *Black*. The same has occurred at the district court level as well.[178] Perhaps it is because these courts cannot confidently assert the meaning of the language in *Black* that they have instead relied on their respective jurisdiction's entrenched objective intent standard for guidance. Maybe these courts believe that *Black* only applies to cross burning or content discrimination and is not relevant in the context of threats against the President or other threatening speech. Perhaps they think the *Black* decision merely affirmed the use of an objective test and thus discussion or citation of it is unnecessary. Whatever the reason, a surprising number of courts have paid little, if any, attention to *Black* when discussing the meaning of true threats.

B. The Subjective Test Interpretation

In upholding its continued use of an objective intent standard, the aforementioned *Ellis* court asserted that there was "nothing in the *Black* opinion to indicate that the Supreme Court intended to overrule a majority of the circuits by adopting a subjective test when dealing with 'true threats.'"[179] Put another way, absent a clearer statement from the Court, the circuit courts will not change the firmly established precedent of their true threat jurisprudence,

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[174] Id. at 646–48.

[175] See generally United States v. Nishnianidze, 342 F.3d 6, 15–17 (1st Cir. 2003) (applying the reasonable speaker objective test).

[176] See generally United States v. Lockhart, 382 F.3d 447, 451–52 (4th Cir. 2004) (comparing the *Watts* factors to the present circumstances in a prosecution for making threats against the President).

[177] See generally United States v. Alaboud, 347 F.3d 1293, 1297–98 (11th Cir. 2003) (applying the reasonable neutral test).

[178] See generally, e.g., United States v. Richards, 415 F. Supp. 2d 547 (E.D. Pa. 2005); United States v. Veliz, No. 03 CR. 1473, 2004 WL 964005 (S.D.N.Y. May 5, 2004); United States v. Oakley, No. CR. 02-123-01, 2003 WL 22425035 (E.D. Pa. May 30, 2003). Interestingly, Judge Surrick from the Eastern District of Pennsylvania wrote the opinion in both *Oakley* and *Richards*. He also authored the aforementioned *Ellis* decision. See supra notes 162–63 and accompanying text.

[179] United States v. Ellis, No. CR. 02-687-1, 2003 WL 22271671, at *4 (E.D. Pa. July 15, 2003).

namely the use of an objective intent standard. However, the Tenth Circuit did find that the Court clearly adopted a subjective intent standard in *Black* and changed its own approach accordingly. In *United States v. Magleby*, a decision that was briefly discussed at the outset of this Note, the court adopted Justice Marshall's specific intent test for true threats. The court stated that true threats, "[u]nprotected by the Constitution[,] . . . must be made 'with the intent of placing the victim in fear of bodily harm or death.' An intent to threaten is enough; the further intent to carry out the threat is unnecessary."[180] While the *Bly* court quoted from the language of *Black* that said the intent to carry out the threat was unnecessary, the *Magleby* court quoted from the intimidation definition that required the specific intent to place the victim in fear. Both courts extrapolated their respective definition of true threats from these different parts of the *Black* definition.[181]

C. The Ninth Circuit: A Locus for (and Microcosm of) Controversy

By this point, it seems cliché to use the Ninth Circuit as the premier example of the judicial split over the proper intent standard for true threats. Remember, it was the Ninth Circuit that produced both *Roy* (the foundational opinion for the reasonable speaker test)[182] and *Twine* (the lone pre-*Black* opinion to adopt Justice Marshall's specific intent to threaten standard);[183] the Ninth Circuit was also home to the sharply contested *Planned Parenthood* decision, which produced majority and dissenting opinions with starkly different approaches to the intent question.[184] Nevertheless, the Ninth Circuit's response to *Black* epitomizes the ambiguity of the

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[180] United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting and citing *Black*, 538 U.S. at 359–60) (internal citations omitted); see also supra notes 8–9 and accompanying text.

[181] See id. at 1139; United States v. Bly, No. CRIM. 3:04CR00011, 2005 WL 2621996, at *2 (W.D. Va. Oct. 14, 2005); see also *Black*, 538 U.S. at 359–60.

[182] Roy v. United States, 416 F.2d 874 (9th Cir. 1969); see supra notes 53–56, 81–88 and accompanying text.

[183] United States v. Twine, 853 F.2d 676 (9th Cir. 1988); see supra notes 44–46, 73–77 and accompanying text.

[184] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002); see supra notes 106–20 and accompanying text.

Court's attempted definition and demonstrates how this lack of clarity continues to trouble the jurisprudence.

In *United States v. Lincoln*, the Ninth Circuit applied its deeply-rooted reasonable speaker test in a prosecution for a threat made against the President.[185] Like some of the courts mentioned above, the court in *Lincoln* did not refer to the *Black* decision when discussing the meaning of "true threats."[186] Instead, it applied an objective intent standard and held that the letter in question did not constitute a true threat.[187] Interestingly, the author of the *Lincoln* opinion was Judge Rawlinson. She was the only judge on the panel who participated in the *Planned Parenthood* en banc decision. In that case, she joined the majority opinion, which adopted an objective intent approach.[188]

The Ninth Circuit panel that decided *United States v. Cassel* also had a single alumnus from the *Planned Parenthood* decision, Judge O'Scannlain.[189] Unlike Judge Rawlinson, Judge O'Scannlain dissented in *Planned Parenthood*.[190] Filed less than two months after *Lincoln*, the *Cassel* opinion, written by Judge O'Scannlain, adopted an entirely new approach to the meaning of true threats. After acknowledging that true threats are unprotected by the First Amendment, the court made the following observations:

> We are . . . faced with the question whether intent to threaten the victim is required in order for speech to fall within the First Amendment exception for threats. . . . [T]he disputed question is whether the government must prove that the defendant intended his words or conduct to be understood by the victim as a threat. [Defendant] argues that it must. The government's position is that mere negligence with regard to the victim's understanding is enough: in other words, speech is punishable if a reasonable person would understand it as a threat, whether or not the speaker meant for it to be so understood.[191]

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[185] 403 F.3d 703, 706 (9th Cir. 2005) (relying on *United States v. Hanna*, 293 F.3d 1080, 1084 (9th Cir. 2002)).

[186] The court did mention *Watts*, however. Id. at 706–07.

[187] Id. at 706–08.

[188] *Planned Parenthood*, 290 F.3d at 1062.

[189] United States v. Cassel, 408 F.3d 622, 624 (9th Cir. 2005).

[190] *Planned Parenthood*, 290 F.3d at 1089, 1101.

[191] *Cassel*, 408 F.3d at 627–28.

Thus, the court signaled its intention to address the constitutional issue which has consumed this Note—a question the Ninth Circuit evaded when it first decided the issue in *Roy*.[192]

Although it recognized that, with the exception of *Twine* and its progeny, the Ninth Circuit had traditionally applied the reasonable speaker test, the *Cassel* panel asserted that *Black* was now the guiding precedent. After quoting *Black*'s definition of true threats and intimidation, the panel interpreted the Court's language to mean that "only *intentional* threats are criminally punishable consistently with the First Amendment. . . . A natural reading of [the Court's] language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim."[193] Noting that the "Court laid great weight on the intent requirement" in *Black*, the *Cassel* panel held that it must "conclude that the same principle governs in the case before us."[194] Recognizing that the adoption of a specific intent to threaten subjective test conflicted with some of the circuit's previous decisions, the court simply observed that the Supreme Court's "definition of a constitutionally proscribable threat is, of course, binding," and therefore the court was "bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."[195]

In a span of forty-five days (the length of time between the *Lincoln* and *Cassel* decisions), the Ninth Circuit had seemingly made a

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[192] See supra note 82 and accompanying text.

[193] *Cassel*, 408 F.3d at 631 ("The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another prima facie evidence of an intent to intimidate.") (internal quotations omitted).

[194] Id. at 631–33.

[195] Id. at 633. The court attempted to reconcile its holding with the *Lincoln* decision, which was decided only weeks earlier, in a footnote: "Because *Lincoln* merely applied longstanding precedent and did not raise or consider the implications of *Virginia v. Black*, it does not constrain our analysis in this case." Id. at 633 n.9. Similarly, the court reconciled its opinion with some of those discussed earlier, which held that *Black* affirmed the use of an objective test, by stating that "it appears that no other circuit has *squarely addressed* the question whether *Black* requires the government to prove the defendant's intent." Id. at 633 n.10 (emphasis added).

180-degree turn on the issue of intent. Forty-two days later, the Ninth Circuit made another about-face. In *United States v. Romo*, a case involving a conviction for threats made against the President, the court revisited the meaning of true threats.[196] Instead of applying the specific intent standard seemingly required by *Cassel*, the court applied its familiar reasonable speaker objective test and explained the limited reach of *Cassel* in a footnote:

> The recent decision in *United States v. Cassel* does not change our view. *Cassel* leaves untouched the reasonable person analysis for presidential threats because it did not address whether statutes like 18 U.S.C. § 871(a) require intent. Because [the defendant] has not raised First Amendment issues and *Cassel* does not alter the analysis of presidential threats, we employ the decades-old [*Roy*] approach to analyzing threats under 18 U.S.C. § 871(a).[197]

But the Ninth Circuit did not rest with its decision in *Romo*. In *United States v. Stewart*, a case heard by the same panel which decided *Cassel*, the court attempted to reconcile the circuit's most recent true threat opinions.[198] The defendant was convicted for making a threat against a federal judge, and one of the issues before the court was whether his speech was constitutionally protected.[199] The court compared the contradictory holdings in *Cassel* and *Romo* and, as would be expected given the panel's membership, had doubts about "*Romo*'s continued use of the objective 'true threat' definition" in light of "*Black*'s subjective 'true threat' definition."[200] Instead of resolving the conflicting approaches, the court took a page from the Supreme Court's playbook and punted: "Nonetheless, we need not decide whether the objective or subjective 'true threat' definition should apply here. That is because the evidence establishes that [the defendant's] statement was a 'true threat' under either definition and thus is not protected by the First

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[196] 413 F.3d 1044, 1051 (9th Cir. 2005). This panel had no members from the en banc *Planned Parenthood* decision.

[197] Id. at 1051 n.6 (internal citations omitted).

[198] 420 F.3d 1007, 1016–19 (9th Cir. 2005).

[199] Id.

[200] Id. at 1018.

Amendment."[201] Put simply, the court threw up its hands and declared, at least temporarily, an intra-circuit truce.

V. WHAT SHOULD THE INTENT STANDARD BE?: A NORMATIVE ANALYSIS

As evidenced by the back-and-forth of the Ninth Circuit, there is still a need, even after *Black*, for a clear and consistent approach to the intent standard of true threats. While the best interpretation of *Black* seems to be that the specific intent to threaten is required for all true threats, not just intimidation, the Court's inability to clearly articulate an intent standard has allowed a potpourri of mens rea approaches to persist in the lower courts.[202] Regardless of what the Court's aims in *Black* truly were, the disparate treatments (and interpretations) by the lower courts indicate that the Court must revisit the meaning of true threats, and the question of intent, sometime soon. When that time arrives, what intent standard should the Court adopt? This Part will examine the normative arguments of each approach and argue that for all true threats the Court should require the same subjective intent standard it adopted for intimidation—the specific intent to threaten the recipient or victim.

True threats, like any of the "*Chaplinsky* exceptions" to the First Amendment, should be defined with both the values underlying free speech and the reasons for proscribing the category in mind. This much is not controversial. As the Court noted in *Black*, "[t]he hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[203] These principles must be bal-

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[201] Id.

[202] Some commentators have been even more critical of the Court's failure to clearly define the meaning of true threats. For example, in a sharp critique, Professor Gey states that "we have no way of knowing exactly what *Black* portends for free speech because (to put the matter unkindly) Justice O'Connor's opinion in the cross burning case borders on the incoherent. The Court sends several different messages about free speech in *Black*, many of which contradict each other." Gey, A Few Questions, supra note 3, at 1287–88; see also Martin, supra note 10, at 290–91 ("Unfortunately, the Court [in *Black*] did not delineate the border between true threats and protected speech . . . [and thus] avoided the precarious task of defining the outer reaches of the true threats doctrine.").

[203] *Black*, 538 U.S. at 358; see also Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea

anced against the motives for prohibiting threatening speech: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[204] It was an attempt to achieve such a balance that originally animated the conception of the term "true threats."[205] For reasons that will be elaborated further, the subjective test that requires the specific intent to threaten achieves the optimal balance.

Since the Ninth Circuit's 1969 decision in *Roy*, the objective intent test has been the prevailing standard.[206] In *United States v. Kosma*, the Third Circuit provided a particularly thorough, and fairly representative, justification for the objective intent approach to true threats. "[M]indful of the potential difficulties in distinguishing between constitutionally protected political speech and unprotected threats,"[207] the court offered two generally accepted reasons for why the objective intent approach is superior. First, the objective intent test "best satisfies the purposes" of punishing threatening speech "since it recognizes the power of a threat to hinder . . . even when the threatmaker has no intention of carrying

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itself offensive or disagreeable."); see generally N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (extolling the importance of protecting speech even if it contains factual errors or defamatory content because of the need for promoting vigorous and open debate in public discourse).

[204] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); see also *Black*, 538 U.S. at 360; supra notes 21–24 and accompanying text.

[205] See Watts v. United States, 394 U.S. 705, 708 (1969) (noting that "we must interpret the language Congress chose against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" and that political language "is often vituperative, abusive, and inexact") (internal quotations and citations omitted).

[206] See supra notes 81–88 and accompanying text.

[207] United States v. Kosma, 951 F.2d 549, 553 (3d Cir. 1991). While *Kosma* deals with a prosecution under 18 U.S.C. § 871 for threats made against the President, and thus its rationales are tailored to such a prosecution, its reasoning for the superiority of an objective intent approach is consistent with the justifications courts and commentators give for objective intent tests generally, regardless of who the victim or recipient of the alleged threat is. Furthermore, as noted earlier, with the exception of the Ninth Circuit, every circuit that has adopted an objective intent approach has applied that standard across-the-board to all contexts of threatening statements. See supra note 75. Because this author agrees that the same intent standard should be used for all true threats, the respective merits of the objective and subjective intent approaches will be analyzed regardless of whether the victim is the President or a private person.

out the threat and there is no actual danger."[208] Because "[t]he *threat alone* is disruptive of the recipient's sense of personal safety and well-being," the court argued that one subjective intent standard, the specific intent to carry out the threat test, was inappropriate.[209]

Having dismissed the requirement of a specific intent to carry out the threat, the court in *Kosma* addressed the second subjective standard, the specific intent to threaten test, and supplied another popular reason for preferring an objective intent approach. The court considered and rejected the specific intent to threaten standard, first articulated by Justice Marshall in *Rogers*, because this "subjective test makes it considerably more difficult for the government to prosecute threats."[210] Moreover, "any subjective test potentially frustrates the purposes" of preventing true threats because it "make[s] prosecution of these threats significantly more difficult."[211] Thus, according to *Kosma* and other objective intent opinions, the specific intent to threaten should not be required.

Supporters of an objective intent standard correctly reject the subjective test which requires the defendant to have intended to carry out the threat. As noted in *Kosma*, such a standard ignores the harms associated with threatening speech, such as fear and disruption. The speaker need not intend to carry out his threat in order for his words to have a deleterious effect. Put simply, threats are not, and should not, be considered inchoate crimes. Thus, most courts, including the Supreme Court, have rightly held that "[t]he speaker need not actually intend to carry out the threat" in order for the communication to constitute a true threat.[212]

When it comes to the specific intent to threaten subjective test, however, the majority of courts have missed the mark. Although

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[208] *Kosma*, 951 F.2d. at 557.

[209] Id. (internal quotations omitted) (alteration in original); see also United States v. Aman, 31 F.3d 550, 555 (7th Cir. 1994) (stating that the objective standard best accomplishes the aim of preserving the recipient's sense of personal safety).

[210] *Kosma*, 951 F.2d at 556–58 (citing Rogers v. United States, 422 U.S. 35, 48 (1975) (Marshall, J., concurring)).

[211] Id. at 558. As one commentator stated, concurring with this justification for rejecting the specific intent to threaten, "a subjective speaker-based test could overburden prosecutors by requiring an extremely high standard of proof." Strauss, supra note 10, at 263–64.

[212] *Black*, 538 U.S. at 359–60.

an objective test secures the purposes of regulating threats, it does not properly balance those concerns with the values of the First Amendment. In fact, the foundational opinion for the reasonable speaker test, the Ninth Circuit's decision in *Roy*, did not even consider the First Amendment implications of its interpretation.[213] Because it undervalues the tenet that language which is "vituperative, abusive, and inexact" may still be protected under the First Amendment,[214] the objective intent standard, in each of its forms, is over-inclusive when it comes to prohibiting threatening speech. By focusing on how a reasonable person may react, the objective approach severely discounts the speaker's general First Amendment right to communicate freely, even if that means using language which a reasonable person might find disagreeable. The Court clearly stated this principle in *Black* when it opined, "[t]he hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[215] By ignoring the intent of the speaker, an objective test runs the risk of punishing crudely worded ideas; conversely, a subjective test provides a better line of demarcation between ideas and threats. If the speaker did not intend for his communication to be threatening, it is much more likely that he intended to communicate an idea, even if he did so using what a reasonable person would consider abrasive or offensive language.

As Justice Marshall explained in his concurrence in *Rogers*, "[i]n essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. . . . [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech" because it "would have substantial costs in discouraging the uninhibited, robust, and wide-open debate that the First Amendment is intended to protect."[216] Because an objective test makes the intent of the speaker irrelevant, a speaker who does not intend for his communication to be threatening, but fears that some may interpret it as so, will not engage in such expression. Consequently,

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[213] See supra notes 81–93 and accompanying text.

[214] Watts v. United States, 394 U.S. 705, 708 (1969).

[215] *Black*, 538 U.S. at 358.

[216] Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring) (internal citations and quotations omitted).

speakers who do not intend for their speech to be threatening will still censor themselves, fearful that a reasonable person may construe the communication as threatening. Put simply, an objective standard chills speech.

Like an objective intent standard, Justice Marshall's subjective test protects against the harms caused by threatening speech. Unlike the objective intent approach, however, it properly balances this goal against the values of free expression. Instead of simply prohibiting speech based on the reaction it incurs, this subjective intent standard punishes the speaker who intends to create the harms of threatening speech, be it fear, disruption, or the threat of violence. Under the First Amendment, this is a much better approach. By requiring a specific intent to threaten, a speaker who wishes to bring about the harms associated with threatening speech will be punished; at the same time, the speaker who had no such intention will be given the necessary "breathing space" to speak freely and openly.

There are two common and related criticisms to this subjective intent approach. First, objective intent proponents, such as the court in *Kosma*, claim that a subjective intent test will increase the prosecutor's burden. This, however, is not a legitimate reason for rejecting a subjective standard. If anything, the burden on the prosecutor should be heightened when the regulation of pure speech is involved. Furthermore, the purpose of criminalizing any form of conduct, including speech, is not to ease the prosecutor's burden but to prohibit conduct society finds worthy of punishment.

Second, critics of the specific intent to threaten standard have argued that such an approach should not be adopted because it "would allow carefully crafted statements by speakers who actually intend to threaten to go unpunished."[217] Even if this were true, such criticism does not merit the rejection of this subjective intent test. In the vast majority of cases, if a statement seems clearly threatening, it will be difficult for the defendant to plausibly explain how his communication was not intended to be threatening. For instance, in *United States v. Bly*, the defendant sent several threatening letters and emails to University of Virginia employees follow-

[217] Strauss, supra note 10, at 263.

ing his termination from a graduate program. One such communication said the following:

> It would be a damn shame if the only way I could obtain justice in this element of class warfare is to kill Dr. Rydin. This is not venting. I promise you, this is DEADLY SERIOUS. Please get your ass in gear so I am not left with retribution, retaliation, and vigilante justice as the only justice available to me. NO JOKE. . . . Remember my belief in bullets as the ultimate backup for futile dialogue.[218]

In cases such as this, any attempt by the defendant to explain the intent of his communication as non-threatening would most likely be laughable and unbelievable. Only in cases at the proverbial margin, where the line between protected idea and punishable threat is more thinly sliced, will the application of the specific intent to threaten standard potentially lead to a different outcome than if an objective test were applied.

For example, in *United States v. Rogers*, the case in which Justice Marshall introduced the specific intent to threaten standard in a concurring opinion (the Court reversed the conviction on other grounds), the defendant was prosecuted for making threats against President Nixon. After walking into a coffee shop, the defendant "accosted several customers and waitresses, telling them, among other things, that he was Jesus Christ and that he was opposed to President Nixon's visiting China because the Chinese had a bomb that only he knew about, which might be used against the people of this country."[219] During these outbursts, the defendant "announced that he was going to go to Washington to 'whip Nixon's ass,' or to 'kill him in order to save the United States.'"[220] After local police were notified of the disturbance and threatening remarks, the defendant was questioned about his behavior. Asked if he had threatened the President, the defendant "replied that he didn't like the idea of the President's going to China and making friends with the Chinese." He then said, "'I'm going to Washington and I'm going

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[218] United States v. Bly, No. CRIM. 3:04CR00011, 2005 WL 2621996, at *1 n.1 (W.D. Va. Oct. 14, 2005) (alteration in original).

[219] *Rogers*, 422 U.S. at 41–42 (Marshall, J., concurring).

[220] Id. at 42.

to beat his ass off. Better yet, I will go kill him.'"[221] Rogers was prosecuted for making threatening statements against the President and was later convicted after a jury trial; the circuit court affirmed the conviction. At his trial, the judge instructed the jury that it should convict if the reasonable speaker objective test was met.[222]

It is hard to know whether Rogers would still have been convicted if the specific intent to threaten subjective test was used instead of the reasonable speaker standard. However, it seems at least plausible that given the context of his threatening statements (his disapproval of President Nixon's visit to China), his remarks were nothing more than crude political statements of the sort that were protected in *Watts*. However, it is also possible that he actually intended to threaten the President. The point is that an objective intent test fails to distinguish between these two situations, rendering the speaker's actual intent immaterial. All that matters under an objective standard is whether a reasonable person would have construed the statement as threatening. Conversely, the specific intent to threaten standard inquires into the speaker's motive, distinguishing between these two possible explanations of the speaker's intent.

It must be emphasized that the use of a subjective intent test does not mean the defendant will automatically go free; instead, it will simply permit the speaker an opportunity to explain his statement—an explanation that may shed light on the question of whether this communication was articulating an idea or expressing a threat.[223]

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[221] Id.

[222] Id. at 43–44 ("[T]he jury was permitted to convict on a showing merely that a reasonable man in petitioner's place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.").

[223] Another way the use of a subjective intent standard could potentially lead to a different result than an objective intent test is that defenses based on mental incompetence (or voluntary intoxication) would be permissible. For instance, in *United States v. Richards*, 415 F. Supp. 2d. 547, 551 (E.D. Pa. 2005), a defendant with "evident" mental health problems was prosecuted for making threatening statements against an immediate family member of a former President (former First Lady and current Senator Hillary Clinton). In line for dinner at a homeless shelter, the defendant said, apparently to no one in particular but loud enough for most in the room to hear, "I'm gonna [sic] put two bullets in her, gonna [sic] put two bullets into Hillary Clinton." Id. at 549. The defendant was later involuntarily committed to a mental health clinic. However, as the court implicitly recognized, a defense based on mental defect would

Any time the government must prove a specific intent element, society runs the risk of its craftiest criminals escaping conviction. This risk does not mean, however, that we should limit our mens rea options to general intent (negligence and recklessness, for example). Instead, the legal system, as it always does, must rely on the jury (or judge in a bench trial) to make judgments as to whether the defendant is telling the truth about his intent. By requiring a subjective intent, the government can still secure a conviction for blatant threats. The only significant difference is that under a subjective test, the defendant can legitimately argue that he did not mean to threaten the recipient; under an objective test, he is limited to arguing how a reasonable person should have understood his communication. When pure speech is punished, the speaker's intent should matter.[224] Moreover, the results in the easy cases would not change. As even the court in *Kosma* admitted, the adoption of a "subjective 'knowingly' standard would probably not open the floodgates to threats" going unpunished.[225] The only area that would likely see a difference is at the edge. In those close-call situations, however, it is much better to let the "crafty criminal" go free than to imprison the innocent speaker whose words unintentionally seemed threatening to a "reasonable person." Otherwise, speech, especially at the fringe, will be unnecessarily chilled.[226]

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only be permissible under a subjective intent test. Id. at 551; see also supra notes 44–47 and accompanying text.

[224] The First Amendment's incitement exception provides an apt analogy. In that context, the Court has held 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 of law violation except where such advocacy is *directed* to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added). *Brandenburg* was decided less than two months after *Watts*.

[225] United States v. Kosma, 951 F.2d 549, 558 (3d Cir. 1991).

[226] The Court has taken a similar approach when it comes to the First Amendment overbreadth doctrine. Fearful that overbroad statutes would inappropriately chill speech, the Court has allowed defendants, whose conduct is not necessarily constitutionally protected, to make facial challenges to statutes which may chill the speech of others, even if not their own. In effect, the Court has let the "uncrafty criminal" go free in order to secure sufficient free speech protection for others whose speech may be chilled as a result of an otherwise permissible prosecution. For a discussion of the First Amendment overbreadth doctrine, see Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 184–99 (5th ed. 2003).

Instead of letting the reasonable person decide what constitutes a true threat, only those speakers who intended for their communication to be threatening should be punished for their speech. As the Court famously explained, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[227] A speaker should not become a criminal simply because of the effect of his words; only when the speaker has the specific intent to threaten should he be punished for making a true threat.

CONCLUSION

For now, the *Black* opinion has had a limited influence on the jurisprudence of true threats and the issue of intent. After quoting the definition provided in *Black*, the district court in *United States v. Carmichael* explained that "[t]he Supreme Court has not settled on a definition of a 'true threat.'"[228] If anything, the *Black* decision further muddied the area by suggesting, at least to some, that the specific intent to threaten was constitutionally required—a requirement that enjoyed little support in the jurisprudence before April 2003.

At this point, only two things seem clear. First, absent a stronger statement from the Court in support of a subjective standard, the objective intent approach will continue to reign supreme. This, unfortunately, means speech will continue to be chilled in the name of precedent and prosecutorial burden. Second, given the range of reactions to *Black*, the Court will have to revisit the meaning of true threats and the issue of intent. When it does, we can only hope it is more successful at clearly defining the doctrine than it has been in the past. Until then, it will be fourth down and goal to go.

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[227] Cohen v. California, 403 U.S. 15, 26 (1971).

[228] United States v. Carmichael, 326 F. Supp. 2d 1267, 1280 (M.D. Ala. 2004) (applying the reasonable neutral test for the meaning of true threats).

CRIME-FACILITATING SPEECH

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This Article gives as examples the URLs of some crime-facilitating Web pages. All these URLs can be found with quick and obvious Google searches; I therefore think that my including them won't materially help any would-be criminal readers.

INTRODUCTION: THE SCOPE OF THE CRIME-FACILITATING SPEECH PROBLEM

Some speech provides information that makes it easier for people to commit crimes, torts, or other harms. Consider:

(a) A textbook,[1] magazine, Web site, or seminar describes how people can make bombs (conventional[2] or nuclear[3]), make guns,[4] make drugs,[5] commit contract murder,[6] engage in

1. See *infra* note 78 for examples.

2. *See* 18 U.S.C. § 842(p)(2)(A) (2000) (prohibiting distribution of "information pertaining to . . . the manufacture or use of an explosive . . . with the intent that" the information be used criminally); *id.* § 842(p)(2)(B) (prohibiting distribution of such information "to any person . . . knowing that such person intends"

sabotage,[7] painlessly and reliably commit suicide,[8] fool ballistic identification systems or fingerprint recognition systems,[9] pick locks,[10] evade taxes,[11] or more effectively resist arrest during civil disobedience.[12]

(b) A thriller or mystery novel does the same, for the sake of realism.[13]

(c) A Web site or a computer science article explains how messages can be effectively encrypted (which can help stymie law enforcement),[14] how encrypted copyrighted material can

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to use it criminally); Plea Agreement, United States v. Austin, No. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (describing Web site operator's guilty plea to a violation of 18 U.S.C. § 842(p)(2)(A)).

3. *See* United States v. Progressive, Inc., 486 F. Supp. 5 (W.D. Wis. 1979) (enjoining the publication of article describing how a hydrogen bomb could be constructed), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979); Atomic Energy Act, 42 U.S.C. §§ 2014, 2274 (2000) (prohibiting the revealing of certain data concerning nuclear weapons); *cf.* Invention Secrecy Act, 35 U.S.C. §§ 181, 186 (2000) (prohibiting people from disclosing details of inventions, if the inventions have been ordered kept secret on the ground that revealing them would be "detrimental to the national security").

4. See *infra* note 98 for examples of such speech, and the political message it may communicate.

5. *See, e.g.*, S. 1428, 106th Cong. § 9 (1999) (applying the approach of 18 U.S.C. § 842(p) to information about the manufacturing or use of "controlled substance[s]").

6. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233 (4th Cir. 1997) (holding that the publisher of a contract murder manual may be held liable for crimes the manual facilitated).

7. *See* 18 U.S.C. § 231(a) (2000) (prohibiting "teach[ing] or demonstrat[ing] . . . the use . . . or making of any firearm or explosive . . . knowing or having reason to know or intending that the same will be unlawfully employed" in civil disorders that obstruct commerce or federal functions); United States v. Featherston, 461 F.2d 1119, 1121 (5th Cir. 1972) (upholding § 231(a) conviction of black militants for teaching how to make explosives for "the coming revolution"); *see also* Scales v. United States, 367 U.S. 203, 250 (1960) (affirming conviction for being a member of the Communist Party with the intent of overthrowing the government, based partly on the defendant's organizing "training schools" where, among other things, instructors taught people "how to kill a person with a pencil"); Earth Liberation Front, Setting Fires with Electrical Timers, *at* http://web.mit.edu/simsong/ www/SettingFires_ELF.pdf (May 2001) (describing arson techniques, and labeling itself "[t]he politics and practicalities of arson"; I first saw the article on an Earth Liberation Front site, but it has since been removed from there).

8. See *infra* note 410 for calls to restrict such materials.

9. See *infra* notes 99-100 for examples of such speech and of its possible noncriminal value.

10. *See* Chicago Lock Co. v. Fanberg, 676 F.2d 400 (9th Cir. 1982) (refusing to enjoin the publication of manuals that help people make keys for certain locks given the serial number written on the outside of the lock); *see also infra* note 82 (citing a paper that discusses how people can make a master key from a nonmaster key).

11. *Compare, e.g.*, United States v. Kelley, 769 F.2d 215, 216-17 (4th Cir. 1985) (upholding criminal punishment for such speech); United States v. Freeman, 761 F.2d 549 (9th Cir. 1985) (same); United States v. Buttorff, 572 F.2d 619, 623 (8th Cir. 1978) (same); United States v. Schiff, 269 F. Supp. 2d 1262, 1285 (D. Nev. 2003) (containing an order item enjoining the defendants from assisting others to violate tax laws), *aff'd on other grounds*, 379 F.3d 621 (9th Cir. 2004), *with* United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (holding such speech to be constitutionally protected).

12. *See* Dana Hull, *Anti-War Activists Plan to Disrupt Daily Activities If War Breaks Out*, SAN JOSE MERCURY NEWS, Feb. 25, 2003, at 1A ("Civil disobedience advice is passed from activist to activist, can be found on the Internet, and is dispensed at training sessions. Among the tips: It is . . . harder for cops to drag you away if you go limp."); State v. Bay, 721 N.E.2d 421, 423 (Ohio Ct. App. 1998) (holding that going limp to make it harder for the police to take one away constitutes resisting arrest).

13. See *infra* note 115 for examples.

14. Bernstein v. United States Dep't of Justice, 176 F.3d 1132 (9th Cir. 1999) (holding that such speech is protected), *reh'g en banc granted*, 192 F.3d 1308 (9th Cir. 1999), *appeal later dismissed*; Karn v. United States Dep't of State, 925 F. Supp. 1 (D.D.C. 1996) (same). I set aside for purposes of this Article the debate whether restrictions on computer source code should be treated as content-based speech restrictions. *See* sources cited

be illegally decrypted,[15] what security flaws exist in a prominent computer operating system,[16] or how computer viruses are written.[17]

(d) A newspaper publishes the name of a witness to a crime, thus making it easier for the criminal to intimidate or kill the witness.[18]

(e) A leaflet or a Web site gives the names and possibly the addresses of boycott violators, abortion providers, strikebreakers, police officers, police informants, anonymous litigants, registered sex offenders, or political convention delegates.[19]

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infra note 223. If source code restrictions should be treated as content-based, then the analysis in this Article applies to them. If they shouldn't—for instance, because they're seen as restrictions on the functional aspect of the code (since the code can be directly compiled into object code and executed, without a human reading it) rather than the expressive aspect—then this Article's analysis would still apply to the human-language descriptions of the algorithm that the source code embodies, which are dangerous precisely because they communicate to humans.

15. *See* sources cited *infra* note 226 (describing threatened lawsuits based on such speech); *cf.* Nat'l Fed'n of the Blind, Inc. v. Loompanics Enters., Inc., 936 F. Supp. 1232, 1244-46 (D. Md. 1996) (holding that the publisher of a how-to book on trademark infringement could be held liable for contributory infringement).

16. *See* Government's Motion for Reversal of Conviction at 6 n.3, United States v. McDanel, C.A. No. 03-50135 (9th Cir. Oct. 14, 2003) (taking the position that communicating such information may violate the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A), (e)(8) (2000), but only if the speaker intended to facilitate security violations, rather than intending to urge the software producer to fix the problem; the government moved for reversal because it conceded that the culpable intent hadn't been shown at trial); Letter from Kent Ferson, representing Hewlett-Packard, to Adriel T. Desautels, SnoSoft (July 29, 2002) (threatening Digital Millennium Copyright Act and Computer Fraud and Abuse Act liability based on SnoSoft's publishing information about a security bug), http://www.politechbot.com/docs/hp.dmca.threat.073002.html; Declan McCullagh, *HP Backs Down on Copyright Warning*, CNET NEWS.COM, Aug. 1, 2002, *at* http://news.com.com/2100-1023-947745.html (describing the SnoSoft incident and saying that HP had withdrawn its threat); *infra* notes 109-11 and accompanying text.

17. *See* Clive Thompson, *The Virus Underground*, N.Y. TIMES, Feb. 8, 2004, § 6 (Magazine), at 28 (describing people who post virus source code on Web sites, where it can be used both by people who are interested in understanding and blocking viruses, and by people who want to spread the viruses; similar issues would be raised if virus-writers posted not the code but a detailed description of the algorithm).

18. *See* Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463 (9th Cir. 1986) (holding that liability may be imposed in such a situation, under the disclosure of private facts tort, even when the newspaper isn't intending to facilitate crime); Times-Mirror Co. v. Superior Court, 244 Cal. Rptr. 556 (Ct. App. 1988) (same); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982) (same).

19. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (rejecting lawsuit that was based partly on distribution of boycott violators' names); Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc) (allowing lawsuit based partly on distribution of abortion providers' names and addresses, though focusing mostly on other material in the defendants' works); City of Kirkland v. Sheehan, No. 01-2-09513-7 SEA, 2001 WL 1751590 (Wash. Super. Ct. May 10, 2001) (refusing to enjoin distribution of police officers' names and addresses); CAL. PENAL CODE § 146e (Deering 2004) (prohibiting, among other things, "publish[ing] . . . the residence address or telephone number" of various law enforcement employees "with the intent to obstruct justice"); FLA. STAT. ANN. § 843.17 (West 2003) (likewise); *infra* note 85 (describing New Jersey's restrictions on citizens' communicating information on released sex offenders); *Probe into Republican Delegate Data Posting*, FOXNEWS.COM, Aug. 30, 2004, *at* http://www.foxnews.com/story/0,2933,130629,00.html ("The Secret Service is investigating the posting on the Internet of names[, home addresses, e-mail addresses, and hotel addresses of] thousands of delegates to the Republican National Convention . . . [because of] concerns that posting of the delegate lists could subject the delegates to harassment, acts of violence or identity theft."); Who's a Rat, *at* http://www.whosarat.com (last visited Nov. 30, 2004) (a site that identifies police informants and undercover agents, and asserts that it is "designed to assist attorneys and criminal defendants"); United States v. Carmichael,

(f) A Web site posts people's social security numbers or credit card numbers, or the passwords to computer systems.[20]

(g) A newspaper publishes the sailing dates of troopships,[21] secret military plans,[22] or the names of undercover agents in enemy countries.[23]

(h) A Web site or a newspaper article names a Web site that contains copyright-infringing material, or describes it in enough detail that readers could quickly find it using a search engine.[24]

(i) A Web site sells or gives away research papers, which helps students cheat.[25]

(j) A magazine describes how one can organize one's tax return to minimize the risk of a tax audit,[26] share music files while minimizing the risk of being sued as an infringer,[27] or better conceal one's sexual abuse of children.[28]

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326 F. Supp. 2d 1267, 1295-96 (M.D. Ala. 2004) (concluding that a criminal defendant's Web site containing the names of government informants and agents didn't pose enough danger to the informants and agents, and thus rejecting the government's request for an injunction ordering the defendant to take down the site); Motion for TRO, Doe v. Omaha World Herald, No. 4:04CV3306 (D. Neb. Sept. 20, 2004) (motion by the ACLU of Nebraska asking a court to enjoin a newspaper from revealing the name of a John Doe plaintiff in a case challenging the posting of the Ten Commandments, because the plaintiff had received death threats); Memorandum and Order, Doe v. Omaha World Herald, No. 4:04CV3306 (D. Neb. Sept. 21, 2004) (denying the motion).

20. *See* CAL. CIV. CODE § 1798.85(a)(1) (Deering 2004) (generally prohibiting publishing social security numbers); *Sheehan* (enjoining the publication of social security numbers); KAN. STAT. ANN. § 21-3755(c)(1) (2003) (prohibiting unauthorized disclosure of computer passwords); MISS. CODE ANN. 97-45-5(1)(b) (2004) (same); GA. CODE ANN. § 16-9-93(e) (2004) (same, but only when damage results).

21. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (suggesting that the government could enjoin the "publication of the sailing dates of transports or the number and location of troops").

22. *See* New York Times Co. v. United States, 403 U.S. 713, 733-34 (1971) (White, J., concurring) (suggesting that such publication could be punished).

23. *See* 50 U.S.C. § 421(c) (2000) (prohibiting engaging in "a pattern of activities intended to identify and expose covert agents . . . with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States"); Haig v. Agee, 453 U.S. 280, 309 (1981) (concluding that such speech is constitutionally unprotected, by analogy to *Near v. Minnesota*).

24. *See, e.g.*, Arista Records, Inc. v. MP3Board, Inc., No. 00 CIV. 4660, 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002) (holding that the publisher of a link to an infringing site may be contributorily liable for the infringement that the link facilitates); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1293-96 (D. Utah 1999) (enjoining defendants from "post[ing] on defendants' website, addresses to websites that defendants know, or have reason to know, contain the material alleged to infringe plaintiff's copyright"); 17 U.S.C. § 512(d) (2000) (providing a safe harbor from damages liability to people who link or refer to infringing material, but only if they didn't know it was infringing); *see also* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 455-58 (2d Cir. 2001) (enjoining publication of links to a page containing material that violated the Digital Millennium Copyright Act); *infra* note 48 (explaining in more detail why such behavior would fit within existing contributory infringement law). The cases all involved clickable links, but including the URL even as plain text would trigger copyright liability just as much as the clickable links would.

25. Academic cheating is fraud, and thus likely a tort or even a crime. The question relevant to this Article is whether term-paper mills are also constitutionally unprotected, because they help students commit such fraud. *Cf., e.g.*, United States v. Int'l Term Papers, Inc., 477 F.2d 1277, 1279 (1st Cir. 1973) (enjoining a term-paper mill on the ground that the mill used the mails to "assist[] students to make false representations to universities"); Trustees of Boston Univ. v. ASM Communications, Inc., 33 F. Supp. 2d 66 (D. Mass. 1988) (dismissing a RICO case against a term-paper mill on statutory grounds).

26. *See, e.g.*, WorldWideWeb Tax, How to Avoid an IRS Audit?, *at* http://www.wwwebtax.com/audits/audit_avoiding.htm (last visited Jan. 14, 2005) (describing "a host of strategies you

(k) A newspaper publishes information about a secret subpoena,[29] a secret wiretap,[30] a secret grand jury investigation,[31] or a secret impending police operation,[32] and the suspects thus learn they are being targeted; or a library, Internet service provider, bank, or other entity whose records are subpoenaed alerts the media to complain about what it sees as an abusive subpoena.[33]

(l) When any of the speech mentioned above is suppressed, a self-styled anticensorship Web site posts a copy, not because its operators intend to facilitate crime, but because they want to protest and resist speech suppression or to inform the public about the facts underlying the suppression controversy.[34]

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can use to ensure you aren't selected for an IRS tax audit"). Of course, this information is useful to law-abiding taxpayers who want to save themselves the hassle of an audit, as well as to cheaters.

27. *See, e.g.*, Elec. Frontier Found., How Not to Get Sued by the RIAA for File-Sharing, *at* http://eff.org/IP/P2P/howto-notgetsued.php (last visited Jan. 14, 2005).

28. *Cf.* Melzer v. Bd. of Ed., 336 F.3d 185, 190 (2d Cir. 2003) (describing such an article, though not deciding whether it was constitutionally unprotected).

29. *See* 50 U.S.C. § 1861(a), (d) (2000 & Supp. I 2001) (prohibiting disclosure by any person—not just government agents—of the issuance of certain document production orders in "investigation[s] to obtain foreign intelligence information . . . or to protect against international terrorism or clandestine intelligence activities"; added by the USA Patriot Act); Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(1)(J) (2000) (same as to subpoenas for certain education records); 18 U.S.C. § 3486(a)(D)(6)(A) (2000) (same as to investigations of health care violations and child abuse, though only if a court so orders, and only for "up to 90 days"); WASH. REV. CODE § 19.86.110 (2004) (same, but without a time limit, as to investigations of unfair or anticompetitive business practices, though only if a court so orders); *see also* MINN. STAT. ANN. § 609.4971 (West 2003) (prohibiting the disclosure of certain subpoenas "with intent to obstruct, impede, or prevent the investigation for which the subpoena was issued").

30. *See* TEX. CODE CRIM. PROC. art. 18.21, §§ 4, 7, 8 (1965) (prohibiting disclosure by any person of searches or subpoenas "involving access to stored electronic communications," if the court determines that such a disclosure may "endanger[] the life or physical safety of an individual," lead to "flight from prosecution," "destruction of or tampering with evidence," or "intimidation of a potential witness," or "otherwise seriously jeopardiz[e] an investigation or unduly delay[] a trial"); DEL. CODE ANN. tit. 11, § 2412(a) (2004) (prohibiting disclosure by any person "of an authorized interception or pending application . . . in order to obstruct, impede or prevent such interception"); 18 U.S.C. § 2332(d) (2000) (likewise).

31. *See, e.g.*, FLA. STAT. ANN. § 905.27(2) (West 2003) (banning the publication of "any testimony of a witness examined before the grand jury, . . . except when such testimony is or has been disclosed in a court proceeding").

32. *Cf.* Risenhoover v. England, 936 F. Supp. 392 (W.D. Tex. 1996), which allowed a negligence lawsuit against media organizations that sent reporters to the scene of a forthcoming raid on the Branch Davidians' compound near Waco. The reporters' presence tipped off the Davidians to the previously secret raid plans, and allegedly helped cause the death of the plaintiffs' relative, an ATF officer. *Risenhoover* involved newsgathering activities, rather than the publication of a news story; but it illustrates the possibility that speakers may also be sued for directly or indirectly exposing secret law enforcement plans, under the theory that "media defendants owe[] a duty . . . not to warn the [targets], either intentionally or negligently, of the impending raid." *Id.* at 408.

33. *See* 18 U.S.C. § 2709(c) (2000) (prohibiting communication service providers from disclosing FBI demands for subscriber or toll billing records information); 18 U.S.C. § 2705(b) (2000) (allowing court orders that bar communication service providers from disclosing administrative subpoenas for stored communications); 12 U.S.C. §§ 3406(c), 3409(b), 3413(i), 3414(a)(3), 3420 (2000) (providing for similar restrictions on financial institutions that are ordered to turn over customer records); statutes cited *supra* notes 29-30 (which restrict disclosure by subpoena recipients or by subjects of searches, as well as by newspapers and other third parties).

34. *See, e.g.*, Mike Godwin, *The Net Effect*, AM. LAW., Feb. 2000, at 47 (describing how people sometimes put up mirror sites for this purpose); sources cited *infra* notes 335-36 (citing examples).

(m) A master criminal advises a less experienced friend on how best to commit a crime, or on how a criminal gang should maintain discipline and power.[35]

(n) A supporter of sanctuary for El Salvadoran refugees tells a refugee the location of a hole in the border fence, and the directions to a church that would harbor him.[36]

(o) A lookout,[37] a friend,[38] or a stranger who has no relationship with the criminal but who dislikes the police[39] warns a criminal that the police are coming.

(p) A driver flashes his lights to warn other drivers of a speed trap.[40]

These are not incitement cases: The speech isn't persuading or inspiring some readers to commit bad acts. Rather, the speech is giving people information that helps them commit bad acts—acts that they likely already want to commit.[41]

When should such speech be constitutionally unprotected? Surprisingly, the Supreme Court has never squarely confronted this issue,[42] and lower courts and commentators have only recently begun to seriously face it.[43] And getting the answer right is important: Because these

35. *Compare* McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002) (holding that such speech is protected), *with* Stewart v. McCoy, 537 U.S. 993 (2002) (Stevens, J., respecting the denial of certiorari) (suggesting that perhaps such speech shouldn't be protected).

36. *See* United States v. Aguilar, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction based on such speech for aiding and abetting illegal immigration), *superseded on unrelated grounds by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181, 1187 (9th Cir. 2001).

37. *See, e.g.*, United States v. Lane, 514 F.2d 22 (9th Cir. 1975).

38. *See, e.g.*, United States v. Bucher, 375 F.3d 929 (9th Cir. 2004).

39. *See, e.g.*, People v. Llanos, 77 N.Y.2d 866 (1991) (holding a defendant not liable in such a case, but only because the applicable statute covered only helping people actually commit the crime, not helping people escape from the police); *see also* People v. Llanos, 151 A.D.2d 128, 131 (N.Y. App. Div. 1989) (noting that "the record here is devoid of any proof linking defendant to the apartment occupants"), *aff'd*, 77 N.Y.2d 866 (1991).

40. This is tantamount to the driver's acting as a lookout, *see supra* notes 37-39: It lets the other drivers drive illegally before and after the speed trap without getting caught, because they have been warned to obey the law when the police are watching. *See* State v. Walker, No. I-9507-03625 (Williamson Cty. (Tenn.) Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense in such circumstances); *For the Record*, SALT LAKE TRIB., Feb. 29, 2000, at B2 (noting a similar case in which a First Amendment defense was accepted); *cf. Bucher*, 375 F.3d at 930 (noting the First Amendment question); Commonwealth v. Beachey, 728 A.2d 912 (Pa. 1999) (considering a similar case, but not confronting the First Amendment question).

41. As Parts I.A and III.E explain, crime-inciting speech and crime-facilitating speech differ considerably in how they cause harm and how they are valuable, so they are usefully analyzed as separate First Amendment categories.

Likewise, crime-facilitating speech cases are different from copycat-inspiring cases, where movies or news accounts inspire copycat crimes but don't give criminals any useful and nonobvious information about how to commit those crimes. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 265 (4th Cir. 1997) (making this distinction). The danger of speech that inspires copycat crimes is that it leads some viewers to want to commit crimes (even if that's not the speaker's purpose). This is the same sort of danger that crime-advocating speech poses, which is why copycat crime cases are generally analyzed using the incitement test. *See, e.g.*, Byers v. Edmondson, 826 So. 2d 551, 557 (La. Ct. App. 2002) (rejecting copycat claim by applying *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

42. *See infra* Part II.A.

43. The most extensive treatments of this question are *Rice*, 128 F.3d 233, and U.S. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION (Apr. 1997), *available at* http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html. (Because the report is far more easily accessible to readers on the Web than in the limited print edition submitted to Congress, I cite to the Web version.) KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1989), treats many issues very

scenarios are structurally similar—a similarity that hasn't been generally recognized—a decision about one of them will affect the results in others. If a restriction on one of these kinds of speech is upheld (or struck down), others may be unexpectedly validated (or invalidated) as well.

In this Article, I'll try to analyze the problem of crime-facilitating speech,[44] a term I define to mean

(1) any communication that,
(2) intentionally or not,
(3) conveys information that
(4) makes it easier or safer for some listeners or readers (a) to commit crimes, torts,[45] acts of war (or other acts by foreign nations that would be crimes if done by individuals), or suicide, or (b) to get away with committing such acts.[46]

In Part III.G, I'll outline a proposed solution to this problem; but my main goal is to make observations about the category that may be useful even to those who disagree with my bottom line.

The first observation is the one with which this Article began: *Many seemingly disparate cases are linked because they involve crime-facilitating speech*, so the decision in one such case may affect the decisions in others. The crime-facilitating speech problem looks different if one is just focusing on the *Hit Man* contract murder manual than if one is looking at the broader range of cases.

It may be appealing, for instance, to categorically deny First Amendment protection to murder manuals or to bomb-making information, on the ground that the publishers know that the works may help others commit crimes, and such knowing facilitation of crime should be constitutionally unprotected.[47] But such a broad justification would equally strip protection from

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well, but spends only a few pages on crime-facilitating speech, *id.* at 86-87, 244-45, 281-82.

44. I borrow the term from the concept of "criminal facilitation," a crime recognized in some jurisdictions, *see infra* note 296, but I apply the phrase to all crime-facilitating speech, whether it's punished by one of these criminal facilitation statutes or by some other law.

45. I include torts as well as crimes because both are generally seen as harmful actions, the facilitating of which might be potentially punishable. *See infra* note 298. Tortious but noncriminal conduct is less harmful than criminal conduct, so restrictions on speech that facilitates purely tortious conduct may be less justified. But I think it's better to consider this as a potential distinction based on how harmful the facilitated conduct is, *see infra* Part III.D, rather than to rule out tort-facilitating speech at the start.

I use the term "crime-facilitating" rather than a broader term such as "harm-facilitating" because it seems to me clearer and more concrete (since "harm" could include many harms, including offense, spiritual degradation, and more), and because most of the examples I give do involve criminal conduct.

46. Helping criminals get away with crimes can be as harmful as helping them commit crimes; among other things, a criminal who knows he'll have help escaping is more likely to commit the crime in the first place, and a criminal who escapes will be free to continue his criminal enterprise and to commit more crimes in the future. This is why lookouts are treated like other aiders and abettors, and why criminal law has long criminalized the accessory after the fact, who helps hide a criminal, as well as the accessory before the fact. *See, e.g.*, material cited *infra* note 150.

47. For articles that make such broad proposals, while focusing only on the well-publicized *Hit Man* case and perhaps one or two other cases, see S. Elizabeth Wilborn Malloy, *Taming Terrorists but Not "Natural Born Killers,"* 27 N. KY. L. REV. 81, 81, 105, 111 (2000); Monica Lyn Schroth, Comment, *Reckless Aiding and Abetting: Sealing the Cracks That Publishers of Instructional Materials Fall Through*, 29 SW. U. L. REV. 567 (2000); Theresa J. Pulley Radwan, *How Imminent Is Imminent?: The Imminent Danger Test Applied to Murder*

newspaper articles that mention copyright-infringing Web sites,[48] academic articles that discuss computer security bugs,[49] and mimeographs that report who is refusing to comply with a boycott.[50]

If one wants to protect the latter kinds of speech, but not the contract murder manual, one must craft a narrower rule that distinguishes different kinds of crime-facilitating speech from each other.[51] And to design such a rule—or to conclude that some seemingly different kinds of speech should be treated similarly—it's helpful to think about these problems together, and use them as a "test suite" for checking any proposed crime-facilitating speech doctrine.[52]

The second observation, which Part I.C will discuss, is that most crime-facilitating speech is an instance of what one might call *dual-use material*.[53] Like weapons, videocassette recorders, alcohol, drugs, and many other things, many types of crime-facilitating speech have harmful uses; but they also have valuable uses, including some that may not at first be obvious.

Moreover, it's often impossible for the distributor to know which consumers will use the material in which way. Banning the material will prohibit the valuable uses along with the harmful ones.[54] Allowing the material will allow the harmful uses alongside the valuable ones. This dual-use nature has implications for how crime-facilitating speech should be treated.

Part II then observes that *restrictions on crime-facilitating speech can't be easily justified under existing First Amendment doctrine*. Part II.A describes the paucity of existing constitutional law on the subject, and Parts II.B, II.C, and II.D discuss the possibility that strict scrutiny, "balancing," or deference to legislative judgment can resolve this problem.

Manuals, 8 SETON HALL CONST. L.J. 47, 73 (1997).

48. *Cf.* the materials mentioned *supra* note 24, which impose liability in similar circumstances; Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996) (defining "contributory infringement" as behavior that materially contributes to third parties' copyright infringement, done with knowledge or reason to know that the behavior will contribute to that infringement, a definition that would cover giving addresses of infringing sites or even enough nonaddress information that would let people easily find the site).

The publisher couldn't escape liability by arguing that some readers might have found the infringing site through other means even if the speaker hadn't mentioned it, and that therefore publishing the address isn't the but-for cause of the infringement. First, many readers will only see a pointer to the site in the newspaper or Web page, and wouldn't have thought of searching for the site had it not been for that reference. Second, even if several different sources report on the site's location, under standard tort law principles, each would be liable for the harm. *See* Anderson v. Minneapolis Saint Paul & Sault Ste. Marie Ry. Co., 179 N.W. 45, 49 (Minn. 1920) (adopting this rule as to negligence cases); RESTATEMENT (SECOND) OF TORTS § 432 (1965) (likewise); *id.* § 622A cmt. b (likewise as to libel cases); *id.* § 632 cmt. c (likewise as to injurious falsehood cases).

49. *See, e.g.*, Ethan Preston & John Lofton, *Computer Security Publications: Information Economics, Shifting Liability and the First Amendment*, 24 WHITTIER L. REV. 71 (2002) (discussing this general issue, and giving many examples); *infra* notes 109-11, 226, and accompanying text.

50. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 903-06 (1982) (involving such mimeographs, during a boycott where some noncompliers had been physically attacked by third parties).

51. For instance, the rule could distinguish speech that's intended to facilitate crime from speech that knowingly facilitates crime, though such a distinction has its own problems. *See infra* Part III.B.2.

52. *See* EUGENE VOLOKH, ACADEMIC LEGAL WRITING 19-24 (2d ed. 2005).

53. I adapt this term from arms control, where "dual-use" refers to products that have both military (and thus often banned) uses and civilian (and thus allowed) uses. *See, e.g.*, 10 U.S.C. § 2500(2) (2000).

54. I use "ban" to refer both to criminal prohibitions and civil liability. First Amendment law treats the two identically, and so do I, for reasons described in Part III.F.

Part III discusses *distinctions that the law might try to draw* within the crime-facilitating speech category to minimize the harmful uses and maximize the valuable ones.[55] These distinctions are the possible building blocks of a crime-facilitating speech exception, but it turns out that such distinctions are not easy to devise. In particular, one seemingly appealing distinction—between speech intended to facilitate crime, and speech that is merely said with knowledge that some readers will use it for criminal purposes—turns out to be less helpful than might at first appear. Many other possible distinctions end up being likewise unhelpful, though a few are promising.

Building on this analysis, Part III.G provides a suggested rule: that crime-facilitating speech ought to be constitutionally protected unless (1) it's said to a person or a small group of people when the speaker knows *these few listeners are likely to use the information for criminal purposes*, (2) it's within one of the few classes of *speech that has almost no noncriminal value*, or (3) it can cause *extraordinarily serious harm* (on the order of a nuclear attack or a plague) even when it's also valuable for lawful purposes. But I hope the analysis in Part III will be helpful even to those who would reach a different conclusion. And even if courts ultimately hold that legislatures and courts should have broad constitutional authority to restrict a wide range of crime-facilitating speech, some of the analysis may help legislators and judges decide how they should exercise that authority.[56]

Finally, the Conclusion makes a few more observations, one of which is worth foreshadowing here: While crime-facilitating speech cases arise in all sorts of media, and should be treated the same regardless of the medium, *the existence of the Internet makes a difference* here. Most importantly, by making it easy for people to put up mirror sites of banned material as a protest against such bans, the Internet makes restrictions on crime-facilitating speech less

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55. I focus on distinctions that might be helpful when the government is acting as sovereign, using its regulatory power to restrict speech even by private citizens. The rules will likely be different when the government is acting as employer or as contractor, disclosing information to employees or others but on the contractual condition that they not communicate the information to others. *See, e.g.*, Snepp v. United States, 444 U.S. 507 (1980) (dealing with restrictions on speech by government employees); Pickering v. Bd. of Educ., 391 U.S. 563, 570 n.3 (1968) (likewise); *infra* note 133 and accompanying text (discussing United States v. Aguilar, 515 U.S. 593 (1995), which involved a similar issue); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (dealing with restrictions on litigants who receive confidential information through discovery, on the condition that they not republish it).

I also do not deal with the special case of harm-facilitating speech that's aimed largely at minors—for instance, material that teaches them how to conceal their anorexia from their parents. *See, e.g.*, Ana Angels, Tips and Tricks, *at* http://members.fortunecity.com/kikienpointe/id19.htm (last visited Jan. 14, 2005); Deirdre Dolan, *Learning to Love Anorexia? 'Pro-Ana' Web Sites Flourish*, N.Y. OBSERVER, Feb. 3, 2003, § 7, at 1.

56. The analysis may also be helpful for courts that want to analyze the question under state constitutional free speech guarantees. *See, e.g.*, State v. Robertson, 649 P.2d 569 (Or. 1982) (setting forth doctrine for Oregon Free Speech Clause cases that's quite different from standard First Amendment doctrine).

I will *not*, however, discuss (1) how individual speakers or publishers should decide whether to endanger others by publishing crime-facilitating speech, or (2) when people should condemn speakers or publishers who publish such speech. These are important ethical questions; speakers might well conclude that though they have a constitutional right to say something, they should nonetheless refrain from exercising this right, because in their own view the harm caused by their speech outweighs whatever benefit it might have. Nonetheless, this is outside the scope of this Article, which discusses the constitutional questions, not the ethical ones.

effective, both practically and (if the restrictions are cast in terms of purpose rather than mere knowledge) legally.

I. THE USES OF CRIME-FACILITATING SPEECH

A. *Harmful Uses*

Information can help people commit crimes. It makes some crimes possible, some crimes easier to commit, and some crimes harder to detect and thus harder to deter and punish.[57]

The danger of crime-facilitating speech is related to that posed by crime-*advocating* speech. To commit a typical crime, a criminal generally needs to have three things:

(1) the desire to commit the crime,

(2) the knowledge and ability to do so, and

(3) either (a) the belief that the risk of being caught is low enough to make the benefits exceed the costs,[58] (b) the willingness—often born of rage or felt ideological imperative—to act without regard to the risk, or (c) a careless disregard for the risk.

Speech that advocates, praises, or condones crime can help provide the desire, and, if the speech urges imminent crime, the rage. Crime-facilitating speech helps provide the knowledge and helps lower the risk of being caught.

But the danger of crime-facilitating speech may be greater than the danger of crime-advocating speech (at least setting aside the speech that advocates imminent crime, which may sometimes be punished under the incitement exception[59]). Imagine two people: One knows how to commit a crime with little risk of getting caught, but doesn't want to commit it. The other doesn't know how to commit the crime and escape undetected, but would be willing to commit it if he knew.

Advocacy of crime may persuade the first person to break the law and to incur the risk of punishment, but it will generally do it over time, building on past advocacy and laying the foundation for future advocacy. No particular statement is likely to have much influence by itself. What's more, over time the person may be reached by counteradvocacy, and in our society there generally is plenty of counteradvocacy, explicit or implicit, that urges people to follow the law. This counteradvocacy isn't perfect, but it will often help counteract the desire brought on by the advocacy (element 1).

But information that teaches people how to violate the law, and how to do so with less risk of punishment, can instantly and irreversibly satisfy elements 2 and 3a. Once a person learns how to make a bomb, or learns where a potential target lives, that information can't be rebutted through counteradvocacy, and needs no continuing flow of information for reinforcement. So

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57. For a long list of bombings connected to particular publications that describe how explosives can be made, see U.S. DEP'T OF JUSTICE, *supra* note 43, pt. II.

58. The benefits and costs can of course be tangible—financial benefit or the cost of being imprisoned or fined—or intangible, such as emotional benefit or the cost of feeling that one has hurt someone or violated social norms.

59. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

crime-facilitating speech can provide elements 2 and 3a more quickly and less reversibly than crime-advocating speech can provide elements 1 and 3b.[60]

Any attempts to suppress crime-facilitating speech will be highly imperfect, especially in the Internet age. Copies of instructions for making explosives, producing illegal drugs, or decrypting proprietary information will likely always be available somewhere, either on foreign sites or on American sites that the law hasn't yet shut down or deterred.[61] The *Hit Man* contract murder manual, for instance, is available for free on the Web,[62] even though a civil lawsuit led its publisher to stop distributing it.[63] (If the civil lawsuit that led the publisher to stop selling the book also made the publisher more reluctant to try to enforce the now-worthless copyright, the suit might thus have actually made the book more easily, cheaply, and anonymously available.[64])

Versions of *The Anarchist Cookbook* are likewise freely available online, and likely will continue to be, even if the government tries to prosecute sites that distribute it.[65] Holding crime-

60. Naturally, even if crime-facilitating speech provides elements 2 and 3a, speech that argues against committing a crime can help prevent element 1 from being satisfied. I am not claiming that crime-facilitating speech by itself guarantees that a crime will be committed, only that it contributes to such crimes, and on average does so more than crime-advocating speech does.

61. For cases discussing whether the likely futility of a speech restriction may render it unconstitutional, see *infra* note 240. In this part of the text, though, I am focusing only on what the possible benefit of the restriction would be, and not on its constitutionality.

62. *See infra* text preceding note 474.

63. *See Publisher Settles Case over Killing Manual*, N.Y. TIMES, May 23, 1999, at A27 (reporting that *Hit Man* publisher Paladin settled the lawsuit by agreeing to stop publishing and selling the manual, as well as paying the victims' families millions of dollars); Mark Del Franco, *Paladin Kills Off Part of Its Product Line*, CATALOG AGE, Apr. 1, 2000, at 14 (same).

64. Future plaintiffs in crime-facilitating speech cases may try to prevent this by demanding, as part of the settlement, that defendants turn over the copyright to the work. The plaintiffs could then try to sue future online copiers of the work for copyright infringement, whether the copiers are in the United States or in foreign countries.

Plaintiffs could then also demand that search engines drop such supposedly copyright-infringing sites from their indexes: Search engines are probably under no legal obligation to exclude known crime-facilitating sites, but contributory copyright infringement law probably requires them to exclude known copyright-infringing sites. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Craig W. Walker, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. J.L. & TECH. 2 (2004). Plaintiffs could thus take advantage of well-established copyright law instead of having to rely on the less well-settled, potentially narrower, and less internationally recognized tort liability for crime-facilitating speech. *See* Harper & Row v. Nation Enters., 471 U.S. 539 (1985) (upholding copyright law against a First Amendment challenge, and with no requirement that the defendant be motivated by bad intentions).

But I doubt that such copyright lawsuits aimed at suppressing a previously published work would prevail. Noncommercially posting a work that's out of print—especially when the work's contents are important to understanding the legal controversy over that work—will probably be a fair use: The use is noncommercial, and it won't affect the economic value of the work, because the plaintiffs are clearly not planning to reissue their own competing edition. *Cf.* Worldwide Church of God v. Philadelphia Church of God, 227 F.3d 1110, 1119 & n.2 (9th Cir. 2000) (rejecting a fair use defense when defendants had copied an out-of-print work, but stressing the copied work's marketing value to the defendant, the potential economic harm to the plaintiff, and the possibility that "the [plaintiff] plans at some time to publish an annotated version of [the work]"). The plaintiffs' strongest argument would be that copying a crime-facilitating work is inherently unfair because the work is so dangerous, but I doubt that the courts will conclude that this factor is relevant to the copyright inquiry.

65. *See infra* text accompanying notes 472-82.

facilitating speech to be constitutionally unprotected, and prosecuting the distributors of such speech, may thus not prevent that much crime.

Yet these restrictions are still likely to have some effect, even if not as much as their proponents might like. Crime-facilitating information is especially helpful to criminals if it seems reliable and well-tailored to their criminal tasks. If you want to build a bomb, you don't just want a bomb-making manual—you want a manual that helps you build the bomb without blowing yourself up,[66] and that you trust to do that. The same is true, in considerable measure, for instructions on how to avoid detection while committing crimes.[67]

The legal availability of crime-facilitating information probably increases the average quality—and, as importantly, the perceived reliability—of such information. An arson manual on the Earth Liberation Front's Web site,[68] or an article in *High Times* magazine on growing or manufacturing drugs,[69] will probably be seen as more trustworthy than some site created by some unknown stranger. It will often be more accurate and helpful, because of the organization's greater resources and greater access to expertise. The organization is more likely to make sure that its version is the correct one, and doesn't include any potentially dangerous alterations that versions on private sites might have. Moreover, because the information is high profile, and available at a well-known location, it's more likely to develop a reputation among (for instance) ecoterrorists or drug-growers; more people will have expressed opinions on whether it's trustworthy or not.[70]

On the other hand, if crime-facilitating information is outlawed, these mechanisms for increasing the accuracy and trustworthiness of the information will be weakened. The data might still be easily available through a Google search, but some of it will contain errors, and it will be less likely to have the reputation of a prominent group or magazine behind it. In marginal cases, this might lead some criminals to use less accurate and helpful information, or be scared off to less dangerous crimes by the uncertainty.

Serious criminals, who are part of well-organized criminal or terrorist networks, will likely get trustworthy crime-facilitating instructions regardless of what the law may try to do. But small-time criminals or tortfeasors may well be discouraged by the lack of seemingly reliable

66. Few bombers are suicide bombers, and even those who are want to commit suicide when the bomb is scheduled to detonate, not while it's being constructed.

67. *Cf.* Park Elliott Dietz, *Dangerous Information: Product Tampering and Poisoning Advice in Revenge and Murder Manuals*, 33 J. FORENSIC SCI. 1206 (1988) (discussing this point, and speculating that such manuals are indeed quite helpful to criminals).

68. *See* Earth Liberation Front, Setting Fires with Electrical Timers, *supra* note 7.

69. *See, e.g.*, Ed Rosenthal, *Ask Ed*, HIGH TIMES, June 1998, at 92; Mel Frank, *Victory Garden: Planting for Personal Use*, HIGH TIMES, May 1992, at 44.

70. *The Anarchist Cookbook*, for instance, seems to have developed a poor reputation. *See, e.g.*, Ken Shirriff, Anarchist Cookbook FAQ, *at* http://www.righto.com/anarchy/ (last visited Jan. 14, 2004) ("The Anarchist Cookbook is a book published in 1971, and you won't find the real thing online, although it is easily purchased from your local bookstore or from amazon.com. There are various files available on the Internet that rip off the name 'Anarchist Cookbook' and have somewhat similar content, but they are not the real Anarchist Cookbook. The Anarchist Cookbook has a poor reputation for reliability and safety, and most of the online files are considerably worse."). Were I to turn to a life of political crime, I would want to use material that had the imprimatur of an established organization, and that had developed a better reputation for reliability—something that would be harder if the material were outlawed.

publicly available instructions.[71] Restrictions on crime-facilitating speech may thus help stop at least some extremists who want to bomb multinational corporations, abortion clinics, or animal research laboratories; some would-be novice computer hackers or solo drugmakers; and some people who want to illegally download pirate software or movies, or to cheat by handing in someone else's term paper.

Moreover, some kinds of crime-facilitating information might not be available except from a few speakers, either because the information is about a new invention,[72] or because it contains details about specific items, events, or places: for instance, particular subpoenas issued by government agencies who are investigating particular suspects, passwords to particular computers, or the layout of particular government buildings. This information is likely to be initially known to only a few people, and not widely spread on hundreds of computers. If those few people are deterred from posting the material, or if the material is quickly ordered to be taken down from the Internet locations on which it's posted (and any search engine caches that may contain it), then potential criminal users—both serious professional criminals and solo, novice offenders—might indeed be unable to get it.[73]

B. *Valuable Uses*

Speech that helps some listeners commit crimes, however, may also help others do legal and useful things. Different people, of course, have different views on what makes speech "valuable,"[74] and the Supreme Court has been notoriously reluctant to settle on any theory—whether a primarily deontologically libertarian theory such as self-expression or self-definition, or a more consequentialist one such as self-government or search for truth—as being the sole foundation of First Amendment law.[75] But the Court has pretty consistently treated as

71. For instance, if people aren't allowed to post the detailed code for viruses, then the "script kiddies"—relatively unskilled exploiters of viruses, *see* Thompson, *supra* note 17— might find it much harder to launch malicious attacks; and this may remain so even if the virus experts remain free to post English-language descriptions of the algorithms, since many script kiddies may not have the knowledge necessary to translate the algorithm into the detailed code.

72. *Cf.* Invention Secrecy Act, 35 U.S.C. §§ 181, 186 (2000) (letting government officials order that patent applications be kept secret if they are "in the opinion of the head of the interested Government agency, . . . detrimental to the national security," and prohibiting people from disclosing the details of such inventions); Roger Funk, Comment, *National Security Controls on the Dissemination of Privately Generated Scientific Information*, 30 UCLA L. REV. 405, 435-54 (1982) (analyzing the constitutionality of the Act); Lee Ann Gilbert, *Patent Secrecy Orders: The Unconstitutionality of Interference in Civilian Cryptography Under Present Procedures*, 22 SANTA CLARA L. REV. 325, 358-64 (1982) (likewise); Sabing H. Lee, *Protecting the Private Inventor Under the Peacetime Provisions of the Invention Secrecy Act*, 12 BERKELEY TECH. L.J. 345, 379-99 (1997) (likewise); Allen M. Shinn, Jr., Note, *The First Amendment and the Export Laws: Free Speech on Scientific and Technical Matters*, 58 GEO. WASH. L. REV. 368 (1990) (likewise).

73. *Cf.* Peter P. Swire, *A Model for When Disclosure Helps Security: What Is Different About Computer and Network Security?*, 3 J. TELECOMM. & HIGH TECH. L. 163, 178-79, 190-91 (2004) (distinguishing "low uniqueness" information, which is likely to leak out despite secrecy strategies, from "high uniqueness" information, for which secrecy may be especially valuable).

74. *See, e.g.*, Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 NW. U. L. REV. 1291, 1369 (2004) (citing sources).

75. *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1617-19 (1986); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a*

"valuable" a wide range of commentary, whether it covers facts or ideas, whether it's argument, education, or entertainment, and whether it's politics, religion, science, or art.[76]

There will doubtless be much controversy about when crime-facilitating speech is so harmful that the harm justifies restricting it despite its value. But there'll probably be fairly broad agreement that, as the following Parts suggest, much crime-facilitating speech indeed has at least some First Amendment value.[77]

1. *Helping people engage in lawful behavior generally*

Much crime-facilitating speech can educate readers, or give them practical information that they can use lawfully. Some of this information is applied science. Books about explosives can teach students principles of chemistry, and can help engineers use explosives for laudable purposes.[78] Books that explain how to investigate arson, homicide, or poisoning can help detectives and would-be detectives, though they can also help criminals learn how to evade detection.[79]

Discussions of computer security problems, or of encryption or decryption algorithms, can educate computer programmers who are working in the field or who are studying the subjects (whether in a formal academic program or on their own). Such discussions can also help programmers create new algorithms and security systems. Scientific research is generally thought to advance more quickly when scientists and engineers are free to broadly discuss their work.[80]

Nonscientific information can be practically useful, too. Descriptions of common scams can help put people on their guard.[81] Descriptions of flaws in security systems can help people avoid

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General Theory of the First Amendment, 78 NW. U. L. REV. 1212, 1217-23 (1983).

76. *See, e.g.*, Winters v. New York, 333 U.S. 507, 510 (1948) (entertainment constitutionally protected); cases cited *infra* note 217 (scientific speech constitutionally protected).

77. These Parts aren't meant to be mutually exclusive; I identify the different kinds of value only to better show that crime-facilitating speech can be valuable in different ways.

78. Some books discuss how explosives (or drugs) are made. Keay Davidson, *Bombs Easy—But Risky—to Make; Ingredients Are Common, Recipes Available*, SAN FRANCISCO EXAMINER, Apr. 20, 1995, at A-12 (discussing bombmakers' using chemistry textbooks); David Unze, *Suspected Meth Lab Found in Search near Paynesville*, ST. CLOUD TIMES (Minn.), Dec. 6, 2000, at 2B (same as to drugmakers). Others discuss how explosives can be used to effectively produce the desired destruction with minimal risk to the user. *See, e.g.*, NAT'L ASS'N OF AUSTRALIAN STATE ROAD AUTHORITIES, EXPLOSIVES IN ROADWORKS—USERS' GUIDE (1982); U.S. DEP'T OF THE INTERIOR, EXPLOSIVES AND BLASTING PROCEDURES MANUAL (1986).

79. I classify these works as applied science because they are essentially applied chemistry, medicine, or forensic science more broadly, which can be used by professionals whose job it is to apply science this way. But even if they aren't treated as science, they would still be valuable to law-abiding users, as well as to criminal users.

80. *See, e.g.*, NAT'L ACADEMY OF SCIENCES, BALANCING THE NATIONAL INTEREST 127 (1987) (noting that mandated secrecy impairs "communication of research through professional society meetings and publications," which is "crucial to the rapid advancement of commercial and military technology in the United States and thus to national security"); Stephen Budiansky, *Retrofitting the Bomb Machine*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 66 (noting that even in nuclear research, "the tradition of secrecy . . . gets in the way of doing basic science"); Edward Teller, *Secrecy: The Road to Nowhere*, TECH. REV., Oct. 1981, at 12.

81. *See* FRANK W. ABAGNALE, THE ART OF THE STEAL (2001) (describing some frauds in considerable detail, for instance at pp. 40-41 and 108-13); *id.* at title page (giving the book's subtitle as "How to Protect

these flaws.[82] Tips on how to minimize the risk of being audited may help even law-abiding taxpayers avoid the time and expense of being audited, and not just help cheaters avoid being caught cheating. Some explanations of how some police departments catch criminals can help corporate security experts, private detectives, or other police departments investigate crimes, though the explanations can also alert criminals about what mistakes to avoid.[83]

Instructions on decrypting videos may help people engage in fair uses as well as unlawful ones; some of these fair uses may help the users engage in speech (such as parody and commentary) of their own.[84] Knowing who is a boycott violator, a strikebreaker, or an abortion provider can help people make choices about whom to associate with—choices that may be morally important to them. Knowing who is a sex offender can help people take extra precautions for themselves and for their children.[85]

Likewise, speech that teaches drug users how to use certain illegal drugs more safely[86] has clear medical value—it may prevent death and illness among many people who would have used drugs in any event—but it also facilitates crime. Just as speech that teaches people how to commit crimes with less risk of legal punishment is crime-facilitating, so is speech that teaches people how to commit crimes with less risk of injury.[87] Such "harm reduction" speech might embolden some people to engage in the illegal drug use; and some proposed crime-facilitation statutes would outlaw such speech (whether deliberately or inadvertently), because the speech

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Yourself and Your Business from Fraud—America's #1 Crime").

82. *See, e.g.*, Matt Blaze, *Cryptology and Physical Security: Rights Amplification in Master-Keyed Mechanical Locks*, IEEE SECURITY & PRIVACY, Mar.-Apr. 2003, at 24 (describing how someone can easily produce a master key for many lock designs so long as one has a nonmaster key to one of the many locks that the master key opens); *id.* (arguing that this should lead people to adopt more threat-resistant designs); Matt Blaze, Keep It Secret, Stupid!, *at* http://www.crypto.com/papers/kiss.html (Jan. 26, 2003) (defending the decision to publish this information); Matt Blaze, Is It Harmful To Discuss Security Vulnerabilities?, *at* http://www.crypto.com/hobbs.html (last revised Jan. 2005) (likewise); *see also* the discussion, *infra* note 110, of Eugene Volokh, *Burn Before Reading*, *in* THOUGHTS AND DISCOURSES ON THE HP 3000 (1984).

83. Thanks to my colleague Mark Greenberg for this point.

84. *See, e.g.*, Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 539-40 (1999).

85. *But see* N.J. Div. of Criminal Justice, Megan's Law Rules of Conduct, *at* http://www.state.nj.us/lps/dcj/megan/citizen.htm (last visited Jan. 14, 2005) (providing that people who receive flyers containing information on released sex offenders may not communicate the information to others, on pain of possible "court action or prosecution"). The Rules of Conduct purport to bind all people who get the information, as well as members of their households, not just those who promise to abide by the Rules as a condition of getting the information. *See* ATTORNEY GENERAL GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION, AND COMMUNITY NOTIFICATION LAWS, 24, 30, 43 (2000), *available at* http://www.state.nj.us/lps/dcj/megan1.pdf; *id.* at 23 (stating that the Rules should be enforced using court orders); A.A. v. New Jersey, 176 F. Supp. 2d 274, 281 (D.N.J. 2001) ("All those receiving notice are bound by the applicable rules of 'Rules of Conduct.'"). If the Rules were applied only to those who promised to keep the information confidential, the First Amendment issue might be different, *see supra* note 55.

86. Ecstasy use, for instance, can be made less risky when certain precautions are taken. E-mail from Mark Kleiman, Professor of Policy Studies, UCLA School of Public Policy and Social Research, to Eugene Volokh (Aug. 9, 2004) (on file with author).

87. *See* definition of "crime-facilitating" at text accompanying note 46 *supra*. Many people view drug use as a less serious crime than many other kinds of crime; but whether or not that's right, speech that makes drug use safer does indeed facilitate the commission of that particular crime.

conveys "information pertaining to . . . use of a controlled substance, with the intent that . . . [the] information be used for, or in furtherance of" drug use.[88]

2. *Helping people evaluate and participate in public debates*

a. *Generally*

Some speech that helps criminal listeners commit crimes may at the same time be relevant to law-abiding listeners' political decisions. Publishing information about secret wiretaps or subpoenas, for instance, may help inform people about supposed government abuses of the wiretap or subpoena power. And such concrete and timely examples of alleged abuse may be necessary to persuade the public or opinion leaders to press for changes in government policies: A general complaint that some unspecified abuse is happening somewhere will naturally leave most listeners skeptical.[89]

Likewise, publishing the names of crime witnesses can help the public evaluate whether the witnesses' stories are credible or not.[90] Publishing the names (or even addresses) of people who aren't complying with a boycott may facilitate legal and constitutionally protected shunning, shaming, and persuasion of the noncompliers.[91] Publishing the names and addresses of abortion

88. See, for example, S. 1428, 106th Cong. § 9 (1999), which would have barred, among other things, "distribut[ing] by any means information pertaining to, in whole or in part, the manufacture or use of a controlled substance, with the intent that the . . . information be used for, or in furtherance of, an activity that constitutes a Federal crime," and also "distribut[ing]" such information to "any person . . . knowing that such person intends to use the . . . information for, or in furtherance of, an activity that constitutes a Federal crime." *See* Jacob Sullum, *Knowledge Control*, REASON ONLINE, June 14, 2000, *at* http://www.reason.com/sullum/060700.shtml (expressing concern that this bill might jeopardize Web sites that "offer advice for reducing the risks of drug use (say, by sterilizing needles or using vaporizers)").

89. As to the need for timely details, see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976). As to the need for concrete details, the Court has implicitly recognized this in its libel cases, where the Justices have protected concrete factual allegations about government officials (if they are true, or even if they are the product of an honest mistake) and not just general statements of opinion. The recognition has not been explicit, I think, only because the need to give facts that concretely support the general claims is so obvious that few have doubted it. *See also* sources cited *infra* note 309 (noting the importance of specific details).

90. *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989), for instance, reasons that the names of crime victims, who are also witnesses, may be especially important when "questions have arisen whether the victim fabricated an assault . . . ." But often these questions arise only once the victim-witness's name is publicized, and people come forward to report that they know the witness to be unreliable or biased. *Cf.* United States v. Carmichael, 326 F. Supp. 2d 1267, 1297-1301 (M.D. Ala. 2004) (holding that a criminal defendant was entitled to maintain a Web site that sought information about the government informants and agents who were going to testify against him).

Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 291 (1992), argues that holding the media liable for publishing witness names "would not significantly chill the media's vigorous reporting of crimes"; but it's not enough that the media can vigorously report crimes in general—there's also value in the media's reporting specific items, such as witness names, that may generate more information about the witness's credibility.

91. *See* NAACP v. Claiborne Hardware, 458 U.S. 886, 909-10 (1982) (concluding that trying "to persuade others to join the boycott through social pressure and the 'threat' of social ostracism" is constitutionally protected speech).

providers may facilitate legal picketing of their homes.[92] Publishing a description of how H-bombs operate can help explain why the government engages in certain controversial nuclear testing practices, or why it wants to build expensive and potentially dangerous new plants.[93]

None of this means the information is harmless: Publishing secret wiretap information may help criminals conceal their crimes, by informing them that they're under suspicion and that certain phones are no longer safe to use; publishing boycotters', abortion providers', or convention delegates' names and addresses can facilitate violence as well as lawful remonstrance and social ostracism.[94] But the speech would indeed be valuable to political discourse when communicated to some listeners, even if it's harmful in the hands of others.

b. *By informing law-abiding people how crimes are committed*

Some crime-facilitating speech may also affect law-abiding people's political judgments precisely by explaining how crimes are committed.

First, such speech can help support arguments that some laws are futile. For instance, explaining how easy it is for people to grow marijuana inside their homes may help persuade the public that the war on marijuana isn't winnable—or is winnable only through highly intrusive policing—and perhaps should be abandoned.[95] Likewise, some argue that the existence of offshore copyright-infringing sites shows that current copyright law is unenforceable, and should thus be changed or repealed.[96] But the validity of the argument turns on whether such

92. Even if focused residential picketing is banned by a city ordinance, parading through the targets' neighborhood is constitutionally protected. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 775 (1994); Frisby v. Schultz, 487 U.S. 474, 480-81 (1988). I think it's therefore not correct to say that information including a person's address "is intrinsically lacking in expressive content." Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 397, 404 (2003).

93. *See* Howard Morland, *The H-Bomb Secret*, THE PROGRESSIVE, Nov. 1979, at 14-15, 22-23; *see also* JAMES A.F. COMPTON, MILITARY CHEMICAL AND BIOLOGICAL AGENTS: CHEMICAL AND TOXICOLOGICAL PROPERTIES, at i (1987) (arguing that understanding chemical and biological weapons is valuable both to "industrial hygienists, safety professionals, civil and military defense planners," and to people interested in international politics and warfare, in which such weapons may play a role).

94. See, for instance, *Claiborne Hardware*, which involved both social ostracism and some violence. Only the names, and not the addresses, of boycott violators were published, but in a rural county with only 7500 black residents, *see* U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 1972, at 258, it likely wouldn't have been hard for one black resident to find out where another lives. *Cf. Probe into Republican Delegate Data Posting*, *supra* note 19 ("There are several lists of Republican National Convention delegates posted on the Indymedia site . . . . Included are names, home addresses, e-mail addresses and the New York-area hotels where many are staying. 'The delegates should know not only what people think of the platform they will ratify, but that they are not welcome in New York City,' said one posting [on the site] . . . .").

95. *Cf.* Robert Scheer, *Dole Backs the Big Lie in Drug War*, L.A. TIMES, Oct. 22, 1996, at B7 (arguing against the war on drugs in part because "the supply of drugs cannot be effectively controlled because they are too easy to grow and smuggle," and "[e]ven if you stopped drugs from coming into the country, that wouldn't affect the supply of marijuana, which is primarily home-grown and accounts for three-quarters of drug use").

96. *See* Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1427 (2004) ("A common argument against enforcement of intellectual property law online has been that infringers will simply move offshore."); Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 162 (1999) (making such an argument); Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHI. L. REV. 223,

sites indeed exist, have an appealing mix of bootleg content, and are easy to use. A pointer to such a site, which law-abiding people can follow to examine the site for themselves, can thus provide the most powerful evidence for the argument.[97]

Explaining how easy it is to make gunpowder, ammunition, or guns may support arguments that criminals can't be effectively disarmed.[98] Explaining how one can deceive fingerprint recognition mechanisms can be a powerful argument against proposed security systems that rely on those mechanisms.[99] Explaining how easy it is to change the "ballistic fingerprint" left by a

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237 (2003) (making a modest version of such an argument); Matthew V. Pietsch, *International Copyright Infringement and the Internet: An Analysis of the Existing Means of Enforcement*, 24 HASTINGS COMM. & ENT. L.J. 273 (2002) (likewise); Michelle Dello, *P2P Company Not Going Anywhere*, WIRED NEWS, July 17, 2004, http:// www.wired.com/news/digiwood/0,1412,64233,00.html (quoting someone who makes such an argument, and who mentions a particular offshore file sharing company as an example).

97. There is nothing illegal about a curious user's simply looking at such a site, or even listening to some bootleg content just to figure out what's available; even if any copying happens in the process, the user's actions would be fair use, because they'd be noncommercial and wouldn't affect the market for the work. *See* 17 U.S.C. § 107 (2000); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984). The site would thus facilitate both legal use by curious users who are trying to decide whether copyright law is a lost cause, and illegal use by other users who want to get material without paying for it.

98. *See* Bruce Barak Koffler, *Zip Guns and Crude Co[n]versions—Identifying Characteristics and Problems* (pt. 2), 61 J. CRIM. L. CRIMINOLOGY & POL. SCI. 115, 125 (1970) (discussing in detail the design of various homemade guns, mostly for the benefit of forensic investigators, but also concluding that "[i]n a city that has probably the most restrictive pistol laws on the continent, we have an example of how such legislation fails to achieve its purpose" because of how easily people can make their own guns, and that "[w]hen we ask for stricter gun ownership legislation in [the] future, this is something to bear in mind"); David T. Hardy & John Stompoly, *Of Arms and the Law*, 51 CHI.-KENT L. REV. 62, 99-100 (1974) (arguing that the ease of making guns at home will make gun controls futile, briefly mentioning some ways one can make homemade guns, and citing articles, including Koffler, *supra*, that describe more detailed designs); *cf.* J. DAVID TRUBY & JOHN MINNERY, IMPROVISED MODIFIED FIREARMS: DEADLY HOMEMADE WEAPONS, at outside back cover, 7, 10, 13 (1992) (arguing that "[t]he message is clear: if you take away a free people's firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place" and that "[t]he object lesson" is that "[g]un prohibition doesn't work," but not in fact providing specific details about how guns can be made at home); BILL HOLMES, HOME WORKSHOP GUNS FOR DEFENSE AND RESISTANCE: THE HANDGUN (1979) (providing those details). Many people might not be persuaded by the combination of these last two books—for instance, some might believe that many fewer criminals would get guns if they had to rely on homemade or black market weapons. But the two books put together still make an important political argument, one that can't be made as effectively without the descriptions of how easy home gunmaking supposedly is.

99. *See, e.g.*, Ton van der Putte & Jeroen Keuning, *Biometrical Fingerprint Recognition: Don't Get Your Fingers Burned*, *in* IFIP TC8/WG8.8 FOURTH WORKING CONFERENCE ON SMART CARD RESEARCH AND ADVANCED APPLICATIONS 289, 291 (Josep Domingo-Ferrer et al. eds., 2000), http://www.keuning.com/biometry/Biometrical_
Fingerprint_Recognition.pdf ("This article should be read as a warning to those thinking of using new methods of identification without first examining the technical opportunities for compromising the identification mechanism and the associated legal consequences."); *id.* at 294 ("The biggest problem when using biometrical identification on the basis of fingerprints is the fact that, to the knowledge of the authors, none of the fingerprint scanners that are currently available can distinguish between a finger and a well-created dummy. Note that this is contrary to what some of the producers of these scanners claim in their documentation. We will prove the statement by accurately describing two methods to create dummies that will be accepted by the scanners as true fingerprints."); *id.* at 294-99 (providing such detailed methods, which they claim can be followed in half an hour at the cost of twenty dollars).

In the past, such an article in the proceedings of a technical conference might have been unlikely to reach the eyes of criminals—though even then, the sophisticated criminals might have read even technical literature. In

gun may rebut arguments in favor of requiring that all guns and their "fingerprints" be registered.[100] Pointing to specific ways that hijackers can evade airport metal-detecting equipment can support an argument that such equipment does little good, that the government is wasting money and unjustifiably intruding on privacy, and that it's better to invest money and effort in arming pilots, encouraging passengers to fight back, and so on.[101]

Second, some descriptions of how crimes can be committed may help show the public that they or others need to take certain steps to prevent the crime. Publishing detailed information about a computer program's security vulnerabilities may help security experts figure out how to fix the vulnerabilities, persuade apathetic users that there really is a serious problem, persuade the media and the public that some software manufacturer isn't doing its job, and support calls for legislation requiring manufacturers to do better.[102] Publicly explaining how Kryptonite

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the Internet age, I stumbled across the article by accident through a pointer at *GeekPress*, a Weblog that posts pointers to interesting or amusing technical information. *See* Posting of Paul Hsieh to GeekPress (Nov. 17, 2003, 2:43 a.m.), *at* http://geekpress.com/2003_11_17_daily.html#106900367854004686.

100. See, for example, Bill Twist, *Erasing Ballistic Fingerprints*, PLANET TIMES.COM, June 28, 2000, *at* http://216.117.156.23/features/barrel_twist/2000/june/erase.shtml, which describes how this can be done, and concludes with:

> So why am I telling you all of this? Well, I have heard [of a proposed mandatory ballistic signature recording system] called "ballistic fingerprinting" and "gun DNA." It is neither. . . . It is not easy to change your fingerprints, and it is impossible to change your DNA (so far). Changing the marks a firearm makes on bullets and cases is a trivial exercise. . . . [T]he calls for "ballistic fingerprinting" are a big lie, to appease those who have an ingrained fear of firearms.

The effectiveness of such registries is still very much an open question, but it's clear that Twist's concerns are legitimate, even if they don't ultimately prove dispositive. *See* FREDERIC A. TULLENERS, TECHNICAL EVALUATION: FEASIBILITY OF A BALLISTICS IMAGING DATABASE FOR ALL NEW HANDGUN SALES 1-5, *at* http://caag.state.ca.us/newsalerts/2003/03-013_report.pdf (Oct. 5, 2001) (report by a laboratory director in the Bureau of Forensic Services of the California Department of Justice) (noting that the supposed "fingerprint" can indeed be changed with "less than 5 minutes of labor," though not explaining in detail how this can be done); JAN DE KINDER, REVIEW—AB1717 REPORT—TECHNICAL EVALUATION: FEASIBILITY OF A BALLISTICS IMAGING DATABASE FOR ALL NEW HANDGUN SALES 17, *at* http://www.nssf.org/PDF/DeKinder.pdf (last visited Feb. 9, 2005) (review by the head of the Ballistics Section of the Belgian Justice Department's National Institute for Forensic Science) (agreeing that alteration of firearms creates "a real problem" for the effectiveness of the registries); Don Thompson, *Gun Registry Called Impractical*, OAKLAND TRIB., Jan. 27, 2003 (noting that the De Kinder report had been commissioned by the California attorney general).

101. See, for example, Bruce Schneier, *More Airline Insecurities*, CRYPTO-GRAM NEWSLETTER, Aug. 15, 2003, *at* http://www.schneier.com/crypto-gram-0308.html, which describes how one can supposedly smuggle plastic explosives onto a plane, or build a knife out of steel epoxy glue on the plane itself, and concludes, "The point here is to realize that security screening will never be 100% effective. There will always be ways to sneak guns, knives, and bombs through security checkpoints. Screening is an effective component of a security system, but it should never be the sole countermeasure in the system."

102. See, for example, Laura Blumenfeld, *Dissertation Could Be Security Threat*, WASH. POST, July 8, 2003, at A1, which describes a geography Ph.D. dissertation that contains a map of communication networks. The map, if published, might be useful to terrorists but also to citizens concerned about whether the government and industry are doing enough to secure critical infrastructure:

> Some argue that the critical targets should be publicized, because it would force the government and industry to protect them. "It's a tricky balance," said Michael Vatis, founder and first director of the National Infrastructure Protection Center. Vatis noted the dangerous time gap between exposing the weaknesses and patching them: "But I don't think security through obscurity is a winning strategy."

See also BRUCE SCHNEIER, APPLIED CRYPTOGRAPHY 7 (1996) ("If the strength of your new cryptosystem relies on the fact that the attacker does not know the algorithm's inner workings, you're sunk. If you believe that keeping the algorithm's insides secret improves the security of your cryptosystem more than letting the

bicycle locks can be easily defeated with a Bic pen can pressure the company to replace such locks with more secure models.[103] Publishing detailed information about security problems—for instance, gaps in airport security, in security of government computer systems, or in security against bioterror—can show that the government isn't doing enough to protect us.[104] Likewise, publishing information about how easy it is to build a nuclear bomb may alert people to the need to rely on diplomacy and international cooperation, rather than secrecy, to prevent nuclear proliferation.[105]

Third, descriptions of how crimes are committed can help security experts design new security technologies. Knowledge in other fields often develops through specialists—whether academics, employees of businesses, or amateurs—publishing their findings, openly discussing them, and correcting and building on each other's work: That's the whole point of professional journals, working papers, and many conferences and online discussion groups. The same is true of security studies, whether that field is seen as a branch of computer science, cryptography, criminology, or something else.[106] And knowledge of the flaws in existing security schemes is needed to design better ones.

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academic community analyze it, you're wrong.") (speaking specifically about the security of cryptographic algorithms); Preston & Lofton, *supra* note 49, at 81 ("At the same time that public disclosure of vulnerabilities unavoidably facilitates the exploitation of computer security vulnerabilities, the correction and elimination of those same vulnerabilities requires their discovery and disclosure. . . . Computer owners and operators who are aware of a potential vulnerability can take steps to fix it, while they are powerless to fix an unknown vulnerability."). *But see* Scott Culp, It's Time to End Information Anarchy, *at* http://www1.microsoft.at/technet/news_showpage.asp?newsid=4121&secid=1502 (Oct. 2001) (arguing that publishing detailed information on vulnerabilities does more harm than good).

Computer security experts who find a vulnerability will often report it just to the software vendor, and this is often the more responsible solution. But if the vendor pooh-poohs the problem, then the security expert may need to describe the problem as part of his public argument that the vendor isn't doing a good enough job.

103. *See* David Kirpatrick et al., *Why There's No Escaping the Blog*, FORTUNE, Jan. 10, 2005, at 44 (discussing how publicizing the details eventually led Kryptonite to switch from its initial reaction—"issu[ing] a bland statement saying the locks remained a 'deterrent to theft' and promising that a new line would be 'tougher'"—to "announc[ing] it would exchange any affected lock free," which it expected would involve sending out over 100,000 new locks).

104. *See, e.g.*, Bob Newman, *Airport Security for Beginners*, DENVER POST, May 16, 2002, at A21 ("A security screener, who when asked why he wanted to see the backside of my belt buckle, said he wasn't really sure (I told him he was supposed to be checking for a 'push' dagger built into and disguised by the buckle). Not a single security screener . . . had ever heard of a carbon-fiber or titanium-blade (nonferrous) knife, which can pass through standard magnetometers used at most airports. . . . Yet the government insists that new security procedures have made airports much more secure, despite the above incidents . . . ."); Andy Bowers, *A Dangerous Loophole in Airport Security: If Slate Could Discover It, the Terrorists Will, Too*, SLATE.COM, Feb. 7, 2005, *at* http://www.slate.com/id/2113157/.

105. *See* United States v. Progressive, Inc., 467 F. Supp. 990, 994 (W.D. Wis. 1979) (citing defendants' arguments to this effect); Morland, *supra* note 93, at 14, 17 ("People assume that even if nothing else is secret, surely hydrogen bomb designs must be protected from unauthorized eyes. The puncturing of that notion is the purpose of this report. . . . [T]here is little reason to think that any other nation that wanted to build [hydrogen bombs] would have trouble finding out how to do it."); *id.* at 23 ("No government intent upon joining the nuclear terror club need long be at a loss to know how to proceed."); *see also* ALEXANDER DE VOLPI ET AL., BORN SECRET (1981) (noting other ways in which the information revealed in the *Progressive* article was relevant to important policy debates).

106. *See, e.g.*, Declan McCullagh, *Crypto Researchers Abuzz over Flaws*, CNET NEWS.COM, Aug. 17, 2004, *at* http://news.com.com/Crypto+researchers+abuzz+over+flaws/

In a very few fields, such as nuclear weapons research, this scientific exchange has traditionally been done through classified communications, available to only a few government-checked and often government-employed professionals.[107] But this is definitely not the norm in American science, and it seems likely that broadening such zones of secrecy would interfere with scientific progress.[108] Perhaps in some fields secrecy is nonetheless necessary, because the risks of open discussion are too great. Nonetheless, even if we ultimately conclude that the speech is too harmful to be allowed, we must concede that such open discussion does have scientific value, and, directly or indirectly, political value.

Fourth, while detailed criticisms of possible problems in a security system (whether computer security or physical security) can help alert people to the need to fix those problems, the absence of such criticisms—in a legal environment where detailed criticisms are allowed—can make people more confident that the system is indeed secure. If we know that hundreds of security experts from many institutions have been able to discuss potential problems in some security system, that journalists are free to follow and report on these debates, and that the experts and the press seem confident that no serious problems have been found, then we can be relatively confident that the system is sound.

But this confidence is justified only if we know that people are indeed free to discuss these matters, both with other researchers and with the public, and both through the institutional media and directly. Restricting speech about security holes thus deprives the public of important information: If the security holes exist, then the public can't learn about them; if they don't exist, then the public can't be confident that the silence about the holes flows from their absence, rather than from the speech restriction.[109]

And in all these situations, as elsewhere, concrete, specific details are more persuasive than generalities: People are more likely to listen if you say "Microsoft is doing a bad job—I'll show this by explaining how easy it is for someone to send a virus through Microsoft Outlook" than if you say "Microsoft is doing a bad job—I've identified an easy way for someone to send a virus through Outlook, but I can't tell you what it is."[110]

2100-1002_3-5313655.html (discussing a conference presentation by cryptographers who claimed to have uncovered flaws in an encryption system); Ed Felten, *Report from Crypto 2004*, FREEDOM TO TINKER, Aug. 18, 2004, *at* http://www.freedom-to-tinker.com/archives/000664.html (discussing this, with comments from readers that discuss it in more detail); Ed Felten, *SHA-1 Break Rumor Update*, FREEDOM TO TINKER, Aug. 17, 2004, *at* http://www.freedom-to-tinker.com/archives/000663.html (likewise). Ed Felten is a Princeton computer science professor and cryptography expert; his Weblog, *Freedom to Tinker*, is devoted to information technology issues.

107. The government also tried to closely regulate cryptographic research, through procedures such as export controls and invention secrecy orders, but ultimately gave up. *See* HERBERT N. FOERSTEL, SECRET SCIENCE 97-139 (1993); Gilbert, *supra* note 72.

108. *See* sources cited *supra* note 80.

109. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."); *cf.* BRUCE SCHNEIER, SECRETS AND LIES 344-45 (2000) (arguing that publishing source code, and letting it be vetted by many experts in the programming community, is the best way to make the code more secure, despite the possibility that publishing the source code can also help criminals find vulnerabilities).

110. *See* Bruce Schneier, *Full Disclosure*, CRYPTO-GRAM NEWSLETTER, Nov. 15, 2001, *at*

Even readers who can't themselves confirm that the details are accurate will find detailed accounts more trustworthy because they know that other, more expert readers could confirm or rebut them. If a computer security expert publishes an article that gives a detailed explanation of a security problem, other security experts could check the explanation. A journalist reporting on the allegations could call an expert whom he trusts and get the expert to confirm the charges.

The journalists could also monitor a prominent online expert discussion group to see whether the experts agree or disagree. And if there is broad agreement, a journalist can report on this, and readers can feel confident that the claim has been well vetted. That is much less likely to happen if the original discoverer of the error was only allowed to write, "There's a serious bug in this program," and was legally barred from releasing supporting details.[111]

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http://www.schneier.com/crypto-gram-0111.html ("[Revealing] detailed information is required. If a researcher just publishes vague statements about the vulnerability, then the vendor can claim that it's not real. If the researcher publishes scientific details without example code, then the vendor can claim that it's just theoretical."). Compare Eugene Volokh, *Burn Before Reading*, *supra* note 82, which shows how users of HP 3000 computers who have been given a certain access privilege (so-called "PM") can in just three commands use PM to get a higher level of privilege, called "SM" (roughly corresponding to "super-user" access in some other systems). I did this to persuade readers that they should limit PM privilege only to the most trusted users, and carefully protect those accounts that were given the privilege, something that many HP 3000 system managers didn't properly do. I've never been positive that I was right to give the specific details; but I suspect I was, because many system managers wouldn't have believed that they needed to do anything unless they could see for themselves how easily the PM privilege could be exploited.

Disclosure of specific details of a computer security problem can also motivate computer companies to fix it, simply because they know that if they don't fix the problem immediately, hackers will exploit it. *See* Schneier, *Full Disclosure*, *supra* (arguing that full disclosure has thereby helped transform "the computer industry . . . from a group of companies that ignores security and belittles vulnerabilities into one that fixes vulnerabilities as quickly as possible"); *see generally* Preston & Lofton, *supra* note 49, at 88 (describing the debate among computer security professionals about whether security vulnerabilities should be fully disclosed).

111. *See* Schneier, *Full Disclosure*, *supra* note 110 ("[Without full disclosure,] users can't make intelligent decisions on security. . . . A few weeks ago, a release of the Linux kernel came without the customary detailed information about the OS's security. The developers cited fear of the DMCA as a reason why those details were withheld. Imagine you're evaluating operating systems: Do you feel more or less confident about the security [of] the Linux kernel version 2.2, now that you have no details?").

This shows the weakness of the court's view in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), that, though the hydrogen bomb information was published to "alert the people . . . to the false illusion of security created by the government's futile efforts at secrecy," there was "no plausible reason why the public needs to know the technical details about hydrogen bomb construction to carry on an informed debate on this issue." *Id.* at 994. When the government is claiming that its nonproliferation efforts are working, because the design of a hydrogen bomb is a successfully guarded secret, a mere "No, it's not—I discovered without a security clearance how such bombs are built" won't be persuasive: it will just be the author's word against the government's. Only providing the details, so that knowledgeable scientists can say, "Yes, the author is right, he has discovered the secret," can really support the author's claim. Perhaps the details of how to build a bomb should nonetheless have been suppressed, because they could help cause very grave harm. *See infra* Part III.D.1. But one ought not deny that the details are indeed needed to make the political argument work.

James R. Ferguson argues the contrary, saying that "the same point could have been made with equal force by an affidavit from the Secretary of Energy which confirmed that the information in the magazine's possession was indeed an accurate design of a thermonuclear weapon." James R. Ferguson, *Scientific and Technological Expression: A Problem in First Amendment Theory*, 16 HARV. C.R.-C.L. L. REV. 519, 545 n.124 (1981). I doubt, though, that the government would often be willing to provide such an affidavit, in part because doing so might itself be seen as revealing certain secrets.

3. *Allowing people to complain about perceived government misconduct*

The ability to communicate details about government action, even when these details may facilitate crime, may also be a check on potential government misconduct. When the government does something that you think is illegal or improper—uses your property for purposes you think are wrong, forces you to turn over documents, orders you to reveal private information about others, arrests someone based on the complaint of a witness whom you know to be unreliable, and so on—one traditional remedy is complaining to the media. The existence of this remedy lets the public hear allegations that the government is misbehaving, and deters government conduct that is either illegal or is technically legal but likely to be viewed by many people as excessive.

Some laws aimed at preventing crime-facilitating speech eliminate or substantially weaken this protection against government overreaching. Consider laws barring people (including librarians or bookstore owners) from revealing that some of their records have been subpoenaed, or barring Internet service providers or other companies from revealing that their customers are being eavesdropped on.[112] Those private entities that are ordered to turn over the records or help set up the eavesdropping will no longer be legally free to complain, except perhaps much later, when the story is no longer timely and interesting to the public.[113]

Likewise, penalties for publishing the names of crime witnesses[114]—aimed at preventing criminals from learning the witnesses' identities and then intimidating the witnesses—may keep third parties who know a witness from explaining to the public why they think the witness is unreliable and why the government is wrong to arrest people based on the witness's word. And laws restricting the publication of detailed information about security problems may keep people from explaining exactly why they think the government or industry isn't taking sufficient steps to deal with some such problem.

4. *Entertaining and satisfying curiosity*

Speech that describes how crimes are performed may also entertain readers.[115] A detective story might depict a murder that's committed in a particularly ingenious, effective, and hard-to-

112. *See supra* notes 29-30.

113. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 560-61 (1976) (stressing that even temporary restrictions can substantially interfere with valuable speech); *cf.* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306, 1359-60 (2004) (criticizing secret subpoenas on these grounds).

114. See *supra* note 18 for examples.

115. *See, e.g.*, EDWARD ABBEY, THE MONKEY WRENCH GANG 81, 169-79 (1975) (describing in some detail the sabotaging of heavy machinery, and the setting of explosive charges to derail a train); JAMES M. CAIN, DOUBLE INDEMNITY 25-29, 37, 47-51, 61, 100-03 (1989) (describing in some detail an elaborate scheme to commit a hard-to-detect murder); FREDERICK FORSYTH, THE DAY OF THE JACKAL 61-63 (1971) (describing a way to get a false passport); PATRICIA HIGHSMITH, RIPLEY'S GAME 58, 68, 78-79, 120-27 (1974) (describing schemes for committing murder); E.W. HORNUNG, RAFFLES 52-56, 69-74, 115-19, 131-38, 151-52, 165-67, 193-97, 204-07, 255-56, 288-90, 327-28 (1984) (describing various nonobvious and seemingly useful burglary tricks); ELMORE LEONARD, GET SHORTY 41-44, 158 (1990) (describing schemes for insurance fraud and for getting into people's hotel rooms); *see also Do You Remember: June 1975—MP Vanishes*, BIRMINGHAM EVENING MAIL,

detect way. Nearly all the readers will just enjoy the book's ingeniousness, but a few may realize that it offers the solution to their marital troubles. (The precise details of the crime may be included either because they are themselves interesting, or for verisimilitude—many fiction writers try to make all the details accurate even if only a tiny fraction of readers would notice any errors.)

This may be true even for some of the crime-facilitating speech that people find the most menacing, such as the contract murder manual involved in *Rice v. Paladin Enterprises*. There were apparently thirteen thousand copies of the book sold,[116] and I suspect that only a tiny fraction of them were really used by contract killers.[117] Who were the remaining readers? Many were likely armchair warriors who found it entertaining to imagine themselves as daring mercenaries who are beyond the standards of normal morality.[118]

Part of the fun of reading some novels is imagining yourself in the world that the book describes. People can get similar entertainment from factual works, including ones that are framed as "how-to" books, such as the travel guide *Lonely Planet: Antarctica*,[119] magazines

Apr. 19, 2001, at 10 ("Inspired by Frederick Forsyth's best-seller The Day Of The Jackal, [politician John Stonehouse] obtained the birth certificate of a dead man named Joseph Markham, received a passport in that name and opened bank accounts. Then he faked his own drowning in Miami and fled to Australia."). This technique is apparently known in England as the "Day of the Jackal fraud." Philip Webster, *Tax-Dodgers Run Up Bill Totalling Billions*, TIMES (London), Mar. 9, 2000; *see also* Marlise Simon, *Blaming TV for Son's Death, Frenchwoman Sues*, N.Y. TIMES, Aug. 30, 1993, at A5 ("Marine Laine said her son, Romain, and his friend, Cedric Nouyrigat, also 17, mixed crystallized sugar and weed-killer, stuffed it into the handlebar of a bicycle and ignited it to test a technique used by MacGyver, a television hero who is part adventurer, part scientific wizard.").

116. Rice v. Paladin Enters., Inc., 128 F.3d 233, 241 n.2 (4th Cir. 1997).

117. In 1983, when *Hit Man* was published, there were only about 20,000 homicides in the U.S., *see* Nat'l Ctr. for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1981-1998, *at* http://webappa.cdc.gov/sasweb/ncipc/mortrate9.html (last modified Feb. 24, 2005). It seems likely that very few of them are contract killings, and presumably very few of those are contract killings by people trained using a particular book. *See* Jacob Sullum, *Murderous Prose*, REASON ONLINE, May 27, 1998, *at* http://reason.com/sullum/ 052798.shtml ("[I]t's doubtful that people like James Perry were the main audience for Hit Man. If they were, somehow the thousands of murders they committed have gone unnoticed."); Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 848 (D. Md. 1996) (asserting that "out of the 13,000 copies of Hit Man that have been sold nationally, one person actually used the information over the ten years that the book has been in circulation," though presumably the court meant that only one person had been discovered to have used the book to commit a crime), *rev'd*, 128 F.3d 233; *see also Publisher of Hit-Man Guidebook Settles Suit*, SEATTLE TIMES, Feb. 28, 2002, at B5 (mentioning another lawsuit flowing from an attempted murder supposedly facilitated by *Hit Man*).

118. *Rice*, 128 F.3d at 241 n.2 (listing "persons who enjoy reading accounts of crimes and the means of committing them for purposes of entertainment" and "persons who fantasize about committing crimes but do not thereafter commit them" as the respondent's asserted target markets for the *Hit Man* book); *cf.* Albert Mobilio, *The Criminal Within: A Genre of How-to Manuals Indulges Our Darkest Fantasies*, HARPER'S MAG., Mar. 1999, at 66, 69 (noting that "[f]or an audience weaned on action movies, the . . . appeal" of books on building weapons, disposing of dead bodies, and committing contract murder "is obvious," and including "vicarious thrills" as part of the appeal).

119. *Cf., e.g.*, Juliet Coombe, *Planet Goes to China*, HERALD SUN (Melbourne, Austl.), Jan. 30, 2004, at T11 (interview with Tony Wheeler, cofounder of the company that produces the *Lonely Planet* guidebooks) ("Q The Lonely Planet guide to Antarctica sells about 45,000 copies a year. Why is it so popular, despite relatively few people going there? [A] Science and wildlife expeditions are getting more exposure and lots of people are armchair travellers. . . . For most of us, a trip to Antarctica is a dream."). Naturally, some of the readers are

about romantic hobbies,[120] the *Worst Case Scenario* series,[121] and even some cookbooks[122]—many readers of such books may want to imagine themselves as Antarctic travelers, survivors, or cooks, with no intention of acting on the fantasies. And people with grislier imaginations can be likewise entertained by books about how to pick locks, change your identity, or even kill people.

Other readers of crime-facilitating how-to manuals are probably just curious. Many nonfiction books are overwhelmingly read by people who have no practical need to know about a subject, whether it's how planets were formed, who Jack the Ripper really was, or how Babe Ruth (or, for that matter, serial killer Ted Bundy) lived his life. Some people are probably likewise curious about how hit men try to get away with murder, or how bombs are made. And satisfying one's curiosity this way may sometimes yield benefits later on—the information you learn might prove unexpectedly useful, in ways that are hard to predict.[123]

This of course doesn't resolve how highly we should value entertainment and satisfaction of curiosity, especially when we compare them against the danger that the book will facilitate murder; Part III.A.3 discusses this. For now, my point is simply that some crime-facilitating works do have some value as entertainment, whether because they're framed as detective stories or because they satisfy readers' curiosity or desire for vicarious thrills. It is therefore not correct to say that such works are useful only to facilitate crime,[124] or that the author's or publisher's purpose therefore must have been to facilitate crime.[125]

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armchair travelers in the sense of people who are curious and want to satisfy their curiosity by reading rather than by traveling; but I suspect that some of the armchair travelers really do read the books to fantasize about actually being there.

120. *See, e.g.*, MICHAEL RUHLMAN, WOODEN BOATS 23 (2002) ("[A]n obscure magazine idea, a magazine devoted to wooden boats, became a resounding success precisely because readers didn't have to own wood to love it, admire it, or even dream about it. . . . [I]ndustry experts guess that fewer than 10,000 wooden boats exist in America, not including dinghies, canoes, kayaks, homemade plywood skiffs, and the like . . . . Yet this minuscule industry . . . generates a subscription base for *WoodenBoat* of more than 100,000 . . . .").

121. Jayne Clark, *'Worst-Case' Writers' Newest Scenario: Runaway Train to Fame*, USA TODAY, Apr. 27, 2001, at 7D ("In this sequel to their best-selling *The Worst-Case Scenario Survival Handbook*, Joshua Piven and David Borgenicht have once again produced a very funny guide with a deadpan tone aimed at armchair Walter Mittys, as well as wannabe Indiana Joneses.").

122. *See, e.g.*, Maurice Sullivan, *Last Best Books of 1997*, WINETRADER, http://www.wines.com/winetrader/r6/r6bk.html (1997) ("I have finally figured out that all these beautiful and expensive color cookbooks aren't for people who really want to cook, but rather are for folks on diets that want to fantasize about food!"). This is probably something of an overstatement, but I suspect that some of the cookbooks' readers do indeed use the books this way, even if others do actually use them to cook.

123. I'm speaking here specifically of the value provided by the crime-facilitating information in the book. The book as a whole can of course do more than entertain the reader and satisfy curiosity: For instance, a detective novel or a nonfiction biography of a criminal can enrich readers' understanding of human nature, affect their moral judgments about criminality, and so on. But the crime-facilitating elements, such as the exact details about how some crime was committed or could be committed, are less likely to have such a generally enriching effect. Sometimes they may indeed be relevant to political debates, a matter I discussed in Parts I.B.2-3; but often they will simply entertain the reader and satisfy his curiosity.

124. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233, 248 (4th Cir. 1997) ("[T]he audience both targeted and actually reached is, in actuality, very narrowly confined, [presumably to criminal users]."); *id.* at 249 ("[A] jury could readily find that the provided instructions . . . have no, or virtually no, noninstructional communicative value . . . ."); *id.* at 254 ("*Hit Man* . . . is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals."); *id.* at 255 ("*Hit Man*'s only genuine use is

5. *Self-expression*

Finally, crime-facilitating speech may be valuable to speakers as a means of expressing their views. A scientist or engineer may feel that speaking the truth about some matter is valuable in itself. People who strongly oppose a law may feel that explaining how the law can be circumvented can help them fully express the depth of their opposition, and can help them "engage in self-definition" by "defin[ing themselves] publicly in opposition" to the law.[126] The same is true of people who strongly believe that all people should have the right to end their own lives if the lives have become unbearable, and who act on this belief by publicizing information about how to commit suicide.[127] Even people who give their criminal friends information about how to more effectively and untraceably commit a crime, or tell them when the police are coming, might be expressing their loyalty, affection, or opposition to the law that the police are trying to enforce.

As with entertainment, it's not clear how much we should value such self-expression. Perhaps the harm caused by crime-facilitating speech is enough to justify restricting the speech despite its self-expressive value, or perhaps self-expressive value shouldn't count for First Amendment purposes.[128] For now, I simply identify this as a possible source of First Amendment value.

C. *Dual-Use Materials*

We see, then, that crime-facilitating speech is a form of dual-use material, akin to guns, knives, videocassette recorders, alcohol, and the like. These materials can be used both in

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the unlawful one of facilitating . . . murders."); *id.* ("[T]he book [is devoid] of any political, social, entertainment, or other legitimate discourse."); *id.* ("[A] reasonable jury could simply refuse to accept Paladin's contention that this purely factual, instructional manual on murder has entertainment value to law-abiding citizens."); *id.* at 267 ("[The book] lack[s] . . . any even arguably legitimate purpose beyond the promotion and teaching of murder . . . .").

125. *See, e.g.*, *id.* at 267.

126. *See* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978) (elaborating on self-expression as the primary First Amendment value); *cf.* United States v. Aguilar, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction for aiding and abetting illegal immigration in part based on a defendant's telling El Salvadoran refugees the location of a hole in the border fence, and the directions to a church that would give them sanctuary), *superseded by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181 (9th Cir. 2001).

Thomas Scanlon has argued in favor of an autonomy vision of the First Amendment, under which the government may not restrict speech on the ground that the speech persuades people to believe certain things. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1972). This theory, though, is limited to "expression which moves others to act by pointing out what they take to be good reasons for action," and doesn't cover factual communications that give listeners "the means to do what they wanted to do anyway." *Id.* at 212. The theory thus offers little argument for protecting crime-facilitating speech, but also little argument for restricting such speech, because the theory doesn't purport to be an exhaustive theory of free speech; Scanlon acknowledges that other communications might still be protected under other theories, such as those related to self-government. *Id.* at 223-24.

127. See *infra* note 410 for examples of suicide-facilitating materials, and of calls to restrict them.

128. See *infra* Part III.A.2 for a discussion of when in particular the speaker's interest in self-expression may have to yield.

harmful ways—instructions and chemicals can equally be precursors to illegal bombs—and in legitimate ways; and it's usually impossible for the distributor to know whether a particular consumer will use the product harmfully or legally.

We'd like, if possible, to have the law block the harmful uses without interfering with the legitimate, valuable ones. Unfortunately, the obvious solution—outlaw the harmful use—will fail to stop many of the harmful uses, which tend to take place out of sight and are thus hard to identify, punish, and deter.

We may therefore want to limit the distribution of the products, as well as their harmful use, since the distribution is usually easier to see and block; but prohibiting such distribution would prevent the valuable uses as well as harmful ones. Most legal rules related to dual-use products thus adopt intermediate positions that aim to minimize the harmful uses while maximizing the valuable ones, for instance by restricting certain forms of the product or certain ways of distributing it.

Any analogies we draw between dual-use speech and other dual-use materials will be at best imperfect, because speech, unlike most other dual-use items, is protected by the First Amendment. But recognizing that crime-facilitating speech is a dual-use product can help us avoid false analogies. For instance, doing something knowing that it will help someone commit a crime is usually seen as morally culpable. This assumption is sound enough as to single-use activity, for instance when someone personally helps a criminal make a bomb.[129] But this principle doesn't apply to dual-use materials, for instance when someone sells chemicals or chemistry books to the public, knowing that the materials will help some buyers commit crimes but also help others do lawful things.

Likewise, as I'll argue in Part II.B, strict scrutiny analysis may apply differently to restrictions on dual-use speech than to restrictions that focus only on speech that has a criminal purpose. And, as I'll argue in Part III.A.2, the case for restricting crime-facilitating speech is strongest when the speech ends up being single-use in practice—because there are nearly no legitimate uses for the particular content, or because the speech is said to people who the speaker knows will use it for criminal purposes—rather than dual-use.

II. IS CRIME-FACILITATING SPEECH ALREADY HANDLED BY EXISTING FIRST AMENDMENT LAW?

Naturally, if existing First Amendment law already sensibly explains how crime-facilitating speech should be analyzed, there would be little need for this Article. It turns out, though, that current law doesn't adequately deal with this problem: The Supreme Court has never announced a specific doctrine covering crime-facilitating speech, and none of the more general doctrines, such as strict scrutiny, is up to the task.

129. See *infra* notes 295-96 for examples of laws that punish such knowing assistance, even if the aider doesn't actually intend to help the criminal but simply knows that his conduct will have this effect.

A. *The Existing Crime-Facilitating Speech Cases*

No Supreme Court case squarely deals with crime-facilitating speech. As Justice Stevens recently noted, referring to speech that instructed people about how to commit a crime, "Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech."[130]

Justice Stevens suggested that a crime-facilitating speech exception ought to be recognized, but this was in a solo opinion respecting the denial of certiorari; and the brief opinion gave no details about what the exception might look like.[131] Likewise, Justice Scalia's solo concurrence in the judgment in *Florida Star v. B.J.F.* acknowledged that a ban on publishing the name of rape victims might possibly be justified as a means of preventing further attacks aimed at intimidating or silencing the victim—but the opinion concluded only that the particular law involved in the case wasn't narrowly tailored to this interest, and didn't discuss what should happen if a ban is indeed precisely focused on prohibiting such crime-facilitating publications.[132]

United States v. Aguilar upheld a conviction for disclosing a secret wiretap, but the brief First Amendment analysis rested partly on the defendant's being "a federal district court judge who learned of a confidential wiretap application" through his government position as opposed to being "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap."[133] *Scales v. United States* upheld a conviction for conspiring to advocate the propriety of Communist overthrow of the government; a small part of the evidence against Scales was that he helped organize "party training schools" where, among other things, instructors taught people "how to kill a person with a pencil," but the Court viewed that simply as an example of Scales's engaging in advocacy of concrete action rather than of abstract doctrine. The Justices didn't treat the case as being primarily about crime-facilitating speech, and enunciated no rules that would broadly cover crime-facilitating speech.[134]

Haig v. Agee concluded that an ex-CIA agent's "repeated disclosures of intelligence operations and names of intelligence personnel" were as constitutionally unprotected as "'the publication of the sailing dates of transports or the number and location of troops,'" at least when the disclosures were done for "the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel."[135] But the Court didn't explain the scope of this exception—it spent just a few sentences on the subject—and in particular didn't discuss whether the exception reached beyond threats to national security. And the following year, the Court held

130. Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of certiorari); *see also* U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying n.44 (asserting the same).

131. *McCoy*, 537 U.S. at 995 (Stevens, J., respecting the denial of certiorari) (suggesting, in a case where the lower court reversed a former gang leader's conviction for giving advice about how to better enforce discipline and maintain loyalty within the gang, that *Brandenburg v. Ohio*, 395 U.S. 444 (1969), shouldn't apply "to some speech that performs a teaching function").

132. 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in the judgment).

133. 515 U.S. 593, 606 (1995); *see also id.* ("As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public.").

134. 367 U.S. 203, 264-65 (1961).

135. 453 U.S. 280, 309-10 (1981) (quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931)).

in *NAACP v. Claiborne Hardware* that knowingly publishing the names of people who weren't complying with a boycott was constitutionally protected, even though some people who weren't observing the boycott had been violently attacked, and the publication clearly could facilitate such attacks.[136]

Some lower court cases have considered the issue, but they haven't reached any consistent result. Several federal circuit cases have held that speech that *intentionally* facilitates tax evasion, illegal immigration, drugmaking, and contract killing is constitutionally unprotected.[137] Three federal circuit cases have held that speech that *knowingly* facilitates bomb-making, bookmaking, or illegal circumvention of copy protection is constitutionally unprotected.[138] Two federal district court cases have similarly held that speech that knowingly (or perhaps even negligently) facilitates copyright infringement is civilly actionable, though they haven't confronted the First Amendment issue.[139] And three appellate cases have held that a newspaper doesn't have a First Amendment right to publish a witness's name when such a publication might facilitate crimes against the witness, even when there was no evidence that the newspaper intended to facilitate such crime.[140] But two federal appellate cases have applied the much more speech-protective *Brandenburg v. Ohio* incitement test to speech that facilitated tax evasion and gang activity, concluding that even intentionally crime-facilitating speech is protected if it isn't intended to and likely to incite *imminent* crime.[141]

Legislatures at times assume that crime-facilitating speech may be punished, at least in some instances, even when the speaker doesn't intend to facilitate crime;[142] other statutes, though, do require such an intention.[143] In recent years, the U.S. Justice Department seems to have taken the view that published crime-facilitating speech may generally be restricted if it's intended to facilitate crime, but not if such an intention is absent.[144] But some federal statutes do not fit this understanding.[145]

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136. 458 U.S. 886 (1982).

137. *See* United States v. Raymond, 228 F.3d 804, 815 (7th Cir. 2000); Rice v. Paladin Enters., Inc., 128 F.3d 233, 243, 266 (4th Cir. 1997); United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989), *superseded by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181 (9th Cir. 2001); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985); United States v. Holecek, 739 F.2d 331, 335 (8th Cir. 1984); United States v. Barnett, 667 F.2d 835, 842-43 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978); *see also* Wilson v. Paladin Enters., Inc., 186 F. Supp. 2d 1140 (D. Ore. 2001).

138. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 457 (2d Cir. 2001); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990); United States v. Featherston, 461 F.2d 1119, 1122 (5th Cir. 1972). *Mendelsohn* involved the distribution of computer object code, which might not be protected by the First Amendment in any event; but the court held that even if code was potentially covered by the First Amendment, distribution of such material with the knowledge that it would likely be used for bookmaking could be punished.

139. *See, e.g.*, Arista Records, Inc. v. MP3Board, Inc., No. 00 CIV. 4660, 2002 WL 1997918, at *4 (S.D.N.Y. Aug. 29, 2002); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1293-96 (D. Utah 1999).

140. *See* cases cited *supra* note 18.

141. McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002); United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983).

142. *See, e.g.*, statutes cited *supra* note 29, except the Minnesota statute; Texas statute cited *supra* note 30.

143. *See, e.g.*, Minnesota statute cited *supra* note 29; statutes cited *supra* note 30, except the Texas statute.

144. *See* U.S. DEP'T OF JUSTICE, *supra* note 43, pt. VI.B; Government's Motion for Reversal of Conviction at 6-7 & n.3, United States v. McDanel, CA No. 03-50135 (9th Cir. Oct. 14, 2003) (taking the position that

Some lower court cases have argued that there's no First Amendment problem with punishing certain kinds of crime-facilitating speech because it is "speech brigaded with action" and "an integral part" of a crime; the Justice Department has taken the same view.[146] Another case has contended that certain crime-facilitating publications violated generally applicable aiding and abetting laws,[147] and that there is no First Amendment problem when such laws are

communicating such information may violate the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A), (e)(8) (2000), but only if the speaker intended to facilitate security violations, rather than intending to urge the software producer to fix the problem).

145. *See* federal statutes cited *supra* note 29.

146. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997); NOW v. Operation Rescue, 37 F.3d 646, 655 (D.C. Cir. 1994); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985); United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978); U.S. DEP'T OF JUSTICE, *supra* note 43, pt. VI.A.3.

147. Actually, as the Justice Department acknowledges, it's not clear that criminal aiding and abetting law is indeed generally applicable to the distribution of crime-facilitating dual-use products (whether speech or nonspeech) to unknown customers. *See* U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying n.24. Standard definitions of aiding and abetting are broad enough to cover distribution of dual-use products, either with the intention that the products be used for criminal purposes, or in many states even if the distributor simply knows that they'll be used for such purposes. *See infra* note 295. But in fact, providers of dual-use products—such as metal-cutting equipment—have generally been held liable only when they know that a particular sale is going to a person who intends to use the product illegally (for instance, to break into a bank), *see, e.g.*, Regina v. Bainbridge, 3 All E.R. 200 (Crim. App. 1959); and even then, some cases refuse to hold the providers liable based on mere knowledge, *see, e.g.*, People v. Lauria, 251 Cal. App. 2d 471, 481 (Ct. App. 1967), reasoning that it's too burdensome to impose on providers of such staple products a "duty to take positive action to dissociate oneself from activities helpful to violations of the criminal law" when the crimes being aided aren't serious. U.S. DEP'T OF JUSTICE, *supra* note 43, at n.24, cites some cases that punish dual-use *speech* as criminal aiding and abetting; but these of course don't show that the law is generally applicable both to speech and nonspeech.

A few tort cases have let distributors of dual-use materials be sued on some generally applicable theory that is related to aiding and abetting, whether it's conspiracy, negligent marketing (the theory being that the manufacturer almost certainly knew that some users would misuse the product, but didn't take steps to minimize this risk), or contributory infringement. *See, e.g.*, Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 157 (Ct. App. 1999) (rejecting motion to dismiss negligent marketing lawsuit against gun manufacturer), *rev'd on statutory grounds*, 28 P.3d 116 (Cal. 2001); City of Gary *ex rel.* King v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003) (allowing negligent marketing and negligent design lawsuit to go forward); cases cited *supra* note 24 (contributory copyright infringement); Nat'l Fed'n of the Blind, Inc. v. Loompanics Enters., Inc., 936 F. Supp. 1232 (D. Md. 1996) (contributory trademark infringement). *But see, e.g.*, Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (rejecting a negligent marketing cause of action against a handgun manufacturer); Caveny v. Raven Arms Co., 665 F. Supp. 530, 536 (S.D. Ohio 1987) (rejecting an aiding and abetting cause of action against a handgun manufacturer); *In re* Tobacco Cases II, No. SDSC 719446, 2002 WL 3168649, at *11 (Cal. Super. Ct. Nov. 22, 2002) (rejecting an aiding and abetting cause of action against a cigarette manufacturer based on the theory that the manufacturers' marketing practices aided unlawful sales to minors). Perhaps courts will one day develop a general tort law rule holding producers of dual-use products liable for harms they knew would happen, or perhaps only for harms they intended to happen, but no such doctrine seems to be firmly established today.

The generally applicable law, both in tort law and in the criminal law of aiding and abetting and crime facilitation, has been developed where the defendant knew that he was helping a *particular* person commit a crime, or even intended to do so, and could therefore avoid this crime-facilitating action while still remaining free to distribute the product to law-abiding users. *Cf.* Mary M. Cheh, *Government Control of Private Ideas: Striking a Balance Between Scientific Freedom and National Security*, 23 JURIMETRICS J. 1, 24 (1982). Applying this law to distribution of dual-use speech would be a significant extension of the law, not just an application.

applied to speech;[148] one could likewise make the same argument as to crime-facilitating speech that violates laws prohibiting criminal facilitation[149] or obstruction of justice.[150] But as I argue in detail elsewhere, such attempts to escape First Amendment scrutiny for these speech restrictions are unsound, and inconsistent with modern First Amendment doctrine.[151]

The task at hand, then, is to define crime-facilitating speech doctrine, not to evaluate or modify some existing accepted doctrine.

B. *Strict Scrutiny*

In recent decades, the Court has often said that "[t]he Government may . . . regulate the content of constitutionally protected speech"—speech that isn't within one of the existing free speech exceptions—if the regulation is "narrowly tailored" to a "compelling government interest."[152] In practice, the Court has almost never upheld restrictions under this test,[153] but in principle, the test seems like a possible justification for bans on crime-facilitating speech, since preventing crime does seem like a compelling interest.

Unfortunately, it's hard to evaluate such a justification doctrinally, because the strict scrutiny test is ambiguous in a way that particularly manifests itself as to dual-use speech. There are two possible meanings of "narrow tailoring," and two possible meanings of the requirement, embedded in the narrow tailoring prong, that a speech restriction not be overinclusive.

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148. *See Rice*, 128 F.3d at 243 ("[S]peech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes."); *id.* at 242 (pointing to "criminal aiding and abetting" as the generally applicable body of law); U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying nn.55-60; *cf. infra* note 295 (describing how aiding and abetting law may be read as applying to crime-facilitating speech).

149. *See infra* notes 296-97 (describing the law of crime facilitation).

150. *See, e.g.*, 18 U.S.C. § 1512(c) (2000 & Supp. II 2002) (outlawing "corruptly . . . imped[ing] any official proceeding"); 4 WHARTON'S CRIMINAL LAW § 570 (15th ed. 2003) (stating that people who "knowing that a felony has been committed, render[] aid to the felon in order to protect him, hinder his apprehension, or facilitate his escape" have traditionally been punishable as accessories after the fact). For cases in which helping someone escape has been treated as obstruction of justice or a similar crime, see, for example, *People v. Shea*, 326 N.Y.S.2d 70 (N.Y. Ct. Special Sessions 1971) (encircling officer and arrestee to let the arrestee escape); *United States v. Hare*, 49 F.3d 447 (8th Cir. 1995) (alerting someone that the FBI was pursuing him); *United States v. Bucher*, 375 F.3d 929 (9th Cir. 2004) (alerting a friend that law enforcement officers were pursuing him); *United States v. Cassiliano*, 137 F.3d 742 (2d Cir. 1998) (likewise). *See also* State v. Walker, No. I-9507-03625 (Williamson Cty. (Tenn.) Cir. Ct. Nov. 13, 2003) (accepting a First Amendment defense to a charge of knowingly interfering with an officer, when the defendant's conduct consisted of flashing his headlights to warn oncoming motorists about a speed trap).

151. *See* Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. (forthcoming 2005), *available at* http://www1.law.ucla.edu/~volokh/conduct.pdf.

152. Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989).

153. The only case in which a majority of the Supreme Court has upheld a speech restriction—as opposed to a restriction on expressive association, or on religious practice—under strict scrutiny is *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (reaffirmed without extensive strict scrutiny analysis in *McConnell v. FEC*, 540 U.S. 93 (2003)). A plurality also upheld a speech restriction under strict scrutiny in *Burson v. Freeman*, 504 U.S. 191 (1992).

The demanding meaning of "narrow tailoring" is that an attempt to prevent the improper uses of speech must be narrowly tailored to affect *only those improper uses*: The government interest may justify punishing instances of distribution that lead to those uses, but only if this doesn't substantially interfere with the lawful uses.

Consider, for example, the decisions involving laws that aim to shield children from sexually explicit material. The Supreme Court has said that there is a compelling government interest in such shielding, and it has upheld bans on distributing such material when the distributor knows that the buyer is a child.[154] But the Court has struck down laws that ban *all* distribution of sexually themed material that would be unsuitable for children, even when the laws were supported by the child-shielding interest.[155]

Sexually explicit but nonobscene material is dual-use speech. It can be legitimately used by adults for its serious value (or even if it lacks serious value but isn't prurient or patently offensive as to adults), but it can also be improperly distributed to children. Yet even though any sexually themed work that's sold to an adult might end up in a child's hands, the Court held that restricting all such distribution to adults in order to prevent the distribution to children is "burn[ing] the house to roast the pig."[156] Likewise, though works that depict sex with (fictional) children might be used by some adults to try to seduce children, the Court held that this danger doesn't justify restricting such works:

> The government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.[157]

Under this approach, dual-use speech couldn't be banned when such a ban would interfere with the valuable uses, even when the ban was needed to prevent the harmful uses.

Another example is the Court's treatment of laws banning leafleting. Some cities argued that the laws were justified by the government interest in preventing litter, and the Court agreed that littering is an evil that the city can generally try to prevent: The First Amendment doesn't "deprive a municipality of power to enact regulations against throwing literature broadcast in the streets."[158]

But the Court held that the restriction could only go so far as prohibiting littering, whether by the leafleteer or the recipient; the city couldn't bar all leafleting, even though for each leaflet there is a risk that it will end up being littered.[159] Leaflets are dual-use products: Some

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154. Ginsberg v. New York, 390 U.S. 629 (1968).

155. *See Sable Communications*, 492 U.S. at 126 (reaffirming, using strict scrutiny, Butler v. Michigan, 352 U.S. 380 (1957)).

156. *Butler*, 352 U.S. at 383.

157. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 252-53 (2002).

158. Schneider v. State, 308 U.S. 147, 160-61 (1939). The case involved a content-neutral restriction, which today would be judged under a form of intermediate scrutiny, rather than strict scrutiny. But the Court's willingness to strike the law down even though the law was content-neutral—and the Court's continued adherence to *Schneider*, *see, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994)—shows that the result would a fortiori be the same under strict scrutiny.

159. *Schneider*, 308 U.S. at 162-63.

recipients will read them and then lawfully dispose of them, while others will illegally throw them on the ground. Under the Court's holding, the government may not try to suppress the illegal use in a way that also blocks the lawful use.

Finally, a third example comes from *Free Speech Coalition v. Ashcroft*, where the government argued that a ban on virtual child pornography—computer-generated material that depicts children in sexual contexts, but that was generated without using real children—was needed to prevent the distribution of true child pornography.[160] The Court rejected this view:

> The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.
>
> The Government may not suppress lawful speech as the means to suppress unlawful speech. . . . "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ." The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.[161]

This then is the first, more demanding, sense of narrow tailoring: The law may restrict distribution of dual-use speech that leads to a harmful use (for instance, littering or selling pornography to minors), but only if the restriction doesn't interfere with the valuable use. Likewise, any restriction that lumps the valuable uses together with the harmful ones may be said to be "overinclusive."[162]

But an alternative, less speech-protective, definition of narrow tailoring is that the government interest may justify whatever is the least restrictive law necessary to prevent the harmful uses, *even if this law also interferes with the valuable uses*. A classic example is the plurality opinion in *Burson v. Freeman*, which used strict scrutiny to uphold a total ban on electioneering within one hundred feet of polling places.[163]

The restriction, the Court held, was necessary to effectively serve the government interests "in preventing voter intimidation and election fraud";[164] but the law also restricted speech that wasn't likely to cause intimidation or fraud. And yet, in the plurality's view, this restriction on the legitimate speech was constitutional because it was an unavoidable side effect of the restriction on the harmful speech: It would be impossible to craft a law that effectively distinguished the intimidating and fraudulent speech from other speech, especially because the people who would draw the distinction—police officers—were "generally . . . barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process."[165]

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160. In *Free Speech Coalition*, the government tried to defend the statute using both this justification and, separately, the justification quoted in the text accompanying note 157.

161. 535 U.S. at 255 (citation omitted).

162. *See also* Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (stating that a contribution limit like the one upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976), wasn't narrowly tailored because "a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent").

163. 504 U.S. 191 (1992) (plurality opinion).

164. *Id.* at 206.

165. *Id.* at 207.

Likewise with *Buckley v. Valeo*, which upheld a $1000 limit on campaign contributions because of the government interest in preventing contributions that are tantamount to bribes[166] (though under an analysis that is now seen as involving "'closely drawn' scrutiny" but not quite strict scrutiny[167]). Many contributions that exceed $1000 are not bribes, especially in campaigns that cost millions—the contributors are often just trying to help elect an official whose views they like, rather than to gain leverage over the official once he's elected. Moderately large contributions are thus dual-use: They can be used as bribes or as honest attempts to support one's preferred candidates, and it's impossible to tell for sure which is which.

The Court, though, upheld the ban on contributions of more than $1000, partly because "it [is] difficult to isolate suspect contributions."[168] Blocking the honest contributions was necessary to effectively block the corrupt ones, and this necessity justified the broad prohibition. And the restriction wasn't treated as overinclusive, because it included only the activity that needed to be included for the law to adequately serve the government interest.

So the meaning of strict scrutiny is unclear, and it's unclear in a way that is important to evaluating restrictions on dual-use crime-facilitating speech. If courts apply the demanding definition of narrow tailoring, the restrictions would be overinclusive because they would block speakers from communicating even with those listeners who would use the speech quite properly. If courts apply the forgiving definition, the restrictions wouldn't be overinclusive, because this interference with valuable speech would be necessary to prevent the speech from reaching those listeners who would use the speech to do harm.

It's also not even clear that the Court would apply either form of strict scrutiny to these sorts of restrictions. Though the Justices have at times suggested that strict scrutiny should be the test for any content-based restriction on speech falling outside the existing First Amendment exceptions, at other times they have struck down speech restrictions without even applying strict scrutiny. Consider, for instance, *Virginia v. Black*, which held that certain kinds of cross-burning are constitutionally protected, but didn't even consider the possibility that restrictions on such cross-burning may be upheld under strict scrutiny.[169]

All this suggests that the strict scrutiny framework ultimately won't much help the Supreme Court decide what to do about crime-facilitating speech. The Court may conclude that the valuable uses must be protected even if this means that some harmful uses would be tolerated, or that the harmful uses must be suppressible even if this means that some valuable uses would be restrictable as well. But it is this decision that will determine how strict scrutiny is applied, and not vice versa.

Likewise, the Court's precedents are inconsistent enough that lower courts aren't really bound by any particular vision of strict scrutiny, either. Defenders of restrictions on crime-facilitating speech may quote the statement from *Sable Communications v. FCC* that "[t]he

166. 424 U.S. 1, 28-29 (1976).

167. McConnell v. FEC, 540 U.S. 93, 134-40 & nn.42-43 (2003).

168. *Buckley*, 424 U.S. at 30.

169. 538 U.S. 343 (2003); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (holding the intentional infliction of emotional distress tort inapplicable as to certain speech, without applying strict scrutiny); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (striking down a content-based restriction without applying strict scrutiny); *cf.* Am. Booksellers' Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1986) (likewise).

Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."[170] Challengers may quote *Ashcroft v. Free Speech Coalition*, saying that First Amendment law "prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[171] Neither set of precedents will itself resolve the question.

It's thus more helpful to ask the questions that the remaining Parts confront—whether a crime-facilitating speech exception should exist, and what should be its scope—rather than trying to fit this inquiry within the strict scrutiny framework, which doesn't yield a determinate result here.

C. *Balancing*

Another possible reaction to the crime-facilitating speech problem is to call for "balancing." Balancing, though, can mean one of two things here. First, balancing can purport to be an answer to the question "How should courts decide whether (and when) a speech restriction is justified?": "Balance the value of the speech against the harm that it causes."

Unfortunately, it's not clear what the command "balance" would really refer to. "Balance" is a metaphor, and its real-world referent—the scale—works because it uses a physical force (gravity) to reduce two objects to a common measure (weight) that can then be mechanically compared. But there is no such force or mechanism in law. There are no means for methodically and objectively comparing the value of speech and the harm that it causes.[172]

The closest analogy to the scale might be a judge's intuitions: "Judges should balance the value of the speech against the harm that it causes" might be seen as an instruction that the judge in each free speech case should simply think hard about both the value of the speech and the harm it causes, and decide which feels more important to him. But this sort of unexamined, un-self-conscious intuitive inquiry can easily be influenced by factors that judges ought not consider, such as the ideology of the speaker or the perceived merits of the political movement to which he belongs.[173] And it leaves speakers uncertain about whether their speech will be constitutionally protected, or potentially subject to serious punishment.

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170. 492 U.S. 115, 126 (1989).

171. 535 U.S. 234, 255 (2002).

172. *See generally* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) ("This process is ordinarily called 'balancing,' but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 788-89 (2001); Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141, 167-68. William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869 n.91 (2001), defends balancing against the charge that it is "like judging whether a particular line is longer than a particular rock is heavy" by responding that "courts make such judgments regularly, and at least in some cases they do not seem particularly hard to make. Some lines are very short, and some rocks are very heavy." I think that may be correct for the very short lines or very heavy rocks, but when the rock is moderately heavy and the line is moderately long, "balancing" stops being a useful metaphor.

173. *See* Melville B. Nimmer, *The Right to Speak From* Times *to* Time*: First Amendment Theory Applied*

Second, "balancing" can be a way of describing whatever courts end up doing when they decide whether a speech restriction is justified. When judges make such a decision, they can be said to have "balanced" all the factors—the constitutional text, the traditional understanding of the text, the harm and value of the speech, the possible indirect effects on future cases of deciding for or against protection in this one, and more—in the process of reaching the result.[174]

All First Amendment cases, including ones that announce bright-line rules, might then be seen as involving a "balancing" of the factors in favor of protection against those in favor of suppression. In this sense, "balancing" is a useful reminder that free speech questions can't just be answered with a categorical assertion that all speech is protected, but must consider a variety of other factors in defining the proper rule.[175]

This definition of "balancing," though, still doesn't tell us just how judges should make the decision that would then be referred to as a "balancing" of the factors. It is this question that the next Parts confront. If one wants to call those Parts, and the analysis that they incorporate from Part I, "balancing," that's fine. The important issue is what the test should be, and the word "balancing" doesn't really add much to that analysis.

D. *Deference to the Legislature*

Finally, courts could simply defer to legislative judgment: Legislatures, the argument would go, are better equipped to determine whether certain kinds of crime-facilitating speech are really harmful enough to be restricted, and courts shouldn't second-guess this determination. For this approach to offer an answer to the crime-facilitating speech problem, courts would have to do more than just seriously consider legislative judgments, or pay attention to legislative fact-finding in close cases—such respectful attention would still require courts to develop their own independent crime-facilitating speech doctrine. Rather, courts would have to basically accept the legislative judgment as nearly conclusive.

I think, though, that this would be unsound. First, if the speech is being restricted by a generally applicable law, such as the law of aiding and abetting, criminal facilitation, or obstruction of justice,[176] then the legislature hasn't made any specific judgment about the harmfulness and value of speech, and about whether the speech should therefore be restricted.

By enacting the law, the legislature has decided to ban a broad range of conduct, the overwhelming majority of which doesn't consist of speech, because the conduct may cause

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to Libel and Misapplied to Privacy, 56 CAL. L. REV. 935, 939-41 (1968) (criticizing ad hoc balancing for this reason); *infra* Part III.A.3 (criticizing proposals that the Court apply a more sliding-scale approach to valuing speech and inquire whether speech has not merely some value, but is of "unusual public concern").

174. "Balancing" is also sometimes used to refer to courts' applying strict scrutiny or intermediate scrutiny, since such tests require courts to consider whether the harm that the speech causes to government interests is enough to justify the speech restriction. For a discussion of why strict scrutiny is unhelpful here, see *supra* Part II.B. Intermediate scrutiny would be improper here because restrictions on crime-facilitating speech should be treated as content-based, *see* Volokh, *Speech as Conduct*, *supra* note 151, at pt. II; intermediate scrutiny is applicable to content-neutral restrictions.

175. This would be what Mel Nimmer called "categorical balancing" as opposed to "ad hoc balancing." MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.02 (1994).

176. *See supra* notes 147-51 and accompanying text.

certain harms. But this doesn't mean that the legislators even considered whether speech—which may have the various kinds of value identified above in Part I.B—should be outlawed as well. Courts ought not defer to a legislative judgment that wasn't made.[177]

Second, while the Court at one time did defer to legislative judgments that speech ought to be restricted, for instance in *Gitlow v. New York*,[178] modern free speech protection rests on a rejection of this approach. The Court has read the First Amendment as broadly shielding public debate from content-based legislative restrictions on valuable speech; and this shielding can't happen if courts let legislatures restrict whatever speech the legislators think is harmful enough.[179] Where the Court has found that the speech lacks First Amendment value, the Court has understandably given legislatures broader discretion.[180] But where the speech has constitutional value, as much crime-facilitating speech does, courts independently judge—and should independently judge—whether the speech may nonetheless be banned.

III. POSSIBLE DISTINCTIONS WITHIN THE CRIME-FACILITATING SPEECH CATEGORY

So how then can courts craft a crime-facilitating speech exception? Let's begin by identifying and evaluating the potential criteria that would distinguish protected crime-facilitating speech from the unprotected. These distinctions will be the potential building blocks of any possible test; Part III.G will then make some suggestions about which blocks should be included.

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177. I am indebted to my colleague Julian Eule for this line, which I heard him use in a talk a few years before his untimely death.

178.

> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare"; and that its police "statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest."

268 U.S. 652, 668 (1925).

179. *See, e.g.*, Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); Reno v. ACLU, 521 U.S. 844, 874 (1997) (taking the same view); Sable Communications, Inc. v. FCC, 492 U.S. 115, 129 (1989) (likewise); *see also* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1997) (refusing to take a deferential view even as to commercial advertising, which is treated as less valuable than other speech).

180. *See, e.g.*, Paris Adult Theatre I v. Slaton, 413 U.S. 49, 60-64, 67 (1973); *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195-96, 213 (1997) (giving more deference, though not complete deference, to congressional judgments when the challenged restriction is content-neutral); *id.* at 213 (stressing that "[c]ontent-neutral regulations do not pose the same 'inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution'").

A. *Distinctions Based on Value of Speech*

1. *First Amendment constraints on measuring the value of speech*

When we decide how to deal with dual-use materials, we naturally care about how valuable the legitimate use would be. This is why, for instance, recreational drugs are treated differently than cars. Both have harmful uses: Cars kill nearly 45,000 Americans per year, cause 300,000 injuries that require hospitalization,[181] and are used in countless other crimes. The valuable uses of the drugs, however—generally the entertainment of those users who don't get addicted and who use the drug responsibly—are seen as less valuable than the valuable uses of cars. The more valuable one thinks drugs are, for instance for medical purposes, the more willing one would be to allow them in some circumstances, even if this means there'll be inevitable leakage from the valuable uses to the harmful ones.

This analysis is always complex, because the harm and the value of the product are hard to estimate, and hard to compare even once one has estimated them. But for crime-facilitating speech, the analysis is harder still, because First Amendment law constrains courts' and legislatures' ability to assess the value of speech. In our own lives, we routinely measure the value of speech based partly on whether it expresses good ideas or evil ones, whether it's reasoned or not, or whether it's mere entertainment or genuine advocacy. The Court, though, has generally held that each of these distinctions may *not* be part of the First Amendment analysis.[182]

First Amendment law doesn't assume that these kinds of speech *are* equally valuable under some commonly held moral or political standard of value. It does, however, conclude that the government *must generally treat them* as equally valuable, because courts and legislators generally can't be trusted to properly decide which speech is right or useful and which is wrong or useless, and because people in a democracy are entitled to decide for themselves which ideas have value and which don't.[183]

181. *See* Nat'l Ctr. for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1999-2002, *at* http://webapp.cdc.gov/sasweb/ncipc/mortrate10_sy.html (last modified Jan. 29, 2005) (2002 data); Nat'l Ctr. for Injury Prevention and Control, WISQARS Nonfatal Injury Reports, *at* http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (last modified Jan. 29, 2005) (2003 data).

182. *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (advocacy of adultery protected just like advocacy of other ideas); Winters v. New York, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these [sensational crime] magazines, they are as much entitled to the protection of free speech as the best of literature."); Cohen v. California, 403 U.S. 15 (1971) (jacket with just the words "Fuck the Draft" is fully protected); Texas v. Johnson, 491 U.S. 397 (1989) (burning a flag is fully protected, even though such symbolic speech doesn't contain serious reasoning or argument). Obscenity is one narrow exception to this principle: To determine whether a work is obscene courts do look at whether the speech has "serious literary, artistic, political, or scientific expression." Miller v. California, 413 U.S. 15, 23 (1973). But obscenity law is intentionally limited to a narrow category of rather explicit sexually themed speech, and doesn't touch other speech, even speech that some see as comparatively low in value, *see, e.g.*, *Cohen*, 403 U.S. at 20 (refusing to extend obscenity law to cover profanity).

183. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 51 (1988) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

Of course, First Amendment doctrine hasn't precluded the Court from making all judgments about the value of speech. Various First Amendment exceptions—such as the ones for false statements of fact, obscenity, and fighting words—are justified on the theory that certain speech has virtually no constitutional value.[184] Even within the zone of valuable speech, the Court has at times suggested that some speech is less valuable than "fully protected" speech.[185]

Still, the Court's jurisprudence in considerable measure constrains courts and legislatures in judging the value of speech; and the Court has taken this constraint seriously, often fully protecting speech that a commonsense judgment would suggest is not tremendously valuable, such as vulgar parody and speech that praises crime (unless it fits within the narrow incitement exception).[186] This limits the degree to which a crime-facilitating speech doctrine can distinguish the less valuable crime-facilitating speech from the more valuable. Conversely, if this limit is relaxed here, and courts are allowed to engage in free-ranging judgments about the value of various kinds of speech, then this new precedent may weaken these limitations elsewhere—a concern the Court has often expressed when rejecting proposed judgments that speech is of low constitutional value.[187]

2. *Virtually no-value speech*

a. *Speech to particular people who are known to be criminals*

Some speech is communicated entirely to particular people who the speaker knows will use it for criminal purposes. A burglar tells his friend how he can evade a particular security system.[188] A lookout, or even a total stranger, tells criminals that the police are coming.[189]

184. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."); Roth v. United States, 354 U.S. 476, 485 (1957) (concluding that obscenity 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"); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (same as to fighting words).

185. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976) (commercial speech); FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion) (profanity); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion) (pornography); *see also* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (criticizing *Pacifica*).

186. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988); Brandenburg v. Ohio, 395 U.S. 444 (1969).

187. *Cohen*, 403 U.S. at 25 (reasoning that the proposed principle that profanity is unprotected but other offensive words remain protected "seems inherently boundless"); *Johnson*, 491 U.S. at 417 (reasoning that "[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries"); *Hustler Magazine*, 485 U.S. at 55 (reasoning that "[i]f it were possible by laying down a principled standard to separate [the attack on Jerry Falwell and his mother] from [traditional political cartoons], public discourse would probably suffer little or no harm," but concluding that "we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one"); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1096 (2003) (discussing this sort of argument). *But see Pacifica*, 438 U.S. 726 (plurality opinion) (concluding that profanity should be distinguished from other speech, at least where radio broadcasting is involved).

188. *Cf.* United States v. Aguilar, 883 F.2d 662, 685 (9th Cir. 1989) (upholding conviction for aiding and abetting illegal immigration in part based on a defendant's telling El Salvadoran refugees the location of a hole

Someone tells a particular criminal (whom he knows to be a criminal) that his line is tapped.[190] A person tells another person how to make explosives or drugs, knowing that the listener is planning to use this information to commit a crime.

In all these examples, the speech has pretty much a solely crime-facilitating effect—it's really single-use speech rather than dual-use speech—and the speaker knows this or is at least reckless about this.[191] In this respect, the speech is like sales of guns or bomb ingredients to people who the seller knows are likely to use the material in committing a crime.

Restricting such speech or conduct will, at least in some situations, make it somewhat harder for the listener or buyer to successfully commit the crime, and it will interfere very little with valuable uses of the speech or other materials. The speech doesn't contribute to political or scientific debates, provide innocent entertainment, or even satisfy law-abiding users' intellectual curiosity; its sole significant effect is to help criminals commit crimes.[192] It makes sense, I think, to treat the speech as having so little First Amendment value that it is constitutionally unprotected, much as how threats or false statements of fact are treated.

Moreover, such a judgment, if limited to this sort of single-use speech, would create a limited precedent that seems unlikely to support materially broader speech restrictions. The speech is not only harmful, but seems to have virtually no First Amendment value. It has been traditionally seen as punishable under the law of aiding and abetting or (more recently) criminal

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in the border fence, and the directions to a church that would give them sanctuary), *superseded by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181 (9th Cir. 2001).

189. *See supra* notes 37-39.

190. *See* United States v. Aguilar, 515 U.S. 593 (1995).

191. If the speaker doesn't realize that the listener is a criminal who will likely use the speech for criminal purposes, then the speech is considerably less culpable; and punishing such innocently intended speech is likely to unduly deter valuable speech to law-abiding listeners. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (using this rationale to protect speakers from liability for false statements of fact about public officials on matters of public concern, unless the speaker knows the statements are false or are likely false); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (applying the same rule to false statements of fact about private figures on matters of public concern, though allowing compensatory damages when the speaker was shown to be negligent).

192. One can imagine some possible social value that might flow from the communication. A burglar who learns more about what he'd need to do to safely commit a crime might be scared off by the difficulty of the process. If you tell someone who you think is a criminal that the police are coming, and it turns out that the person's behavior is really legal but just suspicious-looking, then your statement might inadvertently prevent an erroneous arrest. Even if the person you're warning is a criminal, he might have innocent friends standing nearby, so warning him might prevent the innocents from getting caught in a crossfire, or getting erroneously arrested. Information is valuable, and one can always imagine some conceivable way in which it would facilitate wise and law-abiding decisions. Nonetheless, these valuable uses seem extremely unlikely when someone knowingly conveys crime-facilitating information just to a person who wants to use it for criminal purposes, and thus seem too insubstantial to influence the analysis.

Of course, if we think that some criminal or tortious conduct—for instance, illegal immigration, drugmaking, or copyright infringement—is actually laudable, and shouldn't be illegal at all, then we might view speech that helps particular people engage in such conduct as both harmless and valuable. But I don't think it's proper for courts to reject aiding and abetting or criminal facilitation liability on these grounds, and I'm quite sure that courts won't in fact reject such liability. No judge would reason, I think, that selling marijuana is perfectly fine (though it's illegal and constitutionally unprotected), so that therefore a lookout for a marijuana dealer has a First Amendment right not to be punished for alerting the dealer that the police are coming.

facilitation.[193] It's spoken to only a few people who the speaker knows are criminals. It seems improbable that judges or citizens will see a narrow exception for this sort of speech as a justification for materially broader exceptions.[194]

Speech within this category should be treated the same for constitutional purposes whether it's said with the *intent* that it facilitate crime, or merely with the *knowledge* that it's likely to do so. Say a man goes to a retired burglar friend of his, and asks him for advice on how to quickly disable a particular alarm, or open a particular safe; and say that the burglar replies, "Look, I don't want you to commit this crime—it's too dangerous, you should just retire like I did—and I don't want a cut of the proceeds; but I'll tell you because you're my friend and you're asking me to."

Strictly speaking, the retired burglar doesn't have the "conscious object . . . to cause" the crime, and is thus not acting with the intent that the crime be committed.[195] He may sincerely wish that his friend just give up the project; he may even have a selfish reason for that wish, because if the crime takes place, one of the criminals may be pressured into revealing the retired burglar's complicity. Nonetheless, the retired burglar's speech facilitates the crime just as much

193. *See, e.g.*, State v. Berger, 96 N.W. 1094 (Iowa 1903); State v. Hamilton, 13 Nev. 386 (1878); *cf.* Brenner, *supra* note 92, at 373-74 (discussing the criminality of "[i]ntentionally giving advice with the purpose of facilitating the commission of a crime").

194. *See* Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1056-61, 1077-87 (discussing equality slippery slopes and attitude-altering slippery slopes, two common mechanisms through which a narrow exception might grow into a broader one).

Such an exception might justify some other restrictions on valueless speech said to a criminal audience—but that's likely to be good. It has long been unclear, for instance, exactly why criminal solicitation (such as a man's asking a friend to kill his wife) is punishable even when the *Brandenburg v. Ohio* imminence requirement is not satisfied. *See, e.g.*, Larry Alexander, *Incitement and Freedom of Speech*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 101, 113-14 (David Kretzner & Francine Kershman Hazan eds., 2000) (asserting that solicitation should be punishable); Daniel A. Farber & Philip P. Frickey, *supra* note 75, at 1623 (suggesting that criminal solicitation shouldn't be subject to the "clear and present danger" test); GREENAWALT, *supra* note 43, at 261-63 (likewise). *But see* People v. Salazar, 362 N.W.2d 913 (Mich. Ct. App. 1985) (overturning a solicitation conviction under these circumstances, citing *Brandenburg*). The answer, it seems to me, is that the chief value of speech that advocates violent conduct is not that the speech will persuade people to act violently, but that it will also convey broader social criticisms, which people can act on even without committing crimes. When the speech is said to the public, some listeners—probably most—will focus on the social criticisms, rather than being moved to commit crimes. *See* Dennis v. United States, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring in the judgment). But when it's said to a few people who are selected because the speaker thinks they will be willing to commit a particular crime, listeners are much less likely to draw a broader political message from the speech, and there's thus much less reason for the speech to be protected.

195. MODEL PENAL CODE § 2.02(2)(a) (1962) (defining "intent" in this way); *see also* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 346 (1985) ("Giving disinterested advice on the pros and cons of a criminal venture is closer to the line [between intentional and knowing help], and there is sometimes doubt about whether it should suffice to establish liability. But in principle, if it was the purpose of the one giving the advice to influence the other to commit the crime, he is an accomplice; if that was not his purpose, he is not liable."). If the advisor had a cut of the proceeds—a "stake in the venture"—then the jury might infer that he wanted the crime to take place. *See, e.g.*, Direct Sales Co. v. United States, 319 U.S. 703, 725 (1943); United States v. Isabel, 945 F.2d 1193, 1203 (1st Cir. 1991). But in the hypothetical, the advisor is either unpaid or paid up front without regard to whether the criminals go on to commit the crime.

as if he wanted the crime to take place. It seems to be as constitutionally valueless, as much worth deterring, and as deserving of punishment as speech that purposefully facilitates crime.[196]

Finally, I acknowledge that even single-use speech may be valuable as self-expression: Telling a criminal friend how to commit a crime, or telling him that the police are coming, may express loyalty and affection, and thus contribute to the speaker's self-fulfillment and self-definition.[197] But it seems to me that speech stops being legitimate self-expression when the speaker knows that its only likely use is to help bring about crime.[198]

Self-expression must be limited in some measure by a speaker's responsibility not to help bring about illegal conduct. When speech contributes to public debate as well as constituting self-expression, the speech may deserve protection despite its harmful effects.[199] But when its value is solely self-expression, its contribution to the listener's crimes should strip it of its protection just as its coerciveness or deception would strip it of protection.[200]

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196. For an explanation of why the speech shouldn't be unprotected if it's merely negligently crime-facilitating, see *supra* note 191.

Knowingly or even intentionally providing information that helps others commit minor crimes might not be worth punishing. If I see the police pulling over speeders, and I call a friend who I know always speeds on the same route to warn him to slow down at the proper place, then I'm acting as a lookout: I'm helping him speed with impunity before and after the speed trap. (True, I'm telling him to act *legally* for the few seconds that the police are watching, but that's what lookouts often do: They tell people to pause or stop their illegal activity when the police are watching, so that the illegal activity isn't discovered.)

Likewise, if I tell a friend how to set up a file-sharing program so that he can illegally download music, my advice would be crime-facilitating (or at least tort-facilitating). Still, it seems harsh to punish people who help their friends this way, when the friends' offenses are petty and when many mostly law-abiding people would help each other this way. *See* United States v. Bucher, 375 F.3d 929, 930 (9th Cir. 2004) (upholding criminal liability for alerting a friend that park rangers were planning to arrest him for a minor offense, but expressing some misgivings about holding people liable for helping friends or relatives this way).

This, though, should be reflected in decisions by prosecutors, or in legislative judgments (or possibly common-law decisions by judges) to limit some forms of aiding and abetting liability to more serious crimes, or at least to punish aiders of less serious crimes only when the aid is intentional. *See, e.g.*, People v. Lauria, 251 Cal. App. 2d 471, 481 (Ct. App. 1967) (concluding that aiding and abetting liability shouldn't be applied to people who knowingly, but not intentionally, aid and abet minor crimes); TEX. PENAL CODE. ANN. § 7.02 (Vernon 2004) (limiting aiding and abetting liability to intentional assistance). I don't think the First Amendment should be interpreted as protecting such speech; the reasons not to prosecute it are not First Amendment reasons.

In his concurrence in *Whitney v. California*, 274 U.S. 357, 377-78 (1927), Justice Brandeis argued that inciting minor crimes should be constitutionally protected because "imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious"; but this view rests on the assertion that such speech is constitutionally valuable, because it's "essential to effective democracy." Conveying crime-facilitating information to a person who you know will likely use it for criminal purposes is not similarly constitutionally valuable, and should thus be punishable even if it facilitates only a minor crime.

197. *See* Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 126, at 994.

198. *See* Dennis v. United States, 341 U.S. 494, 544-46 (1951) (Frankfurter, J., concurring in the judgment) (reasoning that public revolutionary advocacy is potentially valuable because many of its listeners will see it as a broader social criticism, which they can act on even without committing crimes).

199. *See infra* Part III.B.1.

200. *See* Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 126, at 997-99 (arguing that coercive speech isn't legitimate self-expression); *id.* at 1005 (arguing that speech which "increases the coercive power of another country" isn't legitimate self-expression, though limiting this to situations where such an

b. *Speech communicating facts that have very few lawful uses*

The preceding pages dealt with speech that has only harmful uses because of the known character of its *listeners*: The speaker is informing particular people, and the speaker knows those people are planning to use the information for criminal purposes. But there are also a few categories of speech that are likely to have virtually no noncriminal uses because of their *subject matter*.

Consider social security numbers and computer passwords. Publicly distributing such information is unlikely to facilitate any political activity (unlike, say, publicly distributing abortion providers' or boycott violators' names, which may facilitate lawful shunning and social pressure, or even their addresses, which may facilitate lawful residential picketing and parading[201]). It's unlikely to contribute to scientific or business decisions (unlike, say, publicly distributing information about a computer security vulnerability[202]). And unlike detective stories or even contract murder manuals, social security numbers and computer passwords are unlikely to have any entertainment value.[203]

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increase in coercive power is "the purpose of the espionage activity"); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 909-10 (2002) (arguing that deceptive speech isn't legitimate self-expression).

Professor Baker takes a different approach than I do to the speech described in this Part: He reasons that such speech (his example is informing "[one's bank robber] associates about the bank's security and layout") should be unprotected because the speech constitutes "participating in an activity that used illegal force," and is "merely one's method of involvement in a coercive or violent project." Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 126, at 1005. But this argument doesn't quite explain why such speech constitutes constitutionally unprotected "participat[ion]" in crime, but revolutionary advocacy—which is intended to bring about coercion and violence but which Professor Baker would protect, *see* C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1208 (1994)—doesn't constitute such "participat[ion]."

Nor does informing a known criminal about how to commit a crime fit within Professor Baker's categories of speech that doesn't constitute legitimate self-expression—speech that coerces a listener, intentionally deceives a listener, or causes harm through means other than "mental intermediation" or "the expression being comprehended by" the listener. *See* Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 126, at 997-99; Baker, *First Amendment Limits on Copyright*, *supra*, at 909-10. Finally, not all such speakers have a purpose to bring about crime, another factor that Professor Baker suggests is important. *See* Baker, *Scope of the First Amendment Freedom of Speech*, *supra* note 126, at 1004 (suggesting that "purpose" is generally an important inquiry in determining whether something is proper self-expression); *id*. at 1005 (arguing that espionage should be distinguished from lawful speech "because the purpose of the espionage activity" is to "increase[] the coercive power of another country"). Rather, I think that the speech stops being legitimate self-expression for the reason given in the text: People's rights to self-expression should be limited by their responsibility not to help bring about illegal conduct, when that illegal conduct is the only likely effect of the speech.

201. *See supra* note 92 and accompanying text.

202. *See supra* text accompanying note 102.

203. Some have urged that social security numbers be protected because they're supposedly "private information" about particular individuals. I have argued in the past that a broad constitutional exception for speech that communicates such allegedly private information is unsound. *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000). Nonetheless, I think that publication of this particular form of data should probably be restricted, not because it's "private" but because—unlike some other data about people, such as whether they shop at stores that are being boycotted, *see, e.g.*, text preceding note 85—it's both crime-facilitating and likely to have nearly no non-crime-facilitating value.

Even in these cases, there may be some conceivable legitimate uses. For instance, say that a newspaper or a Web log gets an e-mail that says, "I have discovered a security hole in system *X* that allowed me to get a large set of social security numbers. I'm alerting you to this so you can persuade the operators of *X* to fix the hole; I pass along a large set of the numbers and names to prove that the hole exists." By publishing some of the numbers and the names, the recipient can prove the existence of the problem, and thus more quickly persuade people to fix the problem. If people see their own names and social security numbers on the list, they'll know there's a problem. If they simply hear that someone claims that such a security hole exists, they may be more skeptical.

Still, these valuable uses would be extremely rare, and people can easily accomplish the same goal in a less harm-facilitating way simply by releasing only the first few digits or characters of the social security numbers (still coupled with the owners' names) or of the computer passwords. Restricting the publication of full social security numbers or passwords thus will not materially interfere with valuable speech.[204]

Moreover, because such purely crime-facilitating information tends to be specific information about particular people or places, restricting it might actually do some good, as Part III.A.3 below discusses in more detail. General knowledge, such as information about encryption or drugmaking, is very hard to effectively suppress, especially in the Internet age: Whatever the government may realistically do, some Web sites containing this information will likely remain. But specific details about particular people or computers are more likely to be initially known to only a few people. If you deter those people from publishing the information, then the information may well remain hidden.[205]

Here, too, crime-facilitating speech is analogous to some crime-facilitating products. For example, some states that allow guns nonetheless forbid silencers,[206] presumably because silencers are seen as having virtually no civilian purposes other than to make it easier to criminally shoot people without being caught. People view silencers as single-use devices; prohibiting them may help diminish crime, or make criminals easier to catch, without materially affecting any law-abiding behavior.[207]

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204. Such equally effective but less harmful alternative channels wouldn't be available for any of the other examples I describe: For instance, if you're trying to prove the existence of a security problem by describing the *problem* rather than by showing the *fruits of exploiting it*, then describing half the problem isn't going to be proof enough that the problem exists. *See supra* note 110 and accompanying text.

205. *See* Swire, *A Model for When Disclosure Helps Security*, *supra* note 73, at 190-91.

206. *See* 26 U.S.C. §§ 5841, 5845, 5861(d), 5871 (2000) (requiring registration of silencers); CAL. PENAL CODE § 12520 (Deering 2004) (prohibiting possession of silencers by civilians); DEL. CODE ANN. tit. 11, § 1444 (2004) (same); GA. CODE ANN. § 16-11-123 (2004) (same); HAW. REV. STAT. § 134-8 (2003) (same); 720 ILL. COMP. STAT. 5/24-1 (same); IOWA CODE § 724.3 (2004) (same); KAN. STAT. ANN. § 21-4201 (2003) (same); MASS. GEN. LAWS ch. 269, § 10A (2004) (same); MICH. COMP. LAWS ANN. § 750.224 (West 2004) (same); MINN. STAT. ANN. § 609.66 (West 2003) (same); MO. ANN. STAT § 571.020 (West 2004) (same); N.J. STAT. ANN. § 2C:39-3 (West 2004) (same); N.Y. PENAL LAW § 265.02 (McKinney 2004) (same); N.D. CENT. CODE § 62.1-05-01 (2003) (same); R.I. GEN. LAWS § 11-47-20 (2004) (same); VT. STAT. ANN. tit. 13, § 4010 (2003) (same).

207. *See, e.g.*, United States v. Hall, 171 F.3d 1133, 1155 (8th Cir. 1999) (Panner, J., concurring in part and concurring in the judgment) ("It is difficult to conceive of any legitimate purpose for which a private citizen needs a silencer."); Desimone v. United States, 423 F.2d 576, 583 (2d Cir. 1970) (Bonsal, J., dissenting) (likewise); 132 CONG. REC. H1757 (daily ed. Apr. 10, 1986) (statement of Rep. Volkmer) (distinguishing

Likewise, if a product has no substantial uses other than to infringe copyrights or patents, then distributing it is legally actionable.[208] Distribution of dual-use products is legal, because making it actionable would interfere with the substantial lawful uses as well as the infringing ones.[209] But when a product has virtually no lawful uses, then there is little reason to allow it, and ample reason—the prevention of infringement—to prohibit it.[210] The same sort of argument would apply to the crime-facilitating speech described here.

There are two major arguments in favor of protecting even these publications. The first is the risk that the category will be applied erroneously, or will stretch over time to cover material that it shouldn't cover. As I mentioned, even publishing others' passwords and social security numbers might have some theoretically possible law-abiding uses. I think these uses are pretty far-fetched; but once courts are allowed to find speech valueless on the ground that it has very few (rather than just no) law-abiding uses, the term "very few" could eventually broaden to cover more and more.[211] If one thinks that this is likely to happen, or if one thinks that courts will often erroneously fail to see the valuable uses of truly dual-use speech,[212] one might prefer to reject any distinction that asks whether speech has "virtually no" lawful uses.

Second, such a distinction would add to the set of reasons why a publication—not just speech to a few known criminals, but speech to the public—might be suppressed; and each new exception makes it easier to create still more exceptions in the future. Arguments for exceptions

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modifications aimed at muffling sound from "common sporting purpose[s]"; Volkmer was the cosponsor of the Firearms Owners' Protection Act of 1986). It's not clear that silencers in fact lack legitimate purposes: Though civilian self-defense uses of silencers seem extremely unlikely (theoretically possible, but practically far-fetched), using silencers might enhance the pleasure of target-shooting. One of the annoying things about target-shooting is the noise, which remains bothersome even when one wears earplugs or earmuffs, and shooting with silencers might thus be more pleasant; if this is so, then perhaps silencers should still be banned because the law-abiding use is not very valuable, but at least one can no longer say that there are no law-abiding uses. Still, the target-shooting point is rarely seen in discussions about silencers. The most common argument (right or wrong) given for the bans on silencers seems to be that they are indeed single-use products, at least in civilian hands.

208. 35 U.S.C. § 271(c) (2000) (prohibiting selling products that are "especially made or especially adapted for use in an infringement of [a] patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use"); Sony Corp. of Am. v. Universal Studios, 464 U.S. 417, 441 (1983).

209. The Digital Millennium Copyright Act, on the other hand, sets forth a standard that would allow somewhat more restrictions on dual-use products: 17 U.S.C. § 1201(a)(2) (2000) bars, among other things, distributing certain kinds of products when the product "has only limited commercially significant purpose or use other than to circumvent a technological [data protection] measure."

210. *See, e.g.*, *In re* Aimster Copyright Litig., 334 F.3d 643, 653 (7th Cir. 2003) (holding that a music sharing service engaged in contributory copyright infringement because "Aimster has failed to produce any evidence that its service has ever been used for a non-infringing use"); Telerate Sys., Inc. v. Caro, 689 F. Supp. 221 (S.D.N.Y. 1988) (holding that a computer software distributor engaged in contributory copyright infringement because the only use of the program that the distributor sold was to infringe a compilation owned by the plaintiffs).

211. *See* Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1064-71 (discussing how this process can operate).

212. *See, e.g.*, *infra* text accompanying notes 219-24 (criticizing the California Supreme Court's finding that a Web page containing the source code to a DVD decryption algorithm was irrelevant to public debate); *supra* note 111 and accompanying text (criticizing the court's finding in *United States v. Progressive, Inc.* that the details of the hydrogen bomb plans were irrelevant to public debates); *supra* notes 116-24 and accompanying text (criticizing the court's conclusion in *Rice v. Paladin Enterprises* that *Hit Man* was "effectively targeted exclusively to criminals").

are often made through analogies, which may be imperfect but still sometimes persuasive. (My own argument above, for instance, uses the existence and propriety of the exceptions for threats and false statements of fact as an analogy supporting an exception for certain kinds of crime-facilitating speech.[213]) As the exceptions increase, these arguments by analogy become easier to make.[214]

This concern may be too speculative to carry much weight when the need for the exception seems strong, but it might help argue against exceptions that don't seem terribly valuable on their own. If the category of facts that have almost no lawful uses is indeed limited to others' social security numbers and computer passwords, then perhaps creating a First Amendment exception to cover such speech might provide too little immediate benefit to justify the potential long-term slippery slope cost.

Nonetheless, it seems to me that the benefits of this exception do exceed the potential costs. If crime-facilitating material really has virtually no legitimate uses, the case for allowing the law to suppress it seems quite strong.

3. *Low-value speech?*

Once we set aside the speech that has only, or nearly only, illegal uses, the remainder is genuinely dual-use: Some listeners will be enlightened or entertained by the information, while others will misuse it. Is it possible to say that some categories of dual-use speech are nonetheless less valuable than others, so that they can be excluded from full First Amendment protection while the others remain protected? (I set aside, for Part III.D, distinctions based on whether some such speech is more *harmful* than other speech; I focus here just on whether it can be distinguished on the ground that it has less value.)

a. *Speech relevant to policy issues vs. speech relevant to scientific or engineering questions*

Some crime-facilitating speech is directly tied to policy debates. A newspaper article that discusses a secret federal subpoena of library records can help readers judge whether the federal government is abusing subpoenas, though it can also alert the subject of the investigation (who may be a terrorist) that the police are after him.[215] Other speech discusses scientific or

213. *See supra* text preceding note 192.

214. *See* Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1093-98 (discussing how a large set of exceptions can strengthen arguments for still more exceptions); *see, e.g.*, California v. Acevedo, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in the judgment) ("Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable. . . . Unlike the dissent, therefore, I do not regard today's holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years. . . . In my view, the path out of this confusion should be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded.").

215. *See* 50 U.S.C. § 1861(d) (2000 & Supp. I 2001) (providing that "[n]o person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things" under a section that deals with "order[s] requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a

engineering questions: Some chemistry textbooks discuss how explosives are made, some posts to computer security discussion groups discuss security bugs in a leading operating system, and some works on criminology or forensics discuss how hard-to-solve murders are committed.[216] May the explicitly politically connected speech be treated as more valuable than the scientific speech?

The Supreme Court has never decided a case squarely involving the suppression of scientific speech, but it has repeatedly described scientific speech as constitutionally equal in value to political speech.[217] Though the Court has sometimes defended the protection of speech on "public issues" such as "economic, social, and political subjects" as being on "the highest rung" of constitutional protection,[218] the Justices have found room on that same rung for scientific subjects as well.

One reason for this is that scientific questions are often relevant to policy matters, at least indirectly. For instance, are software manufacturers negligently failing to correct security problems, so that they should be regulated by Congress, punished through tort liability, or pressured by consumers to change their ways? Is the government negligently failing to correct security problems in its own computer systems? That's hard to tell unless we can hear just what security problems are being left unaddressed, how serious the problems are, and how hard it is to fix them.

Likewise, what's the proper way to regulate chemicals that are precursors to explosives? Again, it's hard to tell for sure unless we can hear which chemicals can be used in explosives, what mechanisms there are for making it harder to use the chemicals this way (though unfortunately this information may also help people defeat the mechanisms), and just how hard

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United States person or to protect against international terrorism or clandestine intelligence activities," 50 U.S.C. § 1861(a)(1); added by the Patriot Act). This section has aroused a good deal of controversy. *See, e.g.*, 149 CONG. REC. S10621-87 (daily ed. July 31, 2003) (statement of Sen. Feingold on introducing S. 1507, 108th Cong. (2003), entitled "A bill to protect privacy by limiting the access of the government to library, bookseller, and other personal records for foreign intelligence and counterintelligence purposes").

216. I define forensics and criminology as sciences for the purposes of this discussion. Like chemistry or computer science, they involve knowledge about the world that can inform people about how to do socially valuable things, and that is advanced by people (academics, professional practitioners, and amateurs) building on each others' published work.

217. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) ("It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.") (citations and some quotation marks omitted); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (determining the protection offered commercial speech by considering whether the speech "is so removed from any 'exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection") (citations omitted); Miller v. California, 413 U.S. 15, 22-23 (1973) ("[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression.").

Lower courts have repeatedly held that scientific speech is as valuable as political speech. *See, e.g.*, Universal City Studios, Inc. v. Corley, 273 F.3d 429, 447 (2d Cir. 2001); Junger v. Daley, 209 F.3d 481, 484-85 (6th Cir. 2000). But see *DVD Copy Control Ass'n v. Bunner*, 75 P.3d 1 (Cal. 2003), which said the same, *id.* at 10, but went on to treat the scientific speech as unprotected because "only computer encryption enthusiasts," *id.* at 16—i.e., people interested predominantly in the scientific issue—were likely to find the speech useful.

218. Carey v. Brown, 447 U.S. 455, 466-67 (1980).

it is to make the explosives regardless of what laws one might enact. These scientific details—and not just the generalities, as the next subsection will discuss—are as important to these debates as are the legal or political arguments that can be built on these details.

The one recent lower court case that has treated scientific speech as being of low value, *DVD Copy Control Ass'n v. Bunner*,[219] helps illustrate this. Bunner had published on his Web site a computer program that decrypts encrypted DVDs, and that could thus help people infringe the copyrights in those DVDs. The California Supreme Court assumed, given the case's procedural posture,[220] that the program was derived from algorithms that were the plaintiffs' trade secrets, and that had been improperly leaked to Bunner.[221]

The court acknowledged that source code "is an expressive means for the exchange of information and ideas about computer programming"[222]—computer professionals can and do read such code to understand how an algorithm works—and concluded that publishing such code is protected by the First Amendment. But, the court concluded, Bunner's publication could be enjoined, because Bunner "did not post [the source code] to comment on any public issue or to participate in any public debate," and "only computer encryption enthusiasts are likely to have an interest in the *expressive* content—rather than the uses—of DVD CCA's trade secrets."[223] Therefore, in the court's view, "[d]isclosure of this highly technical information adds nothing to the public debate over the use of encryption software or the DVD industry's efforts to limit unauthorized copying of movies on DVD's. . . . The expressive content of these trade secrets therefore does not substantially relate to a legitimate matter of public concern."[224]

Contrary to the court's assertions, though, the code is indeed relevant to debate about encryption policy and intellectual property policy. Many new and proposed intellectual property rules—such as the Digital Millennium Copyright Act[225]—rest on the assumption that technological protections are a good way to secure intellectual property, and that the legal system should prevent people from circumventing such protections. These legal rules involve the use of the government's coercive force, as well as the spending of enforcement dollars. And

219. 75 P.3d 1.

220. The trial court held that Bunner had violated trade secret law; the court of appeal didn't review this conclusion, because it reversed on First Amendment grounds; and the California Supreme Court was reviewing only the court of appeal's First Amendment decision. *Id.* at 9-10.

221. Much of the analysis of *Bunner* in these paragraphs is drawn from Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 HOUS. L. REV. 697, 745-48 (2003).

222. *Bunner*, 75 P.3d at 10.

223. *Id.* at 16. As note 14 mentioned, I don't take a position in this Article on whether restrictions on computer source code should be viewed as content-based or content-neutral. *See, e.g.*, Lee Tien, *Publishing Software as a Speech Act*, 15 BERKELEY TECH. L.J. 629 (2000); Steven E. Halpern, *Harmonizing the Convergence of Medium, Expression, and Functionality: A Study of the Speech Interest in Computer Software*, 14 HARV. J.L. & TECH. 139 (2000); Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713 (2000); David McGowan, *From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech*, 64 OHIO ST. L.J. 1515 (2003). My criticism here is of the California Supreme Court's view that the code is of low value, not of its conclusion that the restriction on the code was content-neutral.

224. *Bunner*, 75 P.3d at 16.

225. *See* 17 U.S.C. § 1201 (2000).

they also have opportunity costs, as Congress focuses on one set of enforcement techniques rather than another.

If the technological protections can be made fairly effective, and if industry uses those effective protections, then it may be worthwhile for Congress to support these protections despite the cost and the limits on liberty that they involve. On the other hand, if technological protections will inevitably be easy to circumvent, or if industry chooses not to use the most effective protections, then it may be better for legislators, scholars, and voters to explore other approaches to intellectual property law reform. How reliable these copy protection measures are, both actually and potentially, is thus an important question for sound policy analysis.

Descriptions of how copy protection measures can be evaded help interested observers—researchers, journalists, computer hobbyists, advocacy group staff, and others—answer this question. When a Princeton computer science graduate student discovers that a copy protection feature of some CDs can be defeated by holding down the "shift" key while the CD is being loaded, that's an important piece of information about whether copy protection is effective.[226] The same is true when someone discovers that the CSS DVD scrambler can be defeated using a short computer program consisting only of about 120 lines of source code.[227] And providing the specific source code is often the most effective way of persuading expert readers that the copy protection measure can be evaded. General claims that one has found a flaw will often be unpersuasive; only providing the source code will prove that the flaw really exists.

Of course, distributing the source code, or even the information that one can defeat a copy protection scheme by hitting a key at the right time, itself helps contribute to the copy protection mechanisms' failure. But if a mechanism can be so easily defeated by the distribution of simple instructions, reasonable legislators and voters may conclude that the legal system shouldn't invest its resources into protecting such an ineffective mechanism. These legislators and voters can't, however, have the necessary inputs to that decision unless the law allows speech that describes the circumvention mechanism—crime-facilitating as such a description may be.

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226. *See* John Borland, *Student Faces Suit over Key to CD Locks*, CNET NEWS.COM, Oct. 9, 2003, *at* http://news.com.com/2100-1025-5089168.html (describing threatened lawsuit against a graduate student who posted an academic article on how people can avoid a certain kind of copy protection—the article is J. Alex Halderman, *Analysis of the MediaMax CD3 Copy-Prevention System* (Princeton Univ. Computer Science Tech. Rep. TR-679-03, 2003), http://www.cs.princeton.edu/~jhalderm/cd3/); *id.* (noting that the lawsuit threat was later withdrawn); Letter from Matthew J. Oppenheim, Representing the RIAA, to Prof. Edward Felten (Apr. 9, 2001), *at* http://cryptome.org/sdmi-attack.htm (cautioning a Princeton computer science professor that publishing an article that revealed security holes in a content protection mechanism might violate the Digital Millennium Copyright Act); Statement by Matthew Oppenheim on Professor Felten, *at* http://www.riaa.com/news/ newsletter/press2001/042501.asp (July 13, 2001) (disclaiming any desire to sue Felten under the DMCA); Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERKELEY TECH. L.J. 501, 513-14 (2003) (discussing the Felten matter and other incidents); Neils Ferguson, *Censorship in Action: Why I Don't Publish My HDCP Results*, *at* http:// www.macfergus.com/niels/dmca/cia.html (Aug. 15, 2001) (asserting that Ferguson, a leading Dutch cryptographer, refrained from publishing a paper discussing certain security vulnerabilities for fear of being sued or prosecuted under the DMCA).

227. *See* http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/css_descramble.c (last visited Jan. 14, 2004) (found using a quick Google search for "decss source code").

So scientific speech, even crime-facilitating scientific speech, can be relevant to policy debates. Speech of that sort therefore deserves the same sort of protection that other policy-related speech gets.[228]

The harder question is whether scientific speech should also be entitled to full protection for its scientific value alone, even if a court concludes (rightly or wrongly) that some scientific speech has only a very slight connection to policy issues. Say, for instance, that the government prohibits certain kinds of genetic modification of plants or animals. A scientist wants to publish an article discussing theories or techniques that will make genetic modification much easier, perhaps allowing it to be done with many fewer resources, and thus by many more researchers (maybe including amateurs). Even independently of any political value that the article may have,[229] the article may advance scientists' thinking about forbidden genetic modification, about permitted genetic modification, or about biology more generally.

At the same time, the article would indubitably make it easier for people to engage in prohibited research, research that might jeopardize the environment or public health. Should the article be treated differently than political speech because a judge finds its value to be purely scientific rather than political?[230] (Set aside for now whether this speech, like some nonscientific speech, might be restrictable because of its dangerousness, a matter that will be discussed in Part III.D.1 below.)

I think the answer is "no," because the search for truth about scientific questions should be as protected by the First Amendment as the search for truth about morality or politics. Deeper scientific understanding is as necessary for our society's development as deeper political understanding. In the words of the Continental Congress's *Appeal to the Inhabitants of Quebec*, the freedom of the press is important to the "advancement of truth [and] science," just as it is to

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228. *See* Diane Leenheer Zimmerman, *Scientific Speech in the 1990s*, 2 N.Y.U. ENVTL. L.J. 254, 263 (1993) (making a similar point).

229. The speech may, for instance, be used to argue that banning genetic modification is futile or harmful to American economic competitiveness, because scientists in other countries would surely uncover this technique independently even if it had been suppressed.

230. *Compare* Ferguson, *supra* note 111, at 543 (arguing for full protection), *and* Martin H. Redish, *Limits on Scientific Expression and the Scope of First Amendment Values: A Comment on Professor Kamenshine's Analysis*, 26 WM. & MARY L. REV. 897 (1985) (likewise), *and* Zimmerman, *supra* note 228 (likewise), *and* Cheh, *supra* note 147, at 22-28 (likewise), *and* Ruth Greenstein, *National Security Controls on Scientific Information*, 23 JURIMETRICS J. 50, 77-83 (1982) (likewise), *with* Elizabeth R. Rindskopf & Marshall L. Brown, Jr., *Scientific and Technological Information and the Exigencies of Our Period*, 26 WM. & MARY L. REV. 909, 916-18 (1985) (arguing for reduced protection for much scientific expression), *and* Robert D. Kamenshine, *Embargoes on Exports of Ideas and Information: First Amendment Issues*, 26 WM. & MARY L. REV. 863 (1985) (likewise), *and* Cass R. Sunstein, *Government Control of Information*, 74 CAL. L. REV. 889, 908-12 (1986) (likewise, though limiting his argument to "technical data," such as "algorithms, equations, charts, or blueprints").

It seems to me that the Rindskopf & Brown and Kamenshine articles make a major mistake: they formulate much of their argument around the notion that speech that has "identifiable commercial applications" (Rindskopf & Brown) or that is distributed by a commercial company (Kamenshine) is "commercial speech" and should thus get less protection than other speech. But the Court has limited the commercial speech doctrine to advertising (explicit or implicit) for some product or service. The Court has clearly held that the speaker's economic motivation, the utility of the speech for economic purposes, and the sale of the speech for money do *not* make speech into "commercial speech." Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

the "advancement of . . . morality [and] arts" and "diffusion of liberal sentiments on the administration of Government."[231]

And just as we should be skeptical of government officials' ability to accurately evaluate the harms and benefits of political speech, which may run counter to the current majority's political preferences,[232] so we should be skeptical of their ability to accurately evaluate the harms and benefits of scientific speech, which may also run counter to the current majority's political preferences. Recent debates about stem cell research, cloning, genetic modification of agricultural products and of people, and copyright protection mechanisms show how deep the political disagreements about science and technology can be. And the debates show how decisions are generally made not just based on a dispassionate, technocratic evaluation of likely danger, but also on ideological perspectives about change and stasis,[233] and about the morality of particular practices. There is no First Amendment problem with legislators using these moral and ideological perspectives as justifications for restricting what scientists do, to fetuses, life forms, or electronic devices. But the government shouldn't be trusted to use these perspectives as justifications for restricting what scientists say about science, any more than for restricting what people say about politics.

So the relevance of much scientific speech to political debates, coupled with its value to the search for scientific truth, should, I think, lead scientific speech to be treated the same as political speech. The matter is not as well settled as one might at first assume—the Court has never squarely confronted the question, and when it does so, it might be facing a case where the government's argument for suppression will be hard for the Justices to resist. Scientific speech is most likely to be restricted precisely when it's harm-facilitating, and some scientific speech is now capable of facilitating some extremely serious harms. Nonetheless, for the reasons discussed above, the Court's dicta (and lower courts' holdings) that scientific speech should be as protected as political speech are likely correct.[234]

b. *General knowledge vs. particular incidents*

Some crime-facilitating speech communicates general knowledge—information about broadly applicable processes or products, such as how explosives are produced, how one can be a contract killer, or how an encryption algorithm can be broken. Other crime-facilitating speech communicates details about particular incidents, such as a witness's name, or the fact that certain library records have been subpoenaed.

231. *See* Continental Congress, *Appeal to the Inhabitants of Quebec* (Oct. 26, 1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774), *cited in* Roth v. United States, 354 U.S. 476, 484 (1957) ("The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs.").

232. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 106 (1980).

233. *See, e.g.*, VIRGINIA POSTREL, THE FUTURE AND ITS ENEMIES, at xi-xviii (1999).

234. *See supra* note 217.

Some might argue that the particular information is materially less valuable than the general, precisely because the particular discusses only one specific incident. But the Court has not taken this view. A wide range of cases—such as libel cases, cases dealing with criticism of judges' performance in particular cases, cases dealing with the publication of the names of sex crime victims, and more—have involved statements about particular incidents and often particular people, rather than general assertions about politics or morality.[235] All those cases have treated speech about particular incidents as being no less protected than speech about general ideas.

And the Court has been right about this. First, people's judgment about general problems is deeply influenced by specific examples; and any side that is barred from giving concrete, detailed examples will thus be seriously handicapped in public debate. Generalities alone rarely persuade people—to be sound and persuasive, an argument typically has to rest both on a general assertion and on specific examples. To decide whether library borrowing records should be subject to subpoena, for instance, people will often need to know just how such subpoenas are being used. Statistical summaries (especially ones that can't be verified by the media, because it's a crime to reveal the subpoena to the media) won't be enough.

Likewise, people are much less likely to be persuaded by accounts that omit names, places, and details of the investigation. People are rightly skeptical of accounts that lack corroborating detail—saying "trust me" is a good way to get people not to trust you, especially when, as now, people doubt the media as much as they do other institutions.[236]

Second, speech about particular incidents is often needed to get justice in those incidents, and to deter future abuses. One important limit on government power is its targets' ability to publicly denounce its exercise. If a librarian who is served with a subpoena can't publicize the subpoena, and can't explain in detail how he thinks this subpoena unnecessarily interferes with patrons' and librarians' privacy and freedom, then it will be more likely that such a subpoena may stand even if it's illegal or unduly intrusive.

Likewise, if a newspaper may not publish the names of crime witnesses, then it's less likely that others who may know that the witnesses are unreliable will come forward, and tell their story either to the court or to the journalists. Justice in general can only be done by working to get the right results in each case in particular. And public speech about the concrete details of the particular cases is often needed to find the truth in those cases.

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235. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Garrison v. Louisiana, 379 U.S. 64 (1964); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Florida Star v. B.J.F., 491 U.S. 524 (1989).

236. Newspapers and other speakers sometimes do use anonymous reports in their stories, because of other constraints (such as promises to sources), but that's certainly not the optimal means of persuading a skeptical public.

Some readers may trust the newspaper that says "Trust us" more if it says "Trust us; we'd give the supporting facts, but the law prohibits us from doing so." But other readers might reasonably fear that the newspaper actually doesn't have all the facts—or they might fear that the newspaper thinks it has the facts, but that those facts are less accurate or more ambiguous than the newspaper thinks. There's no substitute for seeing the underlying facts, and knowing that other people, who may know more about the subject than you do, see the facts. Anything else will be inherently less credible.

Finally, even temporary restrictions on publishing specific information raise serious First Amendment problems, because the value of speech can be lost even if the speech is just delayed, rather than prohibited altogether—this is why the Court has generally rejected proposals to suppress speech during trials, even if the speech were to be freely allowed after the trial.[237] The same should apply to, for instance, rules that bar revealing witnesses' identities before they testify, or that bar revealing subpoenas before the investigation is over.[238]

Often, if the speech is delayed, any harm the speech seeks to avoid may become hard to remedy: Many people's personal reading habits might be wrongly revealed to the government by an overbroad subpoena, or a person may be wrongly convicted and the conviction may be hard to overturn even if new evidence is revealed after trial.[239] Moreover, the public is often less interested in discussing alleged past wrongs than it is in confronting supposed injustice in a prosecution or an investigation that's now taking place. Just as any side of the debate that can't produce concrete details is greatly handicapped, so is any side that can't bring its evidence before the public when the evidence is most timely.

But while specific information about particular incidents ought not be distinguished from general knowledge on grounds of value, it is indeed different in another way: Trying to restrict the spread of some such specific information may be less futile than trying to restrict general knowledge. General knowledge, such as drugmaking or bomb-making information, is likely to already be known to many people, and published in many places (including foreign places that are hard for U.S. law to reach). People will therefore probably be able to find it somewhere, especially on the Internet, with only modest effort. If the knowledge is available on five sites rather than fifty, that will provide little help to law enforcement.

On the other hand, any particular piece of specific information—such as the existence of a particular subpoena or the password to a particular computer system—is less likely to be broadly available at the outset. If the law can reduce the amount of such information that's posted, then fewer investigations will be compromised and fewer computer systems will be broken into; it's better that there be fifty incidents of computer system passwords being revealed than five hundred. So to the extent that the futility of a speech restriction cuts against its constitutionality,[240] restrictions on general knowledge are less defensible than restrictions on specific information about particular people or places.

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237. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 560-61 (1976).

238. *See supra* notes 18 and 29.

239. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993) (upholding Texas's rigid constraints on the ability to get a new trial based on newly discovered evidence).

240. *See, e.g.*, *Neb. Press Ass'n*, 427 U.S. at 567 (concluding that a ban on a newspaper's pretrial coverage was unconstitutional, partly because it was unlikely to serve its goal of preventing juror prejudice, since in the small 850-person town, "[i]t is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it."); *id.* at 599 n.22 (Brennan, J., concurring in the judgment) (emphasizing that in small towns such restrictions are likely to be ineffective because "the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication"); Buckley v. Valeo, 424 U.S. 1, 45-47, 53 (1976) (concluding that restrictions on independent expenditures were unconstitutional, partly because they could so easily be skirted and would thus likely prove ineffective); ACLU

c. *Commentary vs. entertainment and satisfaction of curiosity*

i. *The limits of existing First Amendment rules related to entertainment*

As Part I.B.4 discussed, some crime-facilitating speech can entertain readers. A crime novel or a thriller, for instance, may describe how a character commits a crime. A how-to book (how to make guns, how to pick locks, how to be a contract killer) may give armchair adventurers a vicarious thrill, or may just satisfy people's curiosity.

In some of these situations, a court might conclude that the only (or nearly only) noncriminal value of some crime-facilitating details would be entertainment. The work itself may have a substantial ideological component—for instance, a thriller may send the message that big business is evil, or that espionage agencies corrupt even the idealistic. But the detail, for instance, the nonobvious and hard-to-detect way that the hero kills his enemy, may have little connection to the work's ideas. The thriller would convey the same message if the killing were described more vaguely, or if some key element of a bomb recipe were omitted or changed.[241]

May the law properly treat speech that has purely entertainment value as less constitutionally protected than speech which has political, scientific, technical, or educational value? Ever since *Winters v. New York* in 1948, the Supreme Court has generally treated works of entertainment as no less protected than works of advocacy:

> We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines [which contained lurid crime stories], they are as much entitled to the protection of free speech as the best of literature.[242]

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v. Reno, 31 F. Supp. 2d 473, 496 (E.D. Pa. 1999) (concluding that the Child Online Protection Act was unconstitutional partly because it didn't substantially advance the government interest, given that children would still be able to access material from foreign sites), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *rev'd on other grounds sub nom*. Ashcroft v. ACLU, 535 U.S. 564 (2002).

241. *See, e.g.*, TOM CLANCY, THE SUM OF ALL FEARS 210-11, 261-62, 269-70, 280-81, 296-98, 311-12, 332-33, 356-60, 384-85, 414, 421-22, 430, 444-48, 456-60, 469-70, 480-81, 487-88, 495-97, 615-19, 797 (1991) (describing in some detail how nuclear bombs are built, but saying in the Afterword that "certain technical details have been altered, sacrificing plausibility in the interest of obscurity"); CHUCK PALAHNIUK, FIGHT CLUB 11-13, 69, 72-73, 110, 185, 204 (1996) (describing creating a silencer, making and using explosives, opening locks, and facilitating arson); *cf. IGN for Men Interview: Chuck Palahniuk*, IGN FOR MEN, Oct. 15, 1999, *at* http://formen.ign.com/news/11274.html?fromint=1 (quoting Palahniuk as saying that "at the last minute the publisher made me change one ingredient in each of the recipes").

242. Winters v. New York, 333 U.S. 507, 510 (1948); *see also* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995) (stating that even nonsense poetry, instrumental music, and abstract art are fully constitutionally protected); Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."); Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977) ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press].'") (citing *Winters*); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (echoing *Winters*).

The one narrow exception comes in obscenity law, which treats a subset of sexually titillating speech as less

And this is quite right: Precisely because entertainment is more entertaining, it can reach and persuade more viewers than a political tract might. *Dirty Harry* is a powerful piece of advocacy,[243] and ought not be restricted even if a court concludes that it defends, praises, and thus advocates (among other things) illegal behavior in the service of fighting crime. Likewise, the communication of facts is constitutionally protected even if it's done in a docudrama or a novel rather than in a documentary or a work of serious biography.

Nonetheless, *Winters* doesn't fully resolve whether crime-facilitating details that have purely entertainment value should get full First Amendment protection. First, *Winters* and the cases that followed it involved potential harms that were relatively indirect—long-term harm caused by reading supposedly degrading crime stories[244]—or relatively slight, such as the use of another's name without permission.[245] They did not involve speech that could help others commit serious crimes.

Second, the *Winters* rationale concludes, quite correctly, that even works of entertainment are generally protected because of the ideological message that they contain. As I discuss below, fictional details of the work that are connected to the ideological message should thus also be protected.[246]

But *Winters* doesn't resolve whether this protection should extend even to those crime-facilitating elements of the work that are unnecessary to express that ideological message, or whether authors may be required to exclude those elements even from an otherwise valuable work. Libel and child pornography law, for instance, forbid the use of knowing falsehoods or pictures of real children even in works that have substantial value.[247] Such details are seen as being harmful and constitutionally valueless (or nearly valueless),[248] and their potential entertainment value does not save them.

Obscenity law takes a different approach: There, the constitutional value of the work taken as a whole does protect even isolated scenes that might otherwise be obscene.[249] But, as with the speech in *Winters*, the potential harm of obscenity (even if one accepts, as the Court has, that there is such potential harm) is relatively indirect. The question is whether crime-facilitating

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protected; but even sexually themed works are just as protected when they have serious artistic or literary value as when they have serious scientific or political value. Miller v. California, 413 U.S. 15 (1973).

243. *See, e.g.*, John Vinocur, *Clint Eastwood, Seriously*, N.Y. TIMES, Feb. 24, 1985, § 6 (Magazine), at 16.

244. *Winters*, 333 U.S. at 515.

245. *Zacchini*, 433 U.S. at 562; *Time*, 385 U.S. at 374.

246. One could imagine a novel, for instance, that has as its main ideological point the futility of the drug war, and that therefore describes how its characters easily manufacture drugs and how this stymies any attempts at serious drug control. The author might then want readers to take the details of the characters' actions seriously, and might even specifically tell readers that while the plot and the characters are fictional, the descriptions of how the characters make drugs are accurate. Even if the author doesn't make any such assurances, readers might be intrigued by the details, suspect that they might be accurate, confirm them independently, and thus learn something that might be important to their view of drug prohibition.

247. *See* New York v. Ferber, 458 U.S. 747, 761, 764 (1982) (noting that in child pornography cases, "the material at issue need not be considered as a whole," and thus may be punished even if isolated scenes in an otherwise valuable work are child pornography); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (concluding that a false statement could lead to defamation liability even when the statement appears in a magazine article that also contains protected political opinion).

248. *Ferber*, 458 U.S. at 758, 762-63; *Gertz*, 418 U.S. at 340-41.

249. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 89 (1973).

speech for which entertainment is the only noncriminal use should be treated like potentially entertaining false statements of fact or child pornography—which authors must exclude even from their otherwise valuable works—or like other potentially entertaining sexually explicit material, which may be retained if the surrounding work has serious value.

Finally, *Winters* holds that works of entertainment are categorically protected without the need for any case-by-case judgment of whether they have an ideological message.[250] This makes sense: Even overtly ideological entertainment is commonplace ("Everyone is familiar with instances of propaganda through fiction"), and probably most entertainment makes at least some implicit statements about human nature, morality, or politics.[251]

But comparatively little entertainment includes crime-facilitating information, and probably a small portion of such entertainment uses the crime-facilitating information in ways that are needed to express the work's message (though this assertion is necessarily speculative). If courts conclude that purely entertaining uses of crime-facilitating information don't have much First Amendment value, then it may make sense to decide case by case which crime-facilitating information has such broader value beyond entertainment, rather than categorically presuming such value.

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250. The one notable exception is sexually explicit entertainment, which the Court has held may be unprotected when it lacks "serious literary, artistic, political, or scientific value." *Id.* at 67. But this is a deliberately narrow exception.

251. Even the *Hit Man* contract murder manual conveys a message—a rejection of morality, and a sort of bargain basement Nietzschean praise for the "man of action" who is able and willing "to step in and do what is required: a special man for whom life holds no real meaning and death holds no fear . . . [a] man who faces death as a challenge and feels the victory every time he walks away the winner." REX FERAL, *Preface to* HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (1983), *available at* http://ftp.die.net/ mirror/hitman/ (last visited Jan. 14, 2005). This message is one thing that leads many people to find the book repellent. *See, e.g.*, RODNEY A. SMOLLA, DELIBERATE INTENT 38-39 (1999) ("The first time I read the book, I was totally disgusted. . . . I was depressed at the absolute incarnate *evil* of the thing, the brazen, cold-blooded, calculating, meticulous instruction, and repeated encouragement in the black arts of assassination."). If *Hit Man* were being restricted precisely because of its potential to persuade—because of its nihilistic moral message—the rationale of *Winters* would squarely apply to it.

Rice v. Paladin Enterprises dismissed the possibility that *Hit Man* may convey an ideological message: "Ideas simply are neither the focus nor the burden of the book," the court concluded; "[t]o the extent that there are any passages within *Hit Man*'s pages that arguably are in the nature of ideas or abstract advocacy, those sentences are so very few in number and isolated as to be legally of no significance whatsoever." 128 F.3d 233, 262 (4th Cir. 1997). But this, I think, is mistaken: While the idea underlying *Hit Man*—that the "man of action" should be willing, even glad, to violate generally accepted moral commands—is evil, it is an idea, and the content and tone of the book pervasively support that idea. This is, I think, a form of "propaganda" through entertainment, and does "teach[]" a nihilistic "doctrine," even if the *Rice* court, like the *Winters* Court, could "see nothing of any possible value to society" in the book. (*Winters* itself struck down a ban on the distribution of "true crime" magazines, as applied to magazines that the lower court said were "collection[s] of crime stories which portray in vivid fashion tales of vice, murder and intrigue." People v. Winters, 48 N.Y.S.2d 230, 231 (App. Div. 1944). As a class, these magazines seem likely to have not much more overtly political content than *Hit Man*.) If *Hit Man* is to be unprotected, it would be despite its overall political content—for instance, on the theory that some of the crime-facilitating details are unneeded to convey the political message—and not because such content is supposedly absent.

ii. *The tentative case against treating purely entertaining crime-facilitating speech as less valuable*

The question whether the law may treat purely entertaining elements of a work as less constitutionally valuable is thus open. Still, there are two related reasons to be skeptical of such distinctions.

(1) Much purely entertaining crime-facilitating speech would have considerable value, beyond just entertainment, in other contexts. Details about a hard-to-detect poison may just be a plot device in a novel; but they have scientific and practical value in a medical textbook or forensics textbook, and political value in debates about how such chemicals should be regulated or about whether the police properly investigated a case in which the poison might have been used. The explanation of how one can get a fake identity is entertainment in *The Day of the Jackal*[252] but would be relevant to policy debates in an article criticizing lax government identity checks or even in a news story on how crimes are committed. Most of the details in the *Hit Man* manual for aspiring contract killers could valuably appear in a textbook on how contract killers operate, and how they can be identified, stopped, deterred, or avoided.[253]

Moreover, the details in nonentertainment works would probably be more credible, detailed, and useful (both to criminals and to the law-abiding) than the material in a novel, precisely because the work would purport to be factual, and the reader would have less reason to worry that the author has been taking dramatic license or skimping on his research. And they would probably be more credible even than an ostensibly factual work such as *Hit Man*, because they would likely be written by a known, credentialed expert in the field rather than "Rex Feral" (the pseudonym used by the author of *Hit Man*).

So the facts banned from novels or from other works that are mostly consumed for entertainment would still be available in other places. The only way to prevent that would be to shift to a system where fairly basic medical, forensic, criminological, and security literature is classified and available on a need-to-know basis—something that's unlikely in a free and large country, where tens of thousands of professionals and students work in each field.[254] A restriction on crime-facilitating entertainment would thus have little crime-fighting benefit, precisely because the restriction would be limited to entertainment. (Recall that the whole question in this Part is whether entertainment should be treated as specially regulable, even when serious works containing the same facts are protected.)

The restriction probably would not have zero benefit: A widely read novel may give readers ideas that they wouldn't have otherwise had, and that they can confirm by doing more research.

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252. *See supra* note 13.

253. See also *infra* Part III.C.2, which argues that information relevant to political, scientific, and practical matters should be protected even when it's presented without an explicit connection to those matters—for instance, in a "just the facts" newspaper article. It seems to me that this argument is weaker when the information is presented as entertainment, especially as fiction. Readers expect fiction to be false. They may expect it to contain real ideological advocacy, or real information about the era or milieu in which the fiction is set, for instance when an author of historical fiction has a reputation for accuracy. But even fiction authors who have reputations for verisimilitude are traditionally given a great deal of latitude in changing details. Few people, therefore, are likely to treat fiction—as opposed to a newspaper article—as an especially helpful source of specific data about how crimes can be committed.

254. *See also supra* text accompanying note 108.

Many criminals aren't particularly methodical, patient, or intelligent, and might not spend much time reading dry technical tomes—if they hadn't seen the idea in some entertaining potboiler, they might not have come across it, and thus would have committed the crime using a less effective or more detectable technique. Still, this crime-fighting effect would likely be fairly modest.

More broadly, crimes committed using nonobvious instructions derived from a work of fiction, or even from an entertaining how-to manual, seem fairly rare. There's no reliable data that I know of, but I've seen relatively few such instances.[255] If one sets aside those crimes that would have been committed in any event, even had the criminals had to rely on other, more constitutionally protected sources, the number seems likely to be smaller still.

(2) Some crime-facilitating speech in works of entertainment will also have value beyond mere entertainment even in that work itself. A novel that carries a political message about the futility of drug or gun prohibition may describe how a character easily makes or smuggles drugs or guns. The description may create an entertainingly realistic atmosphere, and thus attract more readers who might then absorb the novel's ideological message; but it may also more directly support the novel's ideological claim, just as it would in a political tract. (The novelist may even specifically note to readers that, though the work is fiction, these details are quite accurate.)

The connection may also be more indirect, though still important: The realistic depiction of a complex killing may illuminate the killer's character, and help support the point that the work is trying to make about human nature. In a well-written novel or film, most details aren't just purely entertaining diversions—they work together to support what the work is saying, whether the ultimate statement is about politics or about people. Under *Winters*, the First Amendment fully protects such elements of entertaining works that are indeed related to the "doctrine" that the work teaches, even if it might not fully protect the purely entertaining details that are irrelevant to the work's ideology.

Yet sorting out which speech is merely entertaining and which has a serious connection to a work's message can be very hard, especially since both the message and the connections among the work's elements may be intentionally subtle and indirect. To some readers, a plot detail may illuminate a character's temperament or attitude, and thus affect how they perceive the character, his actions, and the ideas he represents. To others, the connection may be invisible, and the plot detail may seem irrelevant. Even authors may sometimes not be able to syllogistically express the connection between a detail and the overall theme of the book—all they can often say is that they included an element because they felt it was integral to the story.

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255. The chief example seems to be the *Day of the Jackal* fraud. *See supra* note 115. The prosecution in the Timothy McVeigh case argued that the novel *The Turner Diaries* "served as a blueprint for McVeigh and for his planning and execution of the bombing in Oklahoma City"; the novel does talk about blowing up a federal building with a homemade truck bomb, describes how a bomb can be made using ammonium nitrate and fuel oil, and suggests that the ammonium nitrate be obtained from a farm supply store. *See* Closing Argument, United States v. McVeigh, No. 96-CR-68 (D. Colo. May 29, 1997), *available at* 1997 WL 280943; ANDREW MACDONALD, THE TURNER DIARIES 36 (2d ed. 1999). Nonetheless, the instructions the government pointed out in the book were fairly general; and the prosecution pointed out that McVeigh learned exactly how to make the bomb from another book, *Home Made C4*, which was an instruction manual rather than a novel. Closing Argument, *supra*. *The Turner Diaries* may have helped motivate him to do what he did, but I doubt that it helped teach him how to do it.

So perhaps here, as in *Winters*, "[t]he line between the informing and the entertaining is too elusive" for constitutional purposes.[256] First, the vagueness of the line between the purely entertaining and the ideologically linked may make it hard for authors to know what they may safely write about. This may lead the authors to avoid more speech, including speech that has ideological value beyond just entertainment, than the legal rule would ultimately require.[257] (Likewise, courts would have to draw some line between substantially crime-facilitating pure entertainment and entertainment whose crime-facilitating effect is too modest to count, perhaps because the instructions that it gives are obvious.[258] The vagueness of this line would also end up deterring some speech that has some First Amendment value, even if only entertainment value.)

Second, the vagueness of the line between the purely entertaining and the ideologically linked may increase the risk that prosecutors, judges, and juries will erroneously punish speech that is indeed part of a work's ideological argument. This is especially likely when the criminal harm caused by one reader of the work is concrete and obvious, whereas the benefit of the work to many thousands of readers—not just entertainment, but moral or political enlightenment—is diffuse and harder to see.

Third, the vagueness may increase the risk that prosecutors', judges', and juries' decisions will be based on impermissible factors, such as the ideology that the work as a whole expresses.[259] And fourth, the vagueness may increase the risk that courts will over time move the line to restrict more and more speech, including speech that is indeed necessary to most effectively present the author's ideological argument.[260] Some of these are the same reasons mentioned in Part III.A.2 as reasons to hesitate even about an exception for speech that seems to have no noncriminal value, including no entertainment value. But the reasons are more powerful

256. *See supra* text accompanying note 242.

257. One can argue that both the existence of any new exception for the purely entertaining crime-facilitating speech and its vagueness would also have a less direct effect on author's work: By undermining the sense of freedom that authors in America now enjoy, and making them feel that their work is being regulated by the government, such a restriction might hurt our cultural life even when the writer doesn't feel any specific fear that a particular work is going to be restricted.

But while this is possible, it strikes me as not being especially likely. I've seen no substantial evidence of such an atmospheric fear (as opposed to specific concern about particular items) flowing from copyright law, which does regulate the writing of parodies, quotation of songs in books, and more. Many great works both of literature and entertainment have been written in places and times in which the legal system allowed many more speech restrictions—for instance, on novels that relate to sex—than the U.S. legal system does today. A regime with a truly oppressive censorship system, such as the one that existed in the Soviet Union, would likely create such a broadly stifling environment; but I doubt that simply allowing modest restrictions on crime-facilitating details would do so.

258. Many details—consider, for instance, a character's patiently aiming a rifle rather than just shooting from the hip, or wearing gloves to avoid leaving fingerprints—convey some information that could conceivably help some criminals commit crimes more effectively, if those criminals were too ignorant or too dumb to have learned these details on their own. Yet surely such obvious crime tips wouldn't be outlawed, or else fiction about crime couldn't be written.

259. *See* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

260. *See* Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1056-61, 1077-87 (discussing such slippery slope phenomena).

here, precisely because this exception is potentially broader, since it would deliberately cover even speech that has some First Amendment value.

For all these reasons, as Part III.A.2 also discussed, there is good reason to hesitate before creating any new exception. In a legal system built on precedent and analogy, each new free speech exception strengthens the case for still broader and more dangerous exceptions in the future.[261] In some cases, we may have to run that risk, because the need for a new exception is so pressing. But crime-facilitating entertainment seems like a relatively small problem. The benefits of carving out a special restriction for such entertainment thus seem fairly modest. And the potential harm of more broadly eroding constitutional protection for fiction—material that often has serious value, and that even Western democracies have in the past tried to restrict precisely because of its ideological component[262]—seems substantial enough that the risk doesn't seem worth running here.

d. *Speech on matters of "public concern"*

The Supreme Court has occasionally tried to create tests that distinguish speech on matters of "public concern" from speech on matters of merely "private concern" (though it has unfortunately never set forth a clear definition of either phrase). Both categories refer to speech that has at least some value, and thus deserves at least some protection;[263] but, the theory goes, speech on matters of merely private concern has comparatively little value, and so may be subject to more restrictions than speech on matters of public concern. The "newsworthiness" test in the disclosure of private facts tort reflects a similar judgment.[264] So does the suggestion,

261. *See supra* notes 213-14 and accompanying text.

262. *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684 (1959) (involving New York's attempt to restrict *Lady Chatterley's Lover* because of its endorsement of adultery); *cf.* Peter Gotting, *Ford's Land Rover Ad Banned by U.K. Regulator on Use of Gun*, BLOOMBERG NEWS, Aug. 31, 2004, *available at* LEXIS, News Library, Allbbn File ("Ford Motor Co. . . . has had a television commercial for its Land Rover brand banned by the U.K. communications regulator after it was judged to 'normalize' the use of guns. The advertisement, which featured a woman brandishing a gun later revealed to be a starting pistol, breached the Advertising Standards Code and must not be shown again . . . .").

263. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 147 (1983) (citations omitted, brackets in original):

> We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[The] First Amendment does not protect speech and assembly only to the extent it can be characterized as political." . . . We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.

264. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (1977) (describing what many cases call lack of "newsworthiness" as lack of "legitimate concern to the public"); Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998) (treating "of legitimate public concern" and "newsworth[y]" as interchangeable); Peckham v. Boston Herald, Inc., 719 N.E.2d 888 (Mass. App. Ct. 1999) (likewise); Winstead v. Sweeney, 517 N.W.2d 874 (Mich. Ct. App. 1994) (likewise); Montesano v. Donrey Media Group, 668 P.2d 1081 (Nev. 1983) (likewise); *see also* Joe Dickerson & Assocs. v. Dittmar, 34 P.3d 995 (Colo. 2001) (likewise, as to the related tort of "invasion of privacy by appropriation of name and likeness"). The Supreme Court has never decided whether this tort is constitutional, though some courts have upheld it if it is limited to "nonnewsworthy" facts. *See, e.g.*, *Shulman*, 955 P.2d at 482-83.

expressed by many commentators, that free speech protection should be limited to speech that's part of "public discourse."[265]

i. *Some relevance to any political, social, or scientific controversy*

One possible definition of "public concern" would rest on whether the speech is relevant to any political, social, or scientific controversy, be it general or specific. The Court seems to have taken this view in *Florida Star v. B.J.F.*, where it concluded that the name of a rape victim was a matter of "public significance" because of its connection to a report of a crime, and that therefore publishing the name was fully protected speech.[266] Under such an approach, only "domestic gossip,"[267] such as discussions of a private figure's (noncriminal) sex life,[268] would qualify as being of "private concern."[269]

Little crime-facilitating speech would be of merely private concern under this test, for the reasons described in Part I.B.[270] Perhaps this definition of "private concern" speech would include the nearly no-value speech discussed in Part III.A.2: the speech that only helps listeners commit crime, and has virtually no other value. So lower protection for "private concern" speech under this definition would further support the Part III.A.2 analysis, but it wouldn't do any work beyond that.

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265. *See, e.g.*, Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 603 (1990).

266. 491 U.S. 524, 536 (1989). The Court said that "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities," *id.* at 536-37, but ultimately held that the publication even of the specific identity was constitutionally protected as "truthful information about a matter of public significance," *id.* at 533.

267. Bartnicki v. Vopper, 532 U.S. 514, 533 (2001).

268. *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 761 n.7 (1985) (plurality opinion).

269. For criticisms of such lower protection, see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting) ("[A]ssuming that . . . courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject [and thus on] what information is relevant to self-government. . . . The danger such a doctrine portends for freedom of the press seems apparent."); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 30 (1990) (taking a similar view); Volokh, *Freedom of Speech and Information Privacy*, *supra* note 203, at 1088-1106.

270. *Times-Mirror Co. v. Superior Court*, 198 Cal. App. 3d 1420 (Ct. App. 1988), a disclosure tort case, held that a jury might properly find that the witness's name isn't "newsworthy"; but it did so by "balancing the value to the public of being informed" of the witness's name "against the effect publication of her name might have upon [the witness]'s safety and emotional well being." *Id.* at 1429. The court was thus effectively raising the newsworthiness threshold in those cases where the witness's safety was at stake, so that the publication of the name might be restricted even if the name would be in some measure valuable to public discussion. *See also* Capra v. Thoroughbred Racing Ass'n, 787 F.2d 463, 464-65 (9th Cir. 1986) (same); Hyde v. City of Columbia, 637 S.W.2d 251, 269 (Mo. Ct. App. 1982) (same).

ii. *"Public concern" as defined in other Supreme Court cases*

An alternative public/private concern line would try to track the narrower definition of "public concern" that the Supreme Court has applied in three cases: *Connick v. Myers*, *Dun & Bradstreet v. Greenmoss Builders*, and *Bartnicki v. Vopper*.[271] Unfortunately, it's not clear exactly where these cases drew the line, why they drew it there, or why the line is correct.

In *Connick*, the Court held that the First Amendment doesn't protect government employees from being fired for speech unless the speech is on matters of public concern. The speech, which the Court found to be "not [speech] of public concern," was a questionnaire Myers distributed to her District Attorney's office coworkers about "the confidence and trust that [employees] possess in various supervisors, the level of office morale, and the need for a grievance committee."[272] Yet discussions of dissatisfaction in a District Attorney's office would likely be seen as being of quite substantial public concern under any familiar definition of that phrase. We wouldn't be at all surprised or offended, for instance, if we saw a newspaper article discussing morale at the District Attorney's office.[273]

Likewise, *Dun & Bradstreet* held that presumed and punitive damages in libel cases could be imposed without a showing of "actual malice" when a false statement of fact was on a matter of merely private concern—a category in which the Court included a credit report that noted a company's supposed bankruptcy. This conclusion, though, would likely surprise the company's employees, creditors, and customers, as well as local journalists who might well cover the bankruptcy of even a small company in their small town.[274]

Finally, in *Bartnicki*, the Court held that the media was generally free to publish material on matters of public concern even if it was drawn from telephone conversations that were illegally gathered by third parties, and then passed along to the media. In the process, the Court said, in dictum, that "[w]e need not decide whether that interest [in preserving privacy] is strong enough to justify the application of §2511(c) to disclosures of trade secrets or domestic gossip or other information of purely private concern."[275] But this too doesn't seem quite right: Any confidential and valuable business information may be a trade secret, including decisions that are of great concern to a company's employees, customers, neighbors, or regulators—for instance, whether a company is planning to locate an allegedly polluting plant in a particular

271. 461 U.S. 138 (1983); 472 U.S. 749 (1985); 532 U.S. 514 (2001).

272. *Connick*, 461 U.S. at 148 (1983).

273. Lower courts have likewise found that speech wasn't of public concern even when it alleged race discrimination by a public employer, criticized the way a public university department is run, or criticized the FBI's layoff decisions. *See* Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984); Lipsey v. Chi. Cook County Criminal Justice Comm'n, 638 F. Supp. 837 (N.D. Ill. 1986); Landrum v. Eastern Ky. Univ., 578 F. Supp. 241 (E.D. Ky. 1984); Volokh, *Freedom of Speech and Information Privacy*, *supra* note 203, at 1097.

274. *See Dun & Bradstreet*, 472 U.S. at 789 (Brennan, J., dissenting) ("[A]n announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located . . . ."). Greenmoss Builders was located in Waitsfield, Vermont, a town that in 2000 had under two thousand residents. *See* Superior Court Complaint, *in* Joint Appendix, *Dun & Bradstreet*, 472 U.S. 749 (No. 83-18); Cent. Vt. Reg'l Planning Comm'n, Waitsfield Town: Census 2000 Data Report, http://www.badc.com/towns/census00/waitsfield00.pdf (last visited Jan. 14, 2005).

275. *Bartnicki*, 532 U.S. at 533.

area, to manufacture a product that some may see as dangerous, or to close a plant and lay off hundreds of people.[276]

Perhaps the relevant distinction is whether the speech was said to the public, or only to a small group—in *Dun & Bradstreet*, the bankruptcy report was sent only to five subscribers, and in *Connick*, the questionnaire was handed out to a few coworkers.[277] But it's not clear why this distinction should matter much: Much important speech is said to small groups or even one-on-one, and not just in mass publications; in fact, the Court has held that government employee speech may be treated as being "of public concern" even when it's said to one person.[278] The distinction also wouldn't explain *Bartnicki*, where the Court seemed to be talking about media publication of trade secrets. And even if this is the right distinction, then again nearly all crime-facilitating speech (except that discussed in Part III.A.2.a) will be of public concern.

Another possible explanation of *Connick* and *Dun & Bradstreet*—though not of the trade secret discussion in *Bartnicki*—is that the Court is focusing on the speaker's motive, and only secondarily on the content: In both cases, the speakers and likely the listeners seemed to be motivated by their own economic or professional concerns, rather than by a broader public-spirited desire to change society.[279] Lower court cases have sometimes treated the public concern test as being focused largely, though not entirely, on the speaker's motive.[280]

But again, it's not clear just how this line would be drawn—Myers, for instance, was apparently motivated partly by ethical concerns as well as by her own professional advancement[281]—and why such a line would be proper. As *Connick* itself acknowledged, questions about whether employees were being illegally pressured to work on political campaigns are of public concern, even if the speaker (Myers) and the listeners (her coworkers)

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276. *See, e.g.*, RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) (defining a "trade secret" as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others"); OHIO REV. CODE ANN. § 1333.61(D) (Anderson 2003) (defining trade secrets as including "any scientific or technical information, design, process, procedure, formula . . . or improvement, or any business information or plans, [or] financial information" that "derives independent economic value, actual or potential, from not being generally known to . . . persons who can obtain economic value from its disclosure or use" and that "is the subject of efforts . . . to maintain its secrecy").

277. *Connick* and *Dun & Bradstreet* justify their conclusions by saying that a court should look at the "form and context" of speech as well as the "content." 461 U.S. at 147-48; 472 U.S. at 761.

278. *See* Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) (so holding). Part III.A.2.a does argue that speech lacks First Amendment value when it's said to a small audience that the speaker knows consists of criminals who want to use the speech for criminal purposes. But the reason for this is the illegal use that the speaker knows the criminals will make of the speech—knowledge that's most likely when the audience is small—and not the size of the audience as such.

279. In a footnote, *Connick* seemed to suggest that the motive, not the size of the audience or the subject matter of the speech, was the key factor: The Court said that "[t]his is not a case like *Givhan*, where an employee speaks out as a citizen on a matter of general concern, not tied to a personal employment dispute, but arranges to do so privately [to one supervisor]," and went on to acknowledge that the content of Myers's statement might, "in different circumstances, have been the topic of a communication to the public that might be of general interest." 461 U.S. at 148 n.8.

280. *See, e.g.*, Salehpoor v. Shahinpoor, 358 F.3d 782, 788 (10th Cir. 2004); Foley v. Univ. of Houston Sys., 355 F.3d 333, 341 (5th Cir. 2003).

281. 461 U.S. at 140 n.1.

were largely concerned about how this illegality affected them.[282] Why wouldn't the same be true for questions about whether the office is being managed inefficiently or dishonestly? And even if the speech is selfishly motivated, selfishly motivated speech (such as, for instance, unions' advocacy for higher wages) is generally fully protected, so long as it doesn't propose a commercial transaction between the speaker and the listeners. Finally, under this distinction most crime-facilitating speech would again be seen as of public concern, because it's usually motivated by matters other than the speaker's professional or economic grievances.

Connick and *Dun & Bradstreet* might have reached the right results, because the government needs to have extra authority when acting as employer, or because false statements of fact are less valuable than true ones. But it's not clear that the public concern test is the proper way to reach these results; and the particular holdings are clearly inapplicable to the government acting as sovereign, punishing true statements. Few people would argue, I take it, that accurate newspaper stories about mismanagement in the D.A.'s office or about a local company's bankruptcy should be denied full First Amendment protection.

So whatever one thinks of the *Connick* and *Dun & Bradstreet* results, the cases offer little helpful precedent for a more broadly applicable public concern test. If anything, the flaws in the Court's analysis of what is and what isn't a matter of public concern should lead us to be hesitant about such a test more generally. What's a matter of legitimate public concern is a highly subjective judgment, with few clear guideposts. Perhaps the line simply can't be effectively drawn;[283] but even if there is a theoretically possible definition of the line, the Court's stumbling in this area suggests that the Court is unlikely to draw it well.

iii. *"Unusual public concern"*

In *Bartnicki v. Vopper*, Justices Breyer and O'Connor suggested another distinction, between speech on matters of "unusual public concern"—such as "a threat of potential physical harm to others"[284]—and matters that are presumably merely of modest public concern. This approach may seem appealing to those who think that in some situations protecting speech should be the exception rather than the rule: That seems to have been Justices Breyer's and O'Connor's view as to publication of illegally intercepted conversations, and some might take the same view for crime-facilitating speech, too.[285] For instance, some might argue that information about possibly illegal subpoenas needs to be constitutionally protected, but less important crime-facilitating speech (for instance, speech that doesn't allege improper government behavior) should remain restrictable.

Such a distinction, though, seems hard to apply in a principled way. The *Bartnicki* concurrence appears to use "unusual public concern" in a normative sense, referring to speech

282. *Id.* at 149.

283. *See* sources cited *supra* note 269 (reaching such a conclusion).

284. *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

285. *See also* David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 996 (2002) (suggesting that even if negligence law were to generally make crime-facilitating speech actionable, speakers might be immune if the speech "is justifiable because of the importance of the particular information," for instance, when the media "disclos[es] weaknesses in the bomb-screening system for airline luggage or publish[es] detailed information about construction of a 'dirty' radiological bomb").

that the public *should* be unusually concerned about, rather than in an empirical sense, referring to speech that the public is *actually* unusually concerned about.[286] But deciding how much the public should be concerned about something, especially once one concedes that there's some legitimate public concern about the matter, is usually closely tied to the decisionmakers' political and moral preconceptions.

Is there something of "unusual public concern" in the names of abortion providers, strikebreakers, or blacks who refuse to comply with civil rights boycotts? Those who want to publish these names would argue that there is, because the named people's actions are so morally reprehensible that the people deserve to be held morally accountable by their neighbors and peers: publicly condemned, personally berated, or ostracized. Others disagree; the people's behavior, they would argue, should be nobody else's business, presumably because it's morally legitimate. After all, the more morally reprehensible someone's behavior is, the more it legitimately becomes others' business (so long as it has at least some effect, direct or indirect, on others' welfare).

Restricting the speech on the ground that the names aren't matters of "legitimate public concern" is thus restricting speech based on a judgment about which side of this contested political debate is right—something judges generally ought not be doing.[287] The Court has sometimes made such decisions: The obscenity exception, for instance, rests on the notion that sexually themed speech is less likely to be relevant to public debate than is other speech, and thus rests on rejecting the argument that pornography inherently conveys a powerful and valuable message about the social value of uninhibited sex.[288] But partly for this very reason, the obscenity exception has long been controversial. And even if that particular exception is sound, we should still be skeptical of a doctrine that would require courts to routinely make such ideological judgments about a wide range of speech that is potentially related to public affairs.

Moreover, there will always be some errors in applying any First Amendment test. If the test purports to distinguish public concern speech from purely private concern speech, there will be some public concern speech that is erroneously labeled private concern (and vice versa); but this would probably tend to be speech that's close to the line, which is to say speech that has only slight public concern. Something would be lost to public debate when that speech is suppressed, but perhaps not a vast amount.[289]

But if the test distinguishes speech of unusual public concern from speech of modest public concern, then the line-drawing errors will suppress some speech that *is* of unusual public

286. *See Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

287. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.") (quoting FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978) (plurality opinion)).

288. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 56 n.1 (1986) (Brennan, J., dissenting); Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 111-12 (1978).

289. *Cf. Pacifica*, 438 U.S. at 743 (dismissing the risk that an order applying a vague standard "may lead some broadcasters to censor themselves"—presumably to censor themselves too much—because "[a]t most . . . the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities," and "[w]hile some of these references may be protected, they surely lie at the periphery of First Amendment concern") (footnote omitted).

concern. When the test is applied properly, it will suppress quite valuable speech (speech of moderate but not unusual public concern), though by hypothesis such suppression would be justified by the need to prevent crime. But when judges err, the test will suppress even extremely valuable speech.

In this respect, the "unusual public concern" test would also differ from the "serious value" prong of the obscenity test.[290] The risk of erroneous judgments about serious value is mitigated in obscenity law by the presence of the other two prongs—the requirements that the speech appeal to the prurient interest and that the speech contain patently offensive depictions of sexual conduct. Because of these prongs, errors in the serious value prong affect only a narrow category of speech: those works that are sexually explicit and arousing *and* that a court erroneously concludes lack serious value.

Any facts and ideas that the speaker wants to convey are thus conveyable despite the obscenity exception, even if a court erroneously misjudges their value. At worst, the facts and ideas couldn't be conveyed using sexually explicit and arousing depictions—a limitation on free speech, but still a relatively narrow one.[291] A crime-facilitating speech exception, though, would not be so limited: If it lets the government suppress speech that lacks "unusual public concern," then errors in applying this test would altogether block the communication of certain facts, and thus entirely prevent the spread of information that may be closely tied to public debate.

Finally, the "unusual public concern" test would likely be especially unpredictable. A simple public concern test can at least be made clearer by defining the category quite broadly, to cover virtually anything that touches on public affairs or on discussions of crime. What's of "unusual public concern" and what's not is a much harder question. Perhaps after many years and many cases, courts might develop a clear enough rule that speakers would know what they may safely say. But even that is doubtful; and, in any event, until that happens, a good deal of speech that *is* of unusual public concern would be deterred by the test's vagueness.

B. *Distinctions Based on the Speaker's Mens Rea*

1. *Focusing on knowledge that speech will likely facilitate crime or recklessness about this possibility*

Some First Amendment doctrines, most famously libel law, seek to avoid First Amendment problems partly by distinguishing reasonable or even negligent mistakes from situations where the speaker knows the speech will cause harm[292] or is reckless about this possibility.[293] Would it

290. *See* Miller v. California, 413 U.S. 15 (1973).

291. But see David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 GA. L. REV. 1, 33-37, 63, 67 (1994), which suggests that the denial of protection for speech that lacks "serious literary, artistic, political, or scientific value" should also be extended to speech that isn't sexually themed, including some crime-facilitating speech, such as the publication of the names of crime witnesses. The analysis would call for an eight-factor balancing test, but the lack of serious value "should be one of the most significant criteria" in applying the test; and the test, according to the author, should be applicable even if the speaker doesn't intend to facilitate crime, but simply knows that some readers will act criminally based on the speech, or is reckless about that possibility. *Id.* at 63, 67.

292. *See infra* note 299. The test in public figure/public concern libel cases, of course, is whether the speaker knows or is reckless about the falsehood of the speech, but since the key harm in libel law is unjustified

make sense for First Amendment law to likewise treat crime-facilitating speech as unprotected if the speaker knows that the speech will help facilitate crime, or perhaps if he is reckless about that possibility?[294]

Indeed, knowingly doing things that help people commit crimes (for instance, lending a criminal a gun knowing that he will use it to rob someone) is often punishable. In some jurisdictions, it may be treated as aiding and abetting;[295] in others, as the special crime of criminal facilitation[296] (which may also cover reckless conduct[297]). In most jurisdictions, it's considered a civilly actionable tort.[298] Similarly, knowing (and likely reckless) distribution of falsehood, obscenity, and child pornography is constitutionally unprotected.[299]

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injury to another's reputation, knowledge of falsehood is tantamount to knowledge of unjustified, improper harm.

293. *See* MODEL PENAL CODE § 2.02(2)(c) (1962) (defining "recklessness" as knowledge of a substantial and unjustifiable risk that conduct will produce a certain effect).

294. *See* cases cited *supra* notes 18 and 138-39 (allowing liability for, among other things, disseminating information about bomb-making when the speaker knows that the information "would be used in the furtherance of a civil disorder," disseminating information that the speaker knows, or perhaps even should know, could be used to infringe copyright, or publishing the names of witnesses when the speaker knows that criminals could use the information to kill or intimidate the witnesses); sources cited *supra* note 47 (urging civil liability for certain kinds of crime-facilitating speech based on knowledge or on recklessness); Crump, *supra* note 291, at 33-37, 63, 67 (likewise).

295. *See, e.g.*, IND. CODE ANN. § 35-41-2-4 (West 2004) ("A person who knowingly or intentionally aids . . . another person to commit an offense commits that offense."); W. VA. CODE § 17C-19-1 (2004) (likewise); WYO. STAT. ANN. § 6-1-201(a) (Michie 2004) (likewise); N.Y. PENAL LAW §§ 230.15, 230.20 (McKinney 2004) (prohibiting knowing aiding of prostitution); Backun v. United States, 112 F.2d 635 (4th Cir. 1940) (treating knowing help as aiding and abetting); People v. Spearman, 491 N.W.2d 606, 610 (Mich. Ct. App. 1992) (likewise), *overruled as to other matters*, People v. Veling, 504 N.W.2d 456 (Mich. 1993); People v. Lauria, 59 Cal. Rptr. 628, 633-35 (Ct. App. 1967) (dictum) (suggesting knowledge liability would be proper when the person is aiding a "[h]einous crime" as opposed to merely a "[v]enial" one).

In other jurisdictions, intent to aid the criminal is required. *See, e.g.*, ALA. CODE § 13a-2-23 (2004) (defining only intentional aiding as aiding and abetting); COLO. REV. STAT. ANN. § 18-1-603 (West 2003) (likewise); 18 PA. CONS. STAT. ANN. § 306 (West 2004) (likewise); TEX. PENAL CODE. ANN. § 7.02 (Vernon 2004) (likewise); United States v. Pino-Perez, 870 F.2d 1230, 125 (7th Cir. 1989) (likewise); United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) (likewise); People v. Lauria, 59 Cal. Rptr. 628 (Ct. App. 1967) (likewise); *see generally* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988).

296. *See* ARIZ. REV. STAT. ANN. § 13-1004 (West 2004); 9 GUAM CODE ANN. § 4.65 (2004); KY. REV. STAT. ANN. § 506.080 (Banks-Baldwin 2004); N.Y. PENAL LAW § 115.00 (McKinney 2004); N.D. CENT. CODE § 12.1-06-02 (2003); TENN. CODE ANN. § 39-11-403 (2004).

297. *See, e.g.*, N.Y. PENAL LAW § 115.00 (McKinney 2004) ("A person is guilty of criminal facilitation in the fourth degree when, believing it probable that he is rendering aid . . . to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony.").

298. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 876 (1979) ("For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . ."); Halberstam v. Welch, 705 F.2d 472, 482 (D.C. Cir. 1983).

299. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (knowing or reckless distribution of falsehood); Smith v. California, 361 U.S. 147, 153 (1959) (knowing distribution of obscenity); Gotleib v. State, 406 A.2d 270, 276-77 (Del. 1979) (reckless distribution of obscenity); Osborne v. Ohio, 495 U.S. 103, 112 n.9 (1990) (reckless possession of child pornography); *cf.* Schroth, *supra* note 47, at 582, 584 (arguing that a knowledge/recklessness standard should be imported from *New York Times v. Sullivan* into crime-facilitating

Under this knowledge-or-recklessness test, most of the speakers mentioned in the Introduction would probably be punishable, because they generally know that some of their readers will likely misuse the information that the speaker conveys. For instance, a thoughtful journalist who writes a newspaper article about a pirate Web site would have to know that some of his many thousands of readers will probably find the site and will then use it to infringe copyright.[300] Even if the journalist doesn't subjectively know this, that will quickly change once a copyright owner notifies the journalist and the publisher that the article is indeed helping people infringe. Future articles will thus be published knowing the likely crime-facilitating effect; and if the article is on the newspaper's Web site, then the publisher will be continuing to distribute the article knowing its likely effects.

Likewise for authors and publishers of prominent chemistry reference books that discuss explosives. The authors and publishers probably know that some criminals will likely misuse their books; and even if they don't, they will know it once the police inform them that the book was found in a bomb-maker's apartment.[301]

Yet it's a mistake to analogize knowingly producing harm through dual-use speech (such as publishing chemistry books) to knowingly producing harm through single-use speech, single-use products, or single-effect conduct. Such single-use or single-effect behavior involves a strong case for liability precisely because the speaker or actor knows his conduct will produce harm but no (or nearly no) good. That's true if he gives a gun to a particular person who he knows will use it to commit crime (which is analogous to the no-value one-to-one speech discussed in Part

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speech law, on the theory that a publisher of a crime-facilitating book is equivalent to "a security guard who gives his accomplice the combination to a safe in the bank where he works"); Rice v. Paladin Enters., Inc., 128 F.3d 233, 248 (4th Cir. 1997) (reasoning that the conclusion that intentionally crime-facilitating speech is unprotected "would seem to follow a fortiori" from *New York Times v. Sullivan*'s endorsement of liability "for reputational injury caused by mere reckless disregard of the truth of . . . published statements"); Hyde v. City of Columbia, 637 S.W.2d 251, 264-67 (Mo. Ct. App. 1982) (reasoning that negligently crime-facilitating speech—there, the publication of a crime witness's name, where the criminal was still at large and could use the information to intimidate or attack the witness—should be actionable just as negligently false and defamatory statements of fact about private figures are actionable).

300. *See* MODEL PENAL CODE § 2.02(2)(b) (1962) (defining "knowingly" to mean that the actor "is aware that it is practically certain that his conduct will cause" a certain result). This would be true even if the site's URL isn't included in the article, since the article may well provide information that enables people to find the site using a search engine.

301. *See supra* note 2 (citing newspaper stories about chemistry textbooks found during raids on illegal bombmakers' homes and on illegal drugmaking labs).

Of course, a publisher may not know for certain that some readers will misuse the books; it's impossible to predict the future with such confidence. But when one is distributing a work to many thousands (or, for some newspaper articles, millions) of readers, and the work is capable of facilitating crime, surely a thoughtful author and publisher have to know that there's a high probability—which is all we can say as to most predictions—that at least a few readers will indeed use the work for criminal purposes. And though the publisher and author will rarely know which particular person will misuse the information, "knowledge" requirements in criminal law and First Amendment law generally don't require such specific knowledge: Someone who bombs a building knowing that there are people in it is guilty of knowingly killing the people even if he didn't know their precise identities; and someone who knowingly defames a person is liable for business that the victim loses as a result of the defamation even if the speaker didn't know precisely who will stop doing business with the victim.

III.A.2), or if he broadly distributes false statements of fact, which are generally seen as lacking in constitutional value (analogous to the no-value public speech discussed in Part III.A.2).[302]

If, however, a speaker is distributing material that has valuable uses as well as harmful ones, and he has no way of limiting his audience just to the good users—the classic dual-use product scenario—then the case for restricting his actions is much weaker. For instance, a distributor who sells alcohol to a particular minor, knowing that he's a minor, is breaking the law.[303] A manufacturer who sells alcohol to distributors in a college town, while being quite certain that some substantial fraction of the alcohol will fall into the hands of minors, is acting lawfully.

Likewise, knowingly helping a particular person infringe copyright is culpable, and constitutes contributory infringement.[304] Knowingly selling VCRs is not, even if you know that millions of people will use them to infringe.[305] Under the "substantial noninfringing uses" prong of the contributory copyright infringement test, product distributors can only be held liable if the product is nearly single-use (because nearly all of its uses are infringing) rather than dual-use.[306] Where speech is concerned, the First Amendment should likewise protect dual-use speech from liability even when the speaker knows of the likely harmful uses as well as the likely valuable ones.

Of course, knowingly distributing some dual-use products is illegal, because the harmful use is seen as so harmful that it justifies restricting the valuable use. Recreational drugs (the valuable use of which is mostly entertainment) are a classic example. Guns, in the view of some, should be another.

One may likewise argue that knowingly crime-facilitating speech should be unprotected, because it can cause such serious harm: bombings, killings of crime witnesses, computer security violations that may cause millions or billions of dollars in damage, and the like.[307] Moreover, the argument would go, restricting crime-facilitating speech will injure discussion about public affairs less than restricting crime-advocating speech would—people could still express whatever political ideas they might like, just without using the specific factual details.[308]

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302. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."). On rare occasions, the Court has suggested that false statements may have value, *see, e.g.*, *Sullivan*, 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (citation omitted), but most of the time it has treated false statements said with actual malice as valueless; and in *New York Times v. Sullivan* itself, it concluded that they could be punished. 376 U.S. at 279-80.

303. *See, e.g.*, TEX. ALCO. BEV. CODE ANN. § 106.06 (Vernon 2004).

304. *See, e.g.*, Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 265 (9th Cir. 1996).

305. Sony Corp. of America v. Universal Studios, 464 U.S. 417 (1983).

306. *See supra* text accompanying note 208.

307. *See supra* Part I.A. The argument would be reinforced by the growing ease of public communication: In the past, it may have been possible to rely on publishers' refraining from printing really dangerous material, but now that Internet publication is cheap, this constraint vanishes. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1836-38 (1995).

308. *Cf.* Scanlon, *supra* note 126, at 211-12, 214 (seemingly endorsing broad restrictions on crime-facilitating speech, and distinguishing speech that provides "reasons for action" from speech that simply informs people how to do things). The Court has recognized that providing specific factual details is important, even when they may harm reputation or privacy, *Sullivan*, 376 U.S. at 273; Florida Star v. B.J.F., 491 U.S. 524, 531 (1989); but the argument described in the text would distinguish such speech on the ground that harm to reputation or privacy is less serious than that caused by crime-facilitating speech.

Such restrictions may interfere more seriously with scientific speech, whether about chemistry, computer security, drugs, criminology, or cryptography, since such speech particularly requires factual detail. But, the argument would go, the government is unlikely to regulate such speech more than necessary, because legislators won't want to stifle useful and economically valuable technological innovation. Chemistry textbooks on explosives, publications that name boycott violators or abortion providers, and detective novels that describe nonobvious but effective ways to commit crime would thus be stripped of First Amendment protection—the decision about whether to allow them would be left to legislatures.

I think, though, that creating such a broad new exception would be a mistake. As Part I.B described, dual-use crime-facilitating speech can be highly relevant to important public debates, and few public policy debates are resolved by abstractions. To be persuaded, people often need concrete examples that are rich with detail; and requiring speakers on certain topics to omit important details will systematically undermine the credibility of their arguments.[309]

"Mandatory ballistic fingerprinting of guns won't work" isn't enough to make a persuasive argument.[310] "Mandatory ballistic fingerprinting won't work because it's easy to change the gun's fingerprint; I'm not allowed to explain why it's easy, but trust me on it" isn't enough. Often only concrete details—a description of the supposedly easy techniques for changing the fingerprint—can really make the argument effective, and can rebut the government's assertions defending the proposed program. And this is true even if the details don't themselves mean much to the typical reader: Once the details are published, lay readers will be able to rely on further information brought forward by more knowledgeable readers, or by experts that newspapers can call on to evaluate the claims.[311]

Also, as Part I.B.3 discusses, the ability to communicate details may be a check on potential government misconduct. Bans on publishing information about subpoenas, wiretaps, witnesses, or security flaws, for instance, can prevent people from blowing the whistle on what they see as government misbehavior. It is indeed unfortunately true that if librarians can publicize subpoenas for library records, the criminals who are being investigated may learn of the subpoenas and flee. But if librarians can't publicize such subpoenas, even if they think that the subpoenas are overbroad and unjustified, then the government will have more of an incentive to issue subpoenas that are too broad or even illegal. Here, as in other areas, the First Amendment may require us to tolerate some risks of harm—even serious harm—in order to preserve people's ability to effectively debate policy and science.

A broad exception for knowingly crime-facilitating speech would also, I think, set a precedent for other broad exceptions in the future. The exception, after all, would empower the government to restrict speech that concededly has serious value (unlike, for instance, false statements of fact, fighting words, or even obscenity) and is often connected to major political

309. *Cf.* Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 303 (Iowa 1979) ("[A]t a time when it was important to separate fact from rumor, the specificity of the report would strengthen the accuracy of the public perception of the merits of the controversy."); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 356 (1983) ("A factual report that fails to name its sources or the persons it describes is properly subject to serious credibility problems.").

310. See *supra* note 100 for more on this example.

311. *See supra* text accompanying note 111.

debates.[312] It would empower the government to completely ban the publication of certain facts, and wouldn't leave the speaker with any legal means to communicate those facts.[313] And it would let the government do so in a wide variety of cases, not just those involving extraordinarily dangerous speech such as the publication of instructions on how to make H-bombs or biological weapons.[314] That's quite a step beyond current First Amendment law, as I hope some of the examples in the Introduction illustrate.

Moreover, even the existing First Amendment exceptions, which are comparatively narrow, are already often used to argue for broader restraints.[315] Each new exception strengthens those arguments—and an exception for all knowingly or recklessly crime-facilitating speech, including speech that is potentially an important contribution to political debate among law-abiding voters, would strengthen them still further.[316] In a legal system built on analogy and precedent,[317] broad new exceptions can have influence considerably beyond their literal boundaries.

2. *Focusing on purpose to facilitate crime*

So the speakers and publishers of most crime-facilitating speech likely know that it may help some readers commit crime, or are at least reckless about the possibility. Punishing all such knowingly or recklessly crime-facilitating speech would punish a wide range of speech that, I suspect, most courts and commentators would agree should remain protected. But what about a distinction, endorsed by the Justice Department and leading courts and commentators,[318] based on intent (or "purpose," generally a synonym for intent[319])—on whether the speaker has as one's "conscious object . . . to cause such a result," rather than just knowing that the result may take place?[320]

Most legal rules don't actually distinguish intent and knowledge (or recklessness), even when they claim to require "intent." Murder, for instance, is sometimes thought of as intentional

312. The incitement exception does let the government restrict speech that's connected to major political debates and that sometimes has serious value (for instance, when the speech both incites imminent illegal conduct but also powerfully criticizes the current legal system). But the imminence requirement has narrowed the incitement exception dramatically; crime-advocating ideas may still be communicated, except in unusual situations such as the speech to an angry mob. An exception for knowingly crime-facilitating speech would be considerably broader than this narrow incitement exception.

313. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (stressing that the prohibited fighting words were "no essential part of the exposition of ideas"); FCC v. Pacifica Found., 438 U.S. 726, 773 (1978) (plurality opinion) (stressing that the profanity restriction left the speaker free to convey his message in other ways); New York v. Ferber, 458 U.S. 747, 763 (1982) (likewise as to child pornography law); Harper & Row v. Nation Enters., 471 U.S. 539, 585-86 (1985) (likewise as to copyright law).

314. For more on the possibility of a narrow exception for knowing publication of material that facilitates extraordinary harms, see *infra* Part III.D.1.

315. *See* Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1059-60.

316. *See id.* at 1093-94.

317. *See supra* text accompanying note 261.

318. *See supra* notes 137 and 144; GREENAWALT, *supra* note 43, at 273; Brenner, *supra* note 92, at 373-78, 411-12.

319. *See, e.g.*, MODEL PENAL CODE § 2.02(2)(a) (1962).

320. *Id.* § 2.02(2)(a)(i).

killing,[321] but it actually encompasses knowing killing and reckless killing as well.[322] Blowing up a building that one knows to be occupied is murder even when one's sole purpose was just to destroy the building, and one sincerely regrets the accompanying loss of life.

Similarly, the mens rea component of the intentional infliction of emotional distress tort can usually be satisfied by a showing of recklessness or knowledge and not just intent.[323] Likewise, so-called intentional torts generally require a mens rea either of intent or of knowledge.[324] Concepts such as "constructive intent" or "general intent," which generally don't require a finding of intent in the sense of a "conscious object . . . to cause [a particular] result," further muddy the intent/knowledge distinction,[325] and risk leading people into confusion whenever the distinction does become important.

Yet some legal rules do indeed distinguish intent to cause a certain effect from mere knowledge that one's actions will yield that effect. For instance, if a doctor knowingly touches a fifteen-year-old girl's genitals during a routine physical examination, the doctor isn't guilty of a crime simply because he knows that either he or the girl will get aroused as a result. But if he does so with the *intent* of sexually arousing himself or the girl, in some states he may be guilty of child molestation.[326]

Likewise, if your son comes to the country in wartime as an agent of the enemy, and you help him simply because you love him, then you're not intentionally giving aid and comfort to the enemy—and thus not committing treason—even if you know your conduct will help the enemy. But if you help your son partly because you want to help the other side, then you are

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321. *See, e.g.*, CAMBRIDGE DICTIONARY OF AMERICAN ENGLISH (2001) (defining "murder" as "the crime of intentionally killing a person").

322. *See, e.g.*, N.Y. PENAL LAW § 125.25 (McKinney 2004).

323. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 46 (1965).

324. *See, e.g.*, *id.* § 8A ("The word 'intent' . . . denote[s] that the actor desires to cause consequences of his act, or that *he believes that the consequences are substantially certain to result* from it.") (emphasis added); Rice v. Paladin Enters., Inc., 128 F.3d 233, 251 (4th Cir. 1997) (taking the view that in civil aiding and abetting cases, intent "requires only that the criminal conduct be the 'natural consequence of [one's original act],'" as opposed to "a 'purposive attitude' toward the commission of the offense").

325. *See* RESTATEMENT (THIRD) OF TORTS (PHYSICAL HARMS) § 1 (Tentative Draft No. 1, 2001) ("A person acts with the intent to produce a consequence if: (a) The person has the purpose of producing that consequence; or (b) The person knows to a substantial certainty that the consequence will ensue from the person's conduct."); *id.* § 5 (imposing liability for physical harm that's caused "intentionally" under the section 1 definition); BLACK'S LAW DICTIONARY 813 (7th ed. 1999) (defining "constructive intent" as "[a] legal principle that actual intent will be presumed when an act leading to the result could have been reasonably expected to cause that result. 'Constructive intent is a fiction which permits lip service to the notion that intention is essential to criminality, while recognizing that unintended consequences of an act may sometimes be sufficient for guilt of some offenses.'") (citation omitted); *id.* (defining "general intent" as "[t]he state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability. General intent [usually] takes the form of recklessness (involving actual awareness of a risk and the culpable taking of that risk) or negligence (involving blameworthy inadvertence)").

326. *See, e.g.*, IDAHO CODE § 18-1506 (Michie 2004); TEX. PENAL CODE ANN. § 21.11 (Vernon 2004); UTAH CODE ANN. § 76-5-401.1(2) (2004). *But see* CAL. PENAL CODE § 11165.1(b)(4) (Deering 2004) (defining sexual assault as intentional touching of a child's genitals "for purposes of sexual arousal or gratification," but excluding "acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose," presumably in order to prevent prosecution based on a theory that seemingly normal caretaking, affection, or medical care was actually motivated by sexual desires).

acting intentionally and not just knowingly, and are guilty of treason. (This is the distinction the Court drew in *Haupt v. United States*,[327] a World War II case, and it's a staple of modern treason law.[328]) To quote Justice Holmes in *Abrams v. United States*,

> [T]he word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. . . . But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind. . . .
>
> A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made "with intent . . . to cripple or hinder the United States in the prosecution of the war"].[329]

Might courts follow this exact usage of "intent"—meaning purpose, as opposed to mere knowledge—and draw a useful distinction between dual-use speech distributed with the purpose of promoting the illegal use, and dual-use material distributed without such a purpose?

a. *Crime-facilitating speech and purpose*

Let's begin analyzing this question by considering what the possible purposes behind crime-facilitating speech might be.

(1) Some speakers do have the "conscious object" or the "aim" of producing crime: For instance, some people who write about how to effectively resist arrest at sit-ins, engage in sabotage, or make bombs may do so precisely to help people commit those crimes.[330] The deeper motive in such cases is generally ideological, at least setting aside speech said to a few confederates in a criminal scheme. Speakers rarely want unknown strangers to commit a crime unless the crime furthers the speaker's political agenda.

(2) Others who communicate dual-use information may intend to facilitate the lawful uses of the sort that Part I.B described. For instance, they may want to concretely show how the government is overusing wiretaps, by revealing the existence of a particular wiretap. They may

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327. 330 U.S. 631, 641-42 (1947).

328. *See, e.g.*, Kawakita v. United States, 343 U.S. 717, 736, 742-44 (1952); Cramer v. United States, 325 U.S. 1, 29 (1945).

329. 250 U.S. 616, 626 (1919) (Holmes, J., dissenting).

330. *See, e.g.*, Plea Agreement, United States v. Austin, No. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (stating that the defendant admits he put up a Web site contain bombmaking information intending to help people make bombs); Travis Bemann, *Targeting the Capitalist Propaganda/Media System*, EXPERTS AGAINST AUTHORITY, July 1, 2001, *at* http://free.freespeech.org/xaa/xaa0001.txt (posting, in "[a] textfile zine on anarchy, technology, direct action, and generally deconstructing our wonderful society and culture," focusing on physical sabotage of communications channels); Earth Liberation Front, Setting Fires with Electrical Timers**,** *supra* note 7 (publication described as "[t]he politics and practicalities of arson"); materials cited *supra* note 12 (giving advice about how to effectively resist arrest at sit-ins).

want to show the futility of drug laws, by explaining how easy it is to grow marijuana. Or they may want to entertain, by writing a novel in which the criminal commits murder in a hard-to-detect way.

(3) Other speakers may be motivated by a desire for profit, without any intention of facilitating crime. The speaker may be aware that he's making money by helping criminals, but he might sincerely prefer that no one act on his speech.

The contract murder manual case is probably a good example: If you asked the publisher and the writer, "What is your purpose in publishing this book?" they'd probably sincerely tell you, "To make money." If you asked them, "Is your purpose to help people commit murder?" they'd sincerely say, "Most of our readers are armchair warriors, who just read this for entertainment; if we had our choice, we'd prefer that none of them use this book to kill someone, because if they do, we might get into legal trouble."[331]

Perhaps this intention to make money, knowing that some of the money will come from criminals, is unworthy. But "when words are used exactly,"[332] the scenario described in the preceding paragraph does not involve speech purposefully said to facilitate crime. If crime-facilitating speech doctrine is set up to distinguish dual-use speech said with the intent to facilitate crime from dual-use speech said merely with knowledge that it will facilitate crime (as well as the knowledge that it will have other, more valuable, effects), the profit-seeking scenario falls on the "mere knowledge" side of the line.

In the *Rice v. Paladin Enterprises* litigation, the defendants stipulated for purposes of their motion to dismiss that they intended to facilitate crime, but that was done simply because they couldn't debate the facts, including their mental state, at that stage of the litigation.[333] In reality, there was little practical or ideological reason for them to intend to help criminals (as opposed to merely knowing that they were helping criminals).

(4) Still other speakers may be motivated solely by a desire to speak, or to fight speech suppression, rather than by an intention to help people commit crimes or torts.[334] A journalist who publishes information about a secret subpoena might do so only because he believes that the public should know what the government is doing, and that all attempts to restrict publication of facts should be resisted.

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331. *Cf.* Schroth, *supra* note 47, at 575 (acknowledging that "the intent that derives from knowledge is probably not as easily inferred in the case of a publisher of a book that teaches how to commit a murder" as when an ideologically minded author self-publishes his crime-advocating and crime-facilitating work, but arguing that the publisher should be held liable under a recklessness standard rather than an intent standard).

332. *See supra* text accompanying note 329.

333. 128 F.3d 233, 241 (4th Cir. 1997).

334. *See, e.g.*, Laura Blumenfeld, *Dissertation Could Be Security Threat*, WASH. POST, July 8, 2003, at A1:

> Toward the other end of the free speech spectrum are such people as John Young, a New York architect who created a Web site with a friend, featuring aerial pictures of nuclear weapons storage areas, military bases, ports, dams and secret government bunkers, along with driving directions from Mapquest.com. He has been contacted by the FBI, he said, but the site is still up.
>
> "It gives us a great thrill," Young said. "If it's banned, it should be published. We like defying authority as a matter of principle."

This is a pretty irresponsible intention, I think, at least in this situation—but it is not the same as an intention to facilitate harmful conduct (though it may show a knowledge that the site will facilitate harmful conduct). The site is at http://eyeball-series.org/; I found it through a simple Google search.

Some people who posted information on decrypting encrypted DVDs, for instance, likely did so because they wanted people to use this information. But after the first attempts to take down these sites, others put up the code on their own sites, seemingly intending only to frustrate what they saw as improper speech suppression—many such "mirror sites" are put up precisely with this intention.[335] Still others put up crime-facilitating material because it was the subject of a noted court case, reasoning that people should be entitled to see for themselves what the case was about.[336] Again, while the mirror site operators knew that their posting was likely to help infringers, that apparently wasn't their intention.

(5) Some speakers may be motivated by a desire to help the criminal, though not necessarily to facilitate the crime. That was Haupt's defense in *Haupt v. United States*—he sheltered his son because of parental love, not because he wanted the son's sabotage plans to be successful. The Court acknowledged that such a motivation does *not* qualify as an intention to assist the crime.[337]

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335. *See, e.g.*, Russ Kick, *About the Memory Hole*, MEMORY HOLE, *at* http://www.thememoryhole.org/about.htm (last visited Jan. 15, 2005) (describing a broad-ranging mirror site for a wide variety of documents that people have been trying to delete or suppress); Russ Kick, *CDC Deletes Sensitive Portion of Ricin Factsheet*, MEMORY HOLE, Oct. 28, 2003, *at* http://www.thememoryhole.org/feds/cdc-ricin.htm (reporting the substance of a subsequently redacted CDC report that said that "[a]mateurs can make [the deadly gas] ricin from castor beans" because "[r]icin is part of the waste 'mash' produced when castor oil is made"); *MPAA Continues Intimidation Campaign*, 2600NEWS, Mar. 12, 2000, *at* http://www.2600.com/news/view/article/331 ("We joined in the mirroring campaign to lend our support to those who had been subjected to hollow threats and harassment from the DVD industry, but were forced into compliance due to circumstances beyond their control. . . . Our modest mirror list has grown substantially and continues to grow, despite mirrors being removed from time to time. The success of the DeCSS mirroring campaign demonstrates the futility of attempts to suppress free speech on the Internet."); Karin Spaink, The Nuremberg Files: Motivation and Introduction, *at* http://www.xs4all.nl/~oracle/nuremberg/index.html (last modified Feb. 25, 1999) ("While I strongly hold that every woman should have an abortion if she needs one, I do not think that other opinions about the subject should be outlawed or fined, no matter how harshly they are put. Yet this is precisely what happened in the case of the Nuremberg Files."). The Nuremberg Files site was shut down because it was found to have threatened abortion providers' lives, but it also listed their names and home addresses, which might have facilitated crimes against them; the names and addresses are faithfully mirrored on the mirror site. See also Kristin R. Eschenfelder & Anuj C. Desai, *Software as Protest: The Unexpected Resiliency of U.S.-Based DeCSS Posting and Linking*, 20 INFO. SOC'Y 101, 109-13 (2004), which describes many sites' posting of the DeCSS code, or links to such posted code; my sense is that the purpose of many of these sites is simply to express their creators' hostility to the attempts to suppress DeCSS.

336. *See* David S. Touretzky, What the FBI Doesn't Want You to See at RaisetheFist.com, *at* http://www-2.cs.cmu.edu/~dst/raisethefist/ (last modified Sept. 7, 2004) ("I don't share [the politics of Sherman Austin, the creator of the Reclaim Guide bomb-making information site involved in *United States v. Austin*, No. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002) (discussed *supra* note 2)]. I'm a registered Republican, a proud supporter of President Bush (despite the USA PATRIOT Act), and I have nothing but contempt for the mindless anarchism people like Austin mistake for political thought. My reason for republishing the Reclaim Guide is to facilitate public scrutiny of the law under which Austin was charged, and the government's application of the law in this particular case."); David S. Touretzky, Gallery of CSS Descramblers, *at* http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery/ (last modified July 10, 2004) ("If code that can be directly compiled and executed may be suppressed under the DMCA, as Judge Kaplan asserts in his preliminary ruling, but a textual description of the same algorithm may not be suppressed, then where exactly should the line be drawn? This web site was created to explore this issue, and point out the absurdity of Judge Kaplan's position that source code can be legally differentiated from other forms of written expression.").

337. 330 U.S. 631, 641 (1947).

Likewise, consider the burglar who asks a friend for information on how to more effectively break into a building (or a computer system).[338] "Don't do it," the friend at first says, "it's too dangerous"; but then the friend relents and provides the information, either from friendship or from a desire to get a flat sum of money up front (as opposed to a share of the proceeds). The advisor's goal is not to help the burglary take place: The advisor would actually prefer that the burglar abandon his plans, because that would be safer for the advisor himself. Thus, the advisor isn't intending to facilitate crime with his advice, though he knows he is facilitating the crime.

We see, then, several kinds of motivations, but only the first actually fits the definition of "intent" or "purpose," as opposed to "knowledge" (at least when "intent" is used precisely and narrowly, which it would have to be if the law is indeed to distinguish intent from knowledge). Some of the other motivations may well be unworthy. But if they are to be punished, they would be punished despite the absence of intent, not because of its presence.

This list also shows that the presumption that "each person intends the natural consequences of his actions"[339] is generally misplaced here. This presumption causes few problems when it's applied to most crimes and torts, for which a mens rea of recklessness or knowledge usually suffices: It makes sense to presume that each person knows the natural consequences of his actions (the loose usage of "intent" to which Justice Holmes pointed).[340] But when the law really aims to distinguish intent from mere knowledge, and the prohibited conduct involves dual-use materials, the presumption is not apt.

As the above examples show, people often do things that they know will bring about certain results even when those results are not their object or aim. People who distribute dual-use items may know that they're facilitating both harmful and valuable uses, but may intend only the valuable use—or, as categories three through five above show, may intend something else altogether. If one thinks the presumption ought to be used in crime-facilitating speech cases, then one must be arguing that those cases should require a mens rea of either knowledge or intent, and not just of intent.

b. *Difficulties proving purpose, and dangers of guessing at purpose*

So most speakers of crime-facilitating speech will know that the speech may facilitate crime, but relatively few will clearly intend this. For many speakers, their true mental state will be hard to determine, because their words may be equally consistent with intention to facilitate crime and with mere knowledge.

This means that any conclusion about the speaker's purpose will usually just be a guess. There will often be several plausible explanations for just what the speaker wanted—to push an ideology, to convey useful information, to sell more books, to titillate readers by being on the edge of what is permitted, and more. The legal system generally avoids having to disentangle

338. *See supra* text accompanying note 194.

339. *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 513 (1979); Staten v. State, 813 So. 2d 775, 777 (Miss. Ct. App. 2002).

340. The more common statement of this principle, which is that "a man [is] responsible for the natural consequences of his actions," *see, e.g.*, Monroe v. Pape, 365 U.S. 167, 187 (1961), is thus also the more accurate one, because it focuses on responsibility—for which recklessness usually suffices—rather than intent.

these possible motives, because most crimes and torts (such as homicide or intentional infliction of emotional distress) require only knowledge or even just recklessness, rather than purpose.[341] But when the law really requires a mens rea of purpose, and protects speech said with knowledge of its likely bad consequences but punishes speech said with a purpose to bring about those consequences, decisionmaking necessarily requires a good deal more conjecture.[342]

And this conjecture will often be influenced by our normal tendency to assume the best motives among those we agree with, and the worst among those we disagree with. This may have taken place in some of the World War I antiwar speech cases: Eugene Debs's speech condemning the draft, for instance, didn't clearly call on people to violate the draft law;[343] I suspect his conviction stemmed partly from some jurors' assumption that socialists are a suspicious, disloyal, un-American sort, whose ambiguous words generally hide an intent to promote all sorts of illegal conduct.[344]

Even if judges, jurors, and prosecutors try to set aside their prejudices and look instead to objective evidence, an intent test will tend to deter ideological advocacy, and not just intentionally crime-facilitating speech. The most reliable objective evidence of speakers' intentions is often their past political statements and affiliations.[345] If the author of an article on infringing Web sites has in the past written that copyright is an immoral restraint on liberty, and

341. *See, e.g.*, sources cited *supra* notes 322-23.

342. Purpose tests may be familiar from some other contexts, such as burglary (which is usually defined as breaking and entering with the intent to commit a crime, *see* BLACK'S LAW DICTIONARY 211 (8th ed. 2004)); but their administrability in such areas doesn't mean they would equally work as to crime-facilitating speech. Burglary, for instance, requires a purpose *to engage in a further act*, rather than to bring about a consequence. Because we generally have control over our own actions, knowing that we will do something means that we have the intention of doing it—it's hard to imagine a burglar who knows that he will commit theft after he breaks into a building, but doesn't intend to commit theft. Juries in burglary cases thus aren't generally called on to distinguish breaking and entering with the *purpose* to commit a felony from breaking and entering with the *knowledge* that one will commit a felony, even though burglary requires a mens rea of purpose.

On the other hand, we often don't have control over all the consequences of our actions, and aren't able to accomplish some consequences without regrettably causing others. Thus, knowing that some consequence will result (for instance, that our speech will help others commit crime) does not necessarily equal intending that the consequence will result; and if bans on crime-facilitating speech turn on an intent to facilitate crime, juries will indeed have to draw lines between knowing facilitation and intentional facilitation. *See also infra* note 357 (discussing other purpose-based crimes, such as attempt or conspiracy).

343. Debs v. United States, 249 U.S. 211 (1919).

344. *Id.* at 215; *see also* United States v. Pelley, 132 F.2d 170, 177 (7th Cir. 1942) (concluding that a pro-Nazi critic of the U.S. war effort must have acted with "the hope of weakening the patriotic resolve of his fellow citizens in their assistance of their country's cause," because "[n]o loyal citizen, in time of war, forecasts and assumes doom and defeat . . . when his fellow citizens are battling in a war for their country's existence, except with an intent to retard their patriotic ardor in a cause approved by the Congress and the citizenry of this nation"); U.S. DEP'T OF JUSTICE, *supra* note 43, at text accompanying n.75 (acknowledging that in a similar mens rea inquiry—the determination whether a speaker is reckless—a jury may be tempted to find liability because it "is hostile to the message conveyed in the information and does not believe that it serves any social utility to distribute such information").

345. *Cf.* Brief for the United States at 32-44, *Debs*, 249 U.S. 211 (No. 714), *in* 19 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 637-49 (Philip B. Kurland & Gerhard Casper eds., 1975) (arguing that the Socialist Party platform, which expressed opposition to the war and to the draft, was properly admitted to show that Debs's facially ambiguous words were indeed intended to advocate draft resistance).

that free copying helps advance knowledge, then this past work is evidence that he wrote the new article with the intent to help people infringe. The same is true if the author of an article on how marijuana is grown is active in the medical marijuana movement.[346] But if the authors are apolitical, or have publicly supported copyright law or drug law, then that's evidence that they intended simply to do their jobs as reporters or scholars.

Considering people's past statements as evidence of their intentions is quite rational, and not itself unconstitutional[347] or contrary to the rules of evidence:[348] The inferences in the preceding paragraph make sense, and are probably the most reliable way to determine the speaker's true intentions. Where intent is an element of the offense, such evidence is often needed. For instance, in *Haupt v. United States*, where Haupt's treason prosecution rested on the theory that he helped his son (a Nazi saboteur) with the intention of aiding the Nazis and not just from "parental solicitude," the Court stressed that the jury properly considered Haupt's past statements "that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect."[349]

Likewise, in *United States v. Pelley*, a World War II prosecution for spreading false reports with the intent to interfere with the war effort, the government relied, among other things, on Pelley's pro-German statements in a 1936 third-party presidential campaign, and on "his genuine admiration of the Hitler regime."[350] Likewise, in hate crimes prosecutions, evidence of

346. *Rice v. Paladin Enterprises*, 128 F.3d 233, 265 (4th Cir. 1997), defended its holding by saying that there will be very few works that would be punishable under the court's test, which required intent to facilitate crime:

> [T]here will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity. In only the rarest case . . . will there be evidence extraneous to the speech itself which would support a finding of the requisite intent.

Likewise, the court said, "[n]ews reporting . . . could never serve as a basis for aiding and abetting liability consistent with the First Amendment," because "[i]t will be self-evident . . . that neither the intent of the reporter nor the purpose of the report is to facilitate [crime] . . . but, rather, merely to report on the particular event, and thereby to inform the public." *Id.* at 266.

But those statements are mistaken: If the author or the publisher has in the past taken political stands supporting the violation of a particular law, the jury could quite reasonably (even if perhaps incorrectly) infer that the current statement—including a news report—was intended to help some readers commit crime. If Haupt could be convicted of treason based on his past statements about the Nazis (see the next paragraph in the text), so the author of the article on infringing sites or on how marijuana is grown could be convicted of aiding and abetting based on his past statements about the evils of copyright law or marijuana law.

347. Wisconsin v. Mitchell, 508 U.S. 476, 488-89 (1993); Haupt v. United States, 330 U.S. 631, 642 (1947).

348. As the cases discussed in the text show, intent is commonly proved by a person's past statements; and even if the statements are treated as character evidence, they would be admissible because character evidence may be used to show intent. *See, e.g.*, FED. R. EVID. 404(b); United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983) (allowing the admission of prior racist acts, coupled with the defendant's statement explaining their racial motivation, as evidence of racist motive in a subsequent case). And because the statements are indeed powerful evidence of motivation, they would be admissible despite the risk that they may prejudice the jury against a defendant; evidence law generally allows the exclusion of such statements only when "its probative value is *substantially outweighed* by the danger of unfair prejudice." FED. R. EVID. 403 (emphasis added).

349. 330 U.S. 631, 642 (1947).

350. 132 F.2d 170, 176 (7th Cir. 1942).

a person's past racist statements may be introduced to show that he intentionally attacked someone because of the victim's race, rather than for other reasons.[351]

But the inferences are imperfect. The anticopyright or pro-medical-marijuana reporter may genuinely oppose illegal conduct at the same time that he opposes the underlying law: He may be writing his article simply because he finds the subject matter interesting and thinks readers ought to know more about how the law is violated, perhaps because this will show them that the law needs to be changed. And if the factfinder's inference is indeed mistaken, then the error is particularly troublesome, because it involves a person's being convicted because of his political beliefs, and not because of his actual intention to help people commit crimes.[352]

For all these reasons, an intent test tends to deter speakers who fear that they might be assumed to have bad intentions. Say you are an outspoken supporter of legalizing some drug, because you think it can help people overcome their psychiatric problems.[353] Would you feel safe writing an article describing how easily people can illegally make the drug, and using that as an argument for why it's pointless to keep the drug illegal, when you know that your past praise of the drug might persuade a jury that the article is really intended to facilitate crime?[354]

Likewise, say that you often write about the way drugs are made, perhaps because you're a biochemist or a drug policy expert. Would you feel safe publicly announcing that you also think drugs should be legal and people should use them, given that you know such speech could be

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351. *See, e.g.*, United States v. Allen, 341 F.3d 870, 885-86 (9th Cir. 2003) (holding that it was proper for the prosecution to introduce "color photographs of [the defendants'] tattoos (e.g., swastikas and other symbols of white supremacy), Nazi-related literature, group photographs including some of the defendants (e.g., in 'Heil Hitler' poses and standing before a large swastika that they later set on fire), and skinhead paraphernalia (e.g., combat boots, arm-bands with swastikas, and a registration form for the Aryan Nations World Congress)"); United States v. Dunnaway, 88 F.3d 617, 619 (8th Cir. 1996) (likewise); People v. Slavin, 1 N.Y.3d 392 (2004) (likewise).

352. Independent judicial review, *see* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), will do little to prevent such errors. In First Amendment cases, appellate courts and trial courts are indeed required to independently review findings that speech is unprotected. *See generally* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Appellate and Summary Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998). But while courts independently review the application of legal standards to the facts that the jury has found, *id.* at 2442, and independently determine whether the jury had sufficient evidence to make the finding that it did, *Bose*, 466 U.S. at 511, they generally do not reexamine juries' findings of credibility. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688-89 (1989); *Bose*, 466 U.S. at 499-500. So if a journalist testifies that he had no intention of helping people infringe copyright or make drugs, and the jury concludes—based partly on his past anticopyright or prodrug political statements—that he's lying, appellate courts will not meaningfully review this conclusion.

353. *See, e.g.*, *FDA Permits Test of Ecstasy as Aid in Stress Disorder*, WALL ST. J., Nov. 6, 2001, at B1; Rick Doblin, *A Clinical Plan for MDMA (Ecstasy) in the Treatment of Post-Traumatic Stress Disorder (PTSD): Partnering with the FDA*, 34 J. PSYCHOACTIVE DRUGS 185 (2002), http://www.maps.org/research/mdmaplan.html (describing the study); Multidisciplinary Ass'n for Psychedelic Studies, Multidisciplinary Association for Psychedelic Studies, http://www.maps.org (last visited Oct. 10, 2004) ("MAPS' mission is to sponsor scientific research designed to develop psychedelics and marijuana into FDA-approved prescription medicines, and to educate the public honestly about the risks and benefits of these drugs.").

354. Even if you stress in your article that you don't want readers to violate the law, but are giving the information only to support your argument for changing the law, the jury may well conclude (even if wrongly) that you're insincere.

used as evidence if you are prosecuted or sued for your writings on drugmaking?[355] More likely, if you're the drug legalization supporter, you'd be reluctant to write the article about drug manufacturing; and if you're the biochemist, you'd be reluctant to write the article favoring legalization. There would be just too much of a chance that the two pieces put together could get you sued or imprisoned.

Moreover, this deterrent effect would likely be greater than the similar effect of hate crimes laws or treason laws. As the *Wisconsin v. Mitchell* Court pointed out, it seems unlikely that "a citizen [would] suppress[] his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits . . . [an] offense against person or property [more serious than a minor misdemeanor]."[356] Few of us plan on committing such offenses, and we can largely avoid any deterrence of our speech simply by obeying the other laws.[357]

If, however, the purpose-based law restricts not conduct, but speech, its deterrent effect on protected speech would be considerably greater. Citizens might well suppress their pro-drug legalization beliefs for fear that evidence of such beliefs will be introduced against them at trial if they publish information about how drugs are made—especially if discussing drugmaking is part of their job or academic mission.

These concerns about the difficulty of proving intent, and the risk of deterring speech that might be used as evidence of intent, haven't led the Supreme Court to entirely avoid intent inquiries. Most prominently, for instance, modern incitement law retains the inquiry into whether the speaker intended to incite crime.[358] But in most cases, any serious inquiry into intent is made unnecessary by the requirement that the speech be intended to and likely to incite *imminent* crime; it is this, I think, that has kept the incitement exception narrow.[359] There will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime.

Had the imminence requirement not been part of the test, though—had the test been simply intent plus likelihood—a jury could often plausibly decide that a speaker, especially a speaker known for hostility to a particular law, was intending to persuade people to violate the law at some future time. Concerned about this, many speakers would avoid any statements to which a

355. Note that in these situations, the deterrent effects that I describe may operate with special strength. The hypothetical speaker is no hothead or fool, who may think little about legal risk. He's a scholar, an educated, thoughtful, reflective person with a good deal to lose from a criminal conviction or even a criminal prosecution, and time to consider whether publishing is safe or dangerous. He may thus be especially likely to rationally fear the law's deterrent effect—even though the same attributes (his thoughtfulness and rationality) may make his speech especially valuable to public debate.

356. 508 U.S. 476, 489 (1993).

357. Moreover, for other crimes that require intent, such as attempt or conspiracy, there'll often be powerful corroborating evidence of intent other than the defendant's past political statements—for instance, the defendant's getting a share of the crime's proceeds, or the defendant's having taken physical steps that strongly point towards the defendant's purpose being to commit a crime. Proof that someone is involved in a conspiracy to distribute marijuana will rarely rest on the person's past promarijuana statements. But when the crime itself consists solely of speech, the defendant's political opinions will often be the strongest evidence of his purpose. *See also supra* note 342 (discussing the purpose prong of burglary).

358. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

359. Though I think the imminence requirement is valuable as part of the incitement test, Part III.E below explains why it couldn't effectively be transplanted to the crime-facilitating speech test.

jury might eventually impute an improper intent.[360] And to the extent that incitement might be civilly actionable (for instance, in a lawsuit by the victims of the allegedly incited crime), the jury wouldn't even have to find this improper intent beyond a reasonable doubt, but only guess at it by a preponderance of the evidence or at most by clear and convincing evidence.[361] This is in fact one reason the intent-plus-likelihood test developed in *Schenck v. United States* and *Debs v. United States* was criticized,[362] and perhaps one reason that the Court rejected it in favor of the *Brandenburg v. Ohio* intent-plus-imminence-plus-likelihood test.

The risk of jury errors in determining purpose likewise led the Supreme Court to hold that liability for defamation and for infliction of emotional distress[363] may not be premised only on hateful motivations. Before 1964, many states imposed defamation liability whenever the speaker was motivated by "ill will" or "hatred" rather than "good motives."[364] But the Court rejected this approach, reasoning that "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred," especially since "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives."[365] The same risk, and the same inhibition of public debate, appears with crime-facilitating speech: Speakers who are genuinely

360. Say, for instance, that Congress enacts a statute barring speech that's intended to and likely to lead to draft evasion or to interfere with war production. Would people then feel free to criticize the war even if they do this with the purest of intentions? Or will they be reluctant to speak, for fear that juries or judges would conclude, as did the judges in *United States v. Pelley*, 132 F.2d 170, 177 (7th Cir. 1942), that "[n]o loyal citizen, in time of war, forecasts and assumes doom and defeat . . . when his fellow citizens are battling in a war for their country's existence, except with an intent to retard their patriotic ardor in a cause approved by the Congress and the citizenry"?

361. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (requiring that actual malice be proven by clear and convincing evidence in libel cases); People v. Mitchell Bros. Santa Ana Theater, 180 Cal. Rptr. 728, 730 (Ct. App. 1982) (same as to obscenity in civil injunction cases). *But see* Rattray v. City of National City, 51 F.3d 793, 801 (9th Cir. 1995) (concluding that falsity, as opposed to actual malice, in libel cases need only be proven by a preponderance of the evidence); Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969) (same).

362. *See, e.g.*, ZECHARIAH CHAFEE, FREE SPEECH 78 (1941); Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 424-27; *see also* James Parker Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526, 532-33 (1921) (acknowledging this risk, but concluding that the World War I intent-plus-likelihood cases were correctly decided despite this risk); Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13 ("[T]o be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift.").

363. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53 (1988) ("Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude . . . . But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. . . . [While] a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures.") (citing Garrison v. Louisiana, 379 U.S. 64 (1964)); *see also* Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc., 175 F.3d 848, 857-58 (10th Cir. 1999) (citing *Hustler Magazine* to reject a "reading of state [interference with contract] tort law . . . [under which] the protection afforded to an expression of opinion under the First Amendment might well depend on a trier of fact's determination of whether the individual who had published the article was motivated by a legitimate desire to express his or her view or by a desire to interfere with a contract").

364. *See Garrison*, 379 U.S. at 72 n.7.

365. *Id.* at 73-74.

not intending to facilitate crime might nonetheless be deterred by the reasonable fear that a jury will find the contrary.

c. *Is intentional crime facilitation meaningfully different from knowing crime facilitation?*

I have argued so far that intentionally and knowingly/recklessly crime-facilitating speech are hard to distinguish in practice. But they are also similar in the harm they inflict, and in the value they may nonetheless have.

Consider two newspaper reporters. Both publish articles about a secret subpoena of library records; the articles criticize the practice of subpoenaing such records. Both know that the articles might help the target of the subpoena evade liability. The first reporter publishes his article with genuine regret about its being potentially crime-facilitating. The second reporter secretly wants the article to stymie the investigation of the target: This reporter thinks no one should be prosecuted even in part based on what he has read, and hopes that if enough such subpoenas are publicized and enough prosecutions are frustrated, the government will stop looking at library records.

Is there a reason to treat the two reporters differently? Both articles facilitate crime. Both convey valuable information to readers. The second reporter's bad motivation doesn't decrease that value or increase the harm, which suggests that this bad motivation ought not strip the speech of protection.

The Court has, for instance, rejected the theory that statements about public figures lose protection because the speaker was motivated by hatred and an intention to harm the target: "[E]ven if [the speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[366] Likewise, the Court has held that lobbying or public advocacy is protected against antitrust liability even if the speaker's "sole purpose" was anticompetitive: "The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so," partly because even people who are trying to restrict competition may be "a valuable source of information."[367] The ability of dual-use crime-facilitating speech to contribute to the exchange of facts and ideas is likewise independent of whether it's motivated by a bad purpose.

Similarly, say that the intentionally crime-facilitating article is posted on some Web sites, the government tries to get the site operators to take down the articles, and the operators refuse. The site operators—who might be the publishers for whom the reporter works, or the hosting companies from whom the reporter rents space—probably have the same knowledge as the reporter, at least once the government alerts them about the situation. But they quite likely have no intention to facilitate crime. Their decision not to take down the articles may have been simply motivated by a desire to let the reporter say what he wants to say.

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366. *Id.* at 73 (rejecting the argument that unintentionally false statements should be punishable when they're motivated by hatred); *Hustler Magazine*, 485 U.S. at 53 (rejecting the argument that outrageous opinion should be punishable when it's intended to inflict emotional distress).

367. E. R.R. Conference v. Noerr Motors, 365 U.S. 127, 138-40 (1961).

And yet the value and the harm of the speech are the same whether the government is pursuing a reporter who intends the speech to help facilitate crime, or site operators who merely know that the speech has this effect.[368] The one difference between the two articles might be the moral culpability of the speakers, which I'll discuss shortly. For now, though, we see that the practical effects of the articles are quite similar.

Of course, there is precedent for using intent (and not just knowledge or recklessness) as part of First Amendment tests: Under the incitement test, speech that is intended to and likely to cause imminent harm is unprotected.[369] Speech that the speaker merely knows is likely to cause imminent harm is protected.

The incitement cases, though, have never fully explained why an intent-imminence-likelihood test is the proper approach (as opposed to, say, a knowledge-imminence-likelihood test). Moreover, as the preceding subsection mentioned,[370] the main barrier to liability under the *Brandenburg* test has generally been the imminence prong, not the intent prong; and given the imminence prong, it's not really clear whether it makes much of a difference whether the incitement test requires intent or mere knowledge.

Considering the quintessential incitement example—the person giving a speech to a mob in front of someone's house[371]—reinforces this. One can imagine some such person simply knowing (but regretting) that the speech would likely lead the mob to attack, as opposed to intending it. But, first, this scenario would be quite rare. Second, it's not clear how a jury would reliably determine whether the speaker actually intended the attack or merely knew that it would happen. And, third, if the speaker did know the attack would happen as a result of his words, it's not clear why the protection given to his speech should turn on whether he intended this result.

In the era before the Court adopted the imminence prong, Justice Holmes did defend the distinction between an intent-plus-likelihood test and a mere knowledge-plus-likelihood test.[372] And indeed, if no imminence prong were present, a knowledge-plus-likelihood test would be inadequate: People would then be barred from expressing their political views whenever they knew that those views could lead some listeners to misbehave, and this would be too broad a restriction.[373] But an intent-plus-likelihood test proved inadequate, too, partly because of the risk that jurors would err in finding intent.[374] So while the intent-plus-likelihood and the intent-imminence-likelihood tests have long been part of the incitement jurisprudence, it's not clear that either of them offers much support for focusing on intent in other free speech exceptions: The intent prong proved to be not speech-protective enough in the intent-plus-likelihood test;

368. *Cf.* Alexander, *supra* note 194, at 107-08 (making a similar point in criticizing the intent prong of *Brandenburg*).

369. Brandenburg v. Ohio, 395 U.S. 444 (1969).

370. *See supra* note 359.

371. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1023 (5th Cir. 1987).

372. *See* Abrams v. United States, 250 U.S. 616, 626-27 (1919) (Holmes, J., dissenting).

373. *See id.* at 627 ("A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [under a statute limited to statements made 'with intent . . . to cripple or hinder the United States in the prosecution of the war']."").

374. *See supra* note 362.

and in the intent-imminence-likelihood test it is the imminence requirement, not the intent requirement, that strongly protects speech.

d. *Moral culpability*

So the one remaining potential distinction between intentionally and knowingly crime-facilitating speech is the speaker's moral culpability. Trying to help people commit or get away with their crimes is generally reprehensible. Trying to inform the public about perceived government misconduct, persuade the public that some laws are futile, or even to entertain people, while regretfully recognizing that this will as a side effect help people get away with their crimes, is much more defensible.[375]

It seems to me, though, that this advantage of the intent test is more than overcome by its disadvantages, described in the preceding pages. Judges and juries likely will often mistake knowledge for intention, especially when the speakers hold certain political views—either views that seem particularly consistent with an intent to facilitate a certain crime, or just views that make factfinders assume the worst about the speaker.

As a result, many speakers who do not intend to facilitate crime will be deterred from speaking. Some speech will be punished when equally harmful and valueless speech—perhaps including copies of the punished speech, posted on mirror Web sites—will be allowed. And the one ostensible advantage of the intent test, which is distinguishing the morally culpable intentional speakers from the morally guiltless knowing speakers, won't be much served, precisely because of the substantial risk that factfinders won't be able to easily tell the two apart.

C. *Distinctions Based on How Speech Is Advertised or Presented*

1. *Focusing on whether speech is advertised or presented as crime-facilitating*

a. *The inquiry*

Dual-use products are sometimes specially regulated when they have features that seem especially designed for the criminal use, or that are promoted in a way that seems to emphasize the criminal use. For instance, products that circumvent technological copy protection are prohibited if (among other circumstances) they are "primarily designed or produced for the purpose of" circumvention, or are "marketed . . . for use" in circumvention.[376] Drug paraphernalia laws focus on whether a product has been "designed or marketed for use" with drugs.[377] Likewise, one court has concluded that a gun manufacturer could be held liable for

375. *See* Cheh, *supra* note 147, at 24 & n.28 (arguing that intention may be an important factor distinguishing the publisher of a bomb-making manual for terrorists from the publisher of a work on explosives that's not aimed at terrorists—"[i]ntention is irrelevant to the issue of whether harm is or will be caused, but it is crucial to establish culpability").

376. 17 U.S.C. § 1201(2)(A), (C) (2000).

377. *See generally* Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982).

injuries caused by its product in part because the manufacturer advertised the gun as being "resistant to fingerprints."[378]

This is not quite an inquiry into the defendant's purpose: Someone who is distributing programs "primarily designed or produced for the purpose of" circumvention can be held liable even if his only purpose is to make money, to strike a symbolic blow against the law that bans such distribution, or to promote the noncircumvention uses of the program. Many such distributors might sincerely prefer (though not expect) that by some miracle no buyer ever uses the product for criminal purposes, among other things because then there would be less likelihood that the distributor would be sued or prosecuted. They would know the criminal uses are likely, but not have the purpose of promoting such uses; and yet they would still be held liable.

Likewise, I suspect that the *Hit Man* court was wrong to argue that the framing or advertising of the book—there, its characterization as a manual for contract killers—is "highly probative of the publisher's intent" to facilitate crime.[379] As I've mentioned above, 13,000 copies of the book were sold.[380] That seems to be much greater than the likely set of would-be contract killers who would learn their trade from a book (especially a book written by a person using the pseudonym "Rex Feral"). The publisher and the author must have known this, and thus likely intended their market to be armchair soldiers of fortune who like to fantasize about being Nietzschean ubermensches. Perhaps, as I discuss below, distributing *Hit Man* should still be punished because of the way the book was framed or promoted. But this would have to be because of something other than the light that the framing and promotion sheds on the publisher's intent.

On the other hand, the "designed or marketed for criminal uses" inquiry doesn't simply ask whether the defendant knew of the crime-facilitating uses—a seller of cigarette rolling paper wouldn't be held liable simply because he knows that many buyers use it for marijuana rather than tobacco.[381] Rather, the test for distributors would be whether the distributor is knowingly distributing material that's being advertised (by him) or designed or presented (by the author) in a way that's intended to especially appeal to criminals. And the test for authors would be whether they are purposefully producing material that especially appeals to criminals, though not necessarily whether their purpose is actually to help those criminals.[382]

Some of the examples of crime-facilitating speech seem to fit within this definition, and the definition would often track many people's moral intuitions. The *Hit Man* murder manual and

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378. Merrill v. Navegar, Inc., 89 Cal. Rptr. 2d 146, 157 (Ct. App. 1999). The decision was reversed on statutory grounds that didn't bear directly on the advertising question. Merrill v. Navegar, Inc., 28 P.3d 116 (Cal. 2001).

379. Rice v. Paladin Enters., Inc., 128 F.3d 233, 253 (4th Cir. 1997).

380. *See supra* note 116.

381. *See, e.g.*, Dubose v. State, 560 So. 2d 323, 325-26 (Fla. Dist. Ct. App. 1990).

382. This inquiry treats an author's decisions about how to frame the work (writing it as a manual about how to commit contract murder rather than as a book about how contract murderers operate) the same as the publisher's decisions about how to promote the work (advertising it as a manual about how to commit contract murder rather than as a book about how contract murderers operate). One could, I suppose, treat the two kinds of decisions differently, but I think they are best treated the same way: Both are choices about how the information is presented to potential readers, and both may (as the material below discusses) affect what sorts of readers the book attracts.

The Anarchist Cookbook, for instance, seem particularly blameworthy precisely because their content and their promotional advertising portray them as tools for committing crime; they are different in this from a novel about contract killers and a chemistry book about explosives.[383] A Web site that presents itself as a source of research papers that students can plagiarize seems different from an online encyclopedia, though the encyclopedia can also be used for plagiarism and the papers can also be used for legitimate research. And this is true even if the books and Web sites are published by people who intend only to make money, not to facilitate crime.

The definition would also cover Web pages that mirror the contents of suppressed crime-facilitating works, such as some of the pages that mirror *Hit Man* itself. The mirror page operator may intend only to strike a blow against censorship, and not to facilitate crime;[384] and I suspect that many people would be less eager to punish him than they would be to punish the publisher or the author of the original site. But the mirror page operator likely does know that the material he's distributing was designed or presented—not by him, but by its author—to especially appeal to criminals. His actions would thus be on the punishable side of the line discussed here, even if he's motivated by love of free speech rather than by love of money.

b. Ginzburg v. United States *and the "pandering" doctrine*

This inquiry into how a work is promoted or framed already takes place in some measure—though controversially[385]—in the "pandering" doctrine, which is part of obscenity law.

Obscenity law is based on the view that sexually themed material can have "a corrupting and debasing impact [on its consumers,] leading to antisocial behavior."[386] On the other hand, obscenity law also recognizes that much sexually themed material can also have serious value to its other consumers.

Under this framework, many sexually themed works would be dual-use. Consider a work that has some highly sexual portions that aren't valuable by themselves (or are valuable only to those who are merely seeking sexual arousal), but that taken as a whole has serious scientific, literary, artistic, or political value. Some consumers will view the work for that serious value. But other consumers may look only at the valueless portions of the work, and do so out of

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383. *See Rice*, 128 F.3d at 253-54 (stressing this as to *Hit Man*).

384. See, for example, the Web site noted in *supra* note 251, which provides a copy of the *Hit Man* contract murder manual, denounces the lawsuit and court decision that ordered *Hit Man* to be taken off the market, and concludes:

> The book was initially published in 1983. 13,000 copies of the book are now in existence. There has only ever been one case where the book was associated with a crime, in that case the criminal had recently finished a lengthy prison sentence and had a history of prior violent crime. It is our opinion [that] this book has never incited a murder, that the settlement of the Paladin Press case was wrong and forced by the insurance company, and that this book, and no book, should be banned. We invite the public to judge for themselves.
>
> That said, here is Hit Man . . .

385. *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 249 (1990) (Stevens, J., concurring in part and dissenting in part) (criticizing Ginzburg v. United States, 383 U.S. 463 (1966)); Splawn v. California, 431 U.S. 595, 602 (1977) (Stevens, J., dissenting) (likewise); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 911 n.53 (2d ed. 1988) (likewise); G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 258 (1982) (discussing *Ginzburg* in unflattering terms).

386. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973).

prurient motives—when viewed by these consumers, the work will, under the logic of obscenity law, be harmful rather than valuable. Generally speaking, such dual-use works are constitutionally protected. Only those works that the law views as single-use, because they lack serious value and thus are likely to be used only for their prurient appeal, are punishable.

But under the pandering cases, of which the leading one is *Ginzburg v. United States*, a work that would otherwise not be obscene—perhaps because it has serious value—may be treated as obscene if it's "openly advertised to appeal to the erotic interest of . . . customers."[387] For instance, one of the works in *Ginzburg* was a text called *The Housewife's Handbook on Selective Promiscuity*. According to the Court, "[t]he Government [did] not seriously contest the claim that the book has worth" for doctors and psychiatrists. The book apparently sold 12,000 copies when it was marketed to members of medical and psychiatric associations based on its supposed "value as an adjunct to therapy," and "a number of witnesses testified that they found the work useful in their professional practice."[388]

Because Ginzburg marketed the work as pornographic, however, his distribution of the book was treated as constitutionally unprotected, though distributing the same book in ways that didn't appeal to consumers' erotic interest would have been protected. The obscenity inquiry, the Court held, "may include consideration of the setting in which the publication [was] presented," even if "the prosecution could not have succeeded otherwise."[389]

Why should the promotional advertising, or the purposes for which the product was designed—as opposed to the potential uses that the product actually has—affect the analysis? After all, the potential harm and value flow from the substance of the work, not its advertising or its authors' purposes. As Justice Douglas said when criticizing *Ginzburg*,

> The sexy advertisement neither adds to nor detracts from the quality of the merchandise being offered for sale. And I do not see how it adds to or detracts one whit from the legality of the book being distributed. A book should stand on its own, irrespective of the reasons why it was written or the wiles used in selling it.[390]

One might say the same about the advertisement that touts a work's utility for criminal purposes.

There are three plausible responses to this, though for reasons I'll explain below I think they are ultimately inadequate. First, and most important, when a dual-use work is promoted as crime-facilitating or is designed to be useful to criminals, more of its users are likely to be criminal. The advertisements or internal design elements will tend to attract the bad users and repel the law-abiding ones.[391]

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387. 383 U.S. at 467; *see also* Pinkus v. United States, 436 U.S. 293, 302 (1978); *Splawn*, 431 U.S. at 598; Hamling v. United States, 418 U.S. 87, 130 (1974).

388. *Ginzburg*, 383 U.S. at 472.

389. *Id.* at 465-66.

390. *Id.* at 482 (Douglas, J., dissenting); *see also FW/PBS*, 493 U.S. at 249 (Stevens, J., concurring in part and dissenting in part) ("If conduct or communication is protected by the First Amendment, it cannot lose its protected status by being advertised in a truthful and inoffensive manner."). The inoffensiveness of the advertising in *FW/PBS* was relevant because patent offensiveness is part of the obscenity test, so a sufficiently offensive sexually themed advertisement may itself be obscene.

391. *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 254 (4th Cir. 1997) (arguing—though I think incorrectly, given the broad distribution of the book—that *Hit Man* "is so narrowly focused in its subject matter and presentation as to be effectively targeted exclusively to criminals," which means that though "Paladin may technically offer the book for sale to all comers . . . a jury could . . . reasonably conclude that Paladin essentially

Restricting this speech will thus mostly obstruct the illegal uses, especially since the law-abiding readers will still be able to read material that contains the same facts but isn't promoted or framed as crime-facilitating. A criminologist interested in contract killing, a novelist who wants to write plausibly about contract killers,[392] or just a layperson who's curious about the subject would still be able to get information from books that aren't framed as contract murder manuals. A high-school student who genuinely wants to research, not plagiarize, would still be able to get information from encyclopedias and other Web pages that aren't pitched as term-paper mills.

The *Ginzburg* Court justified its decision partly in this way: It suggested that the book could lawfully be distributed "if directed to those who would be likely to use it for the scientific purposes for which it was written"; but though sales of the book to psychiatrists would have value, "[p]etitioners . . . did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed."[393] As Justice Scalia—the most prominent modern supporter of the *Ginzburg* approach—put it, "it is clear from the context in which exchanges between such businesses and their customers occur that neither the merchant nor the buyer is interested in the work's literary, artistic, political, or scientific value."[394]

Second, some material that is designed to be especially useful to criminals may be optimized for criminal use. Though the same information or features might be available from other sources, the other books or devices may be harder to use for criminal purposes, and perhaps may be more likely to lead to errors. A book on the chemistry of drugs that's designed to help criminals make drugs will likely offer special tips (for instance, about how to conceal one's actions) that would be missing in books aimed at chemistry students or lawful drug producers.

Bans on books designed to help criminals may thus make it harder for criminals to gather and integrate the information they need to accomplish their crimes. This won't stymie all criminals, of course, but it might dissuade some, and cause others to make mistakes that might get them caught.

Third, distributing or framing material in a way that stresses its illegal uses seems especially shameless. Even if the public promotion of the illegal uses is insincere—if the speaker or publisher actually doesn't intend to facilitate the illegal uses, but simply wants to make money (for instance, through the edgy glamour that the promotion provides)—the promotion may appear particularly reprehensible.[395] It's therefore tempting to hold the speaker at his word, to

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distributed *Hit Man* only to murderers and would-be murderers").

392. *See* Brief of Amicus Curiae Horror Writers Ass'n at 5, *Rice*, 128 F.3d 233 (No. 96-2412) (claiming that *Hit Man* "is a research tool that offers verisimilitude and authenticity to writers of fiction as well as intelligence to law enforcement and security officials").

393. 383 U.S. at 472-73 (internal citation omitted); *cf.* WHITE, *supra* note 385, at 258 (linking *Ginzburg* with Chief Justice Warren's view in *Jacobellis v. Ohio*, 378 U.S. 184, 201 (1964), that "'the use to which various materials are put—not just the words and pictures themselves'—was to be considered in determining whether a work was obscene").

394. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 832 (2000) (Scalia, J., dissenting).

395. *Cf. Rice*, 128 F.3d at 254 (noting the "almost taunting defiance" of the publisher's stipulation "that it

treat his speech as solely focused on those things that the advertising or framing of the speech stressed, and not to let him defend himself by citing the entertainment value (as with *Hit Man*) of the speech.

So, the theory goes, restrictions on advertising that promotes the improper uses of a work burden lawful uses only slightly, because the same material could be distributed if it weren't billed as promoting illegal uses.[396] And these restrictions have some benefit, because they somewhat decrease the illegal uses. The same can be said of restrictions on speech whose text (rather than its promotional advertising) describes the work as crime-facilitating or sexually titillating. The line between material that's advertised or framed as crime-facilitating and material that's advertised or framed in other ways despite its crime-facilitating uses is thus conceptually plausible.

At the same time, the line often requires subtle and difficult judgments, because the suggested use of a statement will sometimes be unstated or ambiguous, and different factfinders will draw different inferences about it. Is a list of abortion providers, boycott violators, strikebreakers, police officers, or political convention delegates crafted to especially appeal to readers who want to commit crimes against these people, or to readers who want to lawfully remonstrate with them, socially ostracize them, or picket them? Is an article that describes the flaws in some copy protection system crafted to especially appeal to would-be infringers, or to readers who are curious about whether technological attempts to block infringement are futile? Many publications simply present facts, and leave readers to use them as they like. Unless we require that each publication explicitly define its intended audience, it may often be hard to determine this audience.

And lacking much objective evidence about the intended audience, factfinders may end up turning to their own political predilections. As Part III.B.2 suggested, guesses about a person's purposes—here, about the audience to which the author is intending the work to appeal[397]—tend to be influenced by the factfinder's sympathy or antipathy towards the person. If we think antiabortion activists are generally good people trying to save the unborn from murder, we are likely to give the writer and the readers of a list of abortion providers the benefit of the doubt, and to assume the list was aimed only at lawful picketers and protesters. If we think antiabortion activists are generally religious fanatics who seek to suppress women's constitutional rights, we are likely to assume the worst about their intentions. There is thus a substantial risk that factfinders will err, and will err based on the speaker's and their own political viewpoints, in deciding whether something is "designed to appeal to criminals."

Finally, if the law starts focusing on how the speech is framed or marketed, many speakers—both those who are really trying to appeal to criminals and those who aren't—will just slightly change their speech so that it doesn't look like an overt appeal to illegal users. (Some term-paper Web sites, for instance, already present themselves as offering mere "example essays," and say things like "the papers contained within our web site are for research purposes

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intended to assist murderers and other criminals").

396. *Cf. Ginzburg*, 383 U.S. at 470-71 (stressing that a prosecution under a pandering theory "does not necessarily imply suppression of the materials involved").

397. *See supra* text accompanying note 382 (pointing out that the inquiry here is into whether the work is intended or promoted in a way that's intended to especially appeal to criminals).

only!"[398]) Recall that one of the purported advantages of the focus on "pandering" is precisely that it won't burden speech much, since the underlying information could still be communicated if it's not presented in a way that stresses the illegal uses.

If this happens, then there are two possible outcomes. One is that people who genuinely do want to appeal to criminals will be able to get away with it. The pandering exception will be narrow enough that it won't much burden legitimate speakers, but at the same time so narrow that it won't much help prevent crime.

The other possibility is that lawmakers and judges will understandably seek to prevent these "end runs" around the prohibition—and the steps taken to prevent them may end up covering not just those end runs, but also legitimate speech. The rule may start as a narrow First Amendment exception for speech that's explicitly promoted in a way that makes it appealing to criminals; but then even legitimate, well-intentioned promotion of dual-use speech would be perceived as exploiting a "loophole" in the rule. This perception would then tend to yield pressure for categorizing more and more speech under the "promoted as crime-facilitating" label. And this tendency will be powerful because it would reflect a generally sensible attitude: the desire to make sure that rules aren't made irrelevant by easy avoidance.[399]

This pressure for closing supposed loopholes has been visible with other speech restrictions. For instance, the characterization of obscenity as being "utterly without redeeming social importance" led some pornographers to add token political or scientific framing devices: a purported psychologist introducing a porn movie with commentary on the need to explore sexual deviance, or a political aside on the evils of censorship. The Court reacted by rejecting the "utterly without redeeming social importance" standard and demanding "serious literary, artistic, political, or scientific value."[400] This change helped close the loophole to some extent[401]—but

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398. *See, e.g.*, Example Essays.com, Acceptable Use Policy / Site License, *at* http://exampleessays.com/aup.php (last visited Jan. 15, 2005) ("The papers contained within our web site are for research purposes only! You may not turn in our papers as your own work! You must cite our website as your source! Turning in a paper from our web site as your own is plagerism [sic] and is illegal!"). Likewise, the *Hit Man* contract murder manual included a disclaimer stating,

> IT IS AGAINST THE LAW TO manufacture a silencer without an appropriate license from the federal government. There are state and local laws prohibiting the possession of weapons and their accessories in many areas. Severe penalties are prescribed for violations of these laws. Neither the author nor the publisher assumes responsibility for the use or misuse of information contained in this book. *For informational purposes only!*

FERAL, *supra* note 251 (emphasis in original). In *Rice*, though, the court wasn't impressed: "[A] jury could readily find [the book's disclaimer] to be transparent sarcasm designed to intrigue and entice . . . ." 128 F.3d at 254.

399. Volokh, *Mechanisms of the Slippery Slope*, *supra* note 187, at 1051 (describing such "enforcement need slippery slopes"); *see also* Hall, *supra* note 362, at 531-35 (describing such a phenomenon at work in the World War I-era antidraft speech cases, though concluding that those prosecutions were nonetheless sound).

400. *See* Miller v. California, 413 U.S. 15, 21-24 (1973).

401. Nonetheless, similar devices still seem to be used sometimes, with occasional success. *See, e.g.*, Main St. Movies, Inc. v. Wellman, 598 N.W.2d 754, 761 (Neb. 1999):

> The district court determined that exhibit 9, "Takin' It to the Jury," has serious literary or artistic value . . . and, therefore, found as a matter of law that [this movie is] not obscene. "Takin' It to the Jury" depicts the deliberation of a six-person jury in an obscenity case. The jurors discuss the community standard requirements, and when they discuss specific scenes of the movie that they are reviewing for obscenity, various jurors fantasize about themselves in similar scenes.
>
> Based on our de novo review . . . we conclude that the State did not prove beyond a reasonable doubt that "Takin' It to the Jury" lacked any serious literary, artistic, political, or scientific value. The movie appears to be an

only at the cost of punishing speech that "clearly ha[s] *some* social value," though "measured by some unspecified standard, [the value] was not sufficiently 'serious' to warrant constitutional protection."[402] A seemingly very narrow restriction proved so easy to circumvent that the Court shifted to a broader one.

Likewise, in *Buckley v. Valeo*, the Court—aiming to minimize the burden on free speech rights—narrowly interpreted the Federal Election Campaign Act's restrictions on independent expenditures "relative to a clearly identified candidate" as covering only speech "that include[s] explicit words of advocacy of election or defeat of a candidate."[403] Political advertisers then understandably avoided the restrictions by avoiding such explicit words, so that the advertisements would be treated as issue advocacy rather than candidate advocacy.

Supporters of campaign finance regulation then naturally responded by condemning such speech as "sham issue advocacy" and urging that it be restricted.[404] The Bipartisan Campaign Reform Act ultimately changed the express advocacy definition to cover any ad that "refers to a clearly identified [federal] candidate" within sixty days of the election.[405] And the Supreme Court upheld the new rule, citing among other things the need to close the loophole.[406] The original narrow restriction set forth by the Court proved so easy to circumvent that this circumvention created considerable pressure for a broader restriction.

The same may easily happen to restrictions on speech that's explicitly presented as crime-facilitating: Such narrow restrictions will likely lead many authors and distributors to characterize their works less explicitly, with what some see as a wink and a nudge. Legislators may then understandably try to enact broader restrictions aimed at rooting out such "shams." Yet these broader restrictions may affect not just the insincere relabeling of crime-facilitating speech, but also the distribution of valuable material that's genuinely designed for and marketed to law-abiding readers.

The main advantages of focusing on how the work is promoted and framed would thus disappear. Such a focus offers the prospect that (1) the material would still remain distributable when properly promoted, and (2) courts could apply the rule by focusing on the objective terms of the work and its advertising, while minimizing investigations of distributors' or authors' hidden intentions. But the attempts to prevent end runs, code words, and exploitation of loopholes will tend to make it harder to distribute the material even to law-abiding buyers, since people will always suspect that the supposed attempt to focus on law-abiding buyers is just a sham, and that the real market is criminals. And courts may then have to return to trying to determine distributors' or authors' presumed intentions, now by asking whether, for instance, a statement that "Here's how common copyright piracy sites are" is an insincere cover for what the author really wanted to say, which is "Here's how you can infringe copyright."

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attempt by the producers to instruct viewers in the basics of obscenity law with political commentary regarding the lack of validity and usefulness of obscenity laws.

402. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting). Justice Brennan had originated the "utterly without redeeming social importance" test sixteen years before, in *Roth v. United States*, 354 U.S. 476 (1957).

403. 424 U.S. 1, 43 (1976).

404. McConnell v. FEC, 540 U.S. 93, 132 (2003).

405. 2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. II 2002).

406. *McConnell*, 540 U.S. at 193-94.

So on balance, a focus on whether the work panders to the criminal users will probably do more harm than good. It offers only a small degree of protection from crime—the premise of the proposed distinction, after all, is that the work will still remain available if it's promoted in a way that isn't aimed at a criminal audience. It will likely be hard to accurately and fairly apply. And it carries the risk that the narrow restrictions will end up growing into broad ones.

2. *Focusing on whether speech is advertised or presented as an argument rather than just as pure facts*

Some speech that contains crime-facilitating facts is presented as crime-facilitating. Some is framed as political commentary aimed at the law-abiding. And some is framed as just presenting the facts, either by themselves or as part of a broader account. A newspaper article might, for instance, describe a secret wiretap without either encouraging the criminals to flee, or arguing that secret wiretaps should be abolished. A Web page might explain how easy it is to change the supposed "ballistic fingerprint" of a gun, without urging criminals to use this to hide their crimes, but also without arguing that the ease of this operation means that legislation requiring all guns to be "fingerprinted" is thus misguided.

It would be a mistake, though, to protect such purely factual speech less than expressly political speech.[407] Information is often especially useful to people's political decisionmaking when it comes to them as just the facts, without the author's political spin. Many newspapers generally operate this way, at least most of the time: They give readers the facts on the news pages, and usually save the policy conclusions for the editorial page.

Some of the news articles include commentary from both sides as well as the news, but many don't. They present just the information, in the hope that readers will be able to use that information—for instance, that secret wiretaps were employed on this or that occasion—to make up their own minds. This is a legitimate and useful way of informing the public.

Moreover, a rule distinguishing purely factual accounts from factual accounts that are coupled with political commentary seems easy to evade, even more so than the "pandering" rule discussed in the preceding pages. Just as the Court saw "little point in requiring" advertisers who sought constitutional protection to add an explicit "public interest element" to their advertising of prices, "and little difference if [they did] not" add such an element,[408] so there seems to be

407. *But see* Isaac Molnar, Comment, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware*, 59 OHIO ST. L.J. 1333, 1370-72 (1998) (suggesting that the law distinguish "[n]onexpressive instructional speech"—apparently referring to crime-facilitating speech that lacks an overt political message—from "expressive instructional speech").

408. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 764-65 (1976). Of course, the claim here is that such factual assertions should generally be fully protected, unlike commercial speech, which gets a lower level of protection. But the lower protection offered to commercial speech comes from its subject matter, not its being purely factual. (After all, even commercial advertising that is coupled with political advocacy still remains merely commercial advertising. *See* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 n.5 (1980).) The *Virginia Pharmacy* quotes simply show that the purely factual component of speech doesn't itself justify lower protection than when the speech is set forth together with its political implications.

little benefit in requiring people to add political advocacy boilerplate in order to make their factual assertions constitutionally protected.[409]

D. *Distinctions Based on the Harms the Speech Facilitates*

1. *Focusing on whether the speech facilitates severe harms*

a. *Generally*

Some speech facilitates very grave harms: the possible construction of a nuclear bomb or a biological weapon, the torpedoing of a troopship, or the murder of witnesses, abortion providers, or boycott violators. Some facilitates less serious harms: drugmaking, suicide,[410] burglary, or copyright infringement.

When legislatures decide how to deal with dual-use technologies, they normally and properly consider how severe the harmful uses can be. Machine guns and VCRs can both be used for entertainment as well as for criminal purposes. Yet machine guns are much more heavily regulated, because their illegal uses are more dangerous.[411] It's likewise appealing to

409. *See, e.g.*, books cited *supra* note 98. The first, *Improvised Modified Firearms*, describes how people have throughout recent history made guns themselves, and argues that "[t]he message is clear: if you take away a free people's firearms, it will make others. As these pages demonstrate, the methods, means, and technology are simple, convenient, and in place." TRUBY & MINNERY, *supra* note 98, at outside back cover. The second, *Home Workshop Guns for Defense and Resistance*, describes "the methods, means, and technology," and thus helps show whether they are indeed "simple, convenient, and in place." HOLMES, *supra* note 98. There is little reason to conclude that the two books should be constitutionally protected if they are published in one volume, but that the second book should be unprotected if published separately, because it lacks the political argument that the first book provides. Both books, incidentally, come from the same publisher.

410. *See* Criminal Code Amendment (Suicide Related Material Offences), Austl. H.R. 4150, § 474.29A(2)(b), (2)(b)(ii), (2)(c)(iii) (2004) (proposing a ban on electronically distributing material that "directly or indirectly" "provides instruction on a particular method of committing suicide" with the intent that "the material . . . be used by another person to commit suicide"); Criminal Code Act, 1995, § 5.2(3) (Austl.) (defining "intention" as including cases where the actor is "aware that [a result] will occur in the ordinary course of events," thus covering what the Model Penal Code would call "knowledge" as well as "intent"); Rebecca Sinderbrand, *Point, Click and Die*, NEWSWEEK, June 30, 2003, at 28 (stating that a woman's family is suing the operator of a suicide information Web site that the woman seemingly used to learn how to hang herself); *id.* (quoting prosecutor saying that "[w]hen we can definitely prove that someone assisted a suicide, we'll prosecute, no matter what form that help takes"); David Wharton, *Librarians Rely on Book Sense, Reviews in Stocking Shelves*, L.A. TIMES, Dec. 25, 1986, § 4, at 34 (describing a library's deciding not to order a suicide manual because of a warning from the city attorney about the risk of liability); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech*, 34 ARIZ. L. REV. 231, 286 n.357 (1992) (suggesting that suicide manual publishers might be liable under current tort law, though concluding this is unlikely); *cf.* Jerry Hunt, How to Kill Yourself Using the Inhalation of Carbon Monoxide Gas, *at* http://www.jerryhunt.org/JerryHunt/kill.asp (last visited Jan. 15, 2004) (found using a Google search for "how to kill yourself").

411. Technologies that facilitate copyright infringement have traditionally been protected so long as they have the potential for "substantial noninfringing uses." Even if most uses are likely to be illegal, so long as a substantial number of uses—current or future—are legal, courts have judged it better to tolerate both the legal uses and the illegal ones than to prevent both. *See supra* text accompanying note 306. But where risk of death is involved, the calculus has been different. Machine guns do have substantial noninfringing uses: People collect them, and use them for target-shooting, though naturally in exercises different from normal single-shot target-

have the constitutional protection of crime-facilitating speech turn to some extent on the magnitude of the crime being facilitated.

But these severity distinctions are much harder for courts to draw in constitutional cases than they are for legislatures to draw when drafting statutes. Courts are understandably reluctant to decide which crimes are, as a matter of constitutional law, serious and which—despite the legislature's assertions to the contrary—are not serious enough. At times, the Supreme Court has been so concerned about this difficulty that it has asserted that such line-drawing is actually impermissible.[412] In other cases, the Court has been willing to draw such constitutional severity lines,[413] and I think such line-drawing is theoretically defensible (as I discuss in much more detail elsewhere[414]). But in practice, most constitutional severity distinctions that are available for crime-facilitating speech would likely be drawn at quite low levels, and would authorize the restriction of a wide range of valuable speech.

For instance, the Court has at times made constitutional rules turn on the legislature's own judgments of severity, as reflected in the sentences the legislature has authorized for a crime. Thus, for instance, the Court has concluded that the Fourth Amendment doesn't let the police engage in some seizures when the underlying offense doesn't carry the risk of jail time.[415] But the most obvious legislatively defined lines that the courts can adopt, such as the lines between crimes and torts, jailable offenses and nonjailable offenses, and between felonies and misdemeanors, would classify most of the examples in the Introduction as being on the "severe"

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shooting. Nonetheless, civilians are generally banned from owning machine guns—except for the some 100,000 machine guns grandfathered from before the ban, *see* GARY KLECK, TARGETING GUNS 108 (1997)—because their potential criminal use is seen as harmful enough to justify such a ban. The actual criminal uses of machine guns seem fairly rare, and machine guns are actually not dramatically more dangerous in criminal hands than non-machine gun firearms. *See id.* at 108. But because machine guns are seen as having less value than other firearms (because they aren't particularly effective for self-defense and their chief lawful civilian use is thus entertainment), and as posing more risk of harm than other entertainment devices such as VCRs, they are more heavily regulated than either sort of device.

412. See *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972), where the Court declined to create a First Amendment journalists' privilege that was sensitive to the severity of the crime being investigated, reasoning:

> [B]y considering whether enforcement of a particular law served a "compelling" governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.

See also Mincey v. Arizona, 437 U.S. 385, 393 (1978) (taking a similar view in the Fourth Amendment context); New Jersey v. T.L.O., 469 U.S. 325, 342 n.9 (1985) (likewise); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1961-67 (2004) (discussing these cases).

413. Some cases have drawn lines based on a crime's inherent severity. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that shooting at a fleeing suspect is an unreasonable seizure unless there is probable cause to believe that the suspect is guilty of a violent crime, as opposed to just a property crime). Some have turned on the legislature's own severity distinctions—for instance, based on whether the crime is punishable by jail time or only by a fine. And in some contexts, the Court has decided case by case that a particular offense is severe enough to justify a special constitutional rule: For instance, the First Amendment child pornography exception is based partly on the Court's conclusion that sexual exploitation of children is such a serious crime. *See* New York v. Ferber, 458 U.S. 747, 764 (1982).

414. Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 412.

415. *See id.* at 1971-75.

side of the line: For example, a newspaper article that provides the URL of an infringing Web site may facilitate criminal copyright infringement, which is potentially a felony.[416]

Likewise, if courts rely on fairly bright-line inherent severity distinctions, such as between violent crimes and nonviolent crimes,[417] most such distinctions would authorize restricting a wide range of crime-facilitating speech. Chemistry textbooks that describe explosives, novels that describe nonobvious ways of poisoning someone, newspaper articles that mention the name of a crime witness, and publication of the names of boycott violators or strikebreakers can all facilitate violent crimes.

Courts could try to draw the line at a higher level, without pegging it to some established or intuitively obvious distinction. But such ad hoc line-drawing may prove unpredictable both for speakers and for prosecutors; and it may also over time lead the severity line to slip lower and lower, when courts conclude—as the Supreme Court has done as to the Cruel and Unusual Punishment Clause—that they ought to "defer[]" to "rational legislative judgment" about the "gravity of the offense."[418]

Courts may be reluctant to distinguish, for instance, bans on bomb-making information from bans on drugmaking information,[419] given that many people find drug manufacturing to be as deadly as bomb manufacturing[420] (and even if the judges might themselves have taken the contrary view had they been legislators). Likewise, once courts have upheld bans on drugmaking and bomb-making information, they may be reluctant to overturn a similar legislative judgment as to information that helps people break into banks or computer security systems: Though these are just property crimes rather than violent crimes or drug crimes, they are felonies that in the aggregate can lead to billions of dollars in economic harm. And once courts uphold bans on that sort of crime-facilitating information, they may find it hard to distinguish, say, information that describes how people evade taxes, that points to copyright-infringing sites, or that discusses holes in copy protection schemes.

Such deference to legislatures seems particularly likely because many judges would find it both normatively and politically attractive. Deference avoids a conflict with legislators and citizens who may firmly and plausibly argue that certain crimes are extremely serious, and who may resent seeing those crimes treated as being less constitutionally significant than other crimes. Deference shifts from the judges the burden of drawing and defending distinctions that don't rest on any crisp rules. Deference fits the jurisprudential notion that arbitrary line-drawing decisions, such as arbitrary gradations of crime, arbitrary threshold ages for driving or drinking, and so on—decisions where one can logically deduce that there's a continuum of gravity or

416. *See* 18 U.S.C. § 2319 (2000); 17 U.S.C. § 506 (2000).

417. *See* Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 412, at 1967-71.

418. *Id.* at 1975-82.

419. So far Congress has treated the two differently. *Compare* 18 U.S.C. § 842(p) (2000) (banning the distribution of certain kinds of speech that facilitate bomb-making), *with* S. 1428, 106th Cong. § 9 (1999) (unsuccessfully proposing a similar ban as to speech related to drugmaking). The question is what might happen if Congress does enact the ban on drugmaking information.

420. *See* Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in the judgment) (arguing that drug crimes are extremely serious).

maturity, but where one can't logically deduce the proper dividing line—are for the legislature rather than for judges.[421]

If one thinks such deference is sound, then one might well endorse a rule under which a broad category of crime-facilitating speech—for instance, all knowingly crime-facilitating speech—would be constitutionally unprotected. This would then leave it to legislatures to decide which crime-facilitating speech should be punished and which shouldn't be.

But it seems to me that such a broad new exception would be a mistake, and that even speech which may help some listeners commit quite severe crimes, including murder, should still be protected. The First Amendment requires us to run certain risks to get the benefits that free speech provides, such as open discussion and criticism of government action, and a culture of artistic and expressive freedom. These risks may include even a mildly elevated risk of homicide—for instance, when speech advocates homicide, praises it, weakens social norms against it, leads to copycat homicides, or facilitates homicides. Each such crime is of course a tragedy, but a slightly increased risk even of death—a few extra lives lost on top of the current level of over 17,000 homicides per year[422]—is part of the price we pay for the First Amendment, and for that matter for other Bill of Rights provisions.

b. *Extraordinarily severe harms*

So it seems to me that dual-use crime-facilitating speech should not be restrictable even though it may help some readers commit some very serious crimes. Yet this does not necessarily dispose of speech that may cause extraordinarily severe harms—speech that, for instance, might (even unintentionally) help terrorists synthesize a smallpox plague, or might help foreign nations build nuclear bombs.[423]

The Bill of Rights is an accommodation of the demands of security and liberty, which is to say of security against criminals or foreign attackers and security against one's own government. The rules that it sets forth, and that the Supreme Court has developed under it, ought to cover the overwhelming majority of risks, even serious ones and even ones that arise in wartime.

But it's not clear that those rules, developed against the backdrop of ordinary dangers, can dispose of dangers that are orders of magnitude greater. This is why the usual Fourth

421. Volokh, *Crime Severity and Constitutional Line-Drawing*, *supra* note 412, at 1978-82.

422. *See* Nat'l Ctr. for Injury Prevention and Control, WISQARS Injury Mortality Reports, 1999-2002, *supra* note 181 (2002 data).

423. It's not clear that the H-bomb design information involved in *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), often seen as the classic example of such harmful speech, in fact seriously jeopardized national security. Building a hydrogen bomb requires an industrial base that only advanced countries possess, and those countries likely have scientists with the knowledge needed to deduce how such a bomb could be constructed. (Hydrogen bombs, which are fusion bombs, are much harder to build than fission bombs.) This would probably have been true even when *Progressive* was decided, twenty-five years after the H-bomb was invented, and it would pretty certainly be true now. *See, e.g.*, L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 59 (1990). Nonetheless, the case does provide a useful hypothetical: What should be done if someone did want to publish information that would make it much easier for less advanced countries, or even sophisticated nongovernmental groups, to build either fission or fusion bombs, or to make other weapons—such as biological weapons—that could kill tens of thousands of people? *See, e.g.*, Christopher F. Chyba & Alex L. Greninger, *Biotechnology and Bioterrorism: An Unprecedented World*, 46 SURVIVAL 143, 148-53 (2004).

Amendment rules related to suspicionless home searches might be stretched in cases involving the threat of nuclear terrorism;[424] why we continue to have a debate about the propriety of torture in the ticking nuclear time bomb scenario;[425] and why, in a somewhat different context, the Constitution provides for the suspension of habeas corpus in cases of rebellion or invasion.[426]

Likewise, avoiding extraordinary harms—especially harms caused by information that helps others construct nuclear and biological weapons,[427] weapons that can kill tens of thousands at once—may justify restrictions on speech that would facilitate the harms.[428] The government might, for instance, prohibit publication of certain highly dangerous information, even when the information is generated by private entities that have never signed nondisclosure agreements with the government.[429] In effect, research in these fields could then only be conducted by government employees or contractors, or at least people who are operating with government permission: They might be able to share their classified work product with others who have similar security clearances, but they couldn't engage in traditional open scientific discussion.

The restrictions would indeed interfere with legitimate scientific research, and with debates about public policy that require an understanding of such scientific details.[430] For instance, if people weren't free to explain exactly how the terrorists might operate, then it would be harder to debate, for instance, whether the distribution of certain laboratory devices or precursor chemicals should be legal or not, or whether our civil defense strategies are adequate to deal

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424. *See, e.g.*, Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1279 (2004).

425. *See, e.g.*, Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 48-49 (1991); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2004); ALAN DERSHOWITZ, WHY TERRORISM WORKS 141, 158-63 (2002); *see generally* TORTURE: A COLLECTION (Sanford Levinson ed., 2004).

426. U.S. CONST. art. I, § 9, cl. 2.

427. *See, e.g.*, Chyba & Greninger, *supra* note 423, at 148-53 (pointing out the danger posed by legitimate scientific research such as the 2001 publication of a paper that detailed the construction of a vaccine-resistant mousepox virus, technology that might also be usable to create a vaccine-resistant smallpox virus).

428. A standard cost-benefit analysis might ask what the expected value of the harm would be—the magnitude of the harm multiplied by its probability. Nonetheless, here the probability of harm is so hard to estimate that it can't be a practically useful part of the test. I would therefore (tentatively) support the restriction of speech that explains how nuclear or biological weapons can be built, without asking courts to guess the likelihood that the speech will indeed be used this way; and I suspect that courts will in fact allow such restrictions.

This question of course echoes the opinions in *Dennis v. United States*, 341 U.S. 494 (1951). *See id.* at 510 (plurality); *id.* at 551-52 (Frankfurter, J., concurring in the judgment); *id.* at 570 (Jackson, J., concurring); *id.* at 588-89 (Douglas, J., dissenting), though, as I argue below in note 431, speech that may help facilitate very serious harms may be less protectable than speech that advocates very serious harms.

429. As I mentioned in note 55, this Article sets aside what rules constrain the government acting as employer or contractor, when it tries to control disclosures by people who learned information while working for the government.

430. Consider, for instance, the mousepox virus paper discussed in Chyba & Greninger, *supra* note 427: By pointing out that vaccine-resistant pox viruses can be created without vast difficulty, the paper both advanced scientific knowledge and helped prove that this was a threat that governments need to confront—since of course even without the paper terrorists or hostile governments might have been able to perform the same work. At the same time, though, the paper also unfortunately exacerbated the threat.

with the possible threats. The restrictions may even prove counterproductive, especially if they are badly designed or if classified research into countermeasures is inevitably much less effective than open research: They might interfere with the good guys' ability to produce effective defenses—for instance, effective defenses against biological weapons, or effective detection mechanisms for smuggled nuclear bombs—more than they interfere with the bad guys' ability to create and deploy weapons.

The restrictions would thus require more unchallenged trust of the government than free speech law normally contemplates. And there would indeed be some contested cases (for instance, what about discussions of possible gaps in security at nuclear power plants?); there would be a danger that the restrictions would over time broaden to include less dangerous speech; and there would be some undermining of our culture of political and scientific freedom.[431]

These are all reasons to keep the exception narrow, by reserving it for the truly extraordinary cases involving, as I mentioned, the risk of tens of thousands of deaths. These cases would be widely understood as being far outside the run of normal circumstances, so that they would always be seen as highly unusual exceptions to the normal rule of protection. And it seems to me that the risks of such a narrow exception are worth running, in order to try to avoid the risks of mass death.

As importantly, whether I'm right or wrong, chances are that judges will indeed allow this sort of restriction, as the trial court did for the H-bomb plans in *United States v. Progressive, Inc.*[432] And if judges do uphold such restrictions, it's important to have a ready framework that would cabin the restrictions in a way that prevents them from spreading to other, less dangerous kinds of speech.

The best way to do that, I think, is to have the judges use a test that explicitly turns on the extraordinary harms that the speech facilitates, harms on the magnitude of tens of thousands of deaths in one incident, which are far outside the normal range of danger that free speech and other liberties can help create. Rationalizing restrictions on such speech in other ways—for instance, by characterizing all crime-facilitating speech as definitionally unprotected conduct

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431. I would not endorse a restriction on crime-*advocating* speech that advocates such severe crimes. I strongly doubt that either terrorists' or foreign governments' decisions to build nuclear or biological weapons are likely to be much influenced by the sort of persuasive advocacy that the law is likely to be able to reach. The law might be able to suppress the flow of information about such weapons, but not, I think, the desire to build them.

Some speech that advocates other sorts of crime—for instance, denunciations of the government and promotion of violent revolution—may indeed ultimately lead to hundreds of thousands of deaths. Most civil wars and revolutions are indeed largely fomented by speech. But such speech would be harmful only to the extent that it persuades tens of thousands of people; and in the process, it is almost certain to also convey potentially valuable and legitimate criticism of the existing order to millions of people. *See* Dennis v. United States, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring in the judgment) ("A public interest is not wanting in granting freedom to speak their minds even to those who advocate the overthrow of the Government by force. . . . [C]oupled with such advocacy is criticism of defects in our society. . . . It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be. Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed."). The burden on public discourse of suppressing such advocacy is even greater than the burden of suppressing crime-facilitating information.

432. 467 F. Supp. 990 (W.D. Wis. 1979).

rather than speech,[433] by characterizing the laws punishing the speech as generally applicable laws that are immune from serious First Amendment scrutiny,[434] or by distinguishing political advocacy from scientific speech[435]—risks legitimizing much broader prohibitions that would apply even to less harmful speech, speech that ought to remain protected.[436]

2. *Focusing on whether the speech is very helpful to criminals*

Some information is especially helpful to criminals: Committing the crime is considerably easier when the information is available. All things being equal, detailed information (e.g., here's how you can make a silencer[437]) is more helpful than general information (e.g., resist the temptation to brag about your crimes[438]). Nonobvious information is more helpful than the obvious. Information that is only available from one source—for instance, a mimeographed list of the names of shoppers who aren't complying with a boycott, distributed only by the organization whose members stand outside the stores taking down names[439]—is more helpful than information that's also available in lots of other places, such as information about how marijuana is grown.[440]

Restrictions on crime-facilitating speech would have to in some measure distinguish speech that provides substantial assistance from speech that provides very little assistance.[441] Some information is so obvious or so general—for instance, it's easier to get away with murder if you hide the body well, cyanide is poisonous, and so on—that criminals are very likely to know it already, or figure it out with a moment's thought. Restricting such speech would yield little benefit, but impose a large First Amendment cost, since such a broad restriction would cover a huge range of entertainment, news reporting, and even ordinary conversation. The line between the substantially crime-facilitating and the insubstantially crime-facilitating would necessarily be hard to draw, since generality and obviousness are such subjective criteria; and the line's

433. *See supra* note 146 and accompanying text; Volokh, *Speech as Conduct*, *supra* note 151, pt. III.

434. *See supra* notes 147-51 and accompanying text; Volokh, *Speech as Conduct*, *supra* note 151, pt. II.

435. *See supra* Part III.A.3.a.

436. The same is true of having the test turn on the speaker's purpose instead of the gravity of the harm; but such an intent focus also probably won't satisfy those judges who do want to restrict the speech, because in many situations—such as in the *Progressive* case itself, or when a Web site mirrors speech to protest censorship—the harmful speech is not intended to facilitate crime. *See supra* Part III.B.2.a. And if the judges avoid this by treating knowledge of danger as "constructive intent," then the exception would in effect broadly punish knowingly crime-facilitating speech, without the extra protection that an "extraordinary harm" prong would require.

437. *See, e.g.*, FERAL, *supra* note 251, ch. 3.

438. *See, e.g.*, *id.* ch. 8.

439. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

440. See, for example, Growing Marijuana: How to Grow Marijuana Guide, *at* http:// www.growing-marijuana.org/ (last updated Oct. 19, 2004), or Google "growing marijuana."

441. Some general crime facilitation laws already do that: For instance, of the six jurisdictions that explicitly define the crime of "criminal facilitation," three limit it to knowingly providing "substantial" assistance, 9 GUAM CODE ANN. § 4.65 (2004); N.D. CENT. CODE § 12.1-06-02 (2003); TENN. CODE ANN. § 39-11-403 (2004), and three do not, ARIZ. REV. STAT. ANN. § 13-1004 (West 1997); KY. REV. STAT. ANN. § 506.080 (Banks-Baldwin 2004); N.Y. PENAL LAW § 115.00 (McKinney 2004).

vagueness would necessarily cause uncertainty and potential overdeterrence of some people and underdeterrence of others. Nonetheless, the line would indeed have to be drawn.

One could also distinguish crime-facilitating speech based on how easily the information is available from other sources. If a work is available widely enough, then any particular copy will be of little marginal value to a criminal—for instance, if one Web site containing *The Anarchist Cookbook* were unavailable, the criminal would use another.[442]

The government can argue that it's trying to reduce the availability of such works by going after each posting, just as it tries to prosecute each drug dealer and illegal gun seller. But sometimes it might seem unlikely that the government can effectively reduce the work's availability: The work might be available from overseas mirror sites, or the speech restriction might not even prohibit domestic mirror sites (for instance, if the restriction applies only to copies of the work that are posted with the intent to facilitate crime, and the mirror copies are posted without such an intent).[443] If that's so, then attempts to restrict such works may be condemned on the ground that they don't substantially advance the government interest in preventing crime, and thus impose a free speech cost with no corresponding benefit.[444]

On the other hand, as Part III.A.3 points out, speech about particular people, places, or events—for instance, speech that reveals the existence of a wiretap, the name of a formerly unidentified crime witness, people's social security numbers, or the passwords to computer systems—is less likely to be available in many places, and restrictions on such speech are therefore more likely to be effective. Each location that contains such speech will thus provide a substantial marginal benefit to criminal users. And preventing such speech from being posted will thus provide a substantial marginal benefit to people or government projects that might otherwise have been victimized.

E. *Distinctions Based on Imminence of Harm*

Some crime-facilitating speech, such as a warning that the police are coming, facilitates imminent harm or imminent escape from justice. In the incitement test, which is applicable to crime-advocating speech, imminence is an important requirement, perhaps the most important one.[445]

But there is little reason to apply such a requirement to crime-facilitating speech. The standard argument for punishing only advocacy of imminent crime is that such advocacy is especially harmful: It increases the chance that people will act right away, in the heat of passion, without any opportunity to cool down or to be dissuaded by counterarguments.[446]

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442. *See, e.g.*, N.D. CENT. CODE § 12.1-06-02 ("The ready lawful availability from others of the goods or services provided by a defendant is a factor to be considered in determining whether or not his assistance was substantial.").

443. *See supra* text accompanying notes 334-36.

444. *See* cases cited *supra* note 240.

445. *See supra* Part III.B.2.

446. *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be

Crime-facilitating speech, though, generally appeals to the planner, not to the impulsive criminal. When someone tells a criminal how to build a particularly sophisticated bomb, that information is at least as dangerous when it's said months before the bombing as when it's said the day before the bombing.[447] It's hard to see, then, why such speech should be treated as constitutionally different depending on whether it facilitates imminent crime or the criminal's future plans.

F. *Distinctions Between Criminal Punishments and Civil Liability*

Finally, one might distinguish restrictions on crime-facilitating speech based on whether they criminalize such speech or just impose civil liability. This, though, would be unsound. If crime-facilitating speech is valuable enough to be protected against criminal punishment, then it should be protected even against civil liability. If it isn't valuable enough to be protected against civil liability, then there is little reason to immunize it against criminal punishment.[448]

To begin with, if a lawsuit leads the court to enjoin the speech, after a trial on the merits,[449] then the speech *will* become criminally punishable. If the defendant refuses to stop distributing the speech after such an injunction is issued, he may be sent to jail for criminal contempt.

Furthermore, the threat of punitive damages or even compensatory damages can be a powerful deterrent to speech, as the Court recognized in *New York Times v. Sullivan*.[450] The threat of losing all one's assets—which for noncorporate speakers will likely include their homes and life's savings—may, for many speakers, be a deterrent not much smaller than the threat of jail. And this deterrent effect is further increased by the risk that damages will be awarded without proof beyond a reasonable doubt and the other procedural protections available in criminal trials.

In some fields of tort law, where actors reap most of the social benefit of their conduct, purely compensatory damages may not have as large a deterrent effect as would the threat of prison or financial ruin: Such damages would merely require actors to internalize the social costs as well as the social benefits of their conduct, which would in theory foster a socially optimal level of the conduct by providing just the right amount of deterrence. If your conduct (say, your using blasting for construction on your property) produces more benefits than harms, then you will still engage in the conduct despite being held liable for the harm you cause—you would just use the profits from the beneficial effects of the conduct to pay for the damages needed to

time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.").

447. Occasionally, crime-facilitating information may be useful only for a limited time—for instance, when it reveals a password that's changed every couple of days—but that's unusual.

448. *See, e.g.*, Bridges v. California, 314 U.S. 252 (1941) (treating criminal contempt punishment for speech as tantamount to any other criminal punishment for speech).

449. *See, e.g.*, cases cited *supra* note 24, which involve speech that facilitates copyright infringement; City of Kirkland v. Sheehan, No. 01-2-09513-7 SEA, 2001 WL 1751590 (Wash. Super. Ct. May 10, 2001) (enjoining the publication of social security numbers); *see also* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 179 (1998) (discussing courts' increasing willingness to enjoin even libel, and the general constitutionality of such permanent injunctions when directed at unprotected speech).

450. 376 U.S. 254, 279 (1964).

compensate victims for the harmful effects.[451] The availability of compensatory damages would only prevent the conduct if the conduct produces more total harm than benefit, and in such a situation we should want the conduct to be deterred.

But even if this argument works for some kinds of conduct, there's no reason to think that compensatory damages for speech will provide such a socially optimal deterrent. Valuable speech is generally a public good, which has social benefits that aren't fully internalized (or aren't internalized at all) by the speakers.[452] Requiring people who communicate dual-use speech to pay for its harms when they aren't paid for its social benefits will thus overdeter many speakers.

At the same time, purely compensatory liability will also underdeter many other speakers, who are relatively judgment-proof. If a college student is thinking about setting up a Web site that mirrors some crime-facilitating material, the risk of compensatory liability in the highly unlikely event that his particular site will lead to harm will probably do little to stop him.[453] The compensatory damages award against the *Hit Man* murder manual publishers has actually led the book to become *more* available, because several people who aren't worried about liability have posted copies on the Web; the copies are now available for free to the whole world, and not just by mail order from Paladin Press. The speech has simply been shifted from easily deterrable speakers to the harder-to-deter ones. If the legal system really wants to suppress the speech (assuming that the speech can practically be suppressed), it needs a more forceful tool than compensatory damages.

The Court has routinely declined to distinguish criminal liability from civil liability for First Amendment purposes, at least when the speaker is acting recklessly, knowingly, or intentionally.[454] As to crime-facilitating speech, this approach seems correct.

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451. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 64-73 (1987).

452. Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 555 (1991) ("[B]ecause information is a public good, it is likely to be undervalued by both the market and the political system. . . . Consequently, neither market demand nor political incentives fully capture the social value of public goods such as information. Our polity responds to this undervaluation of information by providing special constitutional protection for information-related activities.").

453. Some college students might worry about litigation: The recording industry's lawsuits against college students for illegally trading copyrighted works may have deterred some such trading. *Compare* Lee Rainie et al., The State of Music Downloading and File-Sharing Online 4, *at* http://www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (Apr. 2004) (reporting that peer-to-peer file sharing declined after the music industry's lawsuits against illegal file sharers, and that 38% of music downloaders reported that they are downloading less because of the lawsuits), *with* Thomas Karagiannis et al., Is P2P Dying or Just Hiding?, *at* http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf (Nov.-Dec. 2004) (reporting that peer-to-peer file sharing has not declined at all). But the chances that one's mirror page will be implicated in a future *Rice v. Paladin Enterprises*-like case seem so small—even smaller than the chances that one will be among the hundreds of people that copyright owners decide to sue—that many judgment-proof students are unlikely to be much deterred by this risk.

454. *See, e.g.*, Smith v. United States, 431 U.S. 291 (1977) (upholding criminal liability for distributing obscenity, despite Justice Stevens's arguments in dissent, *id.* at 311-16, that only civil remedies should be allowed in such cases); Garrison v. Louisiana, 379 U.S. 64 (1964) (accepting the possibility of criminal penalties for libel, if the *New York Times v. Sullivan* standards are satisfied). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), held that punitive damages may not be awarded in private figure libel cases when the speaker is merely negligent, which suggests that criminal liability would likewise be improper in such cases; but this judgment rested on the special dangers of holding speakers liable based on honest mistakes. *Id.* at 350.

G. *Summary: Combining the Building Blocks*

In the above discussion, I've tried to identify the pluses and minuses of each potential component of a crime-facilitating speech test. By doing this, I've tried to be thorough, to break the problem into manageable elements, and to provide a perspective that may be helpful even to those who may not agree with my bottom line.

Here, though, is my bottom line, which I can present quickly because it builds so heavily on the long discussion above. In my view (which I express in part with some confidence and in part tentatively), there should indeed be a First Amendment exception for speech that substantially facilitates crime, when one of these three conditions is satisfied:

(1) When the speech is said *to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment* (classic aiding and abetting, criminal facilitation, or obstruction of justice):[455] This speech, unlike speech that's broadly published, is unlikely to have noncriminal value to its listeners. It's thus harmful, it lacks First Amendment value, and any such exception is unlikely to set a precedent for something materially broader. I feel quite confident of this.

(2) When the speech, even though broadly published, has *virtually no noncriminal uses*—for instance, when it reveals social security numbers or computer passwords:[456] This speech is likewise harmful and lacks First Amendment value. Here, I'm more tentative, largely because I think the line-drawing problems increase the risk that valuable speech will be erroneously denied protection, and because I think this exception may indeed eventually be used to support other, less justifiable restrictions on broadly published speech. Nonetheless, it seems to me that these risks are sufficiently small to justify allowing a narrow exception.

(3) When the speech facilitates *extraordinarily serious harms, such as nuclear or biological attacks*:[457] This speech is so harmful that it ought to be restricted even though it may have First Amendment value. Here, I'm again somewhat tentative, because I think there are serious definitional problems here, a near certainty that some valuable speech will be lost, and a substantial possibility that the restriction may lead to broader ones in the future. Nonetheless, extraordinary threats sometimes do justify extraordinary measures, if care is taken to try to keep those measures limited enough that they don't become ordinary.

It also seems to me—though it didn't seem so to me when I first set out to write this Article—that two other kinds of restrictions are somewhat plausible, though I ultimately conclude that they aren't worthwhile:

(1) There is a plausible argument that speech should be restrictable when *its only value (other than to criminals) seems to be entertainment*.[458] The Court has rightly held that entertainment should generally be protected because it often comments on moral, political, spiritual, or scientific matters—but this need not mean that particular crime-facilitating details in works of entertainment should be categorically protected even when they're unnecessary to the broader themes. At the same time, any special exception for entertainment is likely to be not

455. *See supra* Part III.A.2.a.
456. *See supra* Part III.A.2.b.
457. *See supra* Part III.D.1.
458. *See supra* Part III.A.3.c.

very beneficial, and is likely to lead to substantial risks of error, excessive caution on the part of authors, and potential slippage to broader restrictions.

(2) Though *Ginzburg v. New York*, which held that how a work is marketed may affect its First Amendment status, does not enjoy a great reputation, it may actually make a surprising amount of sense: When a work is dual-use, *some marketing or framing of the work may be intended to appeal predominantly to those who would engage in the harmful and valueless use*, rather than in the valuable use.[459] Such marketing or framing might be outlawed without outlawing the underlying information. Nonetheless, here too the marginal benefit of banning works that are marketed or framed as crime-facilitating is low enough, and the potential costs are high enough, that on balance such bans are probably not worthwhile.

Finally, I feel fairly confident that some other potential distinctions—for instance, those based on the speaker's intent,[460] on whether the speech is about scientific questions rather than political ones,[461] or on whether it is on a matter of "private concern," "public concern," or "unusual public concern"[462]—are not terribly helpful.

CONCLUSION

The above analysis has suggested a test for crime-facilitating speech. More importantly, though, I hope it has shown several other things, which should be relevant even to those who disagree with my specific proposal.

(1) Many important First Amendment problems—such as the ones with which the Introduction begins—turn out to be about crime-facilitating speech. They may at first seem to be problems of aiding and abetting law, national security law, copyright law, invasion of privacy law, or obstruction of justice law. But they are actually special cases of the same general problem. Solving the general problem may thus help solve many specific ones.

(2) Precisely because the specific problems are connected, they ought to be resolved with an eye towards the broader issue. Otherwise, a solution that may seem appealing in one situation—for instance, concluding that the *Hit Man* murder manual should be punishable because all recklessly or knowingly crime-facilitating speech is unprotected[463]—may set an unexpected and unwelcome precedent for other situations.

(3) Much crime-facilitating speech has many lawful, valuable uses.[464] Among other things, knowing just how people commit crimes can help the law-abiding learn which security holes need to be plugged, which new laws need to be enacted, and which existing laws are so easy to avoid that they should be either strengthened or repealed. Similarly, knowing how the police are acting—which wiretaps they're planting or which records they're subpoenaing—can help the law-abiding monitor police misconduct, though it can also help criminals evade police

459. *See supra* Part III.C.1.
460. *See supra* Part III.B.2.
461. *See supra* Part III.A.3.a.
462. *See supra* Part III.A.3.d.
463. *See, e.g., supra* note 47.
464. *See supra* Part I.B.

surveillance. As with many other dual-use products, the very things that make dual-use speech useful in the right hands are often what make it harmful in the wrong hands.

(4) Some initially appealing answers—for instance, punishing intentionally crime-facilitating speech but not knowingly crime-facilitating speech, allowing crime-facilitating speech to be restricted when the restriction is done using laws of general applicability, and applying strict scrutiny—ultimately prove not very helpful.[465] Whatever one might think is the right answer here, I hope I've demonstrated that these are wrong answers, or at least seriously incomplete ones. Likewise, it's wrong to say that works such as *Hit Man* have no noncriminal value,[466] or to think that such works could be easily banned on the ground that the publisher's purpose is to promote crime:[467] Perhaps such works should indeed be restrictable, but they can't be restricted on this ground.

(5) The problems with applying these initially appealing proposals to crime-facilitating speech suggest that the proposals may be unsound in other contexts, too. For instance, letting speakers be punished based on their inferred intentions—as opposed to either categorically protecting a certain kind of speech or letting protection turn on the speaker's knowledge or recklessness rather than intention—may prove to be a mistake in a broader range of cases (though not in all cases).[468] Likewise for assuming that strict scrutiny can provide the answer,[469] or for assuming that speech may generally be restricted by laws of general applicability, even when the law applies to the speech precisely because of the communicative impact that the speech has.[470] Conversely, other approaches—such as, for instance, focusing on whether the speech is said only to listeners whom the speaker knows to be criminal—may be promising in other contexts, such as criminal solicitation.[471]

(6) The existence of the Internet may indeed make a significant difference to the analysis.[472] Though crime-facilitating speech on the Internet should be treated the same as crime-facilitating

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465. *See supra* Parts III.B.2, II.A, and II.B.

466. *Compare, e.g.*, *supra* note 391 (quoting the *Rice v. Paladin Enterprises* decision's arguments to this effect), *with supra* Part I.B.4 (arguing that most of *Hit Man*'s readers likely aren't would-be criminals, but are merely curious or interested in vicarious thrills, which is a form of noncriminal value).

467. *See supra* text accompanying notes 331-33.

468. Thus, for instance, it's not clear whether the Court's newfound focus on intent in threat cases is wise. *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003); *cf.* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 308 (2002) (describing the pre-*Black* lower court case law, which generally did not require intent); *see also* Robert Austin Ruescher, *Saving Title VII: Using Intent to Distinguish Harassment from Expression*, 23 REV. LITIG. 349 (2004) (proposing an intent test for hostile environment harassment cases, which I think would be a mistake for reasons similar to those discussed in Part III.B.2). Likewise, I think some lower courts have erred in concluding that knowledge that speech will cause a certain harm, or recklessness about that possibility, should suffice to justify restricting the speech. *See* Taylor v. K.T.V.B., Inc., 525 P.2d 984 (Idaho 1974) (holding that an invasion of privacy claim could prevail if the jury found that the private facts were disclosed "with reckless disregard that the disclosure would embarrass or humiliate" the plaintiff, by analogy—in my view, misguided analogy—to *New York Times v. Sullivan*); Falwell v. Flynt, 797 F.2d 1270, 1275 (4th Cir. 1986) (allowing an intentional infliction of emotional distress claim on the same theory), *rev'd sub nom.* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988).

469. *See supra* Part II.B.

470. *See* Volokh, *Speech as Conduct*, *supra* note 151.

471. *See supra* note 194.

472. This has generally not been my view for most areas of First Amendment law in cyberspace. *See, e.g.*,

speech elsewhere, the creation of the Internet makes it much more difficult to fight crime-facilitating speech anywhere.[473]

In 1990, banning *Hit Man* or *The Anarchist Cookbook* would have likely made it substantially harder for people to get the information contained in those books. Today, the material is a Google search away, and thus easier to access than ever before (despite the lawsuit that led to the *Hit Man* book being taken off the market): The first entry returned by the search for the text "hit man," for instance, pointed me to a site that contained the book's text, and another Google search—for "hit man," "manual for independent contractors," and "rex feral," the pseudonym of the author—found seven more copies. And because many such sites appear to be mirror sites run by people who intend only to fight censorship, not to facilitate crime,[474] they are legally immune from laws that punish intentionally crime-facilitating speech.[475]

To try to adequately suppress these sites, then, the U.S. government would have to prohibit *knowingly* crime-facilitating speech and not just intentionally crime-facilitating speech—a broad ban indeed, which may encompass many textbooks, newspapers, and other reputable publishers.[476] And even that would do little about foreign free speech activists who may respond to the crackdown by putting up new mirror sites, unless the United States gets nearly worldwide support for its new speech restriction. Moreover, unlike in other contexts, where making unprotected material just a little less visible may substantially decrease the harm that the material causes,[477] here most of the would-be criminal users are likely to be willing to invest a little effort into finding the crime-facilitating text. And a little effort is all they're likely to need.

This substantially decreases the benefits of banning crime-facilitating speech—though, as Part I.A described, it doesn't entirely eliminate those benefits—and thus makes it harder to argue that these benefits justify the costs. Broadly restricting all intentionally crime-facilitating speech, for instance,[478] might seem appealing to some if it will probably make it much harder for people to commit crimes. It should seem less appealing if it's likely to make such crimes only a little harder to commit, because the material could be freely posted on mirror sites.

Of course, this presupposes the current Internet regulatory framework, where the government generally leaves intermediaries, such as service providers and search engines, largely unregulated.[479] Under this approach, civil lawsuits or criminal prosecutions will do little

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Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 334 (2000); Volokh, *Cheap Speech and What It Will Do*, *supra* note 307, at 1846-47.

473. *See* Godwin, *supra* note 34 (making this point in the wake of the *Hit Man* case).

474. *See, e.g.*, sites cited *supra* notes 335-36.

475. *See, e.g.*, Rice v. Paladin Enters., Inc., 128 F.3d 233, 252-53 (4th Cir. 1997) (stressing that the *Hit Man* publisher might be held liable because of its unusual stipulation, entered for purposes of the motion to dismiss, that it intended to help criminals).

476. *See supra* Part I.B.

477. For instance, when the speech is libel, tangible copies that infringe copyright, speech that reveals private facts about a person, or obscene spam that's sent to unwilling viewers, reducing the dissemination of the speech would roughly proportionately reduce the harm done by that speech.

478. *See, e.g.*, Part III.B.2.

479. *See* 47 U.S.C. § 230 (2000); Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997). *But see* 17 U.S.C. § 512(d) (2000) (seeming to require search engine companies to remove links to copyright-infringing pages, when the companies are notified that the pages are infringing).

to suppress the online distribution of *Hit Man* or *The Anarchist Cookbook*, even if the law purports to broadly ban knowingly crime-facilitating speech.

But say Congress enacts a law that requires service providers or search engines to block access by the provider's subscribers or search engine's users to any site, anywhere, that contains the prohibited crime-facilitating works. Presumably, the law would have to require that providers and search engines (a) block access to Web sites that are on a government-maintained list of sites containing those works, and (b) electronically examine the content of other sites for certain tell-tale phrases that identify the prohibited works. There would also have to be a way for prosecutors to quickly get new sites and phrases added to the prohibited lists.

Service providers would also have to block access to any offshore relay sites that might make it possible to evade these U.S. law restrictions. This might indeed make the material appreciably harder to find, though of course not impossible (after all, the bomb recipes in *The Anarchist Cookbook* are also available, though perhaps in less usable form, in chemistry books).[480]

This law, though, would be much more intrusive—though perhaps much more effective—than any Internet regulation that we have today; and I suspect that such a law would face much greater opposition than, say, 18 U.S.C. § 842(p) (the bomb-making information ban) did.[481] This sort of control would return us, in considerable measure, to the sort of government power to restrict access to material that we saw in 1990: far from complete power, but still greater than we see today. Yet I doubt, at least given today's political balance, that such a proposal would succeed.[482] So the example of crime-facilitating speech shows how far the Internet has reduced the effectiveness of at least a certain form of government regulatory power—and how much would have to be done to undo that reduction.

Crime-facilitating speech thus remains one of the most practically and theoretically important problems, and one of the hardest problems, in modern First Amendment law. I hope this Article will help promote a broader discussion about how this problem should be solved.

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480. *Cf.* 18 PA. CONS. STAT. § 7626 (2004) (trying to institute a much narrower version of this aimed at ordering service providers to block access to child pornography); Emma-Kate Symons, *Labor Plan to Shield Kids from Net Porn*, AUSTRALIAN, Aug. 16, 2004, at 5 (discussing proposal aimed at ordering service providers to block access by children to hard-core pornography).

481. *See supra* note 2. Among other things, 18 U.S.C. § 842(p) (2000) prohibits only *intentionally* crime-facilitating speech (unless it's said to a particular person, rather than broadly published); the hypothetical new proposal would go after *knowingly* crime-facilitating speech. The hypothetical regulation would also mean more work and potential legal risk for service providers, including universities and businesses that provide their own Internet connections—powerful and reputable organizations that might object to the new obligations. And the regulation sounds like the very sort of national firewall that many Americans have condemned as repressive when it has been instituted by countries such as China.

Such a service provider mandate might also be an unconstitutional prior restraint, because it would coerce providers into blocking access to material even without a final judgment that the particular material was constitutionally unprotected. *See* Ctr. for Democracy & Tech., The Pennsylvania ISP Liability Law: An Unconstitutional Prior Restraint and a Threat to the Stability of the Internet, *at* http://www.cdt.org/speech/030200pennreport.pdf (Feb. 2003).

482. *See* Vandana Pednekar-Magal & Peter Shields, *The State and Telecom Surveillance Policy: The Clipper Chip Initiative*, 8 COMM. L. & POL'Y 429 (2003) (discussing the political defeat of the Clipper Chip proposal, which would have mandated that encryption hardware contain a back door for government surveillance).

FILED

JUL 22 2009

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGE AMY ST. EVE

UNITED STATES OF AMERICA	)	09 CR 542
	)	
v.	)	Violation: Title 18, United States Code, Section 115(a)(1)(B)
	)	
HAROLD TURNER	)	

MAGISTRATE JUDGE ASHMAN

The SPECIAL SEPTEMBER 2008 GRAND JURY charges:

On or about June 2, 2009, and June 3, 2009, in the Northern District of Illinois, Eastern Division, and elsewhere,

HAROLD TURNER,

defendant herein, threatened to assault and murder three United States judges with intent to impede, intimidate, and interfere with such judges while engaged in the performance of official duties and with intent to retaliate against such judges on account of the performance of official duties;

In violation of Title 18, United States Code, Section 115(a)(1)(B).

A TRUE BILL

FOREPERSON

UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE GRAND JURY SUBPOENA NO. 11116275	)	**Misc. No. 11-527 (RCL)**

MEMORANDUM AND ORDER

Before the Court is a Motion to Intervene and to Quash [1] filed by the individual who utilizes the Twitter.com username [redacted] and the pseudonym [redacted] (hereinafter "Mr. X").[1] Mr. X seeks to quash a subpoena issued against Twitter by a federal grand jury in the District of Columbia for records pertaining to his identity. Upon consideration of the motion, the government's opposition, and the individual's reply, the Court will grant the motion to intervene and deny the motion to quash.

I. BACKGROUND

This matter arises out of Mr. X's professed desire to engage in sadomasochistic activities with Congresswoman and presidential candidate Michele Bachmann. Mr. X posts to http://www.twitter.com/, a social networking Web site that restricts users to messages of 140 or fewer characters. The grand jury issued its subpoena to Twitter, Inc. on August 5, 2011, demanding that Twitter provide "any and all records pertaining to the identity of user name [redacted]." Mr. X posted the message, or "tweet," that provoked the subpoena and is the subject

[1] [redacted] likely refers to [redacted]. In the novel, [redacted] an African American standing trial for the alleged rape of a white woman in a segregated town in the South. [redacted] *see* [redacted] (1981). Meanwhile, [redacted] likely refers to [redacted], a brutal [redacted] revolutionary and murderer [redacted]. *See, e.g*, [redacted] A.M.), [redacted]. The Court chooses to refer to the anonymous movant as "[redacted]."

of this motion on August 2, 2011, at 9:32 p.m; it no longer appears on the user's Twitter page. The tweet read: "I want to fuck Michelle Bachman in the ass with a Vietnam era machete."[2]

Unfortunately, an overview of Mr. X's Twitter page is warranted. Mr. X's body of tweets is extremely crude and in almost incomprehensibly poor taste. Occasionally political but consistently vacuous, his *oeuvre* represents an infantile attempt at humor that brings to mind the most obscene aspects of Andrew Dice Clay,[3] but without even the infinitesimal modicum of artistic creativity that Mr. Clay managed to possess. The page is entirely without merit, comedic or otherwise. More offensive even than Mr. X's chosen vocabulary is the pathetic transparency and vapidity of his attempt to elicit the attention on the Internet that he surely lacks in real life. Somehow, this attempt has succeeded to the tune of, at the time of the issuance of this Order, 736 followers—a number that will certainly and regrettably grow once this Order is released to the public. A sad state of affairs indeed. But further criticism is unwarranted.[4] Readers are free, though ill-advised, to form their own opinions regarding Mr. X's output on their own time. It suffices here to include a mere sampling of some representative tweets, which are replicated without modification:

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[2] The government represents that the tweet at issue read, "I want to fuck Michelle Bachmann in her ass with a Vietnam era Machete." Because the tweet no longer appears on Mr. X's page, the Court cannot verify the correct formulation. At any rate, the differences are immaterial.

[3] *See, e.g.*, Janet Maslin, *Review/Film; Andrew Dice Clay Essence: Misogyny, Insult and Sex*, N.Y. Times, May 18, 1991, *available at* http://www.nytimes.com/1991/05/18/movies/review-film-andrew-dice-clay-essence-misogyny-insult-and-sex.html.

[4] And irrelevant to the forthcoming First Amendment inquiry. It goes without saying that the First Amendment applies to even the most tasteless of speech, *see, e.g.*, *Hustler v. Falwell*, 485 U.S. 46, 48 (1988) (involving a political parody wherein *Hustler* magazine portrayed Rev. Jerry Falwell as admitting he lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse"); *see also New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Even still, readers deserve an honest assessment of Mr. X's Twitter page without having to debase themselves by viewing it personally.

> Godamn I smacked my wife with my Dick ... Now she has a cock shaped bruise on her face... Take that take that take that
>
> Marcus Bachmann is sponsoring a scavenger hunt in his home-town In the hopes someone finds his Heterosexuality .
>
> Why does Jesus only communicate With Republicunts and Crazy people? #redundant[5]
>
> My dick testified in court today in the case against my left hand "He beat me,your honor every day for 25 years"
>
> Some of us take great pride in being anti-establishment god loathing socialist degenerate douche Nuggets with Psychopathic Tendencies

Upon receiving the subpoena, Twitter informed Mr. X of its existence and of Twitter's intent to comply unless Mr. X filed a prompt motion to quash. This motion followed.

II. DISCUSSION

Mr. X seeks to quash the subpoena directed at Twitter pursuant to Fed. R. Crim. P. 17(c), which permits a court to quash a subpoena *duces tecum* if "compliance would be unreasonable or oppressive."[6] The public, acting through the grand jury, "has a right to every man's evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quotations omitted). Although this right

[5] Users of Twitter commonly place hashtags, signified by a number sign (#), in front of words to signify the topic, genre or style of the tweet; users can then search for or sort tweets by hashtag.

[6] The government does not oppose Mr. X's motion to intervene, and intervention is plainly appropriate where Mr. X's First Amendment rights are at issue. *See, e.g., United States v. Hubbard*, 650 F.2d 293, 311 n.67 (D.C. Cir. 1980); *In re Grand Jury Proceedings*, 201 F. Supp. 2d 5, 9 (D.D.C. 1999).

The Court notes, however, the oddity of permitting a wholly anonymous movant to invoke the power of the federal judiciary. Normally, participation in litigation requires an individual to identify himself, and anonymity is a "rare dispensation." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (quotations omitted). When considering a request for anonymity, "the court has a judicial duty to inquire into the circumstances of the particular cases to determine whether the dispensation is warranted." *Id.* (quotations omitted). Anonymity is most troublesome in the context of an anonymous plaintiff suing a defendant, which raises due process concerns. *Id.* at 1463. However, in this case, Mr. X's identity is unknown to the government or the grand jury, and it is that very anonymity that is the subject of the dispute. Especially since the government has conceded to Mr. X's intervention, the Court is satisfied that it should allow Mr. X to remain anonymous.

provides the grand jury with the concomitant power to subpoena witnesses, this power is not absolute. In particular, a grand jury may not compel testimony from an individual who holds a valid "constitutional, common-law, or statutory privilege," *id.*, because compliance in such a scenario would be "unreasonable or oppressive" for the purposes of Rule 17(c). *See, e.g.*, *In re Grand Jury, John Doe No. G.J. 2005-2*, 478 F.3d 581, 585 (4th Cir. 2007). Mr. X has a right under the First Amendment to post on the Internet, and to do so anonymously. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) ("Anonymity is a shield from the tyranny of the majority."); *Reno v. ACLU*, 521 U.S. 844, 870 (applying the First Amendment fully to the Internet); *see also Sinclair v. TubeSockTedD*, 569 F. Supp. 2d 128, 131 (D.D.C. 2009). Accordingly, the grand jury may not subpoena Twitter to gain information regarding Mr. X's identity unless the government can show "a compelling interest in the sought-after material" and "a sufficient nexus between the subject matter of the investigation and the information they seek." *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*, 706 F. Supp. 2d 11, 18 (D.D.C. 2009).[7]

In practice, the "compelling interest" and "sufficient nexus" requirements involve a straightforward inquiry into whether the information sought is truly necessary to the grand jury's investigation. *See, e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 78 F.3d 1307, 1312-13 (8th Cir. 1996); *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) ("A good-faith criminal investigation . . . is a compelling interest"); *but cf., e.g., In re Grand Jury Subpoena*,

[7] The government represents that it may be investigating the tweet as a violation of 18 U.S.C. § 875(c), which criminalizes the transmission "in interstate or foreign commerce" of "any communication containing any threat to kidnap any person or any threat to injure the person of another . . . ." The subpoena at issue identified a possible violation of 18 U.S.C. § 115, which criminalizes threats to "assault . . . a United States official . . . with intent to impede, intimidate, or interfere with such official . . . or with intent to retaliate against such official . . . ." The First Amendment analysis is the same for either statute.

246 F.R.D. 570 (W.D. Wisc. 2007) (noting that the court was satisfied that "the government has a bona fide investigative need" to interview individuals who bought books from a target company, but requiring grand jury to solicit volunteers for interviews). That approach has the benefit of easy application in many cases. Here, however, Mr. X argues that the government lacks a real investigative need for his identity. The First Amendment limits the authority of the federal government to criminalize speech, and in this context would only allow prosecution of Mr. X if his tweet constituted a "true threat." In order for a threat to be "true," its speaker must mean "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual . . . ." *Virginia v. Black*, 538 U.S. 343, 359 (2003). Mr. X argues that this is a purely objective test: Would a reasonable person view the statement as expressing a serious intent to cause harm? Since reasonable people viewing Mr. X's tweets do not know his identity, he posits that the grand jury need not know his identity to determine whether there exists probable cause to indict.

There are many problems with this line of reasoning. First, although many circuits apply an objective test to determine whether a statement is a "true threat," *see, e.g.*, *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009), the D.C. Circuit has not ruled on the issue.[8] Further, a close reading of *Black* raises doubts about an objectivity requirement. There, the Supreme Court held that the First Amendment permits criminalization of the act of burning a cross with intent to intimidate. The Court noted that, "while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives." *Black*, 538 U.S. at 357. Regardless of whether any individual act of cross-burning was

[8] And indeed does not seem to have addressed the "true threat" doctrine since *Alexander v. United States*, 418 F.2d 1203 (D.C. Cir. 1969).

objectively intimidating, the First Amendment permitted criminalization of the act when done with intent to intimidate. If that is the case, it seems odd that in other "true threat" cases the First Amendment would require *proof* of the threat's objective effect. More to the point, the Court spoke more generally of a true threat as the manifestation of a speaker's "intent of placing the victim in fear of bodily harm or death." *Id.* at 360. Again, the focus was not on the objective effect of the threat, but on the speaker's state of mind. This Court therefore doubts the propriety of grafting an additional requirement of objective effectiveness on the crime of uttering a statement subjectively intended to cause fear. *Cf. United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) ("[W]ith respect to some threat statutes, we require that the purported threat meet an objective standard *in addition* [to a subjective standard], and for some we do not." (emphasis in original)); *id.* n.14.

Although an objectivity requirement may seem prudent in some cases, an objective inquiry is uniquely problematic for anonymous threats—particularly those made on the Internet. *Cf. id.* at 1120 n.20 (discussing how anonymity of threat can make threat appear more or less salient). The anonymity of a threatening communication introduces an element of ambiguity that renders an assessment of the threat's legitimacy difficult. A reasonable recipient of such a threat simply may not know whether she ought to take it seriously. Although the recipient of a threat may always have some doubt about the likelihood of the threatened act materializing—such as when the recipient is ignorant of basic details regarding the identified speaker—the recipient of a truly anonymous threat will rarely be able to assess its validity.

Even if objectivity were relevant to Mr. X's guilt, the grand jury would still need to investigate both the objective effect of the supposed threat, *and* Mr. X's subjective intent to

threaten at the time of posting, as the government would need to prove both.[9] Accordingly, the grand jury would still be entitled to make an independent inquiry into Mr. X's subjective intent. And the Court can easily see how information about Mr. X's identity could be relevant to a grand jury—indeed, such information might prove dispositive of the probable cause question. The grand jury ought to know if Mr. X has a history of making threats to political candidates in other forums, or has stalked or engaged in other sinister behavior toward Ms. Bachmann, or happens to actually own a Vietnam-era machete. The government and the grand jury surely must know the identity of an individual making a threat in order to ascertain whether he intended the threat to be "true." The government has thus satisfied the "compelling interest" and "sufficient nexus" requirements.

It bears note that the Court has grave doubts about the likelihood of a grand jury returning an indictment in this case. A "true threat" requires a "serious expression of an intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359. There appears to be nothing serious whatsoever about Mr. X's Twitter page, except perhaps the severity of mental depravity that would lead a person to produce such posts. Furthermore, in *Watts v. United States*, the Supreme Court considered a Vietnam War protestor's statement that, if drafted and given a rifle, "the first man I want to get in my sights is L. B. J." 349 U.S. 705, 706. The Court determined that such "political hyperbole" did not constitute a "true threat." *Id.* at 708. *A fortiori*, it seems, were Mr. X to bring a motion to quash an indictment based merely on the facts now before the Court, the Court might well have occasion to grant that motion.

[9] Mr. X argues that an intent to do physical harm is not a necessary component of a threat's status as "true." *See Black*, 538 U.S. at 359 (noting that the "speaker need not actually intend to carry out the threat"). This is correct; the intent at issue is the intent to provoke fear, *i.e.*, to have the statement interpreted as a threat.

But this is not a motion to quash an indictment. It is a motion to quash a subpoena, and the government has the right to make its case to the grand jury that Mr. X has committed a crime. In *Bagdasarian*, the Ninth Circuit determined that the defendant's anonymous message board posts—"Re: Obama fk the niggar, he will have a 50 cal in the head soon," and "shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right???? Long term???? Never in history, except sambos"—did not constitute "true threats." 652 F.3d at 1124. Despite that rather striking conclusion, the Court nonetheless noted that "[a]ll threats against the President or a major presidential candidate must be taken seriously until it is established that there is no reason to do so." *Id.* at 1121 n.20. This Court could not agree more. The government must take seriously all threats against a major presidential candidate such as Ms. Bachmann, unless and until it is satisfied that there is no likelihood that the threat was legitimate. Part of taking a threat seriously may include attempting to convince a grand jury to return an indictment. And if a grand jury does return an indictment, it then becomes the role of the courts to decide the sufficiency of the indictment, *see., e.g.*, *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997) (affirming district court quashing of indictment involving threat), or the jury to determine whether the threat is "true," *see, e.g.*, *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994) ("Whether a given writing constitutes a threat is an issue of fact for the trial jury."), or an appellate court to reverse a conviction, *see, e.g.*, *Watts*, 349 U.S. at 708, among other potential dispositions. But it is for the Executive, not a court, to decide whether an investigation is even worth pursuing. *Cf. Dinler v. City of New York*, 607 F.3d 923, 948-49 (2d Cir. 2010) ("[W]e think that an intrusion into the executive branch's historic control over criminal investigations that unreasonably jeopardizes public safety amounts to a clear abuse of discretion, if not a judicial usurpation of power." (quotations omitted)).

Mr. X argues that his tweet does not constitute a "threat" on its face, and thus that the government has no legitimate, much less "compelling," interest in pursuing it. In particular, Mr. X stresses that his use of the term "I want to," as opposed to "I'm going to" or "I plan to," renders the tweet a mere expression of desire as opposed to a threat. But expressions of desire can still place a recipient "in fear of bodily harm or death," *Black*, 538 U.S. at 360. If Mr. X were standing next to Ms. Bachmann with a Vietnam-era machete in hand, and had spoken instead of tweeted the message, Ms. Bachmann would take cold comfort in those first few words. Wanting to do something is often, though not always, a predicate to actually doing something, and while history and literature may be full of reluctant killers, *see, e.g.*, William Shakespeare, Hamlet, *passim*; Crimes and Misdemeanors (Orion 1989), the Court is aware that many murderous members of our society do not share such trepidation. Use of the phrase "I want to" may signify an inchoate wish, or may indicate a goal toward which an individual is actively working. Mr. X's use of the word "want" instead of "plan" cannot be dispositive.

Additionally, Mr. X emphasizes the context of his tweets as a whole, and the ludicrous nature of the tweet at issue. With apologies for its reiteration, the Court must parse the exact language used. Mr. X's statement that he wants "to fuck Michelle Bachman in the ass with a Vietnam era machete" is indeed a grammatical threat. What Mr. X is describing is the forcible insertion of an extremely sharp, real-world weapon into Ms. Bachmann's rectum, which, if performed, would undoubtedly cause serious bodily injury—and likely death. On its face, the statement expresses a threat of violence.[10] And while the statement appears within a larger group

[10] Mr. X argues that his tweet is as absurd as if he had said, "I want to give Michele Bachmann a kick in the ass that will sender her all the way to Mars," or "I want to put Michele Bachmann in a time machine and send her back to the middle ages where she belongs." But these two analogies exist outside the realm of physical possibility. It is physically possible, though hopefully unlikely, that an individual could do to Michele Bachmann what Mr. X professed a desire to do in the tweet at issue.

of preposterous tweets, this does not automatically render the threat toothless. Again, it may well be that a court would find as a matter of law, or a jury might find as a matter of fact, that this tweet was simple "political hyperbole," *Watts*, 349 U.S. at 708, and not a "serious expression of an intent to commit an act of unlawful violence," *Black*, 538 U.S. at 349. But that is not the present inquiry. Mr. X has tweeted a *prima facie* threat, and the government is entitled to determine whether it is a true threat.

The Court is aware that this conclusion may seem to produce absurd results. Under this line of reasoning, the government could presumably subpoena any Web site any time any anonymous user made any post containing a mere scintilla of violence. The government could require Twitter to divulge the identity of a teenager who tweets, "My parents are so mean! I want to toss them in a ditch." Anonymity on the Internet would be sufficiently compromised to warrant this Court's concern.[11] But we are nowhere near that slippery slope. Here, an individual has made a statement that threatens an established candidate for the presidential nomination of one of our two major political parties, and the government has a strong public interest in investigating that threat, however outlandish.

Political assassination is one of the most destructive tools in the arsenal of domestic terrorism. The brutal and cowardly murders of Abraham Lincoln, James Garfield, William

[11] Part of the tension in applying the standard "compelling interest" test to this case arises because of the purported crime being investigated. Where the crime is unrelated to speech—assume, for example, Mr. X incriminated himself on his Twitter page with regard to a specific real-world crime for which the government was investigating suspects—it makes sense to ask merely whether the information sought is crucial to the grand jury's job in ascertaining probable cause. At that point, one not need inquire into the likelihood that the investigation will indeed produce a favorable probable cause determination. The merits of the investigation are irrelevant.

Here, though, the First Amendment applies doubly. It protects Mr. X's anonymity, and it limits the government's ability to criminalize Mr. X's speech. Its ability to do the former is, in the case law, divorced from the latter. But that seems as if it cannot be. If so, the government could eviscerate the right to communicate ideas that fall below the level of a true threat anonymously on the Internet. Nonetheless, this case presents a narrower inquiry.

McKinley, and John F. Kennedy have left an indelible stain on the collective consciousness of this nation. These abhorrent and devastating acts desecrate this country's very dignity and have irrevocably altered its history for the worse. And there have been no fewer than six close but unsuccessful attempts on the lives of our Presidents (Andrew Jackson, Harry Truman, Gerald Ford [twice], Ronald Reagan, and Bill Clinton), with an additional two attempts on a former President (George H. W. Bush) and a President-elect (Franklin Roosevelt). These despicable events have been some of the most traumatic and consequential moments in our Republic, ranking alongside the firing on Fort Sumter, Pearl Harbor, and September 11, 2001.

The United States of America has a nearly existential need to ensure the safety of its Commander-in-Chief. As Justice Breyer has explained:

> The physical security of the President of the United States has a special legal role to play in our constitutional system. The Constitution vests the entire "Power" of one branch of Government in that single human being, the "President" of the United States. He is the head of state. He and the Vice President are the only officials for whom the entire Nation votes. And he is responsible for the actions of the Executive Branch in much the same way that the entire Congress is responsible for the actions of the Legislative Branch or the entire Judiciary for those of the Judicial Branch. He has been called "'the sole indispensable man in government.'" Thus, one could reasonably believe that the law should take special account of the obvious fact that serious physical harm to the President is a national calamity . . . .

Rubin v. United States, 525 U.S. 990, 990-91 (Breyer, J., dissenting from denial of writ of certiorari) (citations omitted). Indeed, "[t]he Nation undoubtedly has a valid, even overwhelming interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." *Watts*, 394 U.S. at 707.

Although perhaps most destructive at the Presidential level, all political assassination attempts, successful or not, threaten the effective workings of our democracy. From the recent attempt on Congresswoman Gabrielle Giffords, to the untimely death of the Rev. Dr. Martin Luther King Jr., all such acts of villainy scar this country. The assassination of Robert F. Kennedy during his Presidential campaign constituted a grave blow, adding further pain to the still-lingering wounds dealt by his brother's demise. The safety and security of those who seriously aspire to the federal government's highest office is of paramount concern to each and every citizen because threats to Presidential candidates undermine the very legitimacy of our electoral process. Accordingly, law enforcement officials investigating possible threats to such candidates should not be required to automatically shut down their inquiry whenever a First Amendment question is raised. Merely issuing a subpoena to uncover the identity of the speaker so that the police can ascertain whether a threat is valid cannot be deemed a Constitutional violation.

It bears repetition that this matter is before the Court prior to the issuance of an indictment. No charges have been filed. No interviews with Mr. X have been arranged. This is a very preliminary step, in apparent good faith,[12] to see if the tweet at issue is in fact a "true threat." Other steps may infrequently be taken, and hopefully need not be taken in this case.

III. CONCLUSION AND ORDER

[12] The defense of vindictive prosecution and the cause of action for malicious prosecution under the Federal Tort Claims Act allow an individual to challenge the institution of criminal proceedings against him for inappropriate reasons, such as a reprisal for the exercise of constitutional rights. *See Wayte v. United States*, 470 U.S. 598, 608 (1985) (discussing vindictive prosecution defense); *Moore v. Hartman*, 644 F.3d 415 (D.C. Cir. 2011) (involving malicious prosecution claim under FTCA). If the government lacks a good faith basis for its investigation, the most natural time to adjudicate that issue would be post-indictment. And although Mr. X argues that his tweet did not constitute a "true threat," Mr. X does not insinuate that the government lacks good faith, and the Court sees no reason to doubt the government's motives.

The government is investigating Mr. X for having made a *prima facie* threat of violence addressed to a major presidential candidate. The government has a compelling interest in pursuing that investigation, and Mr. X's identity must be known for the grand jury to make an informed probable cause determination. It is therefore hereby

ORDERED that Mr. X's Motion to Intervene is **GRANTED**; and it is further

ORDERED that Mr. X's Motion to Quash is **DENIED**.

Signed by Royce C. Lamberth, Chief Judge, on December 9, 2011.

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	CRIMINAL NO. 1:12 CR35
	)	
v.	)	Count 1: 18 U.S.C. § 371 Conspiracy
	)	
JESSE CURTIS MORTON,	)	
	)	Count 2: 18 U.S.C. §§ 875(c) Communicating Threats
Also Known As:	)	
Younus Abdullah Muhammad	)	
	)	Count 3: 18 U.S.C. §§ 2261A(2)(B) and 2 Using the Internet to Place Another in Fear of Death or Serious Injury
Defendant.	)	
	)	

CRIMINAL INFORMATION

THE UNITED STATES ATTORNEY CHARGES THAT:

COUNT 1

CONSPIRACY

(18 U.S.C. § 371)

Between on or about December 5, 2007, and on or about May 23, 2011, in the County of Fairfax in the Eastern District of Virginia and elsewhere, defendant JESSE CURTIS MORTON, also known as Younus Abdullah Muhammad, did unlawfully, knowingly, and willfully conspire with Zachary Adam Chesser and others known and unknown to the Grand Jury to:

A. solicit, induce, and endeavor to persuade others to engage in conduct constituting a felony that has as an element the use, attempted use or threatened use of physical force against the person of another in violation of the laws of the United States, with the intent that another person engage in such conduct, in violation of 18 U.S.C. §§ 373 and 2261A(1);

B. distribute information pertaining to, in whole and in part, the manufacture and use of explosives, destructive devices, and weapons of mass destruction, with the intent that the teaching, demonstration, and information be used for and in furtherance of an activity that constitutes a Federal crime of violence, in violation of Title 18, United States Code, Sections 842(p) and 2261A(1);

C. transmit in interstate commerce communications containing threats to injure the person of another, in violation of 18 U.S.C. § 875(c); and

D. engage in a course of conduct to use the internet to place people in another state in reasonable fear of death and serious bodily injury, in violation of 18 U.S.C. § 2261A(2)(B).

In furtherance of the conspiracy and to effect its objects, members of the conspiracy engaged in overt acts in the Eastern District of Virginia and elsewhere, including, but not limited to, the following:

1. On or about April 19, 2010, MORTON authorized conspirator Zachary Chesser to post a video titled the "Defense of the Prophet Campaign" to the YouTube account of the Revolution Muslim organization; and

2. On or about July 11, 2010, MORTON posted on the website of the Revolution Muslim organization the English language magazine titled "*Inspire.*" The magazine contained an article titled "Make a Bomb in the Kitchen of Your Mom," a hit list calling for the execution of an individual identified here as "MN", and a statement purporting to be from Anwar Al-Awlaki calling for the execution of those who Al-Awlaki asserted defame Islam's Prophet Muhammad -- and MN, in particular.

(All in violation of Title 18, United States Code, Section 371.)

COUNT 2

COMMUNICATING THREATS

(18 U.S.C. §§ 875(c) and 2)

1. Between on or about April 19, 2010, and the present date, in Fairfax County in the Eastern District of Virginia, and elsewhere, the defendant, JESSE CURTIS MORTON, also known as Younus Abdullah Muhammad, did knowingly and unlawfully transmit in interstate and foreign commerce communications containing threats to injure the person of another, to wit, individuals identified here as "MS" and "TP," in connection with the broadcast of an episode of the *South Park* television show, and aid, abet, and counsel the transmission of such threats in interstate and foreign commerce by Zachary Adam Chesser.

2. The postings on the internet by MORTON and Chesser constituted statements that a reasonable recipient, familiar with the context of the communication, would interpret as meaning to communicate a serious expression of an intent to commit an act of unlawful violence to particular individuals, namely MS and TP.

3. The postings on the internet by MORTON and Chesser were made following a recent history of attacks and attempted attacks against individuals alleged to have defamed or insulted Islam or its Prophet Muhammad.

4. The postings on the internet by MORTON and Chesser, to the website of Revolution Muslim and other websites, objectively constituted messages to an audience that likely included individuals who could be motivated to engage in violent jihad against those whom they believed to be enemies of Islam and who would understand the messages as calls to attack MS and TP.

(All in violation of Title 18, United States Code, Sections 875(c) and 2.)

COUNT 3

USING THE INTERNET TO PLACE ANOTHER
IN FEAR OF DEATH OR SERIOUS BODILY INJURY

Between on or about April 19, 2010, and the present date, within Fairfax County in the Eastern District of Virginia and elsewhere, defendant JESSE CURTIS MORTON, also known as Younus Abdullah Muhammad, did unlawfully, knowingly, and with the intent to place persons identified herein as "MS" and "TP" in another state, namely California, in reasonable fear of death or serious bodily injury, use an interactive computer service and facility of interstate and foreign commerce, namely, the internet, to engage in a course of conduct that placed such persons in reasonable fear of death and serious bodily injury, in violation of Title 18, United States Code, Sections 2261A(2)(B) and 2.

Neil H. MacBride
United States Attorney

John T. Gibbs
Department of Justice Trial Attorney

By: _____
Gordon D. Kromberg
Karen L. Dunn
Assistant United States Attorneys

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 1:12cr35
	)	
JESSE CURTIS MORTON,	)	
	)	
Defendant.	)	

STATEMENT OF FACTS

The parties stipulate that the allegations in the Criminal Information and the following facts are true and correct, and that had the matter gone to trial the United States would have proven them beyond a reasonable doubt.

A. Revolution Muslim Generally

1. Revolution Muslim was an organization started in December 2007 that operated internet platforms and websites that contained postings and information supportive of violent jihad. Revolution Muslim was founded by Jesse Curtis Morton, also known as Younus Abdullah Muhammed, and Conspirator YK. Morton was an administrator of its websites and internet platforms. As such, he made postings, responded to inquiries from other users, and reviewed and permitted postings on the sites from others.

2. These websites included revolutionmuslim.com, revolutionmuslim.info, revolutionmuslim.blogspot.com, revolution4muslim.com, revolutionmuslim.daily.blogspot.com, revolutionmuslimdot.com, revolutionmuslim.muslimpad.com, revolutionmuslimblog@blogspot.com, revolutionmuslim@angelfire.com, and revolutionmuslim@wordpress.com. Revolution Muslim also used internet platforms including Googlegroups, BlipTv, PalTalk,

YouTube, Scribd, Slideshare, and Facebook. The multiple platforms allowed some of the sites to always remain active when others were rendered inoperative by internet service providers for violations of terms of service. Although the revolutionmuslim.com site is no longer operative, many of the organization's posts remain accessible on other internet platforms set up by Morton, Conspirator YK, Zachary Chesser, and others, such as http:/bliptv/revolutionmuslim/, and YouTube accounts in the names of revolutionmuslims, RMNYC2006, RevolutionMuslimCom, RevolutionMuslim, ShoeacideBomber and salafisalafisalafi.

3. Morton and his associates in the Revolution Muslim organization claimed to follow the teachings of Sheikh Abdullah Faisal.[1] They used the organization's websites to encourage Muslims to support Usama bin Laden, Anwar Al-Awlaki[2], al-Qaida, the Taliban, and other Muslims engaged in or espousing jihad. They encouraged Muslims to prepare for and engage in jihad against those they believed to be enemies of Islam.

4. Morton publicly stated his adherence to Faisal's exhortations. For example, the Revolution Muslim website contained the video of portion of a CNN interview with Morton that

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[1] Sheikh Abdullah Faisal is a Muslim cleric who previously preached the necessity of violent jihad and the virtues of killing kuffars. (The term "kuffar" is an Arabic term, referring to an unbeliever, or disbeliever, in Islam). In February 2003, Faisal was convicted in the United Kingdom of "soliciting to murder," based on lectures he gave in which he openly called upon his followers to kill Americans, Jews, Hindus, and other perceived "enemies of Islam." Faisal completed his prison sentence in the United Kingdom and now resides in Jamaica.

[2] Anwar Al-Awlaki was a dual citizen of the United States and Yemen, and an Islamic lecturer and spiritual leader of "al Qa'ida of the Arabian Peninsula" ("AQAP"), a Yemen-based terrorist group that had claimed responsibility for terrorist acts against targets in the United States, Saudi, Korean and Yemeni since its inception in January 2009. Pursuant to a Presidential Executive Order, Al-Awlaki was designated by the United States as a "Specially Designated Global Terrorist" on July 12, 2010. Al-Awlaki was reportedly killed in Yemen on September 30, 2011.

took place in November 2009. In that interview, Morton told the television reporter that Muslims are "commanded to terrorize the disbelievers." At that point, the following exchange took place in the video:

Reporter: You're commanded to terrorize the disbelievers?

Morton: The Koran says very clearly in the Arabic language . . . this means "terrorize them." It's a command from Allah.

Reporter: So you're commanded to terrorize anybody who doesn't believe. . .
Morton: Doesn't mean . . . You define terrorism as going and killing an innocent civilian. That's what you . . .

Reporter: How do you define terrorism?

Morton: I define terrorism as making them fearful, so that they think twice before they go rape your mother or kill your brother or go into your land and try to steal your resources.

5. On August 7, 2009, Morton engaged in street dawa,[3] a video of which he later posted to a Revolution Muslim YouTube account. In the course of the dawa, Morton proclaimed that "God tells you to terrorize them in the Quran" and that "Islam is guerilla warfare." On April 30, 2010, Morton posted a "Paltalk" session on a Revolution Muslim internet platform in which he reiterated that Muslims are commanded to terrorize enemies of Islam. In December 2010, Morton posted to the IslamPolicy website a response to a report on CNN about the Revolution Muslim organization. That response included the following:

> [CNN] suggested that we justify the killing of American soldiers, that we hold the attacks on September 11, 2001 as justified, that we want to restore a global caliphate, wipe Israel off the map, and that attacks on almost any American are justified, to which they also included the quote, "Americans will always be targets, and legitimate targets, until America changes its

[3] Dawa is an Arabic word for Islamic outreach or proselytizing.

> nature in the international arena." I would be a liar if I said I did not hold these ambitions and aspirations . . . .

6. On February 28, 2008, Revolution Muslim posted on one of its websites a video titled "Knowledge is For Acting upon - The Manhattan Raid." The video, which is approximately two hours in length, purported to have been released by As-Sahab, the media and propaganda branch of Al-Qaeda, and depicted Usama bin Laden and the 9/11 hijackers as heroes who acted on the knowledge they had. The video asserted that jihad is an individual obligation, and that Islam can neither be established nor gain a foothold without jihad. It quoted bin Laden, "So talk yourself into martyrdom operations. . . because to the same degree that the number of young men who carry out martyrdom operations increases, the time of victory gets closer, with Allah's permission." It quoted one of the 9/11 hijackers as stating that "the martyrdom operation is the best way to wound the enemy and terrorize them . . . as for its legal status, most people of knowledge . . . have permitted it and shown that it is a great way to bring oneself near to Allah." The video quotes one of the hijackers as affirming that "we are those who built our forts out of skulls." On November 29, 2009, January 25, 2010, and again in February 2011, when correspondents contacted Morton to ask him for an opinion on the attacks of 9/11, Morton emailed responses that "we look to the mujahideen" for guidance and that the questioners should watch the "Knowledge is for Acting Upon by Al-Sahab' video" and reach their own conclusions.

7. In April 2009, Morton emailed a friend engaged in a dispute with another individual about the relative merits of Sheikh Faisal and Anwar Awlaki. In the course of his defense of Faisal over Awlaki, Morton justified the positions of the Revolution Muslim organization on the grounds that

> Allah says: "And incite the believers to fight..." This is our intention. If he [the individual engaged in the dispute with the friend who emailed Morton] wants the best political, economic, and religious analysis and dialougue to flow after that he should read the website. Let him refute something there.

8. On July 25, 2008, a video entitled "Where are the Kings" was posted to the RevolutionMuslims YouTube account. The presentation glorified the efforts of the mujahideen's to overthrow oppressive governments in Muslim lands. The video closed with a photo of Said Qutb[4] behind bars in Egypt and his quotation, "Indeed, our words will remain lifeless, barren, devoid of any passion, until we die as a result of these words."

9. In or about March 2008, what was purported to be a new audio recording of Usama bin Laden was posted to the website RevolutionMuslim.com. The recording was played in Arabic, with an English translation scrolling across a video of rockets firing and then a still photo of bin Laden holding an AK-47 rifle. In the message, bin Laden threatened the European Union over the re-printing of the Danish Cartoons,[5] saying that "if there is no check on the freedom of your words, then let your hearts be open to the freedom of our actions."

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[4] Qutb was a leading member of the Muslim Brotherhood in Egypt in the 1950s and 1960s. A founder of the modern Islamist movement and an inspiration to the likes of Usama bin Laden, Qutb was hanged in Egypt in 1966 for his alleged participation in a plot to assassinate Egyptian President Nasser.

[5] In 2005, the Danish newspaper Jyllands-Posten published 12 cartoons of the Muslim prophet Muhammad ("the Danish Cartoons"), for the stated purpose of showing that Islam should be subject to the same standards as other religions in the press. Publication of the Danish Cartoons later was the subject of rioting in parts of the Muslim world. Since publication of the Danish Cartoons, one of the cartoonists, Kurt Westergaard, has been the object of several murder threats as a result of his drawing Muhammad. In 2007, Swedish cartoonist Lars Vilks drew pictures of Muhammad and later was the object of several murder threats as well.

10. On September 14, 2008, an article with the comment "we need more of this" was posted to one of Revolution Muslim's internet platforms reporting that the chief justice of the Supreme Judicial Council in the Kingdom of Saudi Arabia issued a fatwa authorizing the killing of the owners of Saudi Arabian television networks that broadcast depravity and debauchery. According to the report, it "is lawful to kill ... the apostles of depravation ... if their evil cannot be easily removed through simple sanctions."

11. On January 23, 2009, Morton engaged in street dawa, a video of which he later posted to a Revolution Muslim YouTube account. In the course of the dawa, Morton stated that the 9/11 attacks were against legitimate military targets. In another video posted to the Revolution Muslim account through Bliptv on November 8, 2009, Morton justified Nidal Hasan's killing of 13 soldiers at Fort Hood as a "preventative strike" because these soldiers were deploying to Iraq.

12. On April 17, 2009, Revolution Muslim posted a statement calling President Obama a kaffir and calling for him to spend his afterlife thrown in the deepest depths of fire. The post closed with the exhortation, "May Allah Destroy the U.S.

13. On or about March 7, 2010, Zachary Chesser posted on his themujahidblog.com website an article titled "Open Source Jihad," which concerned providing information on the internet which mujahideen around the world could use "to elude capture and death while maintaining relevance and striking capability."

14. On November 5, 2010, Morton posted to the IslamPolicy website Anwar Awlaki's video, "On Those that Remain Behind." In the video, Awlaki stated that a person who has the "knowledge and does not act upon" it is worse than someone who does not have the knowledge,

and discussed the obligations of Muslims who were unable to fight in jihad. Awlaki stated that such Muslims were obligated to send money. Morton posted to IslamPolicy the video that was previously uploaded to the revolutionmuslims YouTube account.

15. On December 2, 2010, Morton was asked by a journalist to respond to allegations that he was associated with terrorists. In response, Morton wrote that "If loving Muslims that fight and die to defend themselves from Western imperialism makes the UK and US govts associate me or IslamPolicy with terrorists then I am honored to be so associated." When asked how and why he would justify violence, he wrote that "I don't see why people would ever imagine that you can defeat 500 years of the colonialism and genocide that is Western civilization with placards and democratic participation."

B. Samir Khan and Jihad Recollections

16. In January 2009, Samir Khan emailed Morton and Conspirator YK that Khan had dedicated a video on the Inshallahshaheed website "to strike fear in the Kuffar."

17. In January and again in June 2009, Morton authorized Khan to post materials related to jihad on the RevolutionMuslim.blogspot.com website while the website that Khan usually used was disabled. In February 2009, Khan invited Morton to contribute to an on-line magazine dedicated to jihad called *Jihad Recollections*. In April and May of 2009, Morton provided Khan with two articles for the first two on-line editions of *Jihad Recollections*. In September 2009, Morton and Khan communicated by email regarding the fourth edition of *Jihad Recollections*. In October of 2009, Khan moved to Yemen and no further editions of *Jihad Recollections* were compiled or distributed.

C. The Threats Against Jewish Organizations

18. On March 8, 2008, conspirator YK posted to the Revolution Muslim website a video praising the Palestinian believed to have died in the course of killing eight students and wounding 11 more at the Merkaz HaRav Yeshiva (a Jewish religious school) in Jerusalem, Israel, two days earlier.

19. On December 3, 2008, Conspirator YK asserted on Revolution Muslim's website that the November 26, 2008 attack on the Chabad House in Mumbai, India, and the killing of six people inside (including the rabbi and his wife who operated the house) was justified on the grounds that Chabad supported Israel.[6]

20. On or about January 8, 2009, Conspirator YK posted to the Revolution Muslim website a video encouraging viewers upset about events in Gaza to seek out the leaders of Jewish Federation chapters in the U.S. and "deal with them directly at their homes." The video showed Conspirator YK listing the names and addresses of synagogues in New York and the address of the Chabad organization in Brooklyn. The video showed Conspirator YK encouraging viewers to take all of their hatred and enmity for non-Muslims and "put it to the right purpose." Conspirator YK told viewers that "you don't have to do it here on YouTube. You don't have to put a comment on with your name, and where you live, and who you are, and what you want to do. Just do it." The video portrayed Conspirator YK stating:

> Let them understand that there are consequences for those that occupy sovereign lands. And a brother told me a slogan, I don't know if it is legal, I have to check it out . . . . He said, Give me liberty or I'll give you death. Pretty interesting.

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[6] Chabad is an organization of the Lubavitch sect of religious Jews.

21. On or about January 20, 2009, Conspirator YK posted to the Revolution Muslim website a photo of the headquarters of the Chabad organization in Brooklyn with the message "Do Not Let Orthodox Judaism Get Away From Murder in Ghaza". The photo also contained cartoon balloons pointing out the location of the main temple, and noting that it was always full at prayer times.

22. On January 20, 2009, NYPD detectives interviewed Morton about YK's postings on Revolution Muslim's website regarding Chabad and Jewish organizations. NYPD detectives told Morton that even an inferred threat on the website will be taken seriously, and that Morton could be held accountable for what YK posted on the website because he was an administrator of the site.

23. On or about January 21, 2009, Conspirator YK posted to the Revolution Muslim website a slideshow of images of wounded Palestinians interspersed with pictures of the Brooklyn headquarters of Chabad, and a photo of the bloody aftermath of the terrorist attack at the Merkaz HaRav Yeshiva in Jerusalem in 2008. The slideshow also contained images of reports describing the January 20th posting as a threat against Chabad. The only soundtrack was a heartbeat that quickened and slowed and then sped up again, until the end, when there were sounds of gunshots and shattering glass.

24. On January 21, 2009, Conspirator YK and Morton exchanged emails about the postings to Revolution Muslim's website regarding Chabad and Jewish organizations. In response to Morton's request that YK stop the posts regarding Chabad and Jewish organizations, Conspirator YK wrote "all I can say is akhi we are always at risk and inshallah we are all for one

and one for all. Most things we publish carry a chance that you and I can be incarcerated. . . . Muhammad, you and I chose a roooooooogh road this is only the beg[in]ing."

25. On January 23, 2009, Conspirator YK posted to the Revolution Muslim website a video accusing the headquarters of Chabad with funding terrorism, and urging viewers to find the leaders of Jewish organizations he named, "hold them responsible," "speak in front of their homes," and "give them the message of Islam." The video portrayed Conspirator YK as saying "That's not a threat, that's what it is" and

> New York City Police Department, CIA, and FBI, you can put me in jail for the rest of my life. As long as I got that information out there for people to what to do, I did something. I didn't sit on my behind. I did what I could legally do, what was in my means to do so.

The video ended with gunshots.

26. On or about February 23, 2009, Conspirator YK posted to the Revolution Muslim website a video praising the Palestinian believed to have died in the course of killing eight students and wounding 11 more at the Merkaz HaRav Yeshiva in Jerusalem, Israel, in March 2008.

27. On March 13, 2009, an article posted to the Revolution Muslim website quoted Conspirator YK as stating that Rashid Baz - - who shot at a bus filled with religious Jews near the Brooklyn Bridge and killed a 16-year-old in March 1994 - - "took it to the next level," and "understood Lubavitch probably better than we did." On March 24, 2009, the Revolution Muslim website carried a description of Baz's actions, and a request to support him in prison.

28. On or about October 7, 2009, Conspirator YK posted to the Revolution Muslim website a poem listing ways in which Jews could be hurt, including by arson "while they sleep" and by throwing "liquid drain cleaner in their faces."

D. The South Park Threats

29. In January 2010, Morton received an email on the revolutionmuslim@gmail.com account from Conspirator Zachary Chesser, offering to participate in Revolution Muslim. Morton accepted Chesser's offer and provided Chesser with access to the Revolution Muslim websites and platforms. Between January and May 2010, Chesser made posts to Revolution Muslim platforms promoting extremism, including, for example, on February 2, 2010, Anwar Awlaki's "44 Ways to Support Jihad."

30. On or about April 14, 2010, Chesser saw an interview with individuals referred to herein as "MS" and "TP," the writers of the animated television program on the Comedy Central Network known as *South Park*. Chesser understood MS and TP to have said that Muhammad would be depicted in an upcoming episode of *South Park* in a bear suit.

31. On or about April 15, 2010, Chesser posted on Revolution Muslim's website:

a. a graphic photo of the body of Theo van Gogh[7] lying in the street where he had been murdered in 2004 for making what the murderer believed was a film that insulted Islam;

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[7] Theodoor "Theo" van Gogh was a Dutch film director who worked with Ayaan Hirsi Ali, a member of the Dutch Parliament who was born a Muslim in Somalia, to produce the film "Submission," about the treatment of women in Islam. On or about November 2, 2004, van Gogh was knifed to death in the street as he was riding his bicycle in Amsterdam by a Dutch-Moroccan Muslim who claimed that van Gogh and Hirsi Ali defamed Islam through their film; the killer left a note pinned to van Gogh's body asserting that Hirsi Ali would be killed next for defaming Islam.

b. a prediction that MS and TP would end up like van Gogh for airing an episode of South Park that in Chesser's view insulted Islam;

c. audio clips of a sermon by Anwar Al-Awlaki, entitled "The Dust Will Never Settle Down," calling for the assassination of anyone who has "defamed" Muhammad, saying, "Harming Allah and his messenger is a reason to encourage Muslims to kill whoever does that;"

d. the street addresses of Comedy Central and its production company in New York and Los Angeles, and a link to a 2009 Huffington Post article that gave details (but not the exact address) of a residence of MS and TP in Colorado; and

e. a suggestion that the readers of his post "pay a visit" to MS and TP.

32. On April 17, 2010, Chesser told Morton that the controversy engendered by the fatwa calling for the killing of Salman Rushdie for his publication of *The Satanic Verses* "was a tremendous help in radicalizing" Muslims in the United Kingdom, and achieving higher visibility for the controversy over *South Park* might do the same for Muslims in the United States.[8]

33. On April 18, 2010, Chesser produced and posted on the AlQimmah website and on his youtube.com account a video titled "Defense of the Prophet Campaign." The video was narrated by Chesser, and contained:

a. statements by Chesser regarding the South Park episode that featured a character in a bear costume, who various other characters stated was Muhammad;

b. the audio of a speech by Anwar Al-Awlaki, explaining the Islamic justification for killing those who insult or defame Muhammad; and

[8] In 1989, Ayatollah Khomeini issued a fatwa calling for all good Muslims to kill Salman Rushdie for insulting Islam in his book, *The Satanic Verses*. Rushdie has lived under guard or under heightened security ever since. Others connected with the publication of the book have been attacked, and Rushdie's Japanese translator was murdered.

c. photographs of MS, TP, van Gogh, Hirsi Ali, and others who have been publically targeted for death for insulting Muhammad and/or Islam, including Salman Rushdie, Geert Wilders, Kurt Westergaard, and Lars Vilks.[9]

34. On April 19, 2010, Morton suggested ways that he and Chesser could add depth to Chesser's original South Park posts. Morton wanted to "synthesize the general movement of Revolution Muslim along with this particular endeavor."

35. On April 19, 2010, Morton authorized Chesser to post the "Defense of the Prophet" campaign video to Revolution Muslim's YouTube account. Moreover, Morton did not take down the initial postings that Chesser made on the Revolution Muslim websites regarding *South Park*, or direct Chesser to take them down, even though Morton himself concluded that *South Park* did not actually depict Islam's prophet after all. Instead, when the website was hacked as a result of the *South Park* postings, Morton worked to bring the RevolutionMuslim.com website with those postings back on-line.

36. On April 20, 2010, Morton and Chesser decided to stop talking to reporters about the South Park matter and issue a written statement on behalf of Revolution Muslim instead. Morton and Chesser agreed that Chesser would write the first draft of a written statement on behalf of Revolution Muslim, and that Morton would then merge that draft with Morton's own writing.

37. On the evening of April 20, 2010, Chesser emailed his first draft to Morton. Chesser's draft stated that the South Park writers had insulted Muslims, and "[a]s for the Islamic ruling on the situation, then this is clear - there is no difference of opinion from those with any

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[9] Geert Wilders is a member of the Dutch Parliament who is particularly known for his criticism of Islam in the Netherlands and his production of *Fitna*, a film exploring the motivations for terrorism in the Koran. He has lived under police protection for years as a result of threats against him for these criticisms.

degree of a reputation that the punishment is death." Chesser's draft included references to the teachings of specific Islamic authorities for the propositions that the penalty for insulting Islam is death, and that it was contrary to Islam to require that the offenders first be brought before a judge.

38. On the morning of April 21, 2010, Morton emailed a revised draft back to Chesser, and suggested that Chesser then post it on Revolution Muslim's blog. Morton's revision added the following language:

> We hope that the creators of South Park may read this and respond, that before sending hate mail and condemning us that we may partake in dialogue, and that the Western media's degradation of the most blessed of men ceases. Otherwise we warn all that many reactions will not involve speech, and that defending those that insult, belittle, or degrade the Prophet Muhammad (peace be upon him) is a requirement of the religion. As Osama bin Laden said with regard to the cartoons of Denmark, "If there is no check in the freedom of your words, then let your hearts be open to the freedom of our actions."

39. In the afternoon of April 21, 2010, Chesser returned a third version to Morton, retaining the bin Laden reference at the end, but changing Morton's language, "[t]hus our position remains that it is likely the creators of South Park will indeed end up like Theo Van Gogh, and we pray Allah makes this a reality" to "[t]hus our position remains that it is likely the creators of South Park will indeed end up like Theo Van Gogh. This is a reality." Chesser told Morton that Chesser deleted Morton's suggested language that "we pray Allah makes this a reality" so that they would not end up in jail.

40. On April 21, 2010, Morton approved of Chesser's posting of the final version of the statement on the Ansar Al Jihad Network. Chesser had told Morton that posting the statement on the Ansar Al Jihad Network would "scare the kuffar."[10]

41. On April 22, 2010, Chesser distributed the statement, under the title "Clarifying the South Park Response and Calling on Others to Join in the Defense of the Prophet Muhammad RevolutionMuslim.com" (hereinafter "the Clarification Statement"), to the AlQimmah website, the themujahidblog.com website, and to the Ansar Al Jihad Network.

42. On April 22, 2010, Morton posted the Clarification Statement to revolutionmuslimdaily.blogspot.com. On April 23, 2010, Morton posted the document to the IslamicAwakenings.com website. On April 24, 2010, Morton posted the document to the slideshare.com website, and on April 25, 2010, he posted it to the revolutionmuslim.com website.

43. On or about April 25, 2010, Conspirator YK emailed Morton his agreement to the Clarification Statement.

44. That same day (and unrelated to the *South Park* postings), Morton emailed Conspirator YK a message indicating that Chesser had been communicating with Conspirator Bilal Zaheer Ahmed.

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[10] Ansar Al Jihad Network," "themujahid.blog.com," and "IslamicAwakenings.com" were websites that contained numerous articles and comments concerning violent jihad. "AlQimmah" also was a website which contains numerous articles and comments concerning violent jihad, particularly involving Al-Shabaab, an organization based in Somalia that the United States has designated as a foreign terrorist organization. On October 28, 2011, Morton stated that AlQimmah and Ansar were Salafi Jihadi sites that called for killing in the United States

E. The Threats Against "MN" and the Posting of *Inspire* Magazine

45. On or about April 20, 2010, an artist in Washington State, identified here by the initials "MN", drew a cartoon declaring May 20, 2010, to be the first annual "Everybody Draw Mohammed Day," with the explanation that:

> In light of the recent veiled (ha!) threats aimed at the creators of the television show South Park . . by bloggers on Revolution Muslim's website, we hereby deem May 20, 2010, as the first "Everybody Draw Mohammed Day!" Do your part to both water down the pool of targets and, oh yeah, defend a little something our country is famous for (but maybe not for long? Comedy Central cooperated with terrorists and pulled the episode) the first amendment.

A number of social networking sites, including Facebook.com, hosted groups supportive of "Everyone Draw Muhammad Day." As of May 17, 2010, an "Everybody Draw Mohammed Day" page created on Facebook had tens of thousands of members or visitors who pledged to participate in the event.

46. On or about May 11, 2010, Morton posted to the Revolution Muslim website a news article regarding an attack on Lars Vilks.

47. On May 27, 2010, Morton posted to the BlipTv account of Revolution Muslim an audio file of a speech in which he justified terrorizing the participants in Everyone Draw Muhammad Day. In the speech, Morton asserted that Islam's position is that those that insult the Prophet may be killed under Shariah law just as if they were fighting with a weapon. Morton exhorted his listeners to fight the "disbelievers near you."

48. In July 2010, the first edition of an English-language magazine titled *Inspire* was disseminated on-line purportedly by AQAP. The stated purpose of *Inspire* was to inspire English-speaking Muslims to support al-Qaeda and engage in jihad. One section of the *Inspire*

magazine was titled "Open Source Jihad" and contained an eight-page article titled "Make a bomb in the kitchen of Your Mom" by the "AQ Chef" with detailed instructions regarding the construction of an explosive device.

49. Page 22 of the *Inspire* magazine purports to be the start of a special section on "The Dust Will Never Settle Down Campaign." That page contained a table of contents of the special section, including:

a. "A timeline of events pertaining to the cartoons;"

b. "A hit list for the ummah [community of Muslim believers] to take out pertaining to the figures related to the blasphemous caricatures;" and

c. "Our guest writer Shaykh Anwar [Awlaki] writes on the seriousness of the caricature issue & what must be done about it."

50. Pages 23-24 of the *Inspire* magazine contains a timeline about the cartoon controversy. Although it does not mention the postings regarding South Park, it identifies MN for starting Everybody Draw Muhammad Day on April 20, 2010. Page 25 of the *Inspire* magazine is the "hit list" referenced on Page 22 of the magazine, and contains simply a photo of an automatic pistol, with the names "Lars Vilks, Flemming Rose, Carsten Juste, Girt Wilders, Salman Rushie, Kurt Westergaard, Ayann Hirsi Ali, Ulf Johannson, and [MN]."[11]

51. Pages 26-28 of the *Inspire* magazine contain an article by Al-Awlaki, headed with "If it is part of your freedom of speech to defame Muhammad it is part of our religion to fight you." It then states:

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[11] Flemming Rose and Carsten Juste were editors of the Jyllands-Posten at the time the Danish Cartoons were published. Ulf Johannson was an editor at a Swedish paper that also printed the cartoons.

> I would like to express my thanks to my brothers at *Inspire* for inviting me to write the main article for the first issue of their new magazine. I would also like to commend them for having this subject, the defense of the Messenger of Allah, as the main focus of this issue.

On page 28, Al-Awlaki explicitly called for the murder of "MN":

> A cartoonist out of Seattle, Washington, named [MN] started the "Everybody Draw Mohammed Day." This snowball rolled out from between her evil fingers. She should be taken as a prime target of assassination along with others who participated in her campaign.

52. Shortly before July 11, 2010, the first edition of *Inspire* magazine was placed on the website Scribd.com, so that it would be accessible to other websites. Morton believed Inspire to be the product of Samir Khan. On July 11, 2010, Morton looked at the contents of the *Inspire* magazine and then posted it on Revolution Muslim's website by linking to the website Scribd.com, with the following comment (misspellings in the original):

> We have psoted the entirety of the magazine below for educational and informational purpsoes only. Any content of the magazine should not necessarily be determined to mean that revolutionmuslim.com holds the same view or opinion. Additionally, it should not be deemed that we are displaying any advice or support, material or otherwise, for any institution deemed illegal or terroristic by the U.S. government and its thought police, protecting the world from peace in order to preserve the dominance of a rich, greedy and ultimately evil oligarchy. May Allah destroy them...

In posting the *Inspire* magazine, Morton understood that the "Make a Bomb in the Kitchen of Your Mom" article was inflammatory.

53. On July 12, 2010, Morton received in his JMorton1978 email account a Google Alert regarding "MN" being listed on the "Hit List" in the *Inspire* magazine.

54. On July 12, 2010, Scribd removed the *Inspire* magazine from its own site, thereby causing the magazine automatically to be removed from the Revolution Muslim site as well.

Once the *Inspire* magazine was removed by Scribd, an individual submitted comments to the Revolution Muslim website that provided active links to the *Inspire* Magazine on foreign websites. On July 14, 2010, in his capacity as administrator of the website, Morton approved the posting of the comments to the Revolution Muslim website, that provided a link to the first edition of "*Inspire*" magazine on another website overseas.

F. Chesser's Arrest and Morton's Move to Morocco

55. AMIDEAST is an organization engaged in international education, training and development activities in the Middle East and North Africa. On May 30, 2010, Morton signed a contract with AMIDEAST to teach English as a second language for that organization in Morocco.

56. On June 5, 2010, two associates of Morton in the Revolution Muslim organization, Carlos Almonte and Mohamed Alessa, were arrested in New York on their way to Somalia to join a terrorist organization to kill individuals whose beliefs and practices did not accord with their ideology. That same day, Morton was interviewed by investigators from the New York City Police Department. During that interview, Morton told the investigators that he had no immediate plans to travel internationally but hoped to visit Morocco for Ramadan (which in 2010 started on or about August 11th).

57. On June 14, 2010, Morton arranged for tickets to leave for Morocco on August 8, 2010, to take the job at AMIDEAST. On July 14, 2010, Morton emailed AMIDEAST that he was leaving the United States on August 8, 2010.

58. On July 21, 2010, Zachary Chesser was arrested on the charge of attempting to provide material support to the designated terrorist group Al-Shabaab in Somalia. The next day,

Morton changed his flight to July 25, 2010, because he feared that he would be prevented from leaving the country if he waited.

59. On July 25, 2010, Morton flew to Morocco from New York. On July 26, 2010, Morton emailed his supervisor at the Lantern Group in New York that he had left the country and would not return.

G. The Solicitation to Murder Members of the British Parliament

60. Morton regularly communicated between 2008 and 2010 about Revolution Muslim with a variety of others affiliated with the organization. One such individual was Conspirator Bilal Zaheer Ahmad, in the United Kingdom. For example, on April 26, 2010, Morton provided to Ahmad a password for the Revolution Muslim website, with permission to post whenever Ahmad wanted. On May 2, 2010, Ahmad emailed Morton that Ahmad would resume contributing to Revolution Muslim's sites. On August 8, 2010, Ahmad emailed Morton a complaint that someone was altering Ahmad's posts. On September 22, 2010, Morton emailed Ahmad that they should talk about the site and a way forward.

61. On November 3, 2010, Roshonara Choudhry was sentenced in the United Kingdom to life in prison for attempting to kill British Member of Parliament Stephen Timms by stabbing him on May 14, 2010. Choudhry asserted that she tried to kill Timms as revenge for the people of Iraq, because Timms voted for the participation of the United Kingdom in the war in Iraq. Choudhry said that she was radicalized by Anwar Al-Awlaki's lectures which she heard online. She admitted viewing several jihadist websites including Revolution Muslim.

62. On November 3, 2010, Ahmad posted on the Revolution Muslim website praise for Choudhry for attempting to kill Timms over his support for the Iraq war. The next day, Ahmad

posted to the Revolution Muslim website a list of the 383 members of the British Parliament who had voted for the Iraq war, along with suggestions on how to get in to see them and a link to a store where a knife similar to the one Choudhry used could be purchased.

63. Shortly after this post was made, the RevolutionMuslim.com website became unavailable. On November 7, 2010, Ahmad emailed Morton notification that the website was down, or his regret that his post caused the site to be brought down. Ahmad emailed Morton that the purpose of his post was to "make those MPs fearful, so that they think twice before voting to rape our mothers or kill our brothers, or go onto our lands and try to steal our resources." Morton emailed Ahmad that Morton was attempting to arrange for the Revolution Muslim website to be brought back on line.

64. On or about November 12, 2010, Morton posted announcements to RevolutionMuslimdaily.blogspot.com and IslamPolicy.com that announced, "this post is to announce the initiation of IslamPolicy.com, the new home of Revolution Muslim."

H, Operating IslamPolicy from Morocco

65. On or about March 30, 2011, Morton posted to the IslamPolicy.com website the fifth edition of *Inspire* Magazine - - believed by Morton to be compiled by Samir Khan.

66. On May 13, 2011, a criminal complaint was issued against Morton by this Court. On May 17, 2011, Morton told Ali Harfouch that "I will try and stay out of US clutches and stay away from extradition." He further asserted that "I want martyrdom . . . and will continue to pursue it inshAllah . . . as long as it is in the limits of the shariah."

67. On or about May 23, 2011, Morton posted the Clarification Statement to the IslamPolicy.com website along with an announcement that the charges had been issued against him as a result of the statement.

I.. Morton's Administration of Revolution Muslim

68. On or about January 28, 2010, Morton provided Chesser with administrative rights to the Revolution Muslim website. On or about February 2, 2010, Morton instructed Chesser to post to the RevolutionMuslim.blogspot.com site because the service provider suspended the Revolution Muslim website. On or about February 4, 2010, Morton communicated with Conspirator YK regarding obtaining a new hosting service for the Revolution Muslim website. On April 4, 2010, Morton provided Chesser with the passwords for Revolution Muslim's gmail and YouTube accounts.

69. On March 7, 2010, Morton directed Chesser to remove a post from the Revolution Muslim website. On April 12, 2010, Morton conditioned his authorization for Chesser to post on the Revolution Muslim website a fatwa authorizing the killing of Americans outside of Iraq, on Chesser's noting that the posting of the fatwa was for "educational purposes and is in no way for the sake of promoting or inciting violence. Otherwise it may turn up at trial." In October 2010, Morton instructed an individual identified as Silar to remove the second edition of *Inspire* magazine from the Revolution Muslim website.

70. On October 28, 2011, Morton told law enforcement agents that he would remove posts from Revolution Muslim that promoted violence. He said that he would have pulled the *South Park* post made by Chesser in April 2010 if he had known that the episode really didn't depict the Muhammad as he thought it was going to. He stated that he would have pulled down

postings by Chesser if Chesser put addresses of the participants in Everyone Draw Muhammad Day on Revolutionmuslim.com, with the insinuation to find and kill those participants.

I.. Members, Associates, and Followers of Revolution Muslim Attempting To Engage in Jihad Against Those They Perceived to Be Enemies of Islam

71. Morton knew that some viewers of the Revolution Muslim websites were inclined to violence. On February 23, 2009, Morton told NYPD detectives that Revolution Muslim received posts and questions from individuals that may seem radical. In addition to Alessa, Almonte, Samir Khan and Chesser, a variety of associates and followers of Revolution Muslim attempted to engage in jihad against those that they perceived to be enemies of Islam.

72. Abdel Hameed Shehadeh operated a website, civiljihad.com, that hosted extremist material and Al-Qaeda videos. While living in New York, Shehadeh attended Revolution Muslim meetings and made his site a feeder site for Revolution Muslim's website. In mid-2008, Shehadeh arranged for all visitors to his website to be routed automatically to RevolutionMuslim.com. On October 26, 2010, Shehadeh was arrested and charged with falsely denying his attempts to join the Taliban on a trip to Pakistan in 2008.

73. On February 2, 2010, Morton received through the revolutionmuslim@gmail.com account a message from Rezwan Ferdaus. In the message, Ferdaus asked for counsel regarding his duties as a Muslim. Ferdaus asked Morton whether martyrdom operations were a proper Islamic practice. Morton responded that same day by email, advising that

> With regard to martyrdom operations, we think their intention is most important and every act is judged by intention and so we reserve an opinion on this matter. We can however say that these operations have apparent detractions, but also enormous benfits in a war of attrition. That is all I have time to say now, but if you log onto our site and join our Paltalk discussion on Thursday's you can

> ask the questions and we will go into greater detail inshallah. Stay tuned to the homepage to find out what time.

On September 28, 2011, Ferdaus was arrested and charged in connection with a plot to attack the Pentagon and the U.S. Capitol building with remote controlled aircraft filled with explosives.

74. Colleen LaRose, also known as "Jihad Jane," was a subscriber to Revolution Muslim YouTube accounts. On March 4, 2010, LaRose was indicted in Pennsylvania for a variety of terrorism-related offenses, including plotting to kill Lars Vilks. On March 17, 2010, Morton notified Sheikh Faisal that LaRose was a subscriber to Revolution Muslim accounts.

75. On December 8, 2010, Antonio Benjamin Martinez was arrested and charged with plotting to bomb a military recruiting station. On November 3, 2010, Martinez - - also known as Muhammad Hussain - - viewed the Revolution Muslim website, watching a video of Osama bin Laden speaking, and watching multiple jihadist training camp-type video clips.

76. On April 8, 2011, Morton received through the IslamPolicy@gmail.com account a message from Jose Pimental. In the message, Pimental stated that he was a big fan of Revolution Muslim and Islam Policy, and asked whether Pimental should trust an individual known to Morton who suggested that Pimental start a jihad group to kill U.S. Army veterans in the United States. That same day, Morton emailed Pimental that Pimental should stay away from the individual in question because "there is a high probability that he is working for the FBI." On November 20, 2011, Pimental was arrested and charged in connection with a plot to build and use a bomb to assassinate members of the U.S. military returning from active duty in Afghanistan and Iraq.

77. On December 15, 2010, Morton responded on IslamPolicy to a report by Anderson Cooper on CNN that Revolution Muslim encouraged its viewers to engage in terrorism by stating that it was "probable" that "knowledge about the reality of US foreign policy shared on our site did contribute to their radicalization."

78. The acts taken by the defendant, Jesse Curtis Morton, in furtherance of the offenses charged in this case, including the acts described above, were done knowingly and voluntarily and not by mistake or accident. The defendant acknowledges that the foregoing statement of facts does not describe all of the defendant's conduct relating to the offenses charged in this case nor does it identify all of the persons with whom the defendant may have engaged in illegal activities. The defendant further acknowledges that he is obligated under his plea agreement to provide additional information about this case beyond that which is described in this statement of facts.

Neil H. MacBride
United States Attorney

John T. Gibbs
Department of Justice Trial Attorney

By: _____
Gordon D. Kromberg
Karen L. Dunn
Assistant United States Attorneys

After consulting with my attorney and pursuant to the plea agreement entered into this day between the defendant, Jesse Curtis Morton, and the United States, I hereby stipulate that the above Statement of Facts is true and accurate, and that had the matter proceeded to trial, the United States would have proved the same beyond a reasonable doubt.

Jesse Curtis Morton

I am Jesse Curtis Morton's attorney. I have carefully reviewed the above Statement of Facts with him. To my knowledge, his decision to stipulate to these facts is an informed and voluntary one.

James W. Hundley
Attorney for Jesse Curtis Morton

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. WALTER EDWARD BAGDASARIAN, *Defendant-Appellant.*	No. 09-50529 D.C. No. 3:09-CR-00083-H-1 OPINION

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Argued and Submitted
August 5, 2010—Pasadena, California

Filed July 19, 2011

Before: Alex Kozinski, Chief Judge, Stephen Reinhardt and
Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Reinhardt;
Partial Concurrence and Partial Dissent by Judge Wardlaw

COUNSEL

Ezekiel E. Cortez (argued), San Diego, California, for the defendant-appellant.

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OPINION

REINHARDT, Circuit Judge:

The election of our first black President produced a campaign with vitriolic personal attacks and, ultimately, sentiments of national pride and good will. The latter was short-lived on the part of some, politicians and non-politicians alike, and the vitriol continued as President Obama's term of office commenced. To those familiar with American political history, none of this should have come as a surprise. Although

Justice Scalia writes that "[o]bservers of the past few national elections have expressed concern about the increase of character assassination . . . engaged in by political candidates and their supporters,"[1] mudslinging has long been a staple of U.S. presidential elections. Justice Scalia, though analyzing a current issue, uncharacteristically overlooked the experience of our Founding Fathers. In the country's first contested presidential election of 1800, supporters of Thomas Jefferson claimed that incumbent John Adams wanted to marry off his son to the daughter of King George III to create an American dynasty under British rule; Adams supporters called Jefferson "a mean-spirited, low-lived fellow, the son of a half-breed Indian squaw, sired by a Virginia mulatto father."[2] Abraham Lincoln was derided as an ape, ghoul, lunatic, and savage,[3] while Andrew Jackson was accused of adultery and murder,[4] and opponents of Grover Cleveland chanted slogans that he had fathered a child out-of-wedlock.[5] Still, the 2008 presidential election was unique in the combination of racial, religious, and ethnic bias that contributed to the extreme enmity expressed at various points during the campaign.[6] Much of

[1]*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 382 (1995) (Scalia, J., dissenting).

[2]Paul F. Boller, *Presidential Campaigns: From George Washington to George W. Bush* 11 (2004).

[3]*See* Bruce L. Felknor, *Dirty Politics* 27 (1966).

[4]*See* Paul S. Herrnson, *Congressional Elections: Campaigning at Home and in Washington* 160 (1995).

[5]*See id*. The Cleveland story at least may have been true. *See* Jean Kinney Williams, *Grover Cleveland* 26 (2003).

[6]*See, e.g.*, Eileen Sullivan, *Obama Faces More Personal Threats than Other Presidents-Elect*, Huffington Post (Nov. 14, 2008), http://www.huffingtonpost.com/2008/11/14/obama-faces-more-personal_n_144005.html; Dave McKinney et al., *A Plot Targeting Obama? 3 in Custody May Be Tied to Supremacists, Said to Talk of Stadium Shooting*, Chi. Sun-Times, Aug. 26, 2008, at 3.

Then-Senator Obama was the first presidential candidate in U.S. history for whom Secret Service protection was authorized before being nomi-

this bias was misinformed because although the presidential candidate was indeed black, he was neither, as some insisted, Muslim nor foreign born.[7]

Here, we review a district court's conviction under 18 U.S.C. § 879(a)(3), which makes it a felony to threaten to kill or do bodily harm to a major presidential candidate. The defendant Walter Bagdasarian, an especially unpleasant fellow, was found guilty on two counts of making the following statements on an online message board two weeks before the presidential election: (1) "Re: Obama fk the niggar, he will have a 50 cal in the head soon" and (2) "shoot the nig."[8]

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nated for the presidency. *See* Nedra Pickler, *Racial Slur Triggers Early Protection for Obama: He Called on Secret Service to Monitor Big Crowds*, Grand Rapids Pr., May 4, 2007, at A3; Shamus Toomey, "A Lot to Do with Race": Durbin Says Obama Needs Secret Service in Part Because He's Black, Chi. Sun-Times, May 5, 2007, at 6.

[7]False accusations that a President is a member of an unpopular religious minority were prevalent in the 1930s. Wealthy critics of Franklin Delano Roosevelt and his policies referred to the New Deal as the Jew Deal, convinced that the President was a Jew named Rosenfeld who "had surrounded himself with Jews who made policy from a Jewish perspective for their own benefit," Hasia R. Diner, The Jews of the United States, 1654 to 2000, at 212-13 (2006); Peter Novick, *The Holocaust in American Life* 42 (2000).

Today, there are a great number of critics of President Obama who continue to believe that he is a Muslim and many who still refuse to accept the fact that he is a native born citizen. *See* Lauren Green, *Nearly 1 in 5 Americans Thinks Obama is a Muslim, Survey Shows*, FoxNews.com (Aug. 19, 2010), http://www.foxnews.com/politics/2010/08/19-nearly-americans-thinks-obama-muslim-survey-shows (reporting that survey found "those who say the president is a Muslim give him a negative job approval rating"); Brian Stelter, *On Television and Radio, Talk of Obama's Citizenship*, N.Y. Times: Media Decoder, July 24, 2009 (noting that "conspiracy theorists who have claimed for more than a year that President Obama is not a United States citizen have found receptive ears among some mainstream media figures in recent weeks," discussing some of America's most prominent media figures).

[8]The complete second statement appears in the next paragraph.

These statements are particularly repugnant because they directly encourage violence.[9] We nevertheless hold that neither of them constitutes an offense within the meaning of the threat statute under which Bagdasarian was convicted.

I. Background

On October 22, 2008, when Barack Obama's election was looking more and more likely, Bagdasarian, under the username "californiaradial," joined a "Yahoo! Finance — American International Group" message board, on which members of the public posted messages concerning financial matters, AIG, and other topics. At 1:15 am on the day that he joined, Bagdasarian posted the following statement on the message board: "Re: Obama fk the niggar, he will have a 50 cal in the head soon." About twenty minutes later, he posted another statement on the same message board: "shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right???? long term???? never in history, except sambos." Bagdasarian also posted statements on the same message board that he had been extremely intoxicated at the time that he made the two earlier statements.[10] He repeated at trial that he had been drinking heavily on October 22. Another participant on the message board, John Base, a retired Air Force

[9]Neither statement is thereby deprived of constitutional protection, however, because urging others to commit violent acts "at some indefinite future time" does not satisfy the imminence requirement for incitement under the First Amendment. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (holding that the imminence requirement under *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), is not satisfied by constitutionally protected speech that "amount[s] to nothing more than advocacy of illegal action at some indefinite future time").

[10]In the twenty minutes between the time at which he posted the "Obama, fk the niggar" and the "shoot the nig" statements, Bagdasarian posted a message that concluded: "burp more VINOOOOOOOO." Several hours later, he replied to another person's message that he had reported Bagdasarian's statements to the authorities, "Listen up crybaby ole white boy, I was drunk."

officer, reported Bagdasarian's second statement regarding Obama to the Los Angeles Field Office of the United States Secret Service that same morning. Base told the Secret Service that an individual identified by the username "californiaradial" had made alarming statements directed at the presidential candidate. He also provided the Secret Service with the Internet address link to the "shoot the nig" message board posting.

A Secret Service agent located this posting and the "Obama fk the niggar" posting on the Yahoo! message board, and, a week later, Yahoo! provided the Secret Service with subscriber information for californiaradial@yahoo.com, registered in La Mesa, California. Yahoo! also provided the Secret Service with the Internet Protocol history for the "californiaradial" email account, which Service agents used to identify the IP address from which the "shoot the nig" and "Obama fk the niggar" statements were posted. This IP address led the Service agents to Bagdasarian's home in La Mesa.

A month after the two statements for which Bagdasarian was indicted were posted on the AIG message board, two agents visited and interviewed him and he admitted to posting the statements from his home computer. When asked, he also told the agents that he had weapons in his home. The agents found one weapon on a nearby shelf; Bagdasarian said he had other weapons in addition. Four days later, agents executed a federal search warrant at Bagdasarian's home and found six firearms, including a Remington model 700ML .50 caliber muzzle-loading rifle, as well as .50 caliber ammunition.

The agents also searched the hard drive of Bagdasarian's home computer and recovered an email sent on Election Day with the subject, "Re: And so it begins." The email's text stated, "Pistol??? Dude, Josh needs to get us one of these, just shoot the nigga's car and POOF!" The email provided a link to a webpage advertising a large caliber rifle. Another email that Bagdasarian sent the same day with the same subject

heading stated, "Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this." It included a link to a video of a propane tank, a pile of debris, and two junked cars being blown up. These email messages would appear to confirm the malevolent nature of the previous statements as well as Bagdasarian's own malignant nature. Unlike in the case of his first two message board statements two weeks earlier, this time he did not attempt to excuse his inexcusable conduct on the ground that he was intoxicated.

After the Secret Service filed a criminal complaint against Bagdasarian for the posting the "shoot the nig" and "Obama fk the niggar" statements, the Government filed the superseding indictment at issue here, charging Bagdasarian in two counts under 18 U.S.C. § 879(a)(3) with threatening to kill and inflict bodily harm upon a major candidate for the office of president of the United States. Bagdasarian waived his right to a jury trial. His case was tried before a district judge upon the foregoing stipulated facts. The district court found Bagdasarian guilty on both counts. He appeals.

II. Analysis

[1] The federal statute under which Bagdasarian was indicted, 18 U.S.C. § 879(a)(3), makes it a crime to "knowingly and willfully threaten[ ] to kill, kidnap, or inflict bodily harm upon . . . a major candidate for the office of President or Vice President, or a member of the immediate family of such candidate." A statute like § 879, "which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707 (1969). Although the State cannot criminalize constitutionally protected speech, the First Amendment does not immunize "true threats." *Id*. at 708. The Court held in *Virginia v. Black*, 538 U.S. 343 (2003), that under the First Amendment the State can punish threatening expression, but only if the "speaker means to communicate a serious expression of an intent to commit an act of unlawful

violence to a particular individual or group of individuals." *Id*. at 359. It is therefore not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.

[2] Because of comments made in some of our cases, we begin by clearing up the perceived confusion as to whether a subjective or objective analysis is required when examining whether a threat is criminal under various threat statutes and the First Amendment.[11] Such a choice reflects a false dichotomy. The issue is actually whether, as to a threat prosecuted under a particular threat statute, only a subjective analysis need be applied or whether both a subjective and an objective analysis is required. Whether we have held that a threat under a particular statute must be examined under an objective standard, as with 18 U.S.C. § 871(a),[12] which makes it unlawful to threaten the President, or whether we have held that the statute requires the application of both an objective and subjective standard, as with 18 U.S.C. § 879(a)(3),[13] the provision

[11]*See, e.g.*, *United States v. Stewart*, 420 F.3d 1007, 1018 (9th Cir. 2005) (discussing perceived inconsistency in circuit authority as to definition of constitutionally proscribable "true threat" before concluding that "we need not decide whether the objective or subjective 'true threat' definition should apply here . . . because the evidence establishes that [the defendant's] statement was a 'true threat' under either definition and thus is not protected by the First Amendment" (footnote omitted)); *United States v. Sutcliffe*, 505 F.3d 944, 961-62 (9th Cir. 2007) (citing *Stewart* for the proposition that "our . . . case law" is "contradictory" as to whether "an objective, rather than subjective, test [should be applied] to determine whether [the defendant's] statements constituted true threats[,]" but holding that "any error in the 'true threats' [jury] instruction was harmless" because "the district court instructed the jury that specific intent to threaten is an essential element of a § 875(c) conviction, and thus the jury necessarily found that Defendant had the subjective intent to threaten in convicting him of the offense").

[12]*See United States v. Romo*, 413 F.3d 1044, 1051 (9th Cir. 2005); *United States v. Lincoln*, 403 F.3d 703, 707 (9th Cir. 2005); *United States v. Hanna*, 293 F.3d 1080, 1083 (2002); *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969).

[13]*See United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992), *overruled on other grounds by Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

that we consider here, our analysis in its most important respect is ultimately the same: In order to affirm a conviction under any threat statute that criminalizes pure speech, we must find sufficient evidence that the speech at issue constitutes a "true threat," as defined in *Black*. Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech. The difference is that with respect to some threat statutes, we require that the purported threat meet an objective standard *in addition*, and for some we do not.[14]

[14]Prior to *Black*, we did not always apply a subjective test when considering alleged violations of a threat statute. For example, although § 879 includes both an objective and subjective test, *see Gordon*, 974 F.2d at 1117, § 871 includes only an objective and no subjective test, *see Roy*, 416 F.2d at 877, even though both statutes require that threats be made "knowingly and willfully," §§ 871; 879, and even though we have specifically "look[ed] for guidance," in setting forth the statutory requirements of § 879, to *Roy*'s interpretation of the "closely analogous" § 871. *Gordon*, 974 F.2d at 1117.

It appears that we tried in *Roy* to impose a lower burden for conviction under § 871, which applies to threats against a sitting President, because "[a] President's death in office has worldwide repercussions and affects the security and future of the entire nation . . . regardless of whether the person making the threat actually intends to assault the President . . . ." *Roy*, 416 F.2d at 877 (citation omitted). Although in *Roy*, we sought to make it easier to punish threats against a President under § 871, the adoption of an objective standard serves the opposite function after *Black*. Because *Black* requires that the subjective test must be met under the First Amendment whether or not the statute requires it, an objective test is not an alternative but an additional requirement over-and-above the subjective standard.

To the extent that we may have suggested otherwise in a footnote in *Romo*, 413 F.3d at 1051 n.6 (declining, based on pre-*Black* precedent, to apply a subjective intent test under § 871(a) "because [the defendant] has not raised First Amendment issues), such analysis would be inconsistent with *Black* and must be limited to cases in which the defendant challenges compliance only with the objective part of the test and does not contend either that the subjective requirement has not been met, or that the statute has been applied in a manner that is contrary to the Constitution. In all other circumstances in which pure speech is prosecuted under a threat stat-

As we explained in *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005), although the "vagaries of our own case law," *id*. at 630, made it less than "entirely clear or consistent," "whether intent to threaten is a necessary part of a constitutionally punishable threat," *id*. at 628, *Black* "affirmed our own dictum — not always adhered to in our cases — that 'the element of intent [is] the determinative factor separating protected expression from unprotected criminal behavior." *Id.* at 632 (alteration in original) (quoting *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987)). *Cassel* made clear that *Black*'s "definition of a constitutionally proscribable threat is . . . binding on us even though it is in tension with some of the holdings and language in prior cases of this circuit." *Id.* at 633 (citation omitted).[15]

Because § 879(a)(3), the provision at issue here, requires subjective intent as a matter of statutory construction, *see Gordon*, 974 F.2d at 1117, it necessarily incorporates the constitutional inquiry commanded by *Black*: Did the speaker subjectively intend the speech as a threat? In order to "determine

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ute, we cannot apply exclusively an objective standard, and any subjective test must incorporate the constitutional requirement set forth in *Black*. 538 U.S. at 359.

Because the statements at issue in the case before us fail to pass either of the two tests, we see no reason here to consider the question whether to retain an objective test for presidential threat statutes in view of *Black*. To be clear, we are not suggesting that an objective determination does not provide a worthwhile test or that statutes criminalizing threats against the President or others should require only a subjective test. We merely point out a paradox in our treatment of threat statutes now that *Black* requires proof of intent under the First Amendment in all such cases.

[15]In a footnote to the passage just quoted, *Cassel* distinguished *United States v. Lincoln*, 403 F.3d 703, 706 (9th Cir. 2005), which relied on pre-*Black* cases to suggest in dicta that the First Amendment requires application of an objective rather than a subjective test. *Cassel*, 408 F.3d at 633 n .9. *Cassel* pointed out that *Lincoln* "did not raise or consider the implications of *Virginia v. Black*," and therefore, in effect, that *Lincoln* must be treated simply as a pre-*Black* case. *Id.*

whether the verdict [under the statutory elements] is supported by sufficient evidence," we must answer the question "whether the facts as found by the jury establish the core constitutional fact of a 'true threat.' " *Stewart*, 420 F.3d at 1015. Our subjective intent analysis under § 879(a)(3) therefore subsumes the subjective intent-based true threat inquiry as described in *Black*.

A. Elements of the Offense

Two elements must be met for a statement to constitute an offense under 18 U.S.C. § 879(a)(3): objective and subjective. The first is that the statement would be understood by people hearing or reading it in context as a serious expression of an intent to kill or injure a major candidate for President. *See Gordon*, 974 F.2d at 1117. The second is that the defendant intended that the statement be understood as a threat. *Id*. Because Bagdasarian's conviction under § 879 can be upheld only if both the objective and subjective requirements are met, neither standard is the obvious starting point for our analysis, and our resolution of either issue may serve as an alternate holding.[16]

1. Objective Understanding

[3] We begin with the objective test. One question under § 879(a)(3) is whether a reasonable person who heard the statement would have interpreted it as a threat. *Gordon*, 974 F.2d at 1117. This objective test requires the fact-finder to "look[ ] at the entire factual context of [the] statements including: the surrounding events, the listeners' reaction, and whether the words are conditional." *Id*. It is necessary, then, to determine whether Bagdasarian's statements, considered in their full context, "would be interpreted by those to whom the

[16]*See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.").

maker communicates the statement as a serious expression of an intention to inflict bodily harm on or to take the life of [Obama]." *Id*. (quoting *Roy*, 416 F.2d at 877-78). The evidence is not sufficient to support a conclusion that a reasonable person who read the postings within or without the relevant context would have understood either to mean that Bagdasarian threatened to injure or kill the Presidential candidate.[17]

[4] Neither statement constitutes a threat in the ordinary meaning of the word: "an expression of an intention to inflict . . . injury . . . on another." *Webster's Third New International Dictionary* 2382 (1976). The "Obama fk the niggar" statement is a prediction that Obama "will have a 50 cal in the head soon." It conveys no explicit or implicit threat on the part of Bagdasarian that he himself will kill or injure Obama. Nor does the second statement impart a threat. "[S]hoot the nig" is instead an imperative intended to encourage others to take violent action, if not simply an expression of rage or frustration. The threat statute, however, does not criminalize predictions or exhortations to others to injure or kill the President.[18]

[17]In *Planned Parenthood*, we applied a standard of review close to de novo to the question whether pure speech constitutes a "true threat" unprotected by the First Amendment. 290 F.3d at 1070. Here, both parties briefed and argued the case on the basis of the sufficiency-of-the-evidence standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). For that reason, and because we would decide this case the same way under either *Planned Parenthood* or *Jackson*, we do not determine what standard of review applies here or in any future case.

[18]The Fourth Circuit has written that "an essential element of guilt [under § 871, which punishes threats against the President or successors to the presidency] is a present intention either to injure . . . or to incite others to injure," but added that "[m]uch of what we say here is dicta." *United States v. Patillo*, 438 F.2d 13, 16 (4th Cir. 1971) (en banc). No other circuit has concluded that incitement can be punished under a threat statute, and over forty years ago, in a case since cited approvingly in almost every presidential threat case in our circuit, we expressed doubt that § 871 makes criminal an intention or tendency to encourage others to injure the President. *Roy*, 416 F.2d at 877. We explained that "if Congress desired

It is difficult to see how a rational trier of fact could reasonably have found that either statement, on its face or taken in context, expresses a threat against Obama by Bagdasarian.[19]

There is no disputing that neither of Bagdasarian's statements was conditional and that both were alarming and dangerous. The first statement, which referred to Obama as a "niggar" who "will have a 50 cal in the head soon," coupled a racial slur with an assassination forecast during a highly controversial campaign that would ultimately make Obama

to prevent incitement of others to assault the President, then it could have limited the statute to make it a crime to incite or induce others to assault or attempt to assault the President." *Id*. Having previously "look[ed] for guidance," in construing § 879, to Roy's interpretation of the "closely analogous" § 871, *Gordon*, 974 F.2d at 1117, we here follow *Roy* in refusing to find that incitement qualifies as an offense under § 879. We also reach that conclusion independently on the basis of the plain language of the statute. *See* 18 U.S.C. § 879(a)(3) (making it a crime to "knowingly and willfully threaten[ ] to kill, kidnap, or inflict bodily harm upon . . . a major candidate for the office of President."); *see also supra* at 9803 n.9 (discussing imminence requirement for incitement under the First Amendment).

[19]The dissent's interpretation of Bagdasarian's statements as threats can be traced to its misplaced reliance on three cases. *See* Dissent at 9826-27. *Hanna*, which was decided before *Black*, reversed the threat conviction and remanded for a new trial, noting that if the defendant were "convicted again based on admissible evidence, he w[ould] be entitled to have the appellate court independently review the record to ensure that the surrounding facts found by the jury establish the constitutional fact of a true threat." 293 F.3d at 1088. *Planned Parenthood*, also decided before *Black*, is readily distinguishable on the law and the facts: There can be no question that the anti-abortionist group "was aware that a 'wanted'-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community who was identified on one, given the previous pattern of 'WANTED' posters identifying a specific physician followed by that physician's murder." 290 F.3d at 1063. The facts here present no such pattern. Finally, *Romo* declined altogether to address whether the defendant's speech constituted a true threat under § 871(a) because he "has not raised First Amendment issues." 413 F.3d at 1051 n.6.

the country's first black president. No less troubling is the defendant's second statement imploring others to "shoot the nig," lest the "country [be] fkd for another 4 years+" because "never in history" has a black person "done ANYTHING right." There are many unstable individuals in this nation to whom assault weapons and other firearms are readily available, some of whom might believe that they were doing the nation a service were they to follow Bagdasarian's commandment. There is nevertheless insufficient evidence that either statement constituted a threat or would be construed by a reasonable person as a genuine threat by Bagdasarian against Obama.

[5] When our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance, but must not distort or embellish their plain meaning so that the law may reach them. Here, the meaning of the words is absolutely plain. They do not constitute a threat and do not fall within the offense punished by the statute. In *Watts*, the Supreme Court reversed a conviction under a presidential threat statute. 394 U.S. at 705-06. The defendant there had said, "[a]nd now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court held that "we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials' "; adding that "[t]he language of the political arena . . . is often vituperative, abusive, and inexact." *Id.* at 708 (citations omitted).

The Government argues that among the relevant elements of the factual context is that the defendant's messages were anonymous, posted only under the screen name "californ-

iaradial." We grant that in some circumstances a speaker's anonymity could influence a listener's perception of danger. But the Government offers no support for its contention that the imperative "shoot the nig" or the prediction that Obama "will have a 50 cal in the head soon" would be more rather than less likely to be regarded as a threat under circumstances in which the speaker's identity is unknown.[20] Whatever the effect, in other circumstances, of anonymity on a reasonable interpretation of Bagdasarian's statements, the financial message board to which he posted them is a non-violent discussion forum that would tend to blunt any perception that statements made there were serious expressions of intended violence.

[6] When, in this case, we look to "[c]ontextual information . . . that [could] have a bearing on whether [Bagdasarian's] statements might reasonably be interpreted as a threat," *United States v. Parr*, 545 F.3d 491, 502 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1984 (2009), the only possible evidence is that three or four discussion board members wrote that they planned to alert authorities to the "shoot the nig" posting,

[20]In some circumstances, anonymity may generate greater concern because listeners cannot rely on the speaker's identity to discount any serious intentions. *Cf. Doe ex rel. Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 625 F.3d 1182, 1190 (9th Cir. 2010) (Reinhardt, J., joined by Kozinski, C.J., dissenting from denial of rehearing en banc) (rejecting the propositions that "plaintiffs may be unreasonable in fearing severe threats of physical retaliation because they are made via the internet" or that "litigants do not reasonably fear threats of serious harm when they are made by unidentified people, some of whom may not intend to carry them out"). In other circumstances, however, listeners may give less credence to anonymous statements because they cannot identify any association between the speaker and a group that engages in violence, or otherwise ascertain that the speaker is an individual whose threat should be taken seriously. Whether a particular speaker's threat would be taken more or less seriously if made anonymously may depend on who that speaker is. Still, all threats against the President or a major presidential candidate must be taken seriously until it is established that there is no reason to do so.

although only one reader, Air Force Officer Base, actually did. The dissent identifies the responsive postings as the "[m]ost telling" evidence that a reasonable person would have perceived Bagdasarian's messages as a threat. In doing so, it mischaracterizes these postings as "indicat[ing] that [their authors] perceived 'shoot the nig' as a threat to candidate Obama." Dissent at 9828. In fact, none of the responses said anything about a threat. Their authors may well have thought that Bagdasarian's messages were impermissible or offensive for some other reason or that they encouraged racism or violence. We fail to see why the fact that several people had negative reactions to the messages should be taken to mean that they or others interpreted them as a threat. It is certainly more significant that among the numerous persons who read Bagdasarian's messages, the record reveals only one who was sufficiently disturbed to actually notify the authorities.[21]

[7] The Government contends that two additional facts show that Bagdasarian's statements might reasonably be interpreted as a threat. The first is that when Bagdasarian made the statement that Obama "will have a 50 cal in the head soon," Bagdasarian actually had .50 caliber weapons and ammunition in his home. The second is that on Election Day, two weeks after posting the messages, he sent an email that read, "Pistol . . . plink plink plink Now when you use a 50 cal

[21]The Stipulated Facts indicate only that Base "saw the 'shoot the nig' message," that he "was concerned that the posting threatened harm to Barack Obama," and that he "telephoned the Los Angeles Field Office of the United States Secret Service and reported the 'shoot the nig' posting." The Record does not contain evidence as to whether Base posted a response to the message board. Even under *Jackson v. Virginia*, 443 U.S. 307 (1979), the facts are insufficient to support a verdict that Bagdasarian threatened to kill Obama. The "critical inquiry" in *Jackson* "is whether the record evidence," when viewed by any rational trier of fact in the light most favorable to the prosecution, "could reasonably support *a finding of guilt beyond a reasonable doubt*." *Id*. at 318-19 (emphasis added). Here, the record is far too thin to support such a conclusion. *See also* 9810 n.17 (noting that in *Planned Parenthood*, we applied a standard of review close to de novo).

on a nigga car you get this," and linked to a video of debris and two junked cars being blown up. Nobody who read the message board postings, however, knew that he had a .50 caliber gun or that he would send the later emails. Neither of these facts could therefore, under an *objective* test, "have a bearing on whether [Bagdasarian's] statements might reasonably be interpreted as a threat" by a reasonable person in the position of those who saw his postings on the AIG discussion board. *Parr*, 545 F.3d at 502.

2. Subjective Intent

Even if "shoot the nig" or "[he] will have a 50 cal in the head soon" could reasonably have been perceived by objective observers as threats within the factual context, this alone would not have been enough to convict Bagdasarian under 18 U.S.C. § 879(a)(3). The Government must also show that he made the statements intending that they be taken as a threat. A statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal. In *Black*, the Court explained that the State may punish only those threats in which the "speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359. And in *Gordon*, we held as a matter of statutory interpretation that Congress "construe[d] 'knowingly and willfully' [in § 879] as requiring proof of a subjective intent to make a threat,' " and thus requires the application of a subjective as well as an objective test. 974 F.2d at 1117 (alterations in original) (quoting 128 Cong. Rec. 21,218 (1982)).

[8] We have explained, *supra* at 9809-13, why neither of Bagdasarian's statements on its face constitutes a true threat unprotected by the First Amendment. Most significantly, one is predictive in nature and the other exhortatory. For the same reasons, the evidence is not sufficient for any reasonable finder of fact to have concluded beyond a reasonable doubt that Bagdasarian intended that his statements be taken as

threats. *See Jackson*, 433 U.S. at 319. Both under the constitutional requirement established in *Black* that we must read into § 879, and under the statutory requirement that we found extant in *Gordon*, the district court's inference of Bagdasarian's intent to threaten is unreasonable taken in context and does not, even when considered in the light most favorable to the prosecution, lie within the permissible range of interpretations of his message board postings. As a matter of law, neither statement may be held to constitute a "true threat."

As we discussed in the previous section, the prediction that Obama "will have a 50 cal in the head soon" is not a threat on its face because it does not convey the notion that Bagdasarian himself had plans to fulfill the prediction that Obama would be killed, either now or in the future. Neither does the "shoot the nig" statement reflect the defendant's intent to threaten that he himself will kill or injure Obama. Rather, "shoot the nig" expresses the imperative that some unknown third party should take violent action. The statement makes no reference to Bagdasarian himself and so, like the first statement, cannot reasonably be taken to express his intent to shoot Obama.[22]

As with our analysis of the objective test, we do not confine our examination of subjective intent to the defendant's statements alone. Relying on *United States v. Sutcliffe*, 505 F.3d 944 (9th Cir. 2007), the Government points to the two facts

[22]We are aware that an Internet radio host was recently convicted by a federal jury under 18 U.S.C. § 115(a)(1)(B), which punishes threats against, *inter alia*, a federal judge with intent to intimidate or retaliate. He was convicted for statements made regarding three Seventh Circuit judges who had issued a ruling that he disagreed with. *See United States v. Turner*, 1:09-cr-00650-DEW-JMA (E.D.N.Y. Aug. 13, 2010); Mark Fass, *Blogger Found Guilty of Threatening Judges in Third Federal Trial*, N.Y. L.J., Aug. 16, 2010, at 1. That case has not reached the appellate courts and thus does not affect our analysis here. It would in any event not cause us to change our view with respect to the constitutional question answered by *Black* or the result that we reach in this case.

that we discussed in our analysis of objective understanding as evidence that Bagdasarian intended to make a threat: (1) that he was later found to possess a .50 caliber gun like the one he mentioned in the "Obama fk the niggar" posting, and (2) that the Election Day email referred to the use of "a 50 cal on a nigga car." Neither fact is sufficient to prove beyond a reasonable doubt that Bagdasarian intended to make a threat when, two weeks before Election Day, he posted the two statements for which he was indicted.

In *Sutcliffe*, we affirmed a conviction under another threat statute, 18 U.S.C. § 875(c), which, in addition to the knowing transmission of an interstate threat, requires specific intent to threaten. 505 F.3d at 952, 960-61; *see also United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988). We held that the district court did not abuse its discretion by allowing the Government to present evidence of the defendant's gun possession to demonstrate that he actually intended to threaten violence. *Id*. at 959. The fact of the defendant's gun possession was not determinative of the defendant's intent, however, but just one among many pieces of evidence relevant to the language and context of the threats that we considered in determining that the defendant had the requisite specific intent to threaten. Most important in *Sutcliffe* were the first-person and highly specific character of messages such as "I will kill you," "I'm now armed," and "You think seeing [your license plate number posted on my website] is bad . . . trust us when we say [it] can get much, much, worse. . . . [I]f you call this house again . . . , I will personally send you back to the hell from where you came." *Id*. at 951-52 (first omission and second alteration in original).

Given that Bagdasarian's statements, "Re: Obama fk the niggar, he will have a 50 cal in the head soon" and "shoot the nig" fail to express any intent on his part to take any action, the fact that he possessed the weapons is not sufficient to establish that he intended to threaten Obama himself. Similarly, the Election Day emails do little to advance the prosecu-

tion's case. They simply provide additional information — weblinks to a video of debris and two junked cars being blown up and to an advertisement for assault rifles available for purchase online — that Bagdasarian may have believed would tend to encourage the email's recipient to take violent action against Obama. But, as we have explained, incitement to kill or injure a presidential candidate does not qualify as an offense under § 879(a)(3).[23]

[9] Taking the two message board postings in the context of all of the relevant facts and circumstances, the prosecution failed to present sufficient evidence to establish beyond a reasonable doubt that Bagdasarian had the subjective intent to threaten a presidential candidate. For the same reasons that his statements fail to meet the subjective element of § 879, given any reasonable construction of the words in his postings, those statements do not constitute a "true threat," and they are therefore protected speech under the First Amendment. *See Black*, 538 U.S. at 359. Accordingly, his conviction must be reversed.

REVERSED.

WARDLAW, Circuit Judge, concurring in part, and dissenting in part:

I concur fully with the majority's analysis of the law of "true threats." The First Amendment prohibits the criminalization of pure speech unless the government proves that the speaker specifically intended to threaten. Thus, in every threats case the Constitution requires that the subjective test is met. *Virginia v. Black*, 538 U.S. 343 (2003). In this case, the statute at issue, 18 U.S.C. § 879(a)(3), also requires that a reasonable person would foresee that his statement would be

[23] *See supra* at 9810-11 n.18.

perceived as a threat to harm a presidential candidate. Because there is sufficient evidence supporting a finding of objective intent, *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and because even under the heightened standard of review that we apply to constitutional facts, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002) (en banc), the subjective intent requirement is also met, I conclude there is sufficient evidence to find Mr. Bagdasarian guilty of threatening harm against then-presidential candidate Barack Obama.

I.

In the wee hours of the morning of October 22, 2008, Mr. Bagdasarian, under the user name "californiaradial," joined a Yahoo! Finance — American International Group message board, an internet site on which members of the public could post messages concerning financial matters, AIG, and other hot topics of the day. Californiaradial's first posting about candidate Obama, at 1:00 a.m., was to the "thread" headed "re: Hamas, Hezbollah, Syria, and Iran favor Obama 100 to 0," where he said "blow up all the mother fkers, please carpet bomb the middle east . . . give me the switch, no prob, thump and poof sand niggar."[1] Two minutes later on the same thread he posted: "I would really lose no sleep if middle morons gone . . . nuke bombing . . . ." At 1:15 a.m., under another thread with the subject header "OBAMA," he posted the first of the two threats charged in the indictment: "fk the niggar, he will have a 50 cal in the head soon." Six minutes after that, Californiaradial combined his pro-bomb and anti-Obama rhetoric in another post on the "OBAMA" thread: "yea, the honest people have NO guns and the scum bags, niggars and drug fks do, thanx obombhaaaaa." He reiterated his racist animus on a thread referencing Obama's Irish heritage: "full monkey, hey can you crank the music box, I wanna see the puppet

[1]The posts appear here as they do in the record; because of their nature, "sic" designations are omitted.

monkey dance . . . .” Four minutes later, at 1:26 a.m. he added, “a lepraaaaaaniggggggggamuch? blank that one, yahoo a-holes.” At 1:35 a.m., Californiaradial created his own anti-Obama thread, under the subject header “shoot the nig.” There he posted the second threat charged in the indictment: “country fkd for another 4 years+, what nig has done ANY-THING right???? long term???? never in history, except sambos.”

At this point, the other message board participants reacted to the serious nature of Californiaradial’s threats. “Dan757x” immediately responded on the “shoot the nig” thread: “You’ve been reported by me, a good ole’ white boy.” “Freddie226” weighed in to support Dan, who next posted: “I hope everyone reports this type of garbage.” Under the same thread, “Sniper1agent” posted: “Be advised Federal Law Enforcement is monitoring . . . ,” and “Brown.romaine” advised: “I am reporting this post to the Secret Service.” And, in fact, John Base, a retired Air Force officer who saw Californiaradial’s “shoot the nig” message did report the threats to the Los Angeles Field Office of the United States Secret Service because, as set forth in the Stipulated Facts, he was “concerned that the posting threatened harm to Barack Obama.”

In response, a Secret Service agent searched the message board, located the “shoot the nig” posting, and also discovered the “50 cal in the head” posting. From Yahoo!, the Secret Service obtained the IP address for the user registered as “californiaradial,” and it used that information to get subscriber data from Cox Communications. This trail of bread crumbs led the Secret Service to La Mesa, California, and, on November 21, 2008, agents appeared at Californiaradial’s doorstep.

They discovered that, in the real world, the user known as “californiaradial” in cyberspace was Mr. Bagdasarian. Mr. Bagdasarian admitted to posting the “fk the nig” and “50 cal

in the head" message from his home computer. When asked, he stated that he had weapons in his home. A search warrant executed a few days later revealed that Mr. Bagdasarian possessed six firearms, including a Remington model 700 ML .50 caliber muzzle-loading rifle. Agents also discovered .50 caliber ammunition in Mr. Bagdasarian's home. The agents searched Mr. Bagdasarian's computer, where they discovered a November 4, 2008, email message from Mr. Bagdasarian to an associate with the foreboding subject line "Re: And so it begins." The email stated, "Pistol??? Dude, Josh needs to get us one of these, just shoot the nigga's car and POOF!" The email then provided a link to a photograph of a rifle on a Barrett Rifles website. A second email that Mr. Bagdasarian sent the same day under the same subject line stated, "Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this." The email then directed the reader to a YouTube video of a car being blown up.

II.

"Whether a particular statement may properly be considered to be a threat is governed by an objective standard — whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." *Planned Parenthood*, 290 F.3d at 1074 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). "Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." *Orozco-Santillan*, 903 F.2d at 1265. "[C]ontext is critical in a true threats case and history can give meaning to the medium." *Planned Parenthood*, 290 F.3d at 1078. In determining whether Mr. Bagdasarian's statements constituted objective threats, we must look "at the entire factual context of those statements including: the surrounding events, the listeners' reaction, and whether the words are conditional." *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992).

Reading the two statements charged in the indictment in isolation, the majority dissects them to conclude that they were not even threats. It fails to consider the ominous backdrop of America's history of racial violence, the uniquely racial and violent undercurrents of the 2008 presidential election, the entirety of Mr. Bagdasarian's postings on October 22, two weeks before the 2008 election, and the listeners who not only perceived the posts as threatening when they were made, but who acted on that perception.[2]

Mr. Bagdasarian's statements portended no less impending harm because they did not completely spell out the threat. For example, given this country's history of Ku Klux Klan violence, a burning cross can signify "a message of intimidation" and "the possibility of injury or death." *Black*, 538 U.S. at 357. Parking a Ryder truck outside an abortion clinic, after the Oklahoma City bombing, can indicate a serious intent to harm. *Planned Parenthood*, 290 F.3d at 1078-79. And, as the district court recognized, in the wake of September 11, telling a flight attendant that you are carrying a bomb is not a joke. Mr. Bagdasarian posted at a time when violent and racist threats against candidate Obama were being taken very seriously. Though President Obama currently resides in the White House, the prospect of his election ignited polarizing racial animus, including "racist chatter on white supremacist Web

[2]The majority also disregards the evidence presented at trial of our country's experience with political assassinations. The sheer number of presidents (nearly ten percent of the presidents who have served) who have been targeted and killed by assailants with guns in our nation's short history undermines the conclusion that a reasonable person would interpret Mr. Bagdasarian's "50 cal in the head" comment as a joke or mere political rhetoric. Moreover, as the recent example of the shooting of Arizona Representative Gabrielle Giffords demonstrates, what begins as a bizarre post on the Internet can erupt as a devastating outburst of violence. *See* Alexandra Berzon, John R. Emshwiller & Robert A. Guth, *Postings of a Troubled Mind*, Wall St. J., Jan. 12, 2011; Marc Lacey & David M. Herszenhorn, *Congresswoman Is Shot in Rampage Near Tucson*, N.Y. Times, Jan. 9, 2011.

sites." Nedra Pickler, *Racial Slur Triggers Early Protection for Obama*, Associated Press, May 4, 2007. Not only did this animus materialize in at least one viable assassination attempt, *see* Dave McKinney, Frank Main & Natasha Korecki, *A Plot Targeting Obama?*, Chi. Sun-Times, Aug. 26, 2008,[3] but the heightened fear that candidate Obama would be the target of violence spurred the Department of Homeland Security to authorize Secret Service protection as early as May 2007, before candidate Obama was even nominated for the presidency, making him the only presidential candidate to receive protection so early.[4] Pickler, *Racial Slur*.

Certainly as of fall 2008, our country's collective experience with internet threats and postings that presaged tragic events made it all the more likely that a reasonable person would foresee that even anonymous internet postings would be perceived as threats.[5] The country had witnessed the 1999 Columbine High School shootings by Dylan Klebold and Eric Harris, who had posted death threats on his website, along with discussions of bombmaking and killing students and teachers. *See* Michael Janofsky, *Parents Want New Inquiry into Columbine Killings*, N.Y. Times, Jan. 6, 2002; Kirk Johnson, *Columbine Evidence Is Placed on Chilling Public Dis*play, N.Y. Times, Feb. 27, 2004; Kim Murphy, *Warning*

[3]A similar plot planned on the internet by white supremacists involving a killing spree that would end with the assassination of candidate Obama was derailed by the arrest of two men who were charged with, among other things, making threats against a major presidential candidate. *See* Richard A. Serrano, *Pair Accused of Plotting to Kill Obama, 102 Blacks*, L.A. Times, Oct. 28, 2008. A Wisconsin man who threatened over the internet to kill President-elect Obama shortly before the inauguration for what he claimed was the "country's own good" was arrested in Mississippi. *Obama Threat Leads to Arrest*, L.A. Times, Jan. 17, 2009.

[4]Then-Senator Hillary Clinton received Secret Service protection throughout her candidacy due to her status as a former First Lady. Pickler, *Racial Slur*.

[5]The majority acknowledges that a speaker's anonymity can render a statement more threatening.

Signs of Massacre Were Hidden in Plain Sight, LA. Times, May 9, 1999. In 2005, days after an Orange County teenager posted on an Internet message board that he would "start a Terror Campaign to hurt those that have hurt me," the teen went on a neighborhood shooting spree, killing a man and his daughter. Kimi Yoshino, *Threats Online: Is There a Duty to Tell?*, L.A. Times, Nov. 2, 2005. Also in 2005, a teenager who was an "avid participant in Internet discussion groups . . . with postings under his name that mention weapons and violence amid broader conversations about politics, the paranormal, time travel, reincarnation and Big Foot" killed seven people and himself at his high school in Minnesota. Kirk Johnson, *Survivors of High School Rampage Left with Injuries and Many Questions*, N.Y. Times, Mar. 25, 2005.

And in 2007, following a disturbing online posting, a Virginia Tech student shot and killed thirty-two people on the campus. Benedict Carey, *For Rampage Killers, Familiar Descriptions, "Troubled" and "Loner," but No Profile*, N.Y. Times, Apr. 18, 2007. In the wake of this experience, it is only logical to conclude that on-line postings of impending violence would be perceived by reasonable people as serious threats. As one district attorney put it following yet another student's threat to shoot his classmates, "Any kid that makes a direct threat of this nature on the tail of what happened in Santee can reasonably expect there to be a very dramatic reaction." Ofelia Casillas, *Teen Pleads Not Guilty to Making Bomb Threat*, L.A. Times, Mar. 20, 2001.

In a similar case involving internet threats, a federal district judge in 2009 denied a motion filed by Harold Turner, a blogger and internet radio host, seeking to dismiss an indictment against him for threatening three judges of the United States Court of Appeals for the Seventh Circuit. On his blog, Turner had posted information about the judges, and had written: "Let me be the first to say this plainly: These judges deserve to be killed. Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions." David Kra-

vets, *Blogger Threatened to Murder Judges, Feds Say*, Wired, June 24, 2009. The district court found that the fact that Turner, who lived in New Jersey, posted threats against Chicago-based judges did not diminish the threat, reasoning:

> In an era when physicians have been murdered in their places of worship; families of Judges have been slain; a Judge of the Eleventh Circuit Court of Appeals and State Court Judges have been blown up or shot; a Federal Courthouse ripped apart by home-made explosives, all in the name of political dissent or religious fanaticism, it cannot be said that Defendant's statements are unlikely to incite imminent lawless action.

United States v. Turner, 2009 WL 726501, at *3 (E.D.N.Y. 2009). As the majority points out, Turner was subsequently convicted.

The majority does not dispute that Mr. Bagdasarian's statements were nonconditional,[6] alarming, and dangerous, but finds their threatening nature blunted by the fact that Mr. Bagdasarian posted them on a financial "non-violent" message board. Although the message board itself focused on AIG's 2008 financial meltdown, the individuals who posted naturally veered into the political implications of the crashing

[6]The majority cites *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam), for the proposition that we must interpret Bagdasarian's statements in light of our national commitment to free and open political debate. While this principle is undoubtedly correct, *Watts* itself is inapposite. *Black*'s subjective intent requirement prevents free and open public debate from being swept up in the prohibition of "true threats." In *Watts*, however, the Supreme Court examined the defendant's statement under the objective standard and concluded that the statement at issue would not be perceived as a threat because the statement was "expressly conditional," rather than immediate. *Id.* Thus, not only does *Watts* fail to support the majority's assertion that Bagdasarian's meaning was "plain," it lends further support to my view of the objectively threatening nature of Bagdasarian's postings, which were not conditional.

financial markets.[7] Mr. Bagdasarian's own postings on the board contained increasingly political, violent, and vicious attacks targeting candidate Obama. That he posted on a financial message board does not diminish the nature of the threats; just as they would be no less diminished had he shouted them on the floor of the New York Stock Exchange.

The majority focuses narrowly on the charged threats and dismisses them as mere imperatives or predictions. But our case law is to the contrary. We do not require that the speaker in a threats case explicitly threaten that he himself is going to injure or kill the intended victim; rather, we examine the surrounding circumstances to determine whether a reasonable person in the speaker's shoes would foresee that his statements would be perceived as threats.

For example, in *United States v. Hanna*, 293 F.3d 1080, 1082-83 (9th Cir. 2002), we determined that there was sufficient evidence for a jury to conclude that Hanna had threatened the President,[8] where no explicit threat had been made. Rather, the documents underlying the charges merely depicted President Clinton along with statements such as "KILL THE BEAST," "666," "willie jeffer jackal," and "WANTED FOR MURDER, DEAD OR ALIVE." We held that: "Although Hanna did not explicitly indicate that *he* was going to kill the President, a jury could conclude that a reasonable person in Hanna's position would foresee that such statements would be

[7]A thread headed "re: Nobodys Watchin the Store in America" emerged on which "Sheeeyaright" posted "its up to us.No Obama." There ensued a colorful discussion about how the economic situation had changed during the administrations of President Clinton and President Bush, and what might be expected from a President Obama. This led to still other threads not started by Mr. Bagdasarian entitled "Obama will make the US a 3rd world Country" and "Hamas, Hezbollah, Syria, and Iran favor Obama 100 to 0."

[8]In *Hanna*, we reversed the conviction only due to other trial errors which indicated that the jury's deliberations may have been tainted by improperly admitted evidence.

perceived as threats by the recipients of the statements." *Id*. at 1088.

Similarly, in *United States v. Romo*, 413 F.3d 1044, 1051 (9th Cir. 2005), an opinion relied upon by the district court, we upheld a threats conviction where then-incarcerated Romo "wrote and mailed a letter stating that someone should put a bullet in the President's head and that he would like to do it." We found this to be an "unequivocal" threat, stating that a "clearer threat is difficult to imagine." *Id*. at 1050, 1051. And, in *Planned Parenthood*, anti-abortion activists circulated on the internet and elsewhere a series of "WANTED" and "GUILTY" posters identifying doctors who performed abortions, and who were thereafter murdered, along with a "Nuremberg Files" poster where lines were drawn through the names of the murdered physicians. Although the posters did not contain an explicit threat of harm, it was proper to consider them in context. *Planned Parenthood*, 290 F.3d at 1064-65. We concluded substantial evidence supported convictions under the FACE Act,[9] in that the anti-abortionist group "was aware that a 'wanted'-type poster would likely be interpreted as a serious threat of death or bodily harm by a doctor in the reproductive health services community who was identified on one, given the previous pattern of 'WANTED' posters identifying a specific physician followed by that physician's murder." *Id*. at 1063. We were "independently satisfied" that the posters "amounted to a true threat" and were not protected speech.[10] *Id.*

[9]The Freedom of Access to Clinic Entrances Act ("FACE") makes it a crime when a person "by force or threat of force . . . intentionally injures, intimidates or interferes with . . . any person because that person is or has been . . . obtaining or providing reproductive health services." 18 U.S.C. § 248(a)(1).

[10]That *Hanna* and *Romo* do not deal with *Black*'s subjective intent requirement does not discount the persuasiveness of the objective intent analysis in those cases. *Black* clarified that the subjective test governs whether a statement constitutes a "true threat"; it did not disturb how we

Most telling were the contemporaneous reactions of the recipients of Mr. Bagdasarian's posted threats.[11] At least four individuals indicated that they perceived "shoot the nig" as a threat to candidate Obama, and the threat was in fact reported to the United States Secret Service, which then launched into action to prevent the threat from materializing. There can be no doubt that "construing the evidence in the light most favorable to the prosecution," *Nevils*, 598 F.3d at 1166 (citing *Jackson*, 443 U.S. at 319), there was sufficient evidence for "a rational juror" to find objective intent. *Id*.

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have applied the objective test. Thus, the holdings of *Hanna* and *Romo*, analyzing the threats under the objective standard and concluding it was satisfied where the speakers "stated or at least suggested that the President should be killed," remain controlling authority as to the objective standard. *Hanna*, 293 F.3d at 1088. We reversed the conviction in *Hanna* only because of certain improperly admitted evidence which may have tainted the jury's deliberations. Therefore, this reversal does not detract from *Hanna*'s holding that the suggested threat to the President met the objective standard. Nor does the fact that *Romo* declined to address whether Romo's speech constituted a "true threat" bear any relevance to this discussion. As the majority itself reiterates, when First Amendment issues are raised, the *subjective intent* standard must be applied to determine whether the speech is a "true threat" that may be constitutionally criminalized. *Romo*'s *objective test* analysis is pertinent here, and it remains good law. *See Romo*, 413 F.3d at 1051-52.

[11]The majority is correct that none of the other message board participants used the word "threat" in reaction to Bagdasarian's postings, but that they perceived a threat to candidate Obama is made obvious by their postings that the threats had been "reported" and their references to "Federal Law Enforcement" and the "Secret Service." The majority then erroneously relies on its own speculation to conjure up other possible reasons for the readers' reactions. Even if the comments did support the inferences suggested by the majority, however, the trial court made a finding that the readers' comments confirmed that Bagdasarian's postings were objectively perceived as threats, and we "must defer to that resolution." *See United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) ("[W]hen 'faced with a record of historical facts that supports conflicting inferences' a reviewing court 'must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.' " (quoting *Jackson*, 443 U.S. at 326)).

III.

Although it is a closer question, as questions of subjective intent generally are, after independently reviewing the record, I believe the district court did not err in finding that Mr. Bagdasarian subjectively intended to threaten presidential candidate Obama. To prove subjective intent, the government must show that "the speaker means to communicate a serious expression of an intent to commit an unlawful act of violence." *Black*, 538 U.S. at 359. The government need not prove that Mr. Bagdasarian "himself will kill" candidate Obama, but need demonstrate only the intent to threaten. "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects individuals from the fear of violence,' . . . in addition to protecting people 'from the possibility that the threatened violence will occur.' " *Id*. at 360 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

In a night of posting on the AIG board, Mr. Bagdasarian made numerous explosive comments aimed at candidate Obama. Although only two of his posts were charged as threats, they, together with his other posts, indicate that he intended to threaten. Others on the message board posted comments that could be described as political rhetoric, but it was Mr. Bagdasarian alone who introduced the posts tinged with violence and racism toward Obama and it was Mr. Bagdasarian alone who took the affirmative step of introducing the ominous thread headed "shoot the nig," against which the other board participants reacted so strongly. And at the very time that Mr. Bagdasarian posted "fk the niggar, he will have a 50 cal in the head soon," he possessed in his home a Remington model 700 ML .50 caliber muzzle-loading rifle and .50 caliber ammunition with which to load it. *See United States v. Sutcliffe*, 505 F.3d 944, 959 (9th Cir. 2007) (concluding that possession of a weapon is evidence of subjective intent to threaten where the threat involves the infliction of harm).

As the district court found, Mr. Bagdasarian's posts were not casual one-off comments. When other participants confronted him with the gravity of starting a thread labeled "shoot the nig" by indicating they were reporting him and that law enforcement was monitoring him, he evidenced his own belief that his posts were threatening. First, he wanted to know "which [law enforcement] agency" was monitoring the message board. Then he began to make excuses for his threatening comments, posting: "Listen up, crybaby ole white boy, I was drunk."

Mr. Bagdasarian had imbibed some alcohol that night, but it did not prevent him from tracking the conversations occurring on multiple threads and posting responses over a seven-hour period. Moreover, his postings that night were specific, relevant to the context of each thread and even included wordplay. If anything, his intake of "vino," as he described it, may have lowered his inhibitions sufficiently that he was in fact posting his genuinely held views about Obama, including a true expression of his intent to threaten the candidate with harm. As the district court found, that Mr. Bagdasarian was drinking does not make his statements any less threatening than they were at the time he made them, and his 8:00 a.m. posting that he was drunk when he started the "shoot the nig" thread at 1:35 a.m. that morning only indicates that he woke up to realize the serious nature of his threats.

And Mr. Bagdasarian's continuing threats of harm to President-elect Obama two weeks later, when he was presumably sober, further evidence his intent to threaten. He sent two emails on Election Day headed: "And so it begins." The first, which provided a link to the "www.barrettrifles.com" website depicting a Barrett model 82a1 rifle, stated: "Josh needs to get us one of these, just shoot the nigga's car and POOF!" The second provided a link to a YouTube video showing a car being blown up. That email stated: "Pistol . . . plink plink plink Now when you use a 50 cal on a nigga car you get this."

The evidence demonstrates that Mr. Bagdasarian, an adult man who knowingly possessed a .50 caliber rifle, intentionally posted on the "OBAMA" thread: "fk the niggar, he will have a 50 cal in the head soon," understanding he had access to that very weapon and could implement the threat. Only twenty minutes later he initiated the "shoot the nig" thread, under which he wrote "country fkd for another four years+, what nig has done ANYTHING right???? long term???? never in history, except sambos." That Mr. Bagdasarian later made a public apology does not detract from his intent at the time; his intent to threaten harm to candidate Obama generated fear for the candidate's safety and mobilized the Secret Service, which tracked Mr. Bagdasarian down. Mr. Bagdasarian did not come forward; the Secret Service had to locate him. He hid behind his "californiaradial" cloak of anonymity with the hope, one can infer, that he would not be found out. Therefore, independently reviewing the entire record, I conclude that at the time Mr. Bagdasarian made the charged threats, he acted with the specific intent to threaten candidate Obama.

IV.

The prohibition on true threats "protects individuals from the fear of violence and from the disruption that fear engenders." *Black*, 538 U.S. at 360 (citation and internal quotation marks omitted). Undoubtedly, the need for protection takes on exceptional importance in the context of a presidential candidacy. *See Watts*, 394 U.S. at 707 (discussing threats against the president); *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969) ("Thus, it appears that the statute [prohibiting threats against the President] was designed in part to prevent an evil other than assaults upon the President or incitement to assault the President. It is our view that the other evil is the detrimental effect upon Presidential activity and movement that may result simply from a threat upon the President's life."). Not only could the fear engendered by true threats limit a candidate's freedom to participate fully in the debate

leading up to the election — thus depriving the campaign process of its valuable public function, *see Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (per curiam) — but the failure to take such threats seriously could ultimately deprive our country of a public servant and potential leader. Because the evidence presented at trial as to objective intent is more than sufficient to allow at least one rational trier of fact to find that Mr. Bagdasarian's statements were threats in violation of § 879(a)(3), and because an independent review convinces me that the constitutional requirement of subjective intent is met, I would affirm Mr. Bagdasarian's conviction.

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Note

*753 TRUE THREATS--A MORE APPROPRIATE STANDARD FOR ANALYZING FIRST AMENDMENT PROTECTION AND FREE SPEECH WHEN VIOLENCE IS PERPETRATED OVER THE INTERNET

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I. INTRODUCTION

The introduction of the Internet to mainstream society has brought several new and controversial issues to light. [FN1] Those issues include the illegal dissemination of pornography, [FN2] the fraudulent use of personal financial information, [FN3] workplace privacy, [FN4] and even threats of bodily harm or death. [FN5] The Internet provides a place of relative anonymity. For example, it is relatively easy to post altered pictures of celebrities, publish personal information about public figures, or even incite violence on the Internet behind the veil of a false identity. Often, trained professionals cannot trace the origin of an e-mail message or a web site. These and several other characteristics make the Internet a unique form of communication.

Over the past several decades, speech broadcast over the traditional news media outlets--television, newspaper, and radio--has been regulated by several well-established, but often debated, doctrines. [FN6] However, the Internet presents new and unique questions with regard to the regulation of *754 speech, and the standard used to determine whether threatening or "hate" speech broadcast over the Internet should receive First Amendment protection needs to be reevaluated.

This note will address the Internet as a new media "frontier" and the ways that First Amendment interpretation may necessarily need to be modified in order to accommodate this new broadcast medium. More specifically, this note will address threats of violence made over the Internet, to what degree those threats should be protected by the First Amendment, and what standard of review should be used to evaluate them. By looking at the history of both the First Amendment and the Internet, this note will assess the similarities and differences between the Internet and traditional means of mass media and propose a standard for measuring incitement with regard to the Internet.

Section II of this note will examine the history of the First Amendment, three standards for analyzing speech, and the current standard used to determine whether speech should receive constitutional protection under the First Amendment. Section III will give a brief overview of the Internet and its implications on the First Amendment. Section IV will discuss the need for a reformulated test, and Section V will look at two of the most prominent Internet speech cases to date and how they would have been decided under that test.

II. FIRST AMENDMENT HISTORY AND THE INCITEMENT DOCTRINE

The First Amendment states in part, "Congress shall make no law abridging the freedom of speech or of the press." [FN7] The government can, in certain circumstances, regulate individuals' ability to express their ideas

through verbal expression, actions, or association with others. [FN8] However, the First Amendment does not protect incitement to riot and other types of speech that might be dangerous or pose a threat to national security. [FN9] When analyzing speech that contains a violent tone, the Supreme Court has ***755** established two primary categories of unprotected speech: speech that incites [FN10] and speech that poses a "true threat." [FN11]

The following is a review of a series of First Amendment cases that demonstrate the incitement doctrine. [FN12] They evolved from the British common law's bad tendency test into the clear and present danger test, and finally into the "incitement to imminent lawless action" test. [FN13] The bad tendency test permitted the government to prohibit speech before it could create a real danger; the mere tendency to create evil justified suppressing the speech. [FN14] The clear and present danger test required a showing that the danger of speech or writing was clear and could cause damage in the relatively near future. [FN15] The incitement to imminent lawless action test requires a showing that the speech can and has incited lawless action. [FN16]

A. The Bad Tendency Test

State and federal courts in the United States used a bad tendency test to evaluate speech until the 1930s. [FN17] The government could ban any material if "the tendency of the matter charged as obscenity [was] to deprave and corrupt those whose minds [were] open to such immoral influences and into whose hands a publication of this sort [could] fall." [FN18]

Two cases, Gitlow v. New York [FN19] and Whitney v. California, [FN20] confirmed the bad tendency test's validity in the United States. [FN21] Under the ***756** bad tendency test, the First Amendment did not protect disturbing the public peace, attempting to subvert the government, inciting crime, or corrupting morals. [FN22] The danger was no less real and substantial because the effect of a given utterance could not be seen. [FN23] Just as with the offense of conspiracy, the government did not need to wait until the spark kindled the flame. [FN24] It could act toward any threat to public order, even those that were remote. [FN25]

The bad tendency test made membership in any subversive organization punishable in itself. [FN26] Tougher laws followed, such as the Smith Act, [FN27] which made it unlawful to even joke about overthrowing the United States government. [FN28] Some literature was banned, such as the Communist Manifesto, which simply said, "Workers of the world unite." [FN29] Whitney and Gitlow confirmed what we still use today as the basis for an analysis under the bad tendency test. [FN30]

In Gitlow, a case decided two years before Whitney, Gitlow was arrested for publishing the Left Wing Manifesto, a pamphlet proclaiming the inevitability of a proletarian revolution. [FN31] Gitlow was convicted in state court because the publication violated New York's Criminal Anarchy Act of 1902. [FN32] On appeal to the United States Supreme Court, Justice Sanford stated that freedom of speech and of the press were among the fundamental personal rights and liberties protected from impairment by the states under ***757** the Due Process Clause of the Fourteenth Amendment. [FN33] Thus, the right to free speech was incorporated via the Fourteenth Amendment's Due Process Clause to the states. [FN34] Despite this, the Court upheld Gitlow's conviction, reasoning that the New York law did not in fact violate the First Amendment. [FN35]

In Gitlow, the Court relied on the bad tendency test to interpret the scope of First Amendment protections. [FN36] This test, based on the common law presumption of the constitutionality of legislative restrictions on speech, allowed the government to restrict communication that had a natural tendency to produce "substantive evils." [FN37] Under this test, the Court would uphold legislative restrictions on free speech so long as they were reasonable and proscribed expressions that Congress or state legislatures believed could have harmful effects or cause substantive evils. [FN38] Even before Whitney, Gitlow, and the bad tendency test, the Court established another category of speech for those instances when words presented a clear and present danger that actual violence would ensue. [FN39]

B. The Clear and Present Danger Test

In Schenck v. United States, [FN40] Justice Holmes set forth a clear and present danger test to judge whether speech should be protected by the First Amendment. [FN41] "The question," he wrote, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress ***758** has a right to prevent. It is a question of proximity and degree." [FN42] The Supreme Court affirmed the convictions of the defendants for conspiring to violate certain federal statutes by attempting to incite subordination in the armed forces and interfering with recruiting and enlistment. [FN43]

However, in 1969, the Supreme Court narrowed the circumstances under which a defendant could be held liable for his words or actions. [FN44] Defining the current standard for hate speech and the standard upon which this note is based, the Brandenburg v. Ohio [FN45] Court held that it was no longer enough to simply associate with members of any subversive organization, as was held in Whitney. [FN46]

C. The Imminent Lawless Action Test

Brandenburg established the modern test for determining whether speech falls into the incitement category. [FN47] In Brandenburg, the Supreme Court established the modern version of the clear and present danger doctrine, holding that states could only restrict speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [FN48]

The Brandenburg Court overturned the punishment of a Ku Klux Klan leader, holding that the statute under which he was convicted did not draw a sufficient line between incitement, which is not protected by the First Amendment, and advocacy, which is protected. [FN49] The Ku Klux Klan leader challenged his conviction for making the statement, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there ***759** might have to be some revengeance taken." [FN50] The Brandenburg Court reformulated the clear and present danger test into its present form. [FN51] The Court held:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. [FN52]

Thus, the Brandenburg Court held that the First Amendment allows the government to prohibit advocacy of illegal conduct if (1) it is directed to inciting others to imminently engage in illegal conduct, and (2) it is imminently likely to bring about such conduct. [FN53] The "directed to" language imports an intent requirement; the speaker must intend to bring about the unlawful conduct. [FN54] Therefore, to satisfy the imminence requirement, harm must be likely to result immediately after the incitement. [FN55]

Brandenburg's imminence requirement raises several issues. First, its limitation on the government's power to suppress speech is based on the marketplace of ideas principle that counter-speech is preferable to censorship. [FN56] If speech is not likely to immediately result in unlawful conduct or if the listener is given time to rebut the speech, then there is no basis for restricting the speaker's freedom to voice his views. [FN57]

***760** Second, the imminence requirement is a response to suspicion that the government may seek to suppress speech for improper reasons. [FN58] It is an attempt to ensure that the danger is not presumptive and that the government's interest in preventing the violence is not based on false pretenses. [FN59]

The modern test for incitement is very protective of political speech. [FN60] The speaker must incite lawless action, the danger of such action must be imminent, the action must be likely to occur, and the speaker must have

intended the action to occur to meet the incitement threshold. [FN61] Thus, there is both a subjective requirement, the speaker must intend to incite violence, and an objective requirement, the violence must be likely to occur from the point of view of someone other than the speaker. [FN62] Further illuminating its test, the Court quoted from a previous decision, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." [FN63] In analyzing speech and determining whether it falls under the Brandenburg definition of incitement, courts look at two factors: whether the speech prepares and whether it steels its audience to commit imminent lawless action. [FN64] As the Court noted, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." [FN65]

D. Summary of the Modern First Amendment Incitement Analysis

Early in the twentieth century, the Court deferred almost completely to government assessments of the dangers inherent in antisocial or politically ***761** radical speech. [FN66] By the 1970s, the Court was rigorously enforcing a constitutional standard that made it virtually impossible for the government to win a case against a speaker making political pronouncements absent some evidence that the speaker had participated directly in the planning or implementation of some specific criminal activity. [FN67] This progression has coincided with the advent of the Internet and the introduction of hate speech being broadcast over this fairly new medium.

Thirty-three years after Brandenburg, the test it established is still being used to analyze First Amendment issues involving the regulation of hate speech. [FN68] The test has been applied to various forms of speech, including cases dealing with Internet hate speech. [FN69]

III. THE INTERNET

For purposes of this note, it is necessary to distinguish between traditional media--television, newspapers and radio--and the Internet. The way information is sent and received via traditional methods is very different from the way information is read or transmitted over the Internet. Unlike newsprint, radio, or television, information read on the Internet is generally driven by the user. [FN70] For the most part, web surfers have control over what they read. Users may search for information by using key words or phrases, or they may enter a specific web address in order to access a particular site. [FN71] Due to the differences in the way messages are sent and received over the Internet, there is a need for a different standard of First Amendment analysis that is better suited to its uniqueness. [FN72]

***762** A. Reno v. American Civil Liberties Union: The Internet Is Mainstream

Despite the vast differences that the Internet has introduced into society, the Supreme Court has held that speech broadcast over it falls within traditional, mainstream First Amendment analysis. [FN73] In Reno v. American Civil Liberties Union, [FN74] the Supreme Court considered whether the Internet should be regulated in the same manner as traditional media. [FN75] The Court held that none of the "special justifications" that support increased governmental regulation of broadcast media are present in cyberspace. [FN76] The Reno Court observed that while each type of media may present its own problems, some of those factors are not present in cyberspace. [FN77] For instance, the Court noted, "Neither before nor after the enactment of the [Communications Decency Act] have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry." [FN78] The Court further stated that "the Internet is not as 'invasive' as radio or television." [FN79]

Instead, the Supreme Court compared speech broadcast over the Internet to speech broadcast by historical speakers such as the town crier and the pamphleteer. [FN80] The Court noted that "[t]hrough the use of chat rooms,

any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox;" and web pages on the Internet allow "the same individual [to] . . . become a pamphleteer." [FN81] ***763** This comparison did not address the differences between the traditional forms of media, or as in the Court's analogy, a pamphleteer, and a web page broadcast over the Internet. [FN82]

B. The Internet's Distinguishing Features and Why It Lacks the Ability to Provoke "Imminent Lawless Action"

There are many features that distinguish the Internet from traditional forms of media. First, the Internet provides very few barriers to entry for both speakers and listeners. For example, it is easier for a layperson to broadcast a message over the Internet than it would be for that person to broadcast the same message over the radio or television. Even though readership and viewership for the traditional forms of media may well be higher than that of the Internet, what makes the Internet so different is the ability of a common person to broadcast a message through that medium as opposed to a television broadcast. [FN83] For instance, according to the United States Census Bureau, more than half of the households in the United States had one or more computers in 2000, and more than eighty percent of those households had at least one member using the Internet. [FN84] Although more people may have televisions in their homes, not all of those people have the ability to instantaneously broadcast a message over it.

Second, someone with virtually no training or experience with the Internet can post a message on a message board or in a chat room, and someone with only a basic level of programming knowledge can create a web site and broadcast information to millions of readers almost instantaneously. [FN85] Thousands of manuals are available, which explain in lay terms how to create web sites or message boards, and classes on how to create these sites are now common even in high school curriculum. [FN86]

Third, personal information, threatening speech, or a "call to action" can be drafted and disseminated within seconds over the Internet. [FN87] With traditional print media, the time it takes to circulate the intended ***764** information is considerably longer. [FN88] Once a message is posted on the Internet however, the sender must wait for a reader to find the information. [FN89] As this note will address, one of the problems with regulating hate speech over the Internet is that after senders have broadcast messages over the Internet, they never know for certain who or how many readers actually receive it. [FN90]

Additionally, traditional means of mass communication are regulated by federal agencies such as the Federal Communications Commission. [FN91] Currently, there is very little formal government regulation with regard to the Internet. [FN92] The primary means of regulation comes from Internet Service Providers, or ISPs, which are the hosts of web pages, chat rooms, and various web sites. [FN93] ISPs may, at their discretion, edit or censor the information being broadcast from their servers. [FN94]

Finally, the Internet is not hosted, nor is there an editor or broadcaster to filter the transmitted information. [FN95] Due to the vastness of the Internet and the millions of messages being transmitted at any given time, there simply is not a feasible way to monitor each and every message broadcast over it. [FN96] Inevitably, there will be people who elect to exploit the limitless opportunities presented by the Internet, and the issues related to the regulation of hate speech and violent messages posted on the Internet have not been sufficiently addressed. [FN97]

***765** IV. WHY A REFORMULATED TEST IS NEEDED TO EVALUATE INTERNET SPEECH

Given the unique nature of the Internet and the importance of protecting First Amendment free speech rights in cyberspace, an alternative test is needed to better balance free speech concerns with the prohibition of threats and the protection of potential victims. Because Internet speech is broadcast in a manner that is different than traditional media outlets, an analysis of speech made over it should be formulated to accommodate its uniqueness. [FN98]

A. Why Brandenburg Is an Inappropriate Test to Evaluate Internet Speech

Brandenburg, which gave us the current standard by which to gauge threatening speech, was decided in 1969 with regard to a statement spoken at a Ku Klux Klan rally. [FN99] This was long before the Internet was a mainstream means of communication. [FN100] A modern test should reflect the nuances of the Internet and address the fact that speech over the Internet is unlike words spoken at a public rally, broadcast on the evening news, or printed in a newspaper. For example, the audience that the Internet can potentially reach is far wider than the audience one can gather at a public rally, yet on the other hand, a message may go virtually unheard. [FN101] In order to preserve the fundamental protections of the First Amendment, the test should make a fair inquiry as to the intentions of the speaker as well as the reaction of the intended target of the speech.

The incitement doctrine and an analysis under Brandenburg may be better suited for traditional media such as a newspaper, pamphlet, or public address. It is easier to tell how listeners under those conditions are reacting to what the speaker is proposing. [FN102] The Internet creates a different scenario because reactions to a speaker's proposal are not easily gauged. [FN103]

An analysis under the true threats doctrine better fits the circumstances created by the Internet and is more suitable than the Brandenburg test ***766** because it is unlikely that speech broadcast within such a vast expanse of information could ever incite imminent lawless action. [FN104] The Brandenburg test is by far the most speech-protective standard employed by the Court to take advocacy of unlawful conduct out of the reach of governmental regulation. [FN105] Because the Brandenburg test favors protecting extremist speech over governmental regulation, perhaps it is "too blunt an instrument" to address the perpetration of violence that is so prevalent on the Internet. [FN106]

B. The True Threats Doctrine

Another type of speech that is not protected by the First Amendment is known as "true threats." [FN107] Various federal and state statutes make threatening statements a basis for civil liability or criminal prosecution. [FN108] The most general federal statute dealing with threats makes it a crime, punishable by fine or imprisonment, to transmit in commerce "any communication containing . . . any threat to injure the person of another." [FN109] Other federal statutes are more specific. For example, some prohibit threats of force or violence against the President or Vice President, [FN110] federal judges and other federal officials, [FN111] IRS employees, [FN112] providers of abortion services, [FN113] and jurors. [FN114]

1. The Modern True Threats Analysis--Watts v. United States

The modern First Amendment true threats analysis comes from Watts v. United States. [FN115] The defendant in Watts was convicted under a federal ***767** statute that prohibited making threatening statements aimed at the President. [FN116] The defendant was convicted based on the following statement:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers. [FN117] The defendant was speaking at a rally being held near the Washington Monument during the Vietnam War. [FN118] The Supreme Court reversed the court of appeal's decision and held that the defendant's speech did not support his conviction. [FN119]

The Watts Court made a distinction between threats and protected speech, holding that the defendant's statement was mere "political hyperbole," not a viable threat against the President. [FN120] There seems to be a consensus among the circuits that threats are punishable as true threats only when they are "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." [FN121] Thus, the courts have generally been very protective of threatening speech and have only allowed

such speech to be punished when it has reached a level of extreme dangerousness. [FN122]

***768** The Supreme Court's opinion in Watts offers little guidance on how to make such a determination in future cases. [FN123] It stated only that the constitutional free speech principle requires interpretation of the term "threat" in the anti-threat statute as being limited to threats that are "true," and the defendant's speech was political hyperbole that did not meet this threshold. [FN124] The Court in Watts offered no further criteria by which to determine whether a threat is true, and thus unprotected, nor has it since. [FN125] Even though specific criteria was not outlined by the Court for determining whether a statement is a "true threat" under the First Amendment, various courts of appeal have formulated a test. [FN126] The tests, with one exception, are similar. [FN127]

2. Variations of the True Threats Test Within the Circuits

Circuit variations with regard to the true threats test generally turn on a subjective or objective analysis of the speaker's intention and the listener's perception of the threat. [FN128] The first element is "intentional speech." [FN129] The speaker must have made the statement intentionally, but specific intent is not required. [FN130] More precisely, although the speaker must have intended to make the threatening statement, he or she did not actually need to intend to ***769** carry out the threatened action, [FN131] or even have the capability to carry it out. [FN132]

Second, the statement must convey an outward intention to inflict violence on another person. [FN133] The statement can be tested by asking "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." [FN134] For example, most case law suggests that the statement must express the speaker's own intention and not that of a third party. [FN135]

Third, the statement must be made in such a way that the speaker would reasonably foresee that the target of the words would interpret them as a serious expression of an intention to inflict harm. [FN136] The third element is necessary in order to distinguish threatening statements that cause substantial harm, statements that a reasonable listener would take seriously and that are likely to reasonably instill fear in the target of the threat, from those that should be understood as "hyperbole." [FN137] Some courts phrase this element of the test differently, shifting the inquiry to whether a reasonable recipient of the speech would interpret it as a threat, rather than whether a reasonable person (such as the speaker) would foresee that the recipient would interpret the speech as a threat. [FN138] Despite the difference in focus, each of these formulations states an objective standard, how a reasonable ***770** person would interpret the speech, rather than a subjective one, how a particular person actually interpreted it. [FN139]

Finally, the context in which the statement was made must be taken into consideration. [FN140] What one person perceives as a threat, another may perceive as harmless. [FN141] A determination should also be based on "the identities of the speakers and listeners, the current and historical relationship between the parties, the place in which the communication is made, and the method or mode of communication," as well as the social, political, and cultural contexts. [FN142] Also relevant is the subjective factor of whether those who hear the speech actually interpret it as a serious threat. [FN143] Therefore, the subjective reactions of listeners may be a factor in establishing whether the speech was objectively a serious threat. [FN144]

The two cases that follow provide a framework for applying the true threats doctrine when analyzing threatening speech and its protection under the First Amendment. [FN145] Although the outcomes are different, an analysis follows, explaining how the true threats test proposed in this note would allow for a more appropriate result.

***771** V. FREE SPEECH AND THE INTERNET--TWO CASES THAT ILLUSTRATE HOW VIOLENT SPEECH BROADCAST OVER THE INTERNET CAN BE ANALYZED UNDER THE TRUE THREATS DOCTRINE

The Supreme Court's current standard is that speech is protected unless it is directed toward a specific group of

people and likely to produce "imminent lawless action." [FN146] However, following the Brandenburg test to analyze speech made over the Internet fails to address the Internet's unique aspects. [FN147] Two recent cases, United States v. Alkhabaz [FN148] and Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists [FN149] demonstrate the ease by which the Internet is being used as a medium for the transmission of threats. [FN150] Alkhabaz involved the transmission of threats via e-mail messages, [FN151] and Planned Parenthood involved an anti-abortion web site that contained pro-life messages. [FN152] In both cases, variations of the true threats standard were applied, and although the courts reached different conclusions, the cases illustrate how a true threats approach can be applied to situations that present First Amendment Internet concerns. [FN153]

In Planned Parenthood, the Ninth Circuit and the Oregon district court used a true threats analysis to evaluate speech broadcast over the Internet. [FN154] However, the court limited its view to whether the material contained on the Nuremberg Files web site could be construed as a "true threat" by a reasonable person. [FN155]

***772** A. Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists

The leading and most discussed case to date regarding issues of free speech and the Internet is Planned Parenthood. [FN156] The suit, which involved the Nuremberg Files web site, was filed in the United States District Court in Portland, Oregon. [FN157] The complaint alleged that an anti-abortion group, through wanted-style posters and the Nuremberg Files web site, [FN158] was targeting abortion providers in a life-threatening manner. [FN159] The jury had to decide whether the defendants had illegally used the threat of force against abortion providers. [FN160] The case came amidst rising concerns generated by attacks on abortion clinics and doctors who performed abortions, including the murder of Dr. Barnett Slepian in New York on October 23, 1998. [FN161] Slepian was killed by a sniper attack as he was having a conversation with his wife and children in his New York home. [FN162]

On February 25, 1999, a federal judge in Portland, Oregon, banned the anti-abortion activists from publishing the wanted posters and personal information on the Internet. [FN163] In his order, United States District Judge Robert E. Jones wrote, "I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech." [FN164] Judge Jones called the web site "a blatant and illegal communication of true threats to kill." [FN165]

The web site provided a list of abortion providers, which incited violence against doctors and violated a federal law passed to protect abortion providers. [FN166] The initial case marked the first time the Freedom of ***773** Access to Clinic Entrances Act (FACE), [FN167] a 1994 federal law created to protect abortion providers, was invoked without evidence of direct confrontations or threats. [FN168] FACE lists as a prohibited activity: whoever "by force or threat of force . . . intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with" anyone seeking or providing an abortion. [FN169]

The Nuremberg Files web site contained the names of clinic owners and workers, judges, and politicians who had supported the right to an abortion. [FN170] The site sought any information regarding "abortionist[s], their car[s], their house[s], friends." [FN171] From 1993 to 1998, fringe members of the pro-life movement had murdered or attempted to murder dozens of abortion workers who appeared in the wanted posters, which were created by the same individuals responsible for the Nuremberg Files web site. [FN172]

When this case first came to trial, several doctors whose names were on the web site testified that they had resorted to wearing bulletproof vests and elaborate disguises to protect themselves from attack. [FN173] The doctors further testified to living in constant fear for their lives and the safety of their families. [FN174] The ruling in favor of the clinic workers was upheld after the pro-life activists appealed the initial decision, and a permanent injunction was issued to prevent the hit-list effect of the site. [FN175]

In a unanimous decision on appeal, a three-judge panel of the United States Court of Appeals for the Ninth Cir-

cuit held that the site could not be banned or sued for damages. [FN176] The Ninth Circuit ruled that the First Amendment protected the content contained on the Nuremberg Files web site because even though it was contentious and could be intimidating, it presented no explicit or imminent threat of violence against the doctors. [FN177] ***774** The Ninth Circuit decision overturned the $107 million settlement that abortion providers had won from a jury in Portland, Oregon, after they sued the web site's creators. [FN178]

The circuit court's decision repeatedly cited NAACP v. Claiborne Hardware Co., [FN179] a 1982 Supreme Court case that involved a group of white-owned businesses in Mississippi being boycotted by civil rights groups, which accused them of racist practices. [FN180] In Claiborne, civil rights activists took note of African-Americans who shopped in the stores and then later publicized their names. [FN181] Some of the people on the list were threatened or harmed. [FN182] A boycott leader also vowed that if any of them returned to the stores, they would have their necks broken. [FN183] The Supreme Court ruled that the threat was protected under the First Amendment, even though it contributed to an atmosphere of intimidation, because it was a form of political speech pronounced at a public rally and no direct acts of violence had been targeted at any individual. [FN184] "The two cases [Claiborne and Planned Parenthood] have one key thing in common," the Planned Parenthood court concluded, "political activists used words in an effort to bend opponents to their will." [FN185]

1. The Importance of Examining the Context in Which the Threat Was Made

In Planned Parenthood, an ordinary person might not have found the material contained on the web site to be threatening. However, in the context of the overwhelming amount of clinic violence that was taking place around the United States and the number of bombings and attempted murders of abortion doctors, the threats made on the web site could have been particularly threatening and should have been analyzed with a keen eye on the circumstances under which they were made. [FN186]

The use of the true threats test proposed in this note would prohibit the type of speech contained on the Nuremberg Files web site because the doctors gave lengthy testimony regarding their extreme fear. [FN187] Based on ***775** the testimony by the doctors and the actions they took to avoid being targeted by a few members of the pro-life movement, their testimony could have supported a finding that a reasonable listener would have experienced the same fear. [FN188]

It has been established that the medical professionals listed on the web site felt threatened and that they also felt harm was imminent. [FN189] There was evidence to support these fears, such as the testimony that several of the doctors started wearing bulletproof vests after being made aware that their names appeared on the site. [FN190] Some of the medical professionals who testified in Planned Parenthood also described how they donned elaborate disguises and refused to travel in the same vehicle as other family members. [FN191] Under the standard proposed in this note, it would be easier for a jury to conclude that, although the web site content did not provoke imminent lawlessness, it did create significant fear in the minds of the doctors it targeted.

The proposed true threats standard, which evaluates the context in which the speech was made, would likely have resulted in a ruling for the plaintiffs in Planned Parenthood. [FN192] Under the objective prong of the proposed test, a reasonable person hearing, or in this case reading, the defendants' expression would likely perceive it as threatening to the individuals listed on both the posters and the web site, especially in light of the relevant factual context. [FN193] The plaintiffs had introduced into evidence various occasions where doctors had been listed on similar posters and soon after had been shot and either killed or wounded. [FN194] Additionally, the language on the web site itself was threatening as it likened the plaintiffs to war criminals and stated that readers "might want to share your point of view with this doctor," thus implying that the reader use violence against the listed doctors. [FN195]

Under the subjective prong of the proposed test, a jury would likely conclude that the defendants intended their

posters and the web site to threaten the plaintiffs, even if they did not intend their expression to result ***776** in injury to the plaintiffs. [FN196] That the defendants intended at the very least to frighten the plaintiffs out of practice could be implied from the relevant context. [FN197]

Not only were the defendant organizations known for their advocacy of violence to achieve their ends, but the individual defendants had actively advocated the use of violence to put an end to abortion. [FN198] Additionally, the defendants knew from past experience that using expressions such as the posters and the web site listing doctors' addresses and phone numbers had, in some cases, resulted in the murders of several abortion doctors. [FN199]

Broadcasting such information over the Internet leads to fear in the minds of the doctors and therefore satisfies the true threats test. [FN200] This is why, under a true threats approach, the defendants in Planned Parenthood should have been accountable for their actions. [FN201] In fact, such a decision was reached in May 2002 when Planned Parenthood was reheard en banc by the Ninth Circuit. [FN202]

2. Planned Parenthood Revisited En Banc

Upon rehearing the case en banc, the Ninth Circuit found that the material contained in the Deadly Dozen [FN203] wanted-style posters and the ***777** listing of specific personal information about the plaintiffs on the Nuremberg Files web site did, indeed, constitute a "true threat." [FN204] This ruling reevaluated the issuance of the permanent injunction in Planned Parenthood II. [FN205] In Planned Parenthood II, District Judge Robert E. Jones ordered that the defendants not threaten [FN206] the plaintiffs, publish, reproduce or distribute the Deadly Dozen poster, or provide material via the Nuremberg Files web site, [FN207] with the intent to threaten any of the plaintiffs, their employees, family members, patients or their attorneys. [FN208] Upon rehearing the case, the Ninth Circuit affirmed the injunction granted in Planned Parenthood II in all respects, but remanded the case to reevaluate the punitive damages award. [FN209]

It is important to note that Planned Parenthood was brought under FACE, which applies to abortion clinics and is aimed at protecting abortion providers while ensuring safe access to reproductive health services. [FN210] FACE, by its own terms, "requires that 'threat of force' be defined and applied consistent with the First Amendment." [FN211] However, since "threat of force" is not defined in the Act, the court was faced with the task of determining the meaning of those words in the context of FACE. [FN212] In an attempt to construe a meaning that comported with the First Amendment, the court used a long-standing definition of threats, honed from several free ***778** speech cases. [FN213] That definition of threats asks "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault." [FN214]

As such, the court held that the Deadly Dozen poster and part of the Nuremberg files web site, specifically, the list of names and addresses of certain doctors, constituted true threats. [FN215] This decision was reached despite the fact that the posters, on their face, did not contain any "explicitly threatening language." [FN216] The court found support for its ruling because of the "reputation" the hit list had of foreshadowing the murders of abortion doctors. [FN217] The court seemingly found merit in the argument that the doctors whose names appeared on the wanted posters felt that their personal safety was in imminent jeopardy. [FN218]

Finally, the Ninth Circuit concluded that there was no error in the district court's decision to adopt the "long-standing law on 'true threats' to define a 'threat' for the purposes of FACE." [FN219] Relying on this long list of prior authority, the court concluded that because of the context surrounding this case, the messages contained in the wanted posters and the personal information about specific doctors appearing on the Nuremberg Files web site went "well beyond" the political message they were purported to be. [FN220]

The court did make the distinction that being on the "hit list," which named specific physicians, could be con-

sidered a threat, but that the Nuremberg Files web site, in the absence of the list, could not be considered a true threat and was therefore mere political speech protected by the First Amendment. [FN221] It is entirely conceivable that the result in Planned Parenthood would have been different were it not brought under FACE. [FN222]

***779** B. United States v. Alkhabaz--The "Jake Baker" Case

In another case dealing with threats made over the Internet, United States v. Alkhabaz, the Sixth Circuit Court of Appeals affirmed the district court's decision not to indict Jake Baker under 18 U.S.C. § 875(c) for transmitting threats to injure or kidnap another through e-mail messages transmitted via the Internet. [FN223] Baker had posted a fictional story on a message board that described the kidnapping, torture, and murder of a woman who bore the same name as one of his classmates. [FN224] This story led to an investigation, in which private e-mail messages between Baker and Arthur Gonda were discovered. [FN225] In their e-mail messages, Baker and Gonda discussed their shared interest in sexual abuse and torture of women and young girls. [FN226] The Government argued that these messages represented an evolution from shared fantasies into a firm plan to kidnap, rape, and murder a female person and, as such, were threats transmitted in interstate commerce and prohibited under 18 U.S.C. § 875(c). [FN227] The case against Baker was ultimately dismissed, but only because the district court applied a speech-protective version of the true threat doctrine that retained the "imminence" and "likelihood" components of the Brandenburg test. [FN228]

The Sixth Circuit held that the e-mail messages did not constitute true threats, and thus, were protected speech. [FN229] However, in reaching this holding, the Sixth Circuit created a novel two-prong test for determining when speech is a threat. [FN230] Under this new test, speech is an unprotected ***780** threat if a reasonable person: "(1) would take the statement as a serious expression of an intention to inflict bodily harm . . . and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation." [FN231] The court emphasized that the second prong of this test does not create a subjective standard, but instead must be "determined objectively, from the perspective of the receiver." [FN232]

In creating this test, the court described threats as tools that people use to achieve some goal through intimidation, whether that goal is extortionate, coercive, political, or something seemingly innocuous that is done as a prank. [FN233] The court stated that the core purpose of a threat is the intent to achieve a goal through intimidation, and it reasoned that because of this, a communication objectively indicating an intent to harm cannot be a threat unless it is also conveyed for the purpose of furthering a goal through intimidation. [FN234] Further, the court noted that Congress's intent was to forbid only those communications in fact constituting a threat. [FN235] Thus, the court noted that to best achieve Congress's intent in passing 18 U.S.C. § 875(c), it was necessary to add a second prong to the threats test, requiring that the expression be perceived as communicated to achieve some goal through intimidation, as this was part of the meaning of a threat. [FN236]

Circuit Judge Krupansky dissented from the majority's opinion. [FN237] Judge Krupansky stated that, in his opinion, the majority altered the plain meaning of 18 U.S.C. § 875(c) and ignored prevailing precedents by "judicially legislating an exogenous element" into the statute. [FN238] Judge Krupansky suggested that a more appropriate test would be whether, in the context of the statement, a reasonable recipient would believe that the speaker was serious about carrying out his alleged threat, regardless of the speaker's actual motive. [FN239] Judge Krupansky stressed that this test was in line with Sixth Circuit precedent, while the majority's novel test was not. [FN240]

If the Sixth Circuit was trying to create a more speech-protective test, then the second prong, that the speech be reasonably perceived as communicated in order to achieve a goal through intimidation, seems an ***781** awkward way of accomplishing this task. [FN241] With this requirement, the Sixth Circuit was essentially looking at the speaker's intent in making the alleged threat, which is a subjective element. [FN242] However, the Sixth Circuit was trying to keep the test objective, and thus, it asked whether a recipient would think that the threatened action reflected the speaker's intention. [FN243]

Alkhabaz presented a scenario somewhat less compelling than Planned Parenthood, as private e-mails between two people are not likely to reach the rest of the public, and are therefore, likely not intended by their authors to threaten a third person. [FN244] Furthermore, the fact that both the district court and the Sixth Circuit Court of Appeals dismissed the indictments against Baker suggested that the courts were not ready to address free speech and First Amendment issues in cyberspace. [FN245] Nevertheless, an appropriate test is needed that will allow the courts to carve out an exception in those cases in which there are actual threats being made. [FN246]

The important distinction between Alkhabaz and Planned Parenthood is that in Alkhabaz, the e-mails were exchanged between private individuals, [FN247] whereas in Planned Parenthood, the threats were made via a web site with a significant readership. [FN248] Had the Alkhabaz court employed the version of the true threats doctrine used by the court in Planned Parenthood, a contrary result might have been reached. [FN249]

C. How a Different Result Might Have Been Reached in Alkhabaz

The Alkhabaz court found that the e-mails exchanged between James Baker and Arthur Gonda did not constitute a true threat because they were privately exchanged between two individuals. [FN250] Despite the fact that the e-mails referred to raping and murdering a woman on the campus where ***782** Baker attended college, the court concluded that the messages did not rise to the level of a true threat because it was unlikely that the information exchanged would ever reach a third party. [FN251]

Even though the court used a true threats test, the version that was used retained the “imminence” and “likelihood” components of Brandenburg. [FN252] Under the Brandenburg standard, the speaker's words must incite imminent lawless action; however, the link between the speaker's words and the listener's actions have the potential to become very attenuated when dealing with speech over the Internet. [FN253] A test that retains the Brandenburg components makes it more difficult for a jury to convict because the connection between words broadcast over the Internet and the reader's reaction is so difficult to gauge. [FN254]

In Judge Krupansky's dissenting opinion, he suggested a more appropriate test for determining whether speech should be considered a true threat, and thus, outside the protection of the First Amendment. [FN255] In addition to looking at the context in which the statement was made, his test would require determining whether a reasonable recipient would believe that the speaker was serious about carrying out his alleged threat, regardless of the speaker's actual motive. [FN256]

Testimony was offered in United States v. Baker [FN257] regarding the woman whose name was mentioned in the e-mails. [FN258] When the e-mails were brought to her attention, she had a traumatic response that resulted in recommended psychological counseling. [FN259] Had the court used a true threats analysis that included how an objective listener would have perceived the threat, as Judge Krupansky suggested, the jury would have had an easier time convicting Baker. [FN260] Under Judge Krupansky's test, the testimony would have assisted the jury in determining that Baker's threats indeed caused a great deal of psychological harm to the target of his speech and would, therefore, not have been protected by the First Amendment. [FN261]

***783** The two components suggested by Judge Krupansky are essential to a true threats test when scrutinizing hate speech broadcast over the Internet. [FN262] Therefore, a suitable test should take into account the context in which the threats were made and should reflect how the intended target responded to the threatening language. [FN263]

VI. CONCLUSION

The Internet is seemingly the most powerful and far-reaching media tool put in place since television was intro-

duced in the 1930s. [FN264] The task of building a foundation of case law to establish what society will allow and what it will find to be an unacceptable breach of the First Amendment right to free speech is essential.

Free speech issues should not be treated the same with regard to the Internet as they are with other print or broadcast media. The differences between the two distinct media categories are too vast to treat them identically, and the standard that has been in place with regard to traditional media under Brandenburg has been in place for over thirty years. [FN265] Although Brandenburg may be suitable for the traditional media outlets, which were well-established when it was decided, Internet speech and many unforeseen changes have made such a standard outdated.

Many web sites have higher readerships than the New York Times. [FN266] Not only is readership high in many cases, but the information is available for viewing and reviewing at the reader's leisure. That is not always the case with newspaper articles, television programs, or public speeches. An Internet threat can be read worldwide, and in some circumstances, it can be reread or reprinted more easily than a newspaper article. For these reasons, the true threats doctrine should be used to protect the safety of people who become targets on the Internet.

To allow violent threats to go unregulated over such a vast means of communication would compromise the integrity of the First Amendment. ***784** The courts need to address this issue and decide what parameters to place on Internet violence and hate speech. By taking a proactive approach and putting a true threats standard in place, both speakers and listeners will know how their actions will be evaluated.

[FN1]. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997). The Internet originally began as a project of the United States military. Id. In the event the United States engaged in a war, the government devised a defense-related information system that would secure and maintain information in one electronic database. Id. at 850. The electronic system used to exchange and store information was originally called ARPANET, and it linked hundreds of computers, which enabled all defense-related entities to communicate with one another, even if some of those networked computers were lost at war. Id.

[FN2]. John R. Levine et al., The Internet for Dummies 53 (4th ed. 1997).

[FN3]. Kevin F. Rothman, Coping With Dangers on the Internet, Staying Safe On-Line 16-17 (2001).

[FN4]. Levine et al., supra note 2, at 42.

[FN5]. CNET News.com Staff, Jodie Foster Threatened in Chat Rooms (Dec. 4, 1995), available at http://news.com.com/2100-1023-278956.html?legacy=cnet [hereinafter CNET News.com].

[FN6]. See Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding the defendant not liable for statements made at a Ku Klux Klan rally and then televised); N.Y. Times v. Sullivan, 376 U.S. 254, 280 (1964) (holding that libelous statements made about a person regarded as a public figure would be actionable if false); Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 584-87 (5th Cir. 1967) (discussing liability for statements made about a prominent attorney and printed in a newspaper); Hartmann v. Winchell, 73 N.E.2d 30, 31 (N.Y. 1947) (holding that the utterance of defamatory remarks, read from a script into a radio microphone and broadcast, constituted libel).

[FN7]. U.S. CONST. amend. I.

[FN8]. See, e.g., Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372-73 (9th Cir. 1996) (holding that the angry statement, “if you don't give me this schedule change, I'm going to shoot you,” made by a high school student to a guidance counselor, could be reasonably considered a serious expression of intent to harm and was not entitled to First Amendment protection).

[FN9]. Brandenburg, 395 U.S. at 447; Gitlow v. New York, 268 U.S. 652, 665-67 (1925); Schenck v. United States, 249 U.S. 47, 49 (1919).

[FN10]. See Brandenburg, 395 U.S. at 447 (noting the original case establishing the incitement doctrine).

[FN11]. Watts v. United States, 394 U.S. 705, 707-08 (1969) (looking at intent to carry out the threat as the standard to determine whether speech will fall outside of First Amendment protection under the true threats doctrine).

[FN12]. Brandenburg, 395 U.S. at 453-54; Gitlow, 268 U.S. at 668; Schenck, 249 U.S. at 51.

[FN13]. Brandenburg, 395 U.S. at 447; Gitlow, 268 U.S. at 668; Schenck, 249 U.S. at 49.

[FN14]. Gitlow, 268 U.S. at 671.

[FN15]. Schenck, 249 U.S. at 52.

[FN16]. Brandenburg, 395 U.S. at 449. Brandenburg, a leader of the Ku Klux Klan, was convicted of advocating criminal activity to bring about political change. Id.at 447-49. He challenged the state law on First and Fourteenth Amendment grounds. Id. at 445. The Supreme Court reversed the conviction because mere advocacy, as distinguished from incitement to imminent lawless action, is not punishable by virtue of the constitutional guarantees of free speech and press. Id. at 445-46.

[FN17]. ACLU Briefing Paper #14 Artistic Freedom, available at http:// www.lectlaw.com/files/con04.htm (last visited Oct. 28, 2002).

[FN18]. Id.

[FN19]. 268 U.S. 652 (1925).

[FN20]. 274 U.S. 357 (1927).

[FN21]. Gitlow, 268 U.S. at 668; Whitney, 274 U.S. at 380. Benjamin Gitlow had been a prominent member of the Socialist party during the 1920s. Gitlow, 268 U.S. at 655. He was arrested and convicted for violating the New York Criminal Anarchy Law of 1902, which made it a crime to attempt to foster the violent overthrow of government. Id. at 625-26. Gitlow's publication and circulation of sixteen thousand copies of the Left Wing Manifesto violated the Criminal Anarchy Act. Id. at 655-56. The pamphlet advocated the creation of a socialist system through the use of massive strikes and “class action... in any form.” Id. at 659.

[FN22]. Gitlow, 268 U.S. at 667-68.

[FN23]. Id.

[FN24]. Id. at 669.

[FN25]. Id.

[FN26]. Whitney, 274 U.S. at 371.

[FN27]. 18 U.S.C. § 2385 (2000) (regulating advocating the overthrow of the government). The Alien and Registration Act of 1940 was proposed by Congressman Howard Smith of Virginia, a poll tax supporter and a leader of the anti-labor bloc in Congress, and is generally referred to as the Smith Act. Michael Stephen Smith, About the Smith Act Trials, Modern Am. Poetry (1998), available at http://www.english.uiuc.edu/maps/poets/g_l/jerome/smithact.htm. Signed into law by President Franklin Roosevelt, it was the first statute since the Alien and Sedition Acts of 1798 to make mere advocacy of ideas a federal crime. Id.

[FN28]. Whitney, 274 U.S. at 370-72.

[FN29]. Id. at 371.

[FN30]. Id. at 371-72; Gitlow v. New York, 268 U.S. 652, 661-62 (1925).

[FN31]. Gitlow, 268 U.S. at 654.

[FN32]. Id. New York law banned advocating, orally or in writing, the overthrow of a government by assassination or other violent means. Id.

[FN33]. Id. at 664.

[FN34]. Id.; U.S. CONST. amend. XIV, § 1.

[FN35]. Gitlow, 268 U.S. at 672. The clear and present danger test of Schenck was only to be applied in those cases where the statute merely prohibited certain acts involving the danger of substantive evil, without any reference to the speech itself. Id. at 671. In Gitlow, by contrast, the legislature had already determined that certain types of language posed a risk that substantive evils would result. Id.

[FN36]. Id. at 670-71.

[FN37]. Id. at 671.

[FN38]. Id. at 670.

[FN39]. Schenck v. United States, 249 U.S. 47, 52 (1919).

[FN40]. 249 U.S. 47 (1919).

[FN41]. Schenck, 249 U.S. at 52. Schenck was the general secretary of the Socialist Party. Id. at 49. He sent out about 15,000 leaflets to men who had been called to military service, urging them to assert their opposition to the Conscription Act. Id. He was indicted on three counts under the Espionage Act of 1917: (1) conspiracy to cause insubordination in the military service of the United States, (2) using the mails for the transmission of matter declared to be illegal to mail under the Espionage Act, and (3) the unlawful use of the mails for the transmission of the same matter as mentioned above. Id. at 48-49.

[FN42]. Id. at 52.

[FN43]. Id. at 52-53. By enacting the 1917 Espionage Act, Congress made it a crime to cause or attempt to cause

insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or to obstruct the recruiting or enlistment service of the United States. Id. at 48-49. The Court unanimously found that the defendants could constitutionally be convicted of conspiracy to violate the statute. Id. at 52. Justice Holmes stated that whether a given utterance was protected by the First Amendment depended on the circumstances. Id.

[FN44]. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[FN45]. 395 U.S. 444 (1969).

[FN46]. Brandenburg, 395 U.S. at 449; Whitney v. California, 274 U.S. 357, 380 (1927).

[FN47]. Brandenburg, 395 U.S. at 447-49.

[FN48]. Id. at 447.

[FN49]. Id. at 449. The Ohio Criminal Syndicalism Act made it unlawful to "'advocat[e]... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and [to] 'voluntarily assembl[e] with any society, group, or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism."' Id. at 444-45 (quoting Ohio Rev. Code Ann. § 2923.13 (1919)).

[FN50]. Id. at 446.

[FN51]. Id. at 447.

[FN52]. Id.

[FN53]. Id.

[FN54]. See Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (noting a subjective test, rather than an objective one); see also Martin H. Redish, Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger, 70 Cal. L. Rev. 1159, 1178 & n.88 (1982).

[FN55]. See Bernard Schwartz, Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?, 1994 Sup. Ct. Rev. 209, 240 (1995) (stating that if the harm may result at some unknown time or date, the imminence requirement will not be met).

[FN56]. See Dennis v. United States, 341 U.S. 494, 503 (1951) (noting that "Speech can rebut speech, propaganda will answer propaganda"); see also Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." Whitney, 274 U.S. at 376.

[FN57]. Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 227-33 (1983).

[FN58]. See id. (citing motivations such as protecting the President from speech that may not otherwise be protected).

[FN59]. Avital T. Zer-Ilan, Note, The First Amendment and Murder Manuals, 106 Yale L. J. 2697, 2700 (1997).

[FN60]. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that if the speaker does not make a call for immediate action, no violation of the First Amendment will be found).

[FN61]. Cass R. Sunstein, Constitutional Caution, 1996 U. Chi. Legal F. 361, 369 (1996).

[FN62]. See Brandenburg, 395 U.S. 444, 447-48 (establishing the requirements for reaching the threshold of speech that incites imminent lawless action).

[FN63]. Id. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

[FN64]. Zer-Ilan, supra note 59, at 2699-700.

[FN65]. Brandenburg, 395 U.S. at 451 (quoting Abrams v. United States, 250 U.S. 616, 628 (1919)).

[FN66]. See generally, e.g., Schenck v. United States, 249 U.S. 47 (1919) (upholding federal Espionage Act convictions of antiwar activists under a clear and present danger standard that allowed juries to infer danger from speech itself); Gitlow v. New York, 268 U.S. 652, 671 (1925) (holding that the clear and present danger analysis of Schenck did not apply when the legislature itself had specifically identified the dangerous speech).

[FN67]. See, e.g., Brandenburg, 395 U.S. at 447 (establishing a three-part test for analyzing whether speech advocating violence falls outside First Amendment protection and, therefore, is subject to regulation); see also NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928-29 (1982) (applying the Brandenburg test to overturn a civil damages award based on statements made by civil rights protestors); Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (applying the Brandenburg test to overturn the conviction of an antiwar protestor for his inflammatory statements about the President).

[FN68]. See, e.g., Million Youth March, Inc. v. Safir, 63 F. Supp. 2d 381, 390 (S.D.N.Y. 1999) (using the Brandenburg incitement test to assess liability for hate speech).

[FN69]. United States v. Baker, 890 F. Supp. 1375, 1382 (E.D. Mich. 1995).

[FN70]. See Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850 (1997). A web “surfer” is used to describe one who uses the Internet to search different web sites. Id. at 852.

[FN71]. Id.

[FN72]. Id. at 846-47.

[FN73]. Id. at 868-69. In Reno, the plaintiffs brought a suit challenging the constitutionality of some of the provisions of the Communications Decency Act (CDA). Id. at 870. The CDA was enacted to protect minors from indecent material on the Internet. Id. at 871.

[FN74]. 521 U.S. 844 (1997).

[FN75]. Reno, 521 U.S. at 868-69.

[FN76]. Id. at 869. The plaintiffs filed a suit challenging the constitutionality of provisions of the CDA seeking to

protect minors from harmful material on the Internet. Id. at 868. The Supreme Court held that the provisions of the CDA prohibiting transmission of obscene or indecent communications by means of telecommunications devices to persons under age eighteen, or sending patently offensive communications through use of interactive computer services to persons under age eighteen, were content-based blanket restrictions on speech. Id. As such, they could not be properly analyzed on a First Amendment challenge as a form of time, place, and manner regulation. Id. The Court also stated the challenged provisions were facially overbroad in violation of the First Amendment. Id. at 875-76. Finally, the Court stated that the constitutionality of the provision prohibiting transmission of obscene or indecent communications by means of telecommunications devices to persons under age eighteen could be saved from the facial overbreadth challenge by severing the term "or indecent" from the statute pursuant to its severability clause. Id. at 883.

[FN77]. Id. at 868.

[FN78]. Id. at 868-69.

[FN79]. Id. at 869.

[FN80]. Id. at 870.

[FN81]. Id.

[FN82]. Id.

[FN83]. Rothman, supra note 3, at 106-07.

[FN84]. U.S. Census Bureau, U.S. Dep't of Commerce, Home Computers and Internet Use in the United States 1-2 (Aug. 2002), available at http:// www.census.gov/population/www/socdemo/computer.html. Since 1984, the country has experienced more than a five-fold increase in the proportion of households with computers. Id. at 2. In 2000, 44 million United States households had at least one member online. Id. The Census Bureau also found that 94 million people used the Internet in 2000, up from 57 million people in 1998. Id.

[FN85]. See Kathleen M. Sullivan, First Amendment Intermediaries in the Age of Cyberspace, 45 UCLA L. Rev. 1653, 1668 (1998).

[FN86]. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 852-53 (1997).

[FN87]. Id. at 852.

[FN88]. Sullivan, supra note 85, at 1667-68.

[FN89]. Reno, 521 U.S. at 851. Hackers have recently accessed and vandalized sites like MSN and various government homepages such as the Pentagon's web site, where readership can be in the millions. Reuters, Pentagon Kids Kicked Off Grid 1 (Nov. 6, 1998), available at http:// www.wired.com/news/politics/0,1283,16098,00.html. In the month of February 2001 alone, online vandals defaced more than a dozen sites run by major companies, including those owned by Intel, Compaq Computer, Hewlett-Packard, Disney's Go.com, and CompUSA. Robert Lemos, Online Vandals Smoke New York Times Site, CNET NEWS, Feb. 16, 2001, available at http://news.cnet.com/news/0-1003-201-4849987-0.html?tag=rltdnws. Readers are then exposed to the unsolicited messages as soon as they access the hacked site. Id.

[FN90]. Reno, 521 U.S. at 851.

[FN91]. Federal Communications Commission, available at http://www.fcc.gov/ (last visited Jan. 27, 2002). The Federal Communications Commission (FCC) is an independent United States government agency, directly responsible to Congress. Id. The FCC was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. Id. The FCC's jurisdiction covers the fifty states, the District of Columbia, and U.S. territories. Id.

[FN92]. Reno, 521 U.S. at 868-69.

[FN93]. Sullivan, supra note 85, at 1670.

[FN94]. Reno, 521 U.S. at 850-51.

[FN95]. Sullivan, supra note 85, at 1671.

[FN96]. Reno, 521 U.S. at 853-55.

[FN97]. See, e.g., CNET News.com, supra note 5.

[FN98]. Reno, 521 U.S. at 850.

[FN99]. Brandenburg v. Ohio, 395 U.S. 444, 445 (1969).

[FN100]. Reno, 521 U.S. at 849-50. The Internet was in the initial stages of development at that time. Id.

[FN101]. Id. at 854.

[FN102]. Hess v. Indiana, 414 U.S. 105, 108-09 (1973). The defendant in Hess shouted, “We'll take the fucking street later,” while facing a crowd at an antiwar demonstration. Id. at 107. The reaction of Hess's listeners would be easier to gauge than the reaction of people viewing a web site from the privacy of their homes.

[FN103]. United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995).

[FN104]. Brandenburg, 395 U.S. at 447; see also Leigh Noffsinger, Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats From Coercive Political Advocacy, 74 Wash. L. Rev 1209, 1236 (1999).

[FN105]. See Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 755 (1975) (noting that Brandenburg is “the most speech-protective standard yet evolved by the Supreme Court”).

[FN106]. David Crump, Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test, 29 Ga. L. Rev. 1, 5 (1994).

[FN107]. See Watts v. United States, 394 U.S. 705, 708 (1969) (holding that debate on public issues should be “uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[FN108]. E.g., 18 U.S.C. § 875(c) (2000).

[FN109]. Id.

[FN110]. Id. § 871(a).

[FN111]. Id. § 115(a)(1)(B).

[FN112]. 26 U.S.C. § 7212(a) (2000).

[FN113]. 18 U.S.C. § 248.

[FN114]. Id. § 1503.

[FN115]. 394 U.S. 705 (1969).

[FN116]. Watts, 394 U.S. at 706; 18 U.S.C. § 871.

[FN117]. Watts, 394 U.S. at 706 (quoting an Army investigator's testimony of the defendant's statements).

[FN118]. Id.

[FN119]. Id. at 708.

[FN120]. Id.

[FN121]. United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976); see also United States v. Baker, 890 F. Supp. 1375, 1382 (E.D. Mich. 1995) (quoting the Kelner definition); United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997). However, the district judge in Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists gave the following instructions to the jury regarding a true threat:

A statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault. This is an objective standard, that of a reasonable person. Defendants' subjective intent or motive is not the standard that you must apply in this case.

See Leigh Noffsinger, Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy, 74 Wash. L. Rev. 1209, 1237 (1999) (quoting Jury Instruction No. 10, Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, Civ. No. 95-1671-JO (D. Or. 1999)).

[FN122]. Kelner, 534 F.2d at 1027.

[FN123]. See generally Watts v. United States, 394 U.S. 705 (1969) (noting that the Court did not offer a specific test by which future cases could be decided).

[FN124]. Id. at 707.

[FN125]. See generally id. In R.A.V. v. City of St. Paul, the Court enumerated "reasons why threats of violence are outside the First Amendment." R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992). These reasons include "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." Id. The Court offered no further elaboration of the test for unprotected threats. Id.

[FN126]. Compare, e.g., United States v. Malik, 16 F.3d 45, 50 (2d Cir. 1994) (determining that a certain threshold of contextual evidence could support a conclusion that ambiguous language constituted an actual threat), and Kelner, 534 F.2d at 1024-25 (holding that determining whether certain speech constituted an actual threat rather than political hyperbole was a question of fact for the jury), with Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (imposing an objective test on the determination of whether the specific words chosen constituted a threat).

[FN127]. Kelner, 534 F.2d at 1027. The Second Circuit applies a more stringent test: "So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied." Id.

[FN128]. See supra note 126 and accompanying text.

[FN129]. See United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991) (noting that "it is the making of the threat that is prohibited without regard to the maker's subjective intention to carry out the threat"); United States v. Hoffman, 806 F.2d 703, 707 (7th Cir. 1986) (holding that "[t]he government is not required to establish that the defendant actually intended to carry out the threat").

[FN130]. Watts v. United States, 394 U.S. 705, 707 (1969). The Court also expressed "grave doubts" that apparent intent alone was sufficient to be intentional speech. Id.

[FN131]. Id.

[FN132]. See Hoffman, 806 F.2d at 708 (stating that "corroborating evidence that the defendant had the ability to carry out the threat is not a requirement to establish a 'true threat"'); United States v. Orozco-Santillan, 903 F.2d 1262, 1265-66 & n.3 (9th Cir. 1990) (noting that the intent requirement does not include whether the speaker "was able to carry out his threat").

[FN133]. Orozco-Santillan, 903 F.2d at 1265; see also Rice v. Paladin Enters., Inc., 128 F.3d 233, 244 (4th Cir. 1997) (referring to blackmail and other forms of "speech brigaded with action").

[FN134]. Orozco-Santillan, 903 F.2d at 1265; United States v. Malik, 16 F.3d 45, 51 (2d Cir. 1994) (stating "[a] threat is a statement expressing an intention to inflict bodily harm to someone"); Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969) (holding that a threat requires "a serious expression of an intention to inflict bodily harm upon or to take the life of [another]").

[FN135]. See United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (citing United States v. Whitfield, 31 F.3d 747, 749 (8th Cir. 1994)); United States v. Kosma, 951 F.2d 549, 554 (3d Cir. 1991) (distinguishing Rankin v. McPherson, 483 U.S. 378 (1987) on the ground that "Kosma's letters implied that Kosma himself would be the person who would kill the President, while McPherson's statement merely expressed a desire that another person kill the President").

[FN136]. See, e.g., United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (holding that the test for a true threat is "whether [the speaker] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made"); Roy, 416 F.2d at 877 (stating "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm").

[FN137]. See Watts v. United States, 394 U.S. 705, 708 (1969).

[FN138]. See, e.g., United States v. Welch, 745 F.2d 614, 618 (10th Cir. 1984). “The question is whether those who hear or read the threat reasonably consider that an actual threat has been made.” United States v. Dysart, 705 F.2d 1247, 1256 (10th Cir. 1983).

[FN139]. See Recent Case, Criminal Law - First Amendment--First Circuit Defines Threat in The Context of Federal Threat Statutes, United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997), 111 Harv. L. Rev. 1110, 1112-13 (1998) (noting that when the test is objective, there is less analysis to be done as compared to the subjective test, in which listeners' feelings must be discovered).

[FN140]. Watts, 394 U.S. at 708 (considering the political context in holding that an offensive statement regarding political opposition to the President was not a true threat).

[FN141]. Id.

[FN142]. John T. Nockleby, Hate Speech in Context: The Case of Verbal Threats, 42 Buff. L. Rev. 653, 659-60 (1994).

[FN143]. See United States v. J.H.H., 22 F.3d 821, 827 (8th Cir. 1994) (citing Watts, 394 U.S. at 708, and noting that “[e]vidence showing the reaction of the victim of a threat is admissible as proof that a threat was made”); United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995) (stating that the actions taken by the judges were compelling).

[FN144]. See, e.g., United States v. Welch, 745 F.2d 614, 618 (10th Cir. 1984).

[FN145]. See Planned Parenthood of the Columbia/Willamette, Inc., v. Am. Coalition of Life Activists (Planned Parenthood I), 23 F. Supp. 2d 1182, 1191 (D. Or. 1998) (deciding a case involving hate speech broadcast over a pro-life web site), injunction granted at Planned Parenthood of the Columbia/Willamette, Inc., v. Am. Coalition of Life Activists (Planned Parenthood II), 41 F. Supp. 2d 1130 (D. Or. 1999), vacated by Planned Parenthood of the Columbia/Willamette, Inc., v. Am. Coalition of Life Activists (Planned Parenthood III), 244 F.3d 1007 (9th Cir. 2001), aff'd in part and vacated in part by Planned Parenthood of the Colombia/Willamette, Inc. v. Am. Coalition of Life Activists (Planned Parenthood IV), 290 F.3d 1058 (9th Cir. 2002); United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (deciding a case where threatening e-mails were exchanged between two private individuals).

[FN146]. See Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (distinguishing imminent lawless action from mere abstract teaching by noting that it “is not the same as preparing a group for violent action and steeling it to such action”).

[FN147]. See generally id. (noting that the case was decided with regard to a public speech, parts of which were later broadcast on television and making no mention of the Internet).

[FN148]. 104 F.3d 1492 (6th Cir. 1997).

[FN149]. 290 F.3d 1058 (9th Cir. 2002).

[FN150]. E.g., Planned Parenthood I, 23 F. Supp. 2d at 1187.

[FN151]. United States v. Baker, 890 F. Supp. 1375, 1378-79 (E.D. Mich. 1995).

[FN152]. Planned Parenthood I, 23 F. Supp. 2d at 1187.

[FN153]. Compare Alkhabaz, 104 F.3d at 1496 (deciding that because the third party and subject of the violent e-mails was not the recipient of them, she could not have feared that the threats were true and imminent), with Planned Parenthood I, 23 F. Supp. 2d at 1194 (deciding that while the intended targets of the web site could have held an objective fear for their safety, the material did not constitute express threats against them).

[FN154]. See Planned Parenthood I, 23 F. Supp. 2d at 1194 (holding that the "true threat" standard governed the plaintiffs' claims regarding the defendant's speech).

[FN155]. Id.

[FN156]. Id. at 1182.

[FN157]. Id.

[FN158]. Id. at 1185-86. The Nuremberg Files web site, which listed the names of abortion doctors, was created by Neal Horsley, a computer consultant from Georgia. Planned Parenthood II, 41 F. Supp. 2d 1130, 1155 (D. Or. 1999). Horsley stated that he was listing the doctors' names only in the hope that they would be prosecuted if abortion was ever outlawed. See Frederick Clarkson, Journalists or Terrorists? (May 31, 2001), available at http://www.execpc.com/~awallace/force.htm.

[FN159]. Planned Parenthood I, 23 F. Supp. 2d at 1183.

[FN160]. Id.

[FN161]. Lisa Bennett-Haigney, Doctor Murdered as Anti-Abortion Violence and Terrorism Continue (1999), available at http://www.now.org/nnt/winter-99/aborvio.html. Dr. Slepian, an Obstetrics and Gynecology physician who provided abortions, was killed when an anti-abortion protestor shot him from the woods behind his house. Id.

[FN162]. Id.

[FN163]. Planned Parenthood II, 41 F. Supp. 2d at 1155-56.

[FN164]. Id. at 1154.

[FN165]. Id.

[FN166]. Rene Sanchez, Antiabortion Web Site Handed a Win, Wash. Post, Mar. 29, 2001, at A1.

[FN167]. 18 U.S.C. § 248 (2000).

[FN168]. See generally Planned Parenthood I, 23 F. Supp. 2d 1182 (D. Or. 1998) (considering FACE when evaluating statements posted on a web site).

[FN169]. 18 U.S.C. § 248(a)(1).

[FN170]. Visualize Abortionists on Trial, The Nuremberg Files, available at http://www.christiangallery.com/atrocity (last visited Feb. 1, 2002) [hereinafter Abortionists on Trial].

[FN171]. Id.

[FN172]. Planned Parenthood I, 23 F. Supp. 2d at 1185-86.

[FN173]. Id.

[FN174]. Id. at 1186. Evidence showed that the Federal Bureau of Investigation (FBI) informed some of the plaintiffs that they were being named and labeled as baby butchers on the Nuremberg Files web site. Id. They were offered twenty-four-hour protection and advised to obtain and wear bulletproof vests. Id.

[FN175]. Planned Parenthood II, 41 F. Supp. 2d 1130, 1155-56 (D. Or. 1999).

[FN176]. Planned Parenthood III, 244 F.3d 1007, 1019-20 (9th Cir. 2001).

[FN177]. Id. at 1019-20 (holding that the language and depictions contained on the web site were protected by the First Amendment).

[FN178]. Sanchez, supra note 166, at A1.

[FN179]. 458 U.S. 886 (1982).

[FN180]. Planned Parenthood III, 244 F.3d at 1019-20; Claiborne, 458 U.S. at 886-87.

[FN181]. Claiborne, 458 U.S. at 887.

[FN182]. Id. at 893.

[FN183]. Id. at 902.

[FN184]. Id. at 929.

[FN185]. Planned Parenthood III, 244 F.3d at 1014.

[FN186]. Id.

[FN187]. Planned Parenthood I, 23 F. Supp. 2d 1182, 1187-88 (D. Or. 1998).

[FN188]. Id. at 1190.

[FN189]. Id. at 1186-87.

[FN190]. Id. at 1186.

[FN191]. Planned Parenthood II, 41 F. Supp. 2d 1130, 1154 (D. Or. 1999).

[FN192]. See id. (noting that the plaintiff doctors testified as to the level of fear that was placed on them by the pro-life activists via their posters and web site content, and the fact that the plaintiffs took precautions to deter what they perceived as true threats to their safety).

[FN193]. Planned Parenthood I, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998).

[FN194]. Id. at 1187; see also Abortionists on Trial, supra note 170.

[FN195]. Planned Parenthood I, 23 F. Supp. 2d at 1188.

[FN196]. Id. District Judge Jones noted:

I will not summarize the facts giving rise to the 'context of violence' here, but note only that there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement.

Id.

[FN197]. Id.

[FN198]. Id.

[FN199]. Id. at 1191.

[FN200]. Sanchez, supra note 166, at A1.

[FN201]. Id. Although the Nuremberg Files web site did not directly make a call for violence of explicitly threatened bodily harm, it did provide potentially life-threatening information regarding the physical whereabouts of legitimate medical service providers. See Abortionists on Trial, supra note 170. Since 1993, five murders and twelve attempted murders have occurred at reproductive health clinics. See Anne Bower, Clinic Violence: The Python of Choice (Mar. 1996), available at http://www.ifas.org/fw/9603/violence.html. There have been over 20 murders and attempted murders, 100 acid attacks, 166 arson incidents, and 41 bombings in the last twenty-five years. See National Abortion Federation, Incidents of Violence and Disruption Against Abortion Providers, available at http://www.prochoice.org/ (last visited Dec. 1, 2002).

[FN202]. See Planned Parenthood IV, 290 F.3d 1058, 1077-88 (9th Cir. 2002) (determining that the court should review the whole context when determining whether a statement is a true threat and banning the use of specific information from being broadcast over the Nuremberg Files web site).

[FN203]. The Deadly Dozen poster contained several depictions of abortion doctors formatted in such a way that they looked like old-style wanted posters. Id. at 1062. Several of these posters had been distributed over the Internet and at various rallies. Id. at 1064-65. Eventually, some of the doctors depicted in these posters were murdered, leading the doctors being depicted to believe that they were in imminent danger of being killed. Id. at 1063-64. The dissent argued that the majority did not establish a pattern showing that "people who prepare wanted-type posters then engage in physical violence." Id. at 1091 (Kozinski, J., dissenting). The dissent, therefore, disagreed that the posters constituted a true threat. Id. Additionally, a separate dissent criticized the majority opinion, stating that it did not comport with the holding of Claiborne Hardware because the wanted-style posters were not direct threats at individuals. Id. at 1088 (Reinhardt, J., dissenting) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 at 932-34 (1982)).

[FN204]. Id.

[FN205]. Planned Parenthood II, 41 F. Supp.2d 1130, 1155-56 (D. Or. 1999).

[FN206]. Judge Robert E. Jones attempted to outline exactly what he meant by "threaten" in a footnote in his opinion. He wrote:

For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in content, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

Id. at 1155 n.1.

[FN207]. The order specifically included any other "mirror" web site that might be used to house the Nuremberg Files information under another web address. Id. at 1156 & n.2.

[FN208]. Id. at 1155-56 (1999).

[FN209]. Planned Parenthood IV, 290 F.3d 1058, 1088 (9th Cir. 2002).

[FN210]. Id. at 1062.

[FN211]. Id. at 1070.

[FN212]. Id.

[FN213]. Id. at 1063.

[FN214]. Id. at 1088.

[FN215]. Id.

[FN216]. Id. at 1071.

[FN217]. Id. at 1063-64.

[FN218]. Id. at 1079.

[FN219]. Id. at 1063.

[FN220]. Id. at 1079.

[FN221]. Id. at 1088. The court pointed out that in three incidents prior to this ruling, a wanted poster identifying a specific abortion provider was circulated, either on the web site or at a rally, and the doctor depicted in the poster was then murdered. Id.

[FN222]. See id. at 1063 (stating that the "true threats" analysis was proper under FACE, but not mentioning whether it would be proper under other circumstances).

[FN223]. United States v. Alkhabaz, 104 F.3d 1492, 1493 (6th Cir. 1997). Title 18 of the United States Code § 875(c) states: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 875(c) (2000).

[FN224]. Alkhabaz, 104 F.3d at 1493.

[FN225]. Id.

[FN226]. Id. at 1497-1501.

[FN227]. United States v. Baker, 890 F. Supp. 1375, 1386 (E.D. Mich. 1995).

[FN228]. Id. at 1383. In dismissing the indictment, the district court used different reasoning than the appellate court later used. Id. First, the district court held that the United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976) test applied in the Sixth Circuit. Id. at 1385; see also Kelner, 534 F.2d at 1027. The court then noted that the e-mails were private, and there was nothing in them to suggest that they would be distributed any further; thus, the court looked to how a reasonable person would expect Gonda to interpret the e-mail. Baker, 890 F. Supp. at 1386. In determining this, the court first noted that Gonda could have been anyone, so nothing could be assumed about his identity. Id. The court then reasoned that in light of Gonda's responses, he was likely not intimidated by the e-mail from Baker. Id. at 1385. Finally, the court noted that there was no specifically identifiable victim, and thus, no unequivocal, unconditional, and specific expression of intent to harm someone. Id. at 1390. Looking at all of this, the court concluded that there was not enough evidence to prosecute under 18 U.S.C. § 875(c). Id. at 1390-91.

[FN229]. Alkhabaz, 104 F.3d at 1496.

[FN230]. Id. at 1495 (establishing two factors that need to be present in order for speech to be analyzed as a true threat).

[FN231]. Id.

[FN232]. Id. at 1496.

[FN233]. Id. at 1495.

[FN234]. Id.

[FN235]. Id.

[FN236]. Id.

[FN237]. Id. at 1496 (Krupansky, J., dissenting).

[FN238]. Id. at 1496-97.

[FN239]. Id. at 1503.

[FN240]. Id. at 1506.

[FN241]. Id. at 1496.

[FN242]. Id. at 1494-95.

[FN243]. Id. at 1495-96.

[FN244]. United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995).

[FN245]. Id. at 1390; United States v. Alkhabaz, 104 F.3d 1492, 1505-06 (6th Cir. 1997).

[FN246]. See generally United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976) (illustrating how a true threats approach can successfully be applied where the defendant transmitted in interstate commerce a threat to injure a foreign political leader).

[FN247]. Baker, 890 F. Supp. at 1379 (deciding a case which involved two men corresponding by e-mail).

[FN248]. Planned Parenthood I, 23 F. Supp. 2d 1182, 1187 (D. Or. 1998) (noting that the Nuremberg Files web site was available for viewing by the general public and not simply comments exchanged between two individuals).

[FN249]. See Alkhabaz, 104 F.3d at 1496 (noting that a mens rea element must be determined objectively).

[FN250]. Id.

[FN251]. Id. at 1494-95.

[FN252]. Baker, 890 F. Supp. at 1382.

[FN253]. Brandenburg v. Ohio, 395 U.S. 444, 444-47 (1969).

[FN254]. United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995).

[FN255]. See United States v. Alkhabaz, 104 F.3d 1492, 1496-1507 (6th Cir. 1997) (Krupansky J., dissenting).

[FN256]. Id. at 1503.

[FN257]. 890 F. Supp. 1375 (E.D. Mich. 1995).

[FN258]. Baker, 890 F. Supp. at 1506-07.

[FN259]. Id. at 1507.

[FN260]. Id.

[FN261]. Id.

[FN262]. Id.

[FN263]. Id. at 1503.

[FN264]. Reno v. United States, 521 U.S. 844, 850 (1997).

[FN265]. See generally Brandenburg v. Ohio, 395 U.S. 444 (1969) (evaluating a First Amendment case involving a public statement).

[FN266]. See Jeff Bercovici, Ongoing Numbers War for NY News and Post (Oct. 31, 2001), available at http:// www.medialifemagazine.com/news2001/oct01/oct29/3_wed/news4wednesday.html (noting that the daily circulation for the New York Times and the Wall Street Journal was 1,109,371 and 1,780,605 respectively, as of the time of printing); see also 20 With Plenty: August's Top Sites in Daily Hits, According to Jupiter Media Metrix (Oct. 8, 2001), available at http:// www.usnews.com/usnews/nycu/tech/articles/011008/top20.htm (reporting that sites like Yahoo and MSN receive around 14,699,000 and 14,295,000 hits per day, respectively).

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Supreme Court of the United States
NEW YORK TIMES COMPANY, Petitioner,
v.
UNITED STATES.
UNITED STATES, Petitioner,
v.
The WASHINGTON POST COMPANY et al.

Nos. 1873, 1885.
Argued June 26, 1971.
Decided June 30, 1971.

The United States sought to enjoin newspapers from publishing contents of classified historical study on Viet Nam policy. In one case, the District Court for the Southern District of New York, 328 F.Supp. 324, rendered judgment from which the Government appealed, and the Court of Appeals for the Second Circuit, 444 F.2d 544, remanded and continued stay. In the other case, the District Court for the District of Columbia rendered judgment from which the Government appealed, and the Court of Appeals for the District of Columbia Circuit affirmed, 446 F.2d 1327. In both cases certiorari was granted. The Supreme Court held that the Government had not met its burden of showing justification for imposition of restraint on publication of the contents of the study.

Judgment of the Court of Appeals for the District of Columbia Circuit affirmed; order of the Court of Appeals for the Second Circuit reversed and case remanded with directions.

Mr. Justice Black filed concurring opinion in which Mr. Justice Douglas joined; Mr. Justice Douglas filed concurring opinion in which Mr. Justice Black joined; Mr. Justice Brennan filed concurring opinion; Mr. Justice Stewart filed concurring opinion in which Mr. Justice White joined; Mr. Justice White filed concurring opinion in which Mr. Justice Stewart joined; Mr. Justice Marshall filed concurring opinion; Mr. Chief Justice Burger dissented and filed opinion; Mr. Justice Harlan dissented and filed opinion in which The Chief Justice and Mr. Justice Blackmun joined; and Mr. Justice Blackmun dissented and filed opinion.

West Headnotes

[1] Constitutional Law 92 1527

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(A) In General
92XVIII(A)1 In General
92k1525 Prior Restraints
92k1527 k. Presumption of invalidity. Most Cited Cases
(Formerly 92k90(1), 92k90)

Any system of prior restraints of expression bears heavy presumption against its constitutional validity, and Government carries heavy burden of showing justification for imposition of such a restraint.

[2] Injunction 212 1380

212 Injunction
212IV Particular Subjects of Relief
212IV(L) Trade or Business
212k1380 k. Publishing, journalism, and bookselling. Most Cited Cases
(Formerly 212k128(9), 212k128)

In cases in which the Government sought to enjoin newspapers from publishing contents of classified study on the "History of U. S. Decision-Making Process on Viet Nam Policy", Government failed to meet its burden of showing justification for imposition of such restraint.

****2141 *713** Sol. Gen. Erwin N. Griswold, for the United States.

Alexander M. Bickel, New Haven, Conn., for the New York Times.

William R. Glendon, Washington, D.C., for the Washington Post Co.

***714** PER CURIAM.

We granted certiorari, 403 U.S. 942, 943, 91 S.Ct. 2270, 2271, 29 L.Ed.2d 853 (1971) in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Viet Nam Policy.'

[1][2] 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); see also Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971). The District Court for the Southern District of New York in the New York Times case, 328 F.Supp. 324, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, 446 F.2d 1327, in the Washington Post case held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed, 444 F.2d 544, and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

Judgment of the Court of Appeals for the District of Columbia Circuit affirmed; order of the Court of Appeals ****2142** for the Second Circuit reversed and case remanded with directions.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring. DP I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe ***715** that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms.[FN1] They especially feared that the ***716** new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: 'The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.'[FN2] The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and

assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution ****2143** should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men ***717** that they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law * * * abridging the freedom * * * of the press * * *.' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

> FN1. In introducing the Bill of Rights in the House of Representatives, Madison said: '(B)ut I believe that the great mass of the people who opposed (the Constitution), disliked it because it did not contain effectual provisions against the encroachments on particular rights * * *.' 1 Annals of Cong. 433. Congressman Goodhue added: '(I)t is the wish of many of our constituents, that something should be added to the Constitution, to secure in a stronger manner their liberties from the inroads of power.' Id., at 426.

> FN2. The other parts were:
>
> 'The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.'
>
> 'The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances.' 1 Annals of Cong. 434.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

'Now, Mr. Justice (BLACK), your construction of * * * (the First Amendment) is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only ***718** say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true. * * * (T)here are other parts of the Constitution that grant powers and responsibilities to the Executive, and * * * the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States.'[FN3]

> FN3. Tr. of Oral Arg. 76.

And the Government argues in its brief that in spite of the First Amendment, '(t)he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.'[FN4]

> FN4. Brief for the United States 13—14.

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can

make laws enjoining publication of current news and abridging freedom of the press in the name of 'national security.' The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously farreaching contention that the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make ****2144** such a law.[FN5] See concurring opinion of Mr. Justice DOUGLAS, ***719** post, at 2145. To find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.' No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

> FN5. Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives, Madison said: 'If they (the first ten amendments) are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' 1 Annals of Cong. 439.

The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

'The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free ***720** assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.'[FN6]

> FN6. De Jonge v. Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press.[FN1]

> FN1. See Beauharnais v. Illinois, 343 U.S. 250, 267, 72 S.Ct. 725, 736, 96 L.Ed. 919 (dissenting opinion of Mr. Justice Black), 284, 72 S.Ct. 744 (my dissenting opinion); Roth v. United States, 354 U.S. 476, 508, 77 S.Ct. 1304, 1321, 1 L.Ed.2d 1498 (my dissenting opinion which Mr. Justice Black joined); Yates v. United States, 354 U.S. 298, 339, 77 S.Ct. 1064, 1087, 1 L.Ed.2d 1356 (separate opinion of Mr. Justice Black which I joined); New York Times Co. v. Sullivan, 376 U.S. 254, 293, 84 S.Ct. 710, 733, 11 L.Ed.2d 686 (concurring opinion of Mr. Justice Black which I joined); Garrison v. Louisiana, 379 U.S. 64, 80, 85 S.Ct. 209, 218, 13 L.Ed.2d 125 (my concurring opinion which Mr. Justice Black joined).

There is, moreover, no statute barring the publi-

cation by the press of the material which the Times and the Post seek ****2145** to use. Title 18 U.S.C. s 793(e) provides that '(w)hoever having unauthorized possession of, access to, or control over any document, writing * * * or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates * * * the same to any person not entitled to receive it * * * (s)hall be fined ***721** not more than $10,000 or imprisoned not more than ten years, or both.'

The Government suggests that the word 'communicates' is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, ss 792—799. In three of those eight 'publish' is specifically mentioned: s 794(b) applies to 'Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates * * * (the disposition of armed forces).'

Section 797 applies to whoever 'reproduces, publishes, sells, or gives away' photographs of defense installations.

Section 798 relating to cryptography applies to whoever: 'communicates, furnishes, transmits, or otherwise makes available * * * or publishes' the described materials.[FN2] (Emphasis added.)

> FN2. These documents contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that s 793 does not apply to the press is a rejected version of s 793. That version read: 'During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the ***722** enemy.' 55 Cong.Rec. 1763. During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong.Rec. 2167.

Judge Gurfein's holding in the Times case that this Act does not apply to this case was therefore preeminently sound. Moreover, the Act of September 23, 1950, in amending 18 U.S.C. s 793 states in s 1(b) that:

'Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect.' 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its 'inherent power.'

The power to wage war is 'the power to wage war successfully.' See Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 93, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774. But the war power stems from a declaration of war. The Constitution by Art. I, s 8, gives Congress, not the President, power '(t)o declare War.' Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures[FN3] may have a serious impact. But that is no basis for sanctioning****2146** a previous restraint on ***723** the press. As stated by Chief Justice Hughes in Near v. Minnesota ex rel. Olson, 283 U.S. 697, 719—720, 51 S.Ct. 625, 632, 75 L.Ed. 1357:

> FN3. There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is

> rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the in camera brief of the United States. It is all history, not future events. None of it is more recent than 1968.

'While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.'

As we stated only the other day in Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 '(a)ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.'

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression***724** of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally antidemocratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate. New York Times Co. v. Sullivan, 376 U.S. 254, 269—270, 84 S.Ct. 710, 720—721, 11 L.Ed.2d 686.

I would affirm the judgment of the Court of Appeals in the Post case, vacate the stay of the Court of Appeals in the Times case and direct that it affirm the District Court.

The stays is these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in Near v. Minnesota ex rel. Olson.

Mr. Justice BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety,****2147** in the future, of issuing temporary stays and restraining ***725** orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar ju-

dicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined 'could,' or 'might,' or 'may' prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences ***726** may result.[FN*] Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919), during which times '(n)o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.' Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. '(T)he chief purpose of (the First Amendment's) guaranty (is) to prevent previous restraints upon publication.' ****2148**Near v. Minnesota ex rel. Olson, supra, at 713, 51 S.Ct., at 630. Thus, only governmental allegation and proof that publication must inevitably, directly,***727** and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

> FN* Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that 'obscenity is not protected by the freedoms of speech and press.' Roth v. United States, 354 U.S. 476, 481, 77 S.Ct. 1304, 1307, 1 L.Ed.2d 1498 (1957). Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

Mr. Justice STEWART, with whom Mr. Justice WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative [FN1] and Judicial[FN2] branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better of for worse, the simple fact is that a ***728** President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

> FN1. The President's power to make treaties

and to appoint ambassadors is, of course, limited by the requirement of Art. II, s 2, of the Constitution that he obtain the advice and consent of the Senate. Article I, s 8, empowers Congress to 'raise and support Armies,' and 'provide and maintain a Navy.' And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

FN2. See Chicago & Southern Air Lines Inc. v. Waterman S.S. Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568; Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255; cf. Mora v. McNamara, 389 U.S. 934, 88 S.Ct. 282, 19 L.Ed.2d 287 (Stewart, J., dissenting).

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is.[FN3] If the Constitution gives the Executive****2149 *729** a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect ***730** the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

FN3. 'It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it

> productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. * * *' United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S.Ct. 216, 221, 81 L.Ed. 255.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

****2150** Mr. Justice WHITE, with whom Mr. Justice STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints***731** enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.[FN1] Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

> FN1. The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 U.S.C. s 160(c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U.S.C. s 45(b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, e.g., NLRB v. Gissel Packing Co., 395 U.S. 575, 616—620, 89 S.Ct. 1918, 1941—1943, 23 L.Ed.2d 547 (1969). Article I, s 8, of the Constitution authorizes Congress to secure the 'exclusive right' of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See L. A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100, 39 S.Ct. 194, 63 L.Ed. 499 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government's request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

***732** The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens 'grave and irreparable' injury to the public interest;[FN2] and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.

> FN2. The 'grave and irreparable danger' standard is that asserted by the Government in this Court. In remanding to Judge Gurfein for further hearings in the Times litigation, five members of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified with particularity by the Government would 'pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined.'

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the 'grave and irreparable danger' standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from ****2151** the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is ***733** properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in ***734** 1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.[FN3] Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to 'filter out the news to the people through some man.' 55 Cong.Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure

that the editor of such a newspaper 'should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, ****2152** the location of defense works, and all that sort of thing.' Id., at 2009.[FN4]

FN3. 'Whoever, in time of war, in violation of reasonable regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall publish any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be useful to the enemy, shall be punished by a fine * * * or by imprisonment * * *.' 55 Cong.Rec. 2100.

FN4. Senator Ashurst also urged that "freedom of the press' means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason.' 55 Cong.Rec. 2005.

735** The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797[FN5] makes it a crime to publish certain photographs or drawings of military installations. Section 798,[FN6] also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems736** or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.[FN7] If any of the material here ****2153** at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they ***737** publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

FN5. Title 18 U.S.C. s 797 provides:

'On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than $1,000 or imprisoned not more than one year, or both.'

FN6. In relevant part 18 U.S.C. s 798 provides:

'(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

'(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

'(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

'(3) concerning the communication intelligence activities of the United States or any foreign government; or

'(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

'Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.'

FN7. The purport of 18 U.S.C. s 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that '(t)his bill make it a crime to reveal the methods, techniques, and mate riel used in the transmission by this Nation of enciphered or coded messages. * * * Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking.' H.R.Rep.No.1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering 'only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree.' Id., at 2. Existing legislation was deemed inadequate.

'At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers.' Ibid. Section 798 obviously was intended to cover publications by non-employees of the Government and to ease the Government's burden in obtaining convictions. See H.R.Rep.No.1895, supra, at 2—5. The identical Senate Report, not cited in parallel in the text of this footnote, is S.Rep.No.111, 81st Cong., 1st Sess. (1949).

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793(e)[FN8] makes it a criminal act for any unauthorized possessor of a document 'relating to the national defense' either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because preexisting law provided no ***738** penalty for the unauthorized possessor unless demand for the documents was made.[FN9] ****2154** 'The dangers surrounding the unauthorized possession of such items are self-***739** evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand.' S.Rep.No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In Gorin v. United States, 312 U.S. 19, 28, 61 S.Ct. 429, 434, 85 L.Ed. 488 (1941), the words 'national defense' as used in a predecessor of s 793 were held by a unanimous Court to have 'a well understood connotation'—a 'generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness'—and to be 'sufficiently definite to apprise the public of prohibited activities'***740** and to be consonant with due process. 312 U.S., at 28, 61 S.Ct., at 434. Also, as construed by the Court in Gorin, information 'connected with the national defense' is obviously not limited to that threatening 'grave and irreparable' injury to the United States.[FN10]

FN8. Section 793(e) of 18 U.S.C. provides that:

'(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;' is guilty of an offense punishable by 10 years in prison, a $10,000 fine, or both. It should also be noted that 18 U.S.C. s 793(g), added in 1950 (see 64 Stat. 1004; S.Rep.No.2369, pt. 1, 81st Cong., 2d Sess., 9 (1950)), provides that '(i)f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.'

FN9. The amendment of s 793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was in turn Title I of the Internal Security Act of 1950. See 64 Stat. 987. The report of the Senate Judiciary Committee best explains the purposes of the amendment:

'Section 18 of the bill amends section 793 of title 18 of the United States Code (espionage statute). The several paragraphs of section 793 of title 18 are designated as subsections (a) through (g) for purposes of convenient reference. The significant changes which would be made in section 793 of title 18 are as follows:

'(1) Amends the fourth paragraph of section 793, title 18 (subsec. (d)), to cover the unlawful dissemination of 'information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.' The phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense' and not the other items enumerated in the subsection. The fourth paragraph of section 793 is also amended to provide that only those with lawful possession of the items relating to national defense enumerated therein may retain them subject to demand therefor. Those who have unauthorized possession of such items are treated in a separate subsection.

'(2) Amends section 793, title 18 (subsec. (e)), to provide that unauthorized possessors of items enumerated in paragraph 4 of section 793 must surrender possession thereof to the proper authorities without demand. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand. The only difference between subsection (d) and subsection (e) of section 793 is that a demand by the person entitled to receive the items would be a necessary element of an offense under subsection (d) where the possession is lawful, where as such a demand would not be a necessary element of an offense under subsection (e) where the possession is unauthorized.' S.Rep.No.2369, pt. 1, 81st Cong., 2d Sess., 8—9 (1950) (emphasis added).

It seems clear from the foregoing, contrary to the intimations of the District Court for

the Southern District of New York in this case, that in prosecuting for communicating or withholding a 'document' as contrasted with similar action with respect to 'information' the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct. The District Court relied on Gorin v. United States, 312 U.S. 19, 61 S.Ct. 429, 85 L.Ed. 488 (1941). But that case arose under other parts of the predecessor to s 793, see 312 U.S., at 21—22, 61 S.Ct., at 430—432—parts that imposed different intent standards not repeated in s 793(d) or s 793(e). Cf. 18 U.S.C. s 793(a), (b), and (c). Also, from the face of subsection (e) and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under s 793(e) if they communicate or withhold the materials covered by that section. The District Court ruled that 'communication' did not reach publication by a newspaper of documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

FN10. Also relevant is 18 U.S.C. s 794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, of any information with respect to the movements of military forces, 'or with respect to the plans or conduct * * * of any naval or military operations * * * or any other information relating to the public defense, which might be useful to the enemy * * *.'

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585—586, 72 S.Ct. 863, 865—866, 96 L.Ed. 1153 (1952); see also id., at 593—628, 72 S.Ct., at 888—928 (Frankfurter, J., concurring). It has not, however, authorized ****2155** the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

Mr. Justice MARSHALL, concurring.

The Government contends that the only issue in these cases is whether in a suit by the United States, 'the First Amendment bars a court from prohibiting a newspaper***741** from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.'' Brief for the United States 7. With all due respect, I believe the ultimate issue in this case is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases there is no problem concerning the President's power to classify information as 'secret' or 'top secret.' Congress has specifically recognized Presidential authority, which has been formally exercised in Exec. Order 10501 (1953), to classify documents and information. See, e.g., 18 U.S.C. s 798; 50 U.S.C. s 783.[FN1] Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

FN1. See n. 3, infra.

The problem here is whether in these particular cases the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See In re Debs, 158 U.S. 564, 584, 15 S.Ct. 900, 906, 39 L.Ed. 1092 (1895). The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of

course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948); Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 93, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774 (1943); ***742**United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936).[FN2] And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to 'national security,' however that term may be defined.

FN2. But see Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority ****2156** granted by Congress to protect 'national security' it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). It did not provide for government by injunction in which the courts and the Executive Branch can 'make law' without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the ***743** moment do not justify a basic departure from the principles of our system of government.

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in chapter 37 of U.S.C., Title 18, entitled Espionage and Censorship.[FN3] In that chapter, ***744** Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

FN3. There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently imperiled national security to warrant that result. These include 42 U.S.C. ss 2161 through 2166 relating to the authority of the Atomic Energy Commission to classify and declassify 'Restricted Data' ('Restricted Data' is a term of art employed uniquely by the Atomic Energy Act). Specifically, 42 U.S.C. s 2162 authorizes the Atomic Energy Commission to classify certain information. Title 42 U.S.C. s 2274, subsection (a), provides penalties for a person who 'communicates, transmits, or discloses (restricted data) * * * with intent to injure the United States or with intent to secure an advantage to any foreign nation * * *.' Subsection (b) of s 2274 provides lesser penalties for one who 'communicates, transmits, or discloses' such information 'with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation * * *.' Other sections of Title 42 of the United States Code dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating 'Restricted Data'

and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. Title 42 U.S.C. ss 2276, 2277. Title 50 U.S.C.App. s 781, 56 Stat. 390, prohibits the making of any sketch or other representation of military installations or any military equipment located on any military installation, as specified; and indeed Congress in the National Defense Act of 1940, 54 Stat. 676, as amended, 56 Stat. 179, conferred jurisdiction on federal district courts over civil actions 'to enjoin any violation' thereof. 50 U.S.C.App. s 1152(6). Title 50 U.S.C. s 783(b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been 'classified' by the President to any person who that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. See People ex rel. Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938). It is a ****2157** traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. See Z. Chafee & E. Re, Equity 935—954 (5th ed. 1967); 1 H. Joyce, Injunctions ss 58—60a (1909). Here there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers that there is probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute or decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined.

***745** At least one of the many statutes in this area seems relevant to these cases. Congress has provided in 18 U.S.C. s 793(e) that whoever 'having unauthorized possession of, access to, or control over any document, writing, code book, signal book * * * or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits * * * the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it * * * (s)hall be fined not more than $10,000 or imprisoned not more than ten years, or both.' Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U.S.C. s 793(e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in s 793(e). He found that the words 'communicates, delivers, transmits * * *' did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong.Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the Statute is not, however, the only plausible construction that could be given. See my Brother WHITE's concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court ***746** to redecide those issues—to overrule Congress. See Youngtown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the

power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of s 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

'During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense****2158** which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than $10,000 or by imprisonment for not more than 10 years, or both: Provided, that nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same.' 55 Cong.Rec. 1763.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that the decision to provide such power be reconsidered. Instead,***747** the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957 the United States Commission on Government Security found that '(a) irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons.' In response to this problem the Commission proposed that 'Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified.' Report of Commission on Government Security 619—620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong.Rec. 10447—10450. If the proposal that Sen. Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should ***748** be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

Mr. Chief Justice BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of Near v. Minnesota ex rel. Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), until recently in Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple ones. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in ****2159** all circumstances—a view I respect, but reject—can find such cases as these to be simple or

easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals Judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. Mr. Justice HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt ***749** settling of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public 'right to know'; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic 'scoop.' The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout 'fire' in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in Near v. Minnesota ex rel. Olson. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.[FN1]

> FN1. As noted elsewhere the Times conducted its analysis of the 47 volumes of Government documents over a period of several months and did so with a degree of security that a government might envy. Such security was essential, of course, to protect the enterprise from others. Meanwhile the Times has copyrighted its material and there were strong intimations in the oral argument that the Times contemplated enjoining its use by any other publisher in violation of its copyright. Paradoxically this would afford it a protection, analogous to prior restraint, against all others—a protection the Times denies the Government of the United States.

750** It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's 'right to know,' has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged 'right to know' has somehow and suddenly*2160** become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not in fact jeopardized, much of the material could not doubt have been declassified, since it spans a period ending in 1968. With such an approach—one that

great newspapers have in the past practiced and stated editorially to be the duty of an honorable press—the newspapers and Government might well have narrowed***751** the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation, if necessary. To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.[FN2]

FN2. Interestingly the Times explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise its sources and informants! The Times thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

Our grant of the writ of certiorari before final judgment in the Times case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel, on both sides, in oral argument before this Court, were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally 'around the clock' and simply were unable to review the documents that give rise to these cases and ***752** were not familiar with them. This Court is in no better posture. I agree generally with Mr. Justice HARLAN and Mr. Justice BLACKMUN but I am not prepared to reach the merits. [FN3]

FN3. With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the post case. I would direct that the District Court on remand give priority to the Times case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what Mr. Justice WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

****2161** We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function.

Mr. Justice HARLAN, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in Northern Securities Co. v. United States, 193 U.S. 197, 400—401, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904):

'Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their ***753** real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before

which even well settled principles of law will bend.'

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a.m. The application of the United States for interim relief in the Post case was also filed here on June 24 at about 7:15 p.m. This Court's order setting a hearing before us on June 26 at 11 a.m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the Post case was filed with the Clerk shortly before 1 p.m. on June 25; the record in the Times case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. Compare***754** In re Debs, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895), with Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952). This question involves as well the construction and validity of a singularly opaque statute—the Espionage Act, 18 U.S.C. s 793(e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See Near v. Minnesota, ex rel. Olson, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931) (dictum).

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they ****2162** had been feloniously acquired. Cf. Liberty Lobby, Inc. v. Pearson, 129 U.S.App.D.C. 74, 390 F.2d 489 (1967, amended 1968).

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a. The strong First Amendment policy against prior restraints on publication;

***755** b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts,[FN*] and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on the Court—should have been decided under the pressures engendered by th torrent of publicity that has attended these litigations from their inception.

FN* The hearing in the Post case before Judge Gesell began at 8 a.m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p.m. on the same day. The hearing in the Times case before Judge Gurfein was held on June 18 and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting en banc, on June 22. Each court rendered its decision on the following afternoon.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit in the Times litigation to observe that its order must rest on the conclusion that because of the time elements the Government had not been given an adequate opportunity to present its case ***756** to the District Court. At the least this conclusion was not an abuse of discretion.

In the Post litigation the Government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the Second Circuit. But I think there is another and more fundamental reason why this judgment cannot stand—a reason which also furnishes an additional ground for not reinstating the judgment of the District Court in the Times litigation, set aside by the Court of Appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.' 10 Annals of Cong. 613.

From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319—321, 57 S.Ct. 216, 220—221, 81 L.Ed. 255 (1936), collecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to ****2163** me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

'The nature of foreign negotiations requires caution, and their success must often depend on secrecy; ***757** and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.' 1 J. Richardson, Messages and Papers of the Presidents 194—195 (1896).

The power to evaluate the 'pernicious influence' of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid 'a complete abandonment of judicial control.' Cf. United States v. Reynolds, 345 U.S. 1, 8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953). Moreover the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. This

safeguard is required in the analogous area of executive claims of privilege for secrets of state. See id., at 8 and n. 20, 73 S.Ct., at 532; Duncan v. Cammell, Laird & Co., (1942) A.C. 624, 638 (House of Lords).

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

'(T)he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions***758** are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.' Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948) (Jackson J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the Post litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

****2164** Pending further hearings in each case conducted under the appropriate ground rules, I would continue the ***759** restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here.

Mr. Justice BLACKMUN, dissenting.

I join Mr. Justice HARLAN in his dissent. I also am in substantial accord with much that Mr. Justice WHITE says, by way of admonition, in the latter part of his opinion.

At this point the focus is on only the comparatively few documents specified by the Government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. Almost 70 years ago Mr. Justice Holmes, dissenting in a celebrated case, observed:

'Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure * * *.' Northern Securities Co. v. United States, 193 U.S. 197, 400—401, 24 S.Ct. 436, 468, 48 L.Ed. 679 (1904).

The present cases, if not great, are at least unusual in their posture and implications, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months to examining the 47 volumes that came into its unauthorized possession. Once it had begun publication***760** of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly once publication started, the material could not be made public fast enough. Seemingly, from then on, every

deferral or delay, by restraint or otherwise, was abhorrent and was to be deemed violative of the First Amendment and of the public's 'right immediately to know.' Yet that newspaper stood before us at oral argument and professed criticism of the Government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, one would hope, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on required remand, with the Washington Post, on the axcuse that it was trying to protect its source of information, initially refusing to reveal what material it actually possessed, and with the District Court forced to make assumptions as to that possession.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's ****2165 *761** vital welfare. The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the Times itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, Near v. Minnesota, ex rel. Olson, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357 (1931), and Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in Schenck,

'It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' 249 U.S., at 52, 39 S.Ct., at 249.

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the ***762** orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

It may well be that if these cases were allowed to develop as they should be developed, and to be tried as lawyers should try them and as courts should hear them, free of pressure and panic and sensationalism, other light would be shed on the situation and contrary considerations, for me, might prevail. But that is not the present posture of the litigation.

The Court, however, decides the cases today the other way. I therefore add one final comment.

I strongly urge, and sincerely hope, that these

two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, 'could clearly result in great harm to the nation,' and he defined 'harm' to mean 'the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate * * *.' I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regreat to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share ***763** his ****2166** concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom 'the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,' to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

U.S.Dist.Col. 1971.
New York Times Co. v. U.S.
403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822, 1 Media L. Rep. 1031

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534 F.2d 1020, 34 A.L.R. Fed. 767
(Cite as: 534 F.2d 1020)

United States Court of Appeals,
Second Circuit.
UNITED STATES of America, Appellee,
v.
Russell KELNER, Appellant.

No. 396, Docket 75-1290.
Argued Oct. 29, 1975.
Decided April 9, 1976.

Defendant was convicted before the United States District Court for the Southern District of New York, Richard Owen, J., for causing to be transmitted in interstate commerce a communication containing a threat to injure the person of another, and he appealed. The Court of Appeals, Oakes, Circuit Judge, held that defendant's alleged threat to assassinate foreign political leader, who was in United States in same city, made in a videotape interview which was broadcast on television news program fell within proscription of statute that whoever transmits in interstate commerce any communication containing any threats to injure the person of another shall be fined, etc., notwithstanding claim that alleged threat related to "free trade in ideas" and was thus protected under First Amendment.

Judgment affirmed.

Mulligan and Meskill, Circuit Judges, concurred and filed separate concurring opinions.

West Headnotes

Constitutional Law 92 1832

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(I) Harassment and Threats
92k1829 Threats
92k1832 k. Public Employees or Officials, Threats Against. Most Cited Cases
(Formerly 92k90.1(8), 92k90.1(1))

Extortion and Threats 165 25.1

165 Extortion and Threats
165II Threats
165k25 Nature and Elements of Offenses
165k25.1 k. In General. Most Cited Cases
(Formerly 165k25, 377k1(1) Threats)

Defendant's alleged threat to assassinate foreign political leader, who was in United States in same city, made in a videotape interview which was broadcast on television news program fell within proscription of statute that whoever transmits in interstate commerce any communication containing any threat to injure the person of another shall be fined, etc., notwithstanding claim that alleged threat related to "free trade in ideas" and was thus protected under First Amendment. 18 U.S.C.A. §§ 2, 875(c); U.S.C.A.Const. Amend. 1.

***1020** Nathan Lewin, Miller, Cassidy, Larroca & Lewin, Washington, D. C., for appellant.

Robert J. Costello, Asst. U. S. Atty., New York City (Paul J. Curran, U. S. Atty., S. D. N. Y., New York City, Don D. Buchwald and John D. Gordan III, Asst. U. S. Attys., New York City, of counsel), for appellee.

Before MULLIGAN, OAKES and MESKILL, Circuit Judges.

OAKES, Circuit Judge:

This appeal is from a conviction for causing to be transmitted in interstate commerce a communication containing a "threat to injure the person of another," 18 U.S.C. ss 2, 875(c).[FN1] The offense charged in the indictment was that Russell Kelner, a member of the Jewish Defense League (JDL), caused to be transmitted in interstate commerce a threat to assassinate Yasser Arafat. Kelner was convicted after a jury trial in the United States District Court for the Southern District of New York, before Richard Owen, Judge. He was sentenced to imprisonment for one year with execution suspended, placed on probation for four years and given a $1,000 committed

fine. We affirm.

> FN1. 18 U.S.C. s 2 provides:
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.
>
> 18 U.S.C. s 875(c) provides:
>
> Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The objective facts are not seriously disputed. On November 11, 1974, Yasser Arafat, leader of the Palestine Liberation Organization***1021** (PLO), was to be in New York to attend a session of the United Nations General Assembly which he had been invited to address. Both his presence in New York and his invitation to appear before the United Nations had aroused resentment among American Jews, particularly in New York City. About 5:30 p. m. on that day United Press International (UPI) received notification from the JDL of a news conference to be held later that evening at JDL headquarters. UPI thereupon notified its assorted radio, television and newspaper customers of the upcoming news event. One of those notified was WPIX-TV (Channel 11), a licensed television station in New York City with a telecast range of 50 miles extending into Connecticut and New Jersey. The station had previously dispatched WPIX reporter John Miller to cover a JDL demonstration in front of the Waldorf-Astoria Hotel in Manhattan where Arafat and a PLO delegation were expected to stay.[FN2]

> FN2. No evidence was adduced at trial to prove that Arafat or his aides had arrived in New York, or were even in the United States, at the time of the alleged threat or of its subsequent telecast on the ten o'clock news that evening. This omission is not important in view of our disposition of appellant's second claim for reversal, infra.

After attending the demonstration, Miller was assigned to cover the JDL press conference. When he and his film crew arrived at the JDL headquarters the conference had already started. Appellant, Kelner, was seated in military fatigues behind a desk with a .38 caliber “police special” in front of him. To Kelner's right another man was dressed in military fatigues. Miller heard one of the several reporters at the conference ask Kelner whether he was talking about an assassination plot and heard Kelner answer in the affirmative. The WPIX crew quickly filmed general shots of the press conference without sound for use as a “lead-in” on the news and then began filming an actual interview of Kelner by Miller. The reporter, holding a microphone with the WPIX channel number in large numerals on it, asked Kelner to go ahead and the following exchange took place:

Kelner: We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive.

Miller: How do you plan to do that? You're going to kill him?

Kelner: I'm talking about justice. I'm talking about equal rights under the law, a law that may not exist, but should exist.

Miller: Are you saying that you plan to kill them?

Kelner: We are planning to assassinate Mr. Arafat. Just as if any other mur just the way any other murderer is treated.

Miller: Do you have the people picked out for this? Have you planned it out? Have you started this operation?

Kelner: Everything is planned in detail.

Miller: Do you think it will come off?

Kelner: It's going to come off.

Miller: Can you elaborate on where or when or how you plan to take care of this?

Kelner: If I elaborate it might be a problem in bringing it off.

Following the interview, the film was reviewed at the WPIX studios where the film editors determined that it should be televised on the ten o'clock WPIX Channel 11 news that evening with the tape of the exchange above quoted in unedited form. The exchange between Kelner and Miller was then broadcast on television in its entirety and constituted the principal evidence of the Government at the trial. We have seen the videotape as it was played for us at the oral argument of this appeal.

Several character witnesses testified on Kelner's behalf at the trial. Kelner himself testified that at the time his statements were made neither he nor the JDL had any plans to carry out an assassination attempt but that what he was trying to convey was a JDL response to threats from the PLO. Kelner claimed that his sole objective was ***1022** to show the PLO that "we (as Jews) would defend ourselves and protect ourselves and . . . (that the PLO) would not be able to accomplish anything in accordance with their threats."

Appellant makes five claims on this appeal. Our acceptance of any one of the first four would require reversal of the conviction and dismissal of the indictment; acceptance of the fifth claim would require a remand for a new trial. The first point argued for reversal is that Kelner did not "cause" the transmission of a communication in interstate commerce within the meaning of 18 U.S.C. s 2, note 1 supra, because his alleged threat was made in the context of a television news interview and it was the wholly independent conduct of the television station that resulted in the film of the interview being telecast throughout metropolitan New York on the television news. The second is that there was no "communication" within the statute, 18 U.S.C. s 875(c), note 1 supra, because there was no specific addressee of the alleged threat, that is to say, the appellant was not expecting Arafat to watch the WPIX ten o'clock news and there was no evidence that the "threat" actually reached Arafat. Appellant's third claim is that there was no communication "in interstate commerce" within the statute because even though WPIX televises beyond the borders of New York the communication did not have to cross state lines to travel from Kelner to Arafat. The fourth and most troubling of appellant's claims is that the statements made were not "threats" within the meaning of the statute because appellant had no intention of actually using force and the statements were only "political hyperbole." Kelner has also asked for a remand for a new trial on the basis that the prosecutor was improperly allowed to cross-examine appellant's reputation witnesses in connection with arrests occurring after the alleged offense here involved.

Appellant's first point is by no means unique to offenses charged under 18 U.S.C. s 875(c). Although grounded in the statutory language of 18 U.S.C. s 2, the argument that a person cannot be liable for criminal conduct which he has not "caused" has been a premise of our criminal law from its very origin. Cases such as Terry v. United States, 131 F.2d 40, 44 (8th Cir. 1942), and United States v. Fox, 95 U.S. 670, 671, 24 L.Ed. 538, 539 (1878), have long recognized that "(u)pon principle, an act, which is not an offense at the time it is committed cannot become such by any subsequent independent act of (a) party with which it has no connection." Id. See also United States v. Dietrich, 126 F. 676, 685 (8th Cir. 1904). However, viewing the evidence in this case most favorably to the Government's position, as the jury verdict requires us to do, it is apparent that Kelner willfully caused the transmission of his threat over the WPIX facilities in that he took action without which the communication would not have occurred, intending (or at least reasonably foreseeing) that his statement would be transmitted in interstate commerce by others. It is clear enough that a person may be held responsible as a principal under 18 U.S.C. s 2(b), see note 1 supra, for causing another to do an act which would not have been criminal if it had been performed independently by that other person. United States v. Kelley, 395 F.2d 727, 729 (2d Cir.), cert. denied, 393 U.S. 963, 89 S.Ct. 391, 21 L.Ed.2d 376 (1968); United States v. Lester, 363 F.2d 68, 72-73 (6th Cir. 1966), cert. denied, 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967). It is a general principle of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of innocent intermediaries. See, e.

g., United States v. Giles, 300 U.S. 41, 48-49, 57 S.Ct. 340, 344, 81 L.Ed. 493, 497-498 (1937); United States v. Scandifia, 390 F.2d 244, 249 (2d Cir. 1968), vacated on other grounds sub nom. Giordano v. United States, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed. 297 (1969). The charge at appellant's trial closely followed the language of United States v. Scandifia, supra, stating that appellant could be found to have "caused" the transmission of the alleged***1023** threat in interstate commerce if he made the threat in fact and intended, or could reasonably have foreseen, that the threat would be transmitted by WPIX-TV. The fact that WPIX made an editorial decision to publicize the news does not render this basic principle of criminal law inapposite. It is unnecessary that the intermediary who commits the forbidden act have a criminal intent.[FN3] See United States v. Bryan, 483 F.2d 88, 92 (3d Cir. 1973) (en banc); United States v. Lester, supra. See also Pereira v. United States, 347 U.S. 1, 8-9, 74 S.Ct. 358, 362-63, 98 L.Ed. 435, 444 (1954) (delivery of check drawn on out-of-state bank to local bank for collection "caused" it to be transported in interstate commerce as deliverer intended local bank to send check to drawee bank for collection); Kolod v. United States, 371 F.2d 983 (10th Cir. 1967), vacated on oth er grounds, 390 U.S. 136, 88 S.Ct. 752, 19 L.Ed.2d 962 (1968) (evidence sufficient where it permits inference that defendant could have reasonably anticipated interstate ramifications of his threat or of the wrongful conduct of those with whom he was associated). Here the evidence was quite clear that the JDL called the press conference and that during the conference Kelner knew that he was being interviewed by television when he made the threat. Appellant does not seriously dispute the sufficiency of the evidence in this regard. The cases which appellant has cited to us, Terry v. United States, supra, United States v. Fox, supra, and United States v. Dietrich, supra, all involved an intervening act by a third party that could not have been foreseen or was against the will of the alleged defendant. Those cases are plainly inapposite at this appeal.

> FN3. It is, therefore, unnecessary for us to consider whether the television station is protected by the First Amendment from prosecution under 18 U.S.C. s 875(c) for its role in the transmission of Kelner's threat in interstate commerce. Assuming that the First Amendment shields this form of "news publication," Kelner's act is not cleansed of its criminality by his use of an immunized intermediary.

Appellant argues that there was no "communication" within the meaning of 18 U.S.C. s 875(c) because there was no specific person to whom the threat was addressed and to whom the defendant intended to cause emotional suffering. The claim is that the broadcast of the threat to an indefinite and unknown audience is not a "communication" of that threat. The mere statement of this argument suggests its improbability. Congress could not have intended to have left such a gaping hole in its statutory prohibition against the communication of threats in commerce. If appellant's contention were accepted, any would-be threatener could avoid the statute by seeking the widest possible means of disseminating his threat. Publication of the threat in 100 major newspapers, even though it would reach only an "indefinite and unknown audience," would be as sure a means of communicating the threat to the victim as would calling him on the telephone. Our concern under the statute is not whether the means of communication chosen by the appellant caused the threat to reach "an indefinite and unknown audience," but whether the appellant intended to communicate his threat to Arafat through the chosen means, the television interview. As Judge Owen quite properly charged, it was sufficient to support the conviction of Kelner if the jury found that in his use of the means of the televised press conference Kelner held "a specific intent to communicate a threat to injure." United States v. Holder, 302 F.Supp. 296, 299 (D.Mont.1969), aff'd, 427 F.2d 715 (9th Cir. 1970). It was not necessary under the statute for the Government to prove that appellant had a specific intent or a present ability to carry out his threat, 302 F.Supp. at 300; see also Bass v. United States, 239 F.2d 711, 716 (6th Cir. 1957), but only that he intended to communicate a threat of injury through means reasonably adapted to that purpose. We have no doubt that appellant's activity is properly within the scope of the term "communication" as used in 18 U.S.C. s 875(c).

Appellant's next argument is based upon his allegation that Arafat and his aides ***1024** were in New York City at the time that Kelner's threat was made. [FN4] From this assumption, appellant argues that there could have been no communication of the threat "in interstate commerce" since both the appellant and Arafat were in the same state at the time the threat was made. This argument, however, misapplies both

the language and the scheme of the statute. The statute does not require that the communication between Kelner and Arafat be in commerce; rather, it requires that the threat which is communicated be transmitted in commerce. Kelner's choice of a method of transmitting his threat, a telecast reaching three states which is plainly "in commerce," brings him within the literal scope of the statute. Appellant contends, however, that the nexus of his activity was predominantly local, and that the statute should not be read literally to reach into spheres of primarily local concern. However much we might agree as a matter of principle that the congressional reach should not be overextended or that prosecutorial discretion might be exercised more frequently to permit essentially local crimes to be prosecuted locally, see H. Friendly, Federal Jurisdiction: A General View 58-59 (1973), we do not feel that Congress is powerless to regulate matters in commerce when the interstate features of the activity represent a relatively small, or in a sense unimportant, portion of the overall criminal scheme. See, e. g., Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12 (1946) (white slave traffic); Whitaker v. United States, 5 F.2d 546 (9th Cir.), cert. denied, 269 U.S. 569, 46 S.Ct. 25, 70 L.Ed. 416 (1925) (interstate transportation of stolen autos). Our problem is not whether the nexus of the activity is "local" or "interstate"; rather, under the standards which we are to apply, so long as the crime involves a necessary interstate element, the statute must be treated as valid. Here, as in Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955), the constitutional basis for the statute is the withdrawal of interstate facilities for the achievement of the proscribed evil. Since the statutory offense of which appellant has been convicted necessarily involves the use of an interstate facility for transmission of his threat, we are satisfied that the statute and conviction are sufficiently commerce-related to support federal prosecution.

FN4. See note 2 supra.

Appellant's fourth argument for reversal is that his statements were not "threats" within the meaning of the statute because they were, rather, political hyperbole, and that the case should not, therefore, have been submitted to the jury. See Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664, 667 (1969), rev'g, 131 U.S.App.D.C. 125, 402 F.2d 676 (1968); id., 402 F.2d at 686 (Wright, J., dissenting). Appellant additionally claims that to save 18 U.S.C. s 875 from constitutional invalidity as an infringement of the right to free speech there must be evidence of specific intent on his part to carry out the threat as well as a statement unambiguously constituting a threat on the life of Arafat and his aides. He suggests that the statement which he made was a communication of information or opinion that "justice" and "equal rights" demanded that Arafat be treated as a murderer in view of assorted PLO crimes on innocent Israeli civilians. He points out that since the threat was broadcast to the general public it is especially deserving of constitutional protection under the First Amendment because it relates to the "free trade in ideas," Abrams v. United States, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173, 1180 (1919) (Holmes, J., dissenting), or "the power of reason as applied through public discussion," Whitney v. California, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095, 1105 (1927) (Brandeis, J., concurring), overruled by Brandenburg v. Ohio, 395 U.S. 444, 449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).[FN5]

FN5. He also argues that the "threat" here was not a carefully thought-out communication, but was the innocent result of the usual "give and take" between reporters and an individual. This argument, however, is one properly addressed to the jury which found otherwise.

***1025** But it cannot be said as a matter of law that appellant was stating only ideas. He said, after all,

We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive . . .. We are planning to assassinate Mr. Arafat . . .. Everything is planned in detail.

The court left it to the jury to determine whether Kelner "intended the words as a threat against Yasser Arafat and his lieutenants . . . or whether he said those words as a statement of opposition to Arafat . . .. " The court charged the jury that "(m)ere political hyperbole or expression of opinion or discussion does not constitute a threat" and stated that if the jury found that the statements were "no more than an indignant or extreme method of stating political opposi-

tion to Arafat or the PLO" it would be justified in "finding that no threat was in fact made." The jury finding of guilty, therefore, is predicated on the judgment that there was here a genuine threat to kill which, even though it might have been made in the context of a protest against PLO outrages, did not constitute only a political expression of opinion. In order to convict under the charge given, the jury had to, and we must assume did, find that the statements were more than political, that they were "an expression of an intention to inflict" injury, of "such a nature as could reasonably induce fear." They were also made "knowingly and willfully," as the judge defined those terms, "comprehended" by the appellant and "voluntarily and intentionally uttered . . . with the apparent determination to carry them into execution." [FN6] They were not made conditionally or in jest. Since it is the utterance which the statute makes criminal, not the specific intent to carry out the threat, we think the charge adequately instructed on the statutory elements of the crime. Only if the Constitution requires that we read into the offense the element of specific intent to carry out the threat would the charge given be deficient.

> FN6. Although the statute under which appellant was convicted, 18 U.S.C. s 875, does not expressly require that the threat to injure be transmitted "willfully," the trial judge followed Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918), and charged the element of willfulness in terms of "an apparent determination" to carry the threat into execution. Cf. Pierce v. United States, 365 F.2d 292, 294 (10th Cir. 1966). In Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 1401, 22 L.Ed.2d 664, 667 (1969), the Supreme Court expressed "grave doubts" about the Ragansky definition, but the statute in Watts, 18 U.S.C. s 871, did actually require that threats be made "willfully." Furthermore, cases decided since Watts under the Watts statute have almost uniformly held that no proof of actual intent to carry out the threat is required by the use of the word "willfully" in the statute, so that a Ragansky definition may be said to be adequate here. United States v. Hall, 493 F.2d 904, 905 (5th Cir. 1974), cert. denied, 422 U.S. 1044, 95 S.Ct. 266, 45 L.Ed.2d 696 (1975); United States v. Rogers, 488 F.2d 512, 514 (5th Cir. 1974), rev'd and remanded on other grounds, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); United States v. Lincoln, 462 F.2d 1368, 1369 (6th Cir.), cert. denied, 409 U.S. 952, 93 S.Ct. 298, 34 L.Ed.2d 224 (1972); United States v. Hart, 457 F.2d 1087, 1090-91 (10th Cir.), cert. denied, 409 U.S. 861, 93 S.Ct. 150, 34 L.Ed.2d 108 (1972); United States v. Compton, 428 F.2d 18, 21 (2d Cir. 1970), cert. denied, 401 U.S. 1014, 91 S.Ct. 1259, 28 L.Ed.2d 551 (1971); Roy v. United States, 416 F.2d 874, 877-78 (9th Cir. 1969). But see United States v. Patillo, 438 F.2d 13, 16 (4th Cir. 1971) (en banc).

On the most elementary level it would seem possible to conclude that a threat of murder falls within the narrow class of "fighting words" which are so inherently deleterious to social order, see Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942); Cantwell v. Connecticut, 310 U.S. 296, 308, 60 S.Ct. 900, 905, 84 L.Ed. 1213, 1220 (1940), and so inherently unrelated to the "robust" political debate necessary to a democratic society, see Watts, supra, 402 F.2d at 683 n.17, that the umbrella of the First Amendment does not protect the threat from governmental restriction. We do not, however, rest on this simplistic and perhaps misleading proposition. Professor Emerson points out that both Chaplinsky and Cantwell were cases involving the use of expression that might lead to a breach of the peace in the streets, that is to say, they were incitement***1026** cases. T. Emerson, The System of Freedom of Expression 313-15 (1970). Here the crime charged is not that appellant was inciting others to assassinate Arafat but that he himself was threatening to do so. The question remains, therefore, whether an unequivocal threat which has not ripened by any overt act into conduct in the nature of an attempt is nevertheless punishable under the First Amendment, even though it may additionally involve elements of expression.

On that question we believe we have help from Watts, supra, 394 U.S. at 705-08, 89 S.Ct. at 1399-1400, 22 L.Ed.2d at 664-665. The statute involved in that case, 18 U.S.C. s 871, punishing threats to the life of the President, was found to be "constitutional on its face," given the "overwhelming" interest of the Congress in protecting the safety and freedom of movement of the Chief Executive in performing his duties. 394 U.S. at 707, 89 S.Ct. at 1401, 22 L.Ed.2d

at 666. Although the statute under which Kelner has been convicted makes it a criminal act to transmit threats to persons generally, we believe that important national interests similar to those in Watts exist here, more specifically, the governmental interest of reducing the climate of violence to which true threats of injury necessarily contribute.[FN7] As a part of the Government's constitutional responsibility to insure domestic tranquility, it is properly concerned in an era of ever-increasing acts of violence and terrorism, coupled with technological opportunities to carry out threats of injury with prohibiting as criminal conduct specific threats of physical injury to others, whether directed toward our own or another nation's leaders or members of the public. However, as the court said in Watts, even when such valid governmental interests are identified and accepted, a statute such as the one here "which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." Id.

> FN7. In the lower court opinion in Watts v. United States, 131 U.S.App.D.C. 125, 402 F.2d 676, 683 (1968), then Circuit Judge Burger noted in passing that "(a) statute making it a criminal act to utter threats as to citizens generally might well be open to constitutional challenge." He did not mention the statute here, enacted in 1948, nor did he discuss what national interests might be advanced specifically to support such a statute. We do not attach to this dictum controlling weight in our evaluation of the sufficiency of the national interests here.

In confronting this problem of interpreting the threat statute consistently with the First Amendment, the Supreme Court did not accept the solution argued for by appellant and by Judge J. Skelly Wright, dissenting in Watts, supra, 402 F.2d at 687, of conditioning conviction upon proof of a specific intent to carry out the threat made. In alleviation of Judge Wright's concerns lest men go unprotected by the First Amendment and be convicted "of using offensive language, with some implication against the President's life, which (is) meant as jest, as rhetoric," id. at 689, the Court construed the word "threat" to exclude statements which are, when taken in context, not "true threats" because they are conditional and made in jest. 397 U.S. at 708, 89 S.Ct. at 1401, 22 L.Ed. at 667. In effect, the Court was stating that threats punishable consistently with the First Amendment were only those which according to their language and context conveyed a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected "vehement, caustic . . . unpleasantly sharp attacks on government and public officials." See New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686, 701 (1964). We believe that this limitation upon the word "threat" is a construction which satisfies First Amendment concerns as fully as would appellant's and Judge Wright's requirement that specific intent to carry out the threat be proven.[FN8]

> FN8. We are aware that Judge Wright in his dissent, Watts, supra, 402 F.2d at 690-91 & n.11, declared that he had no doubt that the "clear and present danger" test applied to the threat statute there, 18 U.S.C. s 871, and required that the intent of "willfully" there be read to require specific intent to execute the threat. We are by no means certain that the "clear and present danger" test in any of its various formulations even the most recent, in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) is appropriate in this case. Although it may be true that the "historic standard" has survived in a particular formula in contempt of court cases, see Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962), it has not been relied upon by the Supreme Court in the field of its nascence (government control over the advocacy of violence) since Dennis. See Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). In reversing in Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 644 (1969), moreover, the Supreme Court did not adopt Judge Wright's use of the test, but instead fashioned an alternative method of statutory construction of 18 U.S.C. s 871 as a "true threat" statute to prevent any conflict with the First Amendment.

***1027** The purpose and effect of the Watts constitutionally-limited definition of the term "threat" is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished only such threats, in short, as are of the same nature as those threats which

are, as Judge Wright recognizes, "properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues." Watts, supra, 402 F.2d at 690. The Watts requirement of proof of a "true threat," it may be seen, works ultimately to much the same purpose and effect as would a requirement of proof of specific intent to execute the threat because both requirements focus on threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out. These qualities of unequivocal immediacy and express intention are the most, perhaps, that even Judge Wright's and the appellant's proposed requirement of specific intent could demand in any event since such an intent may be proved circumstantially; the jury under that test would have the "almost impossible task of evaluating (a defendant's) subjective mental processes in relation to executing his apparent intent as that intent was manifested by his words and gestures in context." Id. at 684 (opinion of Burger, Circuit Judge).

It is for these reasons that we believe a narrow construction of the word "threat" in the statute here, 18 U.S.C. s 875(c), as approved in Watts, 394 U.S. at 708, 89 S.Ct. at 1401, 22 L.Ed.2d at 667, is consonant with the protection of First Amendment interests. Even where the threat is made in the midst of what may be other protected political expression, such as appellant's reference to "justice" and "equal rights under the law," the threat itself may affront such important social interests that it is punishable absent proof of a specific intent to carry it into action when the following criteria are satisfied. So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied. This clarification of the scope of 18 U.S.C. s 875(c) is, we trust, consistent with a rational approach to First Amendment construction which provides for governmental authority in instances of inchoate conduct, where a communication has become "so interlocked with violent conduct as to constitute for all practical purposes part of the (proscribed) action itself." T. Emerson, supra, at 329. [FN9]

> FN9. T. Emerson, The System of Freedom of Expression 404-05 (1970), has the following to say regarding the analogous crime of solicitation:
>
> The issue should be resolved in terms of the usual rules for determining what is expression and what is action. Under these doctrines solicitation can be constitutionally punished only when the communication is so close, direct, effective, and instantaneous in its impact that it is part of the action. The speaker must, in effect, be an agent in the action.
>
> With respect specifically to solicitation cases, certain more concrete considerations can be suggested. The more general the communication the more it relates to general issues, is addressed to a number of persons, urges general action the more readily it is classified as expression. On the other hand, communication that is specifically concerned with a particular law, aimed at a particular person, and urges particular action, moves closer to action. Communication also tends to become action as the speaker assumes a personal relation to the listener, deals with him on a face-to-face basis, or participates in an agency or partnership arrangement. Other factors may affect the ultimate determination of whether the communication is expression or action. The essential issue is whether the speaker has made himself a participant in a crime or attempted crime of action. Short of this the community must satisfy itself with punishment of the one who committed the violation of law or attempted to do so, not punishment of the person who communicated with him about it.

***1028** The question of the application of the First Amendment to the statute here is properly for the court rather than the jury under Dennis v. United States, 341 U.S. 494, 511-15, 71 S.Ct. 857, 868-870, 95 L.Ed. 1137, 1153-1155 (1951). [FN10] We must determine under the circumstances of this case whether appellant's statement unambiguously constituted an immediate threat upon the life or safety of Arafat and his aides. As we have already indicated, appellant's language met the criteria we have set forth. It was not made in a jesting manner; the military uniforms and the presence of the .38 pistol emphasize this. The language was unequivocal and un-

conditional: "We are planning to assassinate Mr. Arafat." It was immediate: "We have people who have been trained and who are out now . . .." It was specific as to target: "Arafat and his lieutenants." Therefore, in accordance with the above, we conclude that the threat was within the constitutionally permissible scope of the statute and we reject appellant's fourth claim of error.[FN11]

> FN10. In referring to Dennis, as an inferior court we must accept its formulation of the respective roles of judge and jury in free speech cases, see Richardson, Freedom of Expression and the Function of Courts, 65 Harv.L.Rev. 1, 24-31 (1951), although we recognize that formulation is itself subject to serious doubts. See Rostow, The Democratic Character of Judicial Review, 66 Harv.L.Rev. 193, 216-23 (1952). Of course, our overall problems in this regard are not made any simpler by what Professor Emerson has called the "chaotic state of First Amendment theory" as it has been from time to time set forth by the Court. See T. Emerson, note 9 supra, at 16.
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> FN11. Judge Mulligan's concurring opinion, with all respect, does not take into account that portion of the opinion in Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969), which states that "a statute such as this one which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." 394 U.S. at 707, 89 S.Ct. at 1401, 22 L.Ed.2d at 667.

With regard to appellant's final argument, we hold that the cross-examination of Kelner's character witnesses was proper. Of first note is the fact that the failure of appellant to object below should preclude his objection here. United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907, 86 S.Ct. 887, 15 L.Ed.2d 663 (1966). Even had timely objection been made, however, the cross-examination of the witnesses was proper. The four character witnesses had testified as to Kelner's present reputation for peacefulness as well as for truth and veracity. As such, evidence postdating the indictment but predating the witness's testimony was relevant and cross-examination of the witnesses regarding their awareness of appellant's post-indictment arrest was proper. United States v. Lewis, 157 U.S.App.D.C. 43, 482 F.2d 632, 643 (1973). The allowable scope of the impeaching inquiry should be tested by comparison with the reputation asserted. Michelson v. United States, 335 U.S. 469, 483-84, 69 S.Ct. 213, 222, 93 L.Ed. 168, 177-78 (1948). We would be hard put, moreover, even if there were error in this respect, to find such error other than harmless.

Judgment affirmed.

MULLIGAN, Circuit Judge (concurring):

I agree that the conviction of the appellant Kelner must be affirmed. The language of the threat and the circumstances in which it was made as set forth in Judge Oakes's opinion are in my view clearly within the statute (18 U.S.C. s 875(c)) and do not constitute protected speech within the First Amendment. The threat here cannot be sensibly characterized as an "exposition of ideas," ***1029**Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942) or the "communication of information or opinion," Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 1221 (1940).

The reason for this separate opinion is that I cannot accept Judge Oakes's obiter dicta, "So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute (18 U.S.C. s 875(c)) may properly be applied." There is no doubt that the threat here is well within the rule announced. However, I see no reason to set forth a test for future cases which may well involve threats within the statute and not protected by the First Amendment, but which would not fall within the proposed rubric.

For example, if the threat here had been made in the same setting but had been phrased, "We plan to kill Arafat a week from today unless he pays us $1,000,000," I would hold that the threat is still well within s 875(c) and not protected under the First Amendment although the threatened homicide is not immediate, imminent or unconditional under the test

proposed by Judge Oakes. We have already held that a threat to assassinate the President some two weeks later is within a comparable statute, 18 U.S.C. s 871. United States v. Compton, 428 F.2d 18 (2d Cir. 1970), cert. denied, 401 U.S. 1014, 91 S.Ct. 1259, 28 L.Ed.2d 551 (1971). Although the opinion does not advert to the issue of immediacy, I would not think that that argument would change the result.

It is true that in Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) [FN1] the Court, in reversing a conviction under s 871, characterized a threat to assassinate President Johnson as conditional. However, the setting was entirely different from that encountered here. The defendant there was an eighteen-year-old who was participating in a public rally of the W.E.B. DuBois Club on the Washington Monument grounds. He joined a gathering scheduled to discuss police brutality. After a suggestion by one member of the group that young people get more education before expressing their views, the defendant stated:

> FN1. The judgment of the Court was rendered in a per curiam opinion, with a separate concurrence by Justice Douglas. Justice White dissented without opinion, and Justices Stewart, Fortas and Harlan would have denied certiorari.

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.

394 U.S. at 706, 89 S.Ct. at 1400, 22 L.Ed.2d at 666. I do not think that Watts stands for the proposition that a conditional threat is necessarily protected by the First Amendment. The circumstances of the threat made in that case indicate that the assassination was impossible since the defendant never intended to serve in the Armed Forces; that it was considered as a joke by the audience and that it was made in a setting of political and social discussion which should be encouraged and not condemned.

In sum, I believe that in view of the myriad circumstances which will attend the making of such threats and the rich vocabulary of invective available to those prone to indulge in the exercise condemned by the statute, the better course here is to decide each case on its facts, at least until such time as the Supreme Court provides further elucidation. Moreover, the proposed requirement that the threat be of immediate, imminent and unconditional injury seems to me to be required neither by the statute nor the First Amendment.

MESKILL, Circuit Judge (concurring):

Reluctantly I must concur that Kelner's actions come within the literal terms of ***1030**18 U.S.C. ss 875(c), 2. I do not believe, however, that Congress ever intended this statute to apply to the type of television news broadcast incident involved here.

The admittedly sparse legislative history behind this enactment reveals that it originally was aimed at the interstate transportation of extortion messages. After its passage, but long before the advent of television, the statute was broadened to apply to non-extortion cases involving “any” interstate communication of “any” threat. Prosecutions pursuant to s 875(c) and its relatives ss 871 and 876 have involved interstate threats made by telephone and mail, all situations involving some direct and immediate action by a threatener in communicating the threat against a particular recipient. See, e. g., United States v. Bozeman, 495 F.2d 508 (5 Cir. 1974), cert. denied, 422 U.S. 1044, 95 S.Ct. 2660, 45 L.Ed.2d 696 (1975) (telephone threats); United States v. LeVison, 418 F.2d 624 (9 Cir. 1969) (telephone and mail threats). Furthermore, by utilizing the aforementioned modes of transmission, the threatener, by paying for the use of the telephone or mail, was entitled to interstate delivery of his message; the mailman or telephone operator who transmitted the threat was truly an “innocent dupe.” No other case involves activity like Kelner's, which is so detached from the act of transmission itself.

Whatever Kelner may have foreseen, or for that matter whatever he may have wished to happen to his statement at the time he mouthed it, he nevertheless had no control over his threat once it was made. Instead, the decision whether or not to broadcast, which in effect determined whether or not a crime was committed, rested within the discretion of the television personnel. Had Kelner recanted the threat after it was made but before the broadcast, he would have been powerless to prevent transmission and therefore powerless to prevent the crime charged here. Thus

Kelner was in a position unlike other defendants prosecuted under this statute, each of whom had control over the threat until it was transmitted in interstate commerce either by mailing the letter or placing the phone call.

This case, conceded to be one of first impression, deals with the broadcast media which have First Amendment rights separate and apart from Kelner's and which do not apply to telephone company employees or postmen. If WPIX had reported the story by using silent film but quoting Kelner, or in any manner other than sound film, would the transmission of a communication of a threat have taken place within the meaning of the statute? Would there have been a violation if instead of a television newsman, a reporter for a newspaper which is mailed interstate had asked the question and then written a story with a quotation of the threat?

While I concur in the disposition of this appeal, I believe that its precedential value should be severely restricted. I am apprehensive about the implications of considering the broadcast media to be modes of communication in threat cases. It is obvious from the legislative history that Congress had not considered this eventuality; I can only hope that Congress will clarify its intention as to the scope of this statute.

C.A.N.Y. 1976.
U.S. v. Kelner
534 F.2d 1020, 34 A.L.R. Fed. 767

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ARTICLE

FREEDOM FOR THE PRESS AS AN INDUSTRY, OR FOR THE PRESS AS A TECHNOLOGY? FROM THE FRAMING TO TODAY

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When the article was in page proofs, the author was considering representing the defendant in *Obsidian Finance Group, LLC v. Cox*, No. 11-0057, 2011 WL 5999334 (D. Or. Nov. 30, 2011); but this did not affect any aspect of the article, which was substantively complete long before *Obsidian Finance* was decided. The only substantive change following November 30, 2011 was the inclusion of a brief summary of *Obsidian Finance* in note 336. (At the time the article went to press, it was not yet decided whether the author would indeed participate in this case.)

INTRODUCTION

"[T]he freedom . . . of the press"[1] specially protects the *press as an industry*,[2] which is to say newspapers, television stations, and the like—so have argued some judges and scholars, such as the *Citizens United v. FEC* dissenters[3] and Justices Stewart,[4] Powell,[5] and Douglas.[6] This ar-

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

[2] One could equally say "press as an occupation," "press as a trade," or "press as an institution."

[3] The dissent argued that "we learn from [the Free Press Clause] that the drafters of the First Amendment did draw distinctions—explicit distinctions—between types of 'speakers,' or speech outlets or forms," and that "[t]he text and history" of the Free Press Clause thus "suggest[] why one type of corporation, those that are part of the press, might be able to claim special First Amendment status." 130 S. Ct. 876, 951 n.57 (2010) (Stevens, J., dissenting). Based on this, the dissent concluded that restrictions on the Free Speech Clause rights of nonpress entities can thus be upheld without threatening the special Free Press Clause rights of the institutional press. *Id.*

[4] *See* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975) (arguing that the Free Press Clause should be read as specially protecting the press-as-industry because "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches").

[5] *See* Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (assuming a press-as-industry premise in arguing that "[t]he Constitution specifically selected the press . . . to play an important role in the discussion of public affairs" (internal quotation marks omitted)).

[6] *See* Branzburg v. Hayes, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) (arguing that professional journalists are constitutionally entitled to a privilege not to testify about their sources because the press-as-industry "has a preferred position in our constitutional scheme"); *see also* Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 931-32 (1992) (endorsing Justice Stewart's historical

gument is made in many contexts: election-related speech, libel law, the journalist's privilege, access to government property, and more. Some lower courts have indeed concluded that some First Amendment constitutional protections apply only to the institutional press, and not to book authors, political advertisers, writers of letters to the editor, professors who post material on their websites, or people who are interviewed by newspaper reporters.[7]

Sometimes, this argument is used to support weaker protection for non-institutional-press speakers than is already given to institutional-press speakers. At other times, it is used to support greater protection for institutional-press speakers than they already get. The argument in the latter set of cases is that the greater protection can be limited to institutional-press speakers, and so will undermine rival government interests less than if the greater protection were extended to all speakers.

But other judges and scholars—including the *Citizens United* majority[8] and Justice Brennan[9]—have argued that the "freedom . . . of the press" does not protect the press-as-industry, but rather protects everyone's use of the printing *press* (and its modern equivalents) *as a technology*.[10] People or organizations who occasionally rent the tech-

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claim); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1505 (2007) ("The Press Clause singles out the press as an institution entitled to special protection under the umbrella of the First Amendment."); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027-29 (2011) (taking a similar view).

[7] For a discussion of these cases, which involve the journalist's privilege, libel law, and media access to government and private property, see *infra* Sections VII.A-B and D.

[8] 130 S. Ct. at 905 ("We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." (internal quotation marks omitted)); *id.* at 928 n.6 (Scalia, J., concurring) (buttressing this claim with a discussion of the text of the Free Press Clause). For additional Supreme Court cases so holding, see *infra* Section VI.B.

[9] *See infra* note 303 (collecting such quotes from Justice Brennan and others arguing against treating media and nonmedia libel defendants differently for First Amendment purposes); *see also* cases cited *infra* note 321 (collecting recent lower court cases rejecting special protection for the press-as-industry); *see also* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446-47 (2002) ("To the generation of the Framers of the First Amendment, 'the press' meant 'the printing press.' It referred less to a journalistic enterprise than to the technology of printing and the opportunities for communication that the technology created. 'Freedom of the press' referred to the freedom of the people to publish their views, rather than the freedom of journalists to pursue their craft.").

[10] I speak here of communications technologies that today serve the role the printing press did in the 1700s, not just of the printing press as such. "It is not strange that 'press,' the word for what was then the sole means of broad dissemination of ideas and news, would be used to describe the freedom to communicate with a large, unseen audience," even using new technologies that were not known to the Framers. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 800 n.5 (1978) (Burger, C.J., concurring).

nology, for instance by buying newspaper space, broadcast time, or the services of a printing company, are just as protected as newspaper publishers or broadcasters.[11]

Under this approach, the First Amendment rights of the institutional press and of other speakers rise and fall together. Sometimes, this approach is used to support protection for non-institutional-press speakers and to resist calls for lowering that protection below the level offered to institutional-press speakers. At other times, it is used to rebut demands for greater protection: Extending such protection to all speakers, the argument goes, would excessively undermine rival government interests—yet allowing such protection only for the institutional press would improperly give the institutional press special rights.[12]

Both sides in the debate often appeal at least partly to the constitutional text and its presumed original meaning. The words "the press" in the First Amendment must mean the institutional press, says one side. The words must mean press-as-technology, says the other. *Citizens United* is unlikely to settle the question, given how sharply the four dissenters and many outside commentators have disagreed with the majority. So who is right? What light does the "history" referred to by the *Citizens United* dissent shed on the "text"[13] and the Framers' "purpose"?[14]

The answer, it turns out, is that people during the Framing era likely understood the text as fitting the press-as-technology model—as securing the right of every person to use communications technology, and not just securing a right belonging exclusively to members of the publishing industry. The text was likely not understood as treating the press-as-industry differently from other people who wanted to rent or borrow the press-as-technology on an occasional basis.

Parts I, II, and III set forth the evidence on this subject from the Framing era and the surrounding decades. Part I discusses, among other things, early reference works and state constitutions that de-

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The printing press itself was understood during the Framing era as a technological innovation, and existing rights were understood as being adaptable to technological innovations. *See* THOMAS HAYTER, AN ESSAY ON THE LIBERTY OF THE PRESS CHIEFLY AS IT REFLECTS PERSONAL SLANDER 3-4 (London, J. Raymond 1754); FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 38-39 (photo. reprint 1978) (1812).

[11] Alternatively, one could conclude that people who rent such access become members of the press-as-industry for those occasions. But then the results would be the same as under the press-as-technology view, because anyone who occasionally uses the press as a technology would be treated the same as members of the press-as-industry.

[12] *See, e.g.*, cases cited *infra* Section VI.B.

[13] *See supra* note 3.

[14] *See* Stewart, *supra* note 4, at 634.

scribed the freedom of the press as a right of "every freeman," "every man," or "every citizen." This right was generally seen as the right to publish using mass technology, as opposed to the freedom of speech, which was seen at the time as focusing more on in-person speech.

Part II discusses the Framing-era understanding that the freedom of the press extended to authors of books and pamphlets—authors who were generally not members of the press-as-industry,[15] though they did use the press as technology. Part III goes on to discuss fifteen cases from 1784 to 1840 that treated the freedom of the press as extending equally to all people who used press technology, and not just to members of the press-as-industry. To my knowledge, these cases have not been discussed before in this context. Each of the sources standing alone may not be dispositive. But put together, they point powerfully toward the press-as-technology reading, under which all users of mass communications technologies have the same freedom of the press.

Part IV turns to how the "freedom . . . of the press" was understood around 1868, when the Fourteenth Amendment was ratified. Much recent scholarship has suggested that originalist analyses of Bill of Rights provisions applied to the states via the Fourteenth Amendment should consider the original understanding as of 1868 in addition to that of 1791.[16] And it turns out that around 1868, it was even clearer that the "freedom . . . of the press" secured a right to use the press-as-technology, with no special protection for the press-as-industry. Part V offers evidence that this remained true from 1880 to 1930.

Part VI then looks at how the Supreme Court has understood "freedom . . . of the press" since 1931, the first year that the Court struck down government action on First Amendment grounds. Throughout that time, the press-as-technology view has continued to be dominant. Many Supreme Court cases have officially endorsed this view. No Supreme Court case has rejected this view, though some cases have suggested the question remains open.

Part VII turns to how the "freedom . . . of the press" has been understood by lower courts since 1931, and concludes that the press-as-technology view has been dominant there as well. The first lower court decisions I could find adopting the press-as-industry view did not

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[15] *See infra* Section II.A.

[16] *See, e.g.*, Akhil Reed Amar, Heller, HLR, *and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 175-77 (2008); Sanford Levinson, *Superb History, Dubious Constitutional and Political Theory: Comments on Uviller and Merkel*, The Militia and the Right to Arms, 12 WM. & MARY BILL RTS. J. 315, 327-30 (2004) (book review); Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 659-63 (2008).

appear until the 1970s. Even since then, only a handful of cases have adopted such a view, and many more have rejected it. (The press-as-industry cases that this Part identifies could also be helpful as test cases for any future work that discusses the policy advantages and disadvantages of the press-as-industry model.)

None of the evidence I describe specifically deals with corporations, the particular speakers involved in *Citizens United*, but it does show that the institutional media has historically been seen as the equal of other people and organizations for purposes of the "freedom . . . of the press." The constitutional protections offered to the institutional media have long been understood—in the early republic, around 1868, from 1868 to 1970, and in the great bulk of cases since 1970 as well—as being no greater than those offered to others.

Finally, the Conclusion briefly discusses what effect this analysis should have on the Court's interpretation of the Free Press Clause. Of course, text, original meaning, tradition, and precedent have never been the Supreme Court's sole guides. But any calls for specially protecting the press-as-industry have to look to sources other than text, original meaning, tradition, and precedent for support.

I. EVIDENCE FROM AROUND THE FRAMING: THE FREEDOM OF THE PRESS AS A RIGHT OF "EVERY FREEMAN"

A. *Cases, Treatises, and Constitutions*

Early formulations of the freedom of the press spoke of it as a right of every "freeman," "citizen," or "individual." These formulations often set forth narrow substantive views of the "freedom of the press." But, whatever the scope of the right, it belonged to everyone (or at least all free citizens).

Blackstone, for instance, wrote in 1769 that "[*e*]*very freeman* has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press."[17] Jean-Louis de Lolme, an author widely cited by 1780s American writers, likewise wrote in his chapter on "Liberty of the Press" that "[*e*]*very subject* in England has not only a right to present petitions, to the King, or the Houses of Parliament; but he has a right also to lay his complaints and

[17] 4 WILLIAM BLACKSTONE, COMMENTARIES *151 (emphasis added); *see also* David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 99 (1975) ("The emphasis in 'freedom of the press' was upon unrestrained dissemination of thought and the right belonged not merely to 'the press' but to 'every free man.'").

observations before the Public, by the means of an open press."[18] The right to present petitions, of course, was not limited to the press as an industry, but really did belong to "[e]very subject." De Lolme's explanation suggests that the right to speak to the public via "an open press" likewise extended to all subjects, whether or not they used the printing press for a living.

State supreme courts in 1788 and 1791 similarly described the liberty of the press as "permitting *every man* to publish his opinions,"[19] and as meaning that "*the citizen* has a right to publish his sentiments upon all political, as well as moral and literary subjects."[20] Justice Iredell described the liberty of the press in 1799 as meaning that "[*e*]*very freeman* has an undoubted right to lay what sentiments he pleases before the public."[21] St. George Tucker, in 1803, defined the "freedom of the press" as meaning that "[*e*]*very individual*, certainly, has a right to speak, or publish, his sentiments on the measures of government."[22]

Several early state constitutions echoed this as well, providing that "[*e*]*very citizen* may freely speak, write and print on any subject, being responsible for the abuse of that liberty."[23] Likewise, Justice Story, who

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[18] J. L. DE LOLME, THE CONSTITUTION OF ENGLAND 280 (London, T. Spilsbury 1775) (emphasis added). De Lolme is tied for third on Donald Lutz's list of the most-cited authors in 1780s American political writing, behind Blackstone and Montesquieu, and tied with Cesare Beccaria and with Trenchard and Gordon of *Cato's Letters*. Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 193 (1984).

[19] Respublica v. Oswald, 1 Dall. 319, 325 (Pa. 1788) (emphasis added).

[20] Commonwealth v. Freeman, HERALD OF FREEDOM (Boston), Mar. 18, 1791, at 5 (Mass. 1791) (emphasis added).

[21] *In re* Fries, 9 F. Cas. 826, 839 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 5126) (grand jury charge) (emphasis added) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151).

[22] 2 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. 28 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER] (emphasis added).

[23] PA. CONST. of 1790, art. IX, § 7 (emphasis added); *see also, e.g.*, DEL. CONST. of 1792, art. I, § 5 ("The press shall be free to every citizen, who undertakes to examine the official conduct of men acting in a public capacity; and any citizen may print on any subject, being responsible for the abuse of that liberty."); KY. CONST. of 1792, art. XII, § 7 ("[P]rinting presses shall be free to every person who undertakes to examine the proceedings of the Legislature or any branch of Government . . . and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."); Sovchik v. Roberts, No. 3090-M, 2001 WL 490015, at *3 n.1 (Ohio Ct. App. May 9, 2001) (interpreting similar provision in Ohio Constitution and concluding that "the plain language of the constitutional provision '[e]very citizen' cannot reasonably be construed as applying only to members of the media"), *quoted approvingly in* Wampler v. Higgins, 752 N.E.2d 962, 972 (Ohio 2001).

wrote in 1833 but who had learned the law in the decade following the enactment of the Bill of Rights, described the First Amendment as providing that "*every man* shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person . . . or attempt to subvert the government."[24] These references to a right of "every freeman," "every man," "every citizen," and "every individual" appear to refer to every person's right to use printing technology. They are much less consistent with the notion that the right gave special protection to the few men who were members of a particular industry.

Some early state constitutions mentioned both the "every citizen" phrase and, separately, the "liberty of speech, or of the press,"[25] but as the Pennsylvania Constitution of 1776 shows, these formulations did not describe separate rights. The Pennsylvania text read, "That the people have a right to freedom of speech, and of writing and publishing their sentiments: therefore the freedom of the press ought not to be restrained,"[26] which suggests that the freedom of the press was a restatement of the right of "the people" to publish.

Early cases, such as the 1803 *Runkle v. Meyer* decision, likewise treat the "liberty of the press" as equivalent to the provision that "every citizen may freely speak, write and print on any subject."[27] And St.

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[24] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 732 (Boston, Hilliard, Gray, & Co. 1833) (emphasis added). Noah Webster's influential 1828 American dictionary likewise defined "liberty of the press" as "the free right of publishing books, pamphlets or papers without previous restraint; or the unrestrained right which every citizen enjoys of publishing his thoughts and opinions, subject only to punishment for publishing what is pernicious to morals or to the peace of the state." 2 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (under "press"). Another definition in the same dictionary, listed under "liberty," was much the same: "freedom from any restriction on the power to publish books; the free power of publishing what one pleases, subject only to punishment for abusing the privilege, or publishing what is mischievous to the public or injurious to individuals." *Id.*

[25] *See, e.g.*, CONN. CONST. of 1818, art. 1, §§ 5–6 (protecting the right of "[e]very citizen [to] write and publish his sentiment on all subjects" and prohibiting any law from "curtail[ing] or restrain[ing] the liberty of speech or of the press"); N.Y. CONST. of 1821, art. 7, § VIII ("Every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right; and no law shall be passed, to restrain, or abridge the liberty of speech, or of the press.").

[26] PA. CONST. of 1776, ch. I, para. XII. For a discussion of three New York court cases that were decided within a few years of the enactment of article 7, section VIII of the New York Constitution of 1821 and take the press-as-technology view, see *infra* subsections III.B.3-4 and III.C.2.

[27] *See* 3 Yeates 518, 519 (Pa. 1803) (quoting the Pennsylvania Constitution's statement that "every citizen may freely speak, write and print on any subject" in explaining what the court saw as the proper understanding of "liberty of the press").

George Tucker, Chancellor Kent, and Justice Joseph Story all treated the First Amendment phrase "freedom of the speech, and of the press" as interchangeable with the state constitutional provisions that "every citizen may freely speak, write, and publish his sentiments."[28]

B. *The Structure of the Framing-Era Newspaper Industry*

The view that "freedom of the press" covers "every citizen," even people who aren't members of the publishing industry, also makes sense given how many important authors of the time were not members of that industry.

Newspapers of the era were small enterprises, with few or no employees.[29] Woodward and Bernstein were many decades in the future; Framing-era newspapers didn't do sustained investigative journalism.[30]

And while those newspapers doubtless contributed facts and opinions to public debate, some of the most important such contributions in newspapers came from people who were not publishers, printers, editors, or their employees—Madison, Hamilton, and Jay's *The Federal-*

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[28] 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (New York, O. Halsted 1827); *see also* 3 STORY, *supra* note 24, at 732-33; 2 TUCKER, *supra* note 22, app. 11-14. The Justices have often accepted these treatises as evidence of the original meaning of the Constitution. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 799 (1995); Harmelin v. Michigan, 501 U.S. 957, 977, 982 (1991) (Scalia, J., joined by Rehnquist, C.J.); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment).

The sources discussed in the text also suggest that the change from Madison's proposed constitutional amendment—"the people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable," 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834)—to the briefer First Amendment language ("Congress shall make no law . . . abridging the freedom of speech, or of the press") was not understood as affecting the substance of the protection. The freedom of speech or of the press was seen as equivalent to the people's right to speak, to write, or to publish their sentiments.

[29] *See, e.g.*, FREDERIC HUDSON, JOURNALISM IN THE UNITED STATES FROM 1690 TO 1872, at 136 (New York, Harper & Bros. 1873) (noting that printers and editors of the era lacked a "staff of paid writers"); FRANK LUTHER MOTT, AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS, 1690 TO 1940, at 115-16 (1941) (describing how the publisher of the first American daily newspaper "[u]ndoubtedly . . . did all the work on his paper himself during at least part of [1783–1784], even . . . selling it on the street").

[30] *See* Anderson, *supra* note 9, at 446-47 ("The concept of press as journalism cannot claim a historical pedigree. When the First Amendment was written, journalism as we know it did not exist. The press in the eighteenth century was a trade of printers, not journalists.").

ist essays are a classic example.[31] "[N]ot a few of the country editors . . . depended for what literary work their vocation demanded upon the assistance of friends who liked being 'contributors to the press' without fee."[32]

It seems unlikely that the Framers would have secured a special right limited to this small industry, an industry that included only part of the major contributors to public debate. This is especially so given that some of the most powerful and wealthy contributors, such as the politicians and planters who wrote so much of the important published material, weren't part of the industry. Some eighteenth-century American political figures—such as the young Benjamin Franklin and Representative Matthew Lyon, one of the targets of a Sedition Act prosecution—were indeed newspapermen, but they were rare exceptions.

Political elites sometimes secure rights for themselves. They sometimes secure rights for the whole public. But it seems unlikely that they would have secured rights for a class of tradesmen who were generally poorer and less powerful than the elites, and would have denied those rights to themselves and to people of their class. Rather, as William Livingston—who later became a governor of New Jersey and a delegate to the Constitutional Convention—wrote in his 1753 essay titled *Of the Use, Abuse, and Liberty of the Press*, one of the great benefits provided by "the Art of Printing" and "the Invention of the Press" is that "the Press" could be used by "Writers of every Character and Genius," including "[t]he Patriot," "[t]he Divine" (i.e., the clergyman), "the Philosopher, the Moralist, the Lawyer, and Men of every other Profession and Character, whose Sentiments may be diffused with the greatest Ease and Dispatch."[33]

To be sure, the Framers praised newspapers, sometimes extravagantly so; consider Jefferson's statement that, "were it left to me to decide whether we should have a government without newspapers, or

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[31] Nor were these statements necessarily endorsed by the newspaper publishers to the point that they could be seen as an expression of the publishers' own views. *See, e.g.*, PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 70-75 (2010) (describing the public pressures that kept many anti-Federalist essays from being published, and describing how some tried to counteract those pressures by publishing the materials without endorsing them as their own opinions).

[32] MOTT, *supra* note 29, at 162; *see also* DONALD H. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 20 (1969) (stating, in reference to American newspapers of that era generally, that "[s]ubscribers' pens provided a large proportion of the items in these gazettes," mostly "discuss[ing] political subjects").

[33] William Livingston, *Of the Use, Abuse, and Liberty of the Press*, INDEP. REFLECTOR, Aug. 30, 1753, *reprinted in* THE INDEPENDENT REFLECTOR 336, 336-37 (Milton M. Klein ed., 1963).

newspapers without a government, I should not hesitate a moment to prefer the latter."[34] But Jefferson spoke of newspapers, not newspapermen. There is no reason to think his praise, or the Free Press Clause, excluded newspapers as a means of propagating the views of authors who weren't part of the press-as-industry but who occasionally submitted their articles for publication.

It's theoretically conceivable that a right of "every person" to publish using the press might refer only to the right of every person—including Livingston's clergyman, philosopher, moralist, or lawyer—to buy a printing press and to start printing using that press, or perhaps to start a regular newspaper published on someone else's press. Once a person buys the press or starts a newspaper, the theory would go, what the person publishes with it would be protected by the freedom of the press. But until then, the freedom of the press does not cover any article the person submits to a newspaper, or any leaflet that the person pays a printer to print.

This, though, seems like an odd understanding of the "undoubted right" of "[e]very freeman" "to lay what sentiments he pleases before the public."[35] Buying a press and hiring a printer to operate it—or starting a newspaper and hiring an editor—was an expensive and cumbersome means of laying your sentiments before the public.

Indeed, even rich and influential American politicians did not take such steps. If they wanted to publish something, they would submit it to a newspaper (for a famous example, consider Madison, Hamilton, and Jay's *The Federalist*), or help pay for its publication as a pamphlet (as Hamilton did for the second edition of *The Federalist*, and as Thomas Paine did for *Common Sense*).[36]

Again, one can imagine a notion of the "undoubted right" of "[e]very freeman" "to lay what sentiments he pleases before the public" under which those publications were not seen as protected by the author's freedom of the press—so that authors who really wanted such protection (for instance, against a libel lawsuit, libel prosecution, or injunction) had to buy their own presses or start their own newspapers, which they almost never did. But the cases, commentaries, and

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[34] Letter from Thomas Jefferson to Colonel Edward Carrington (Jan. 16, 1787), *in* 2 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 84, 85 (Thomas Jefferson Randolph ed., London, Henry Colburn & Richard Bentley 1829).

[35] *See supra* note 17.

[36] *See infra* note 69. In the early republic, a few politicians helped fund partisan newspapers. But this was done by only a few political leaders, and I have seen no reason to think that it was done to get the politicians special protections against legal liability.

Framing-era practice do not suggest that anyone at the time had such an odd understanding of what "[e]very freeman['s]" "right" meant.

C. *The (Possibly) Dissenting Sources*

I have found only two early sources that could be read as supporting a view that the liberty of the press might belong only to printers or newspaper publishers, though both include language that points in both directions.

The first source is Francis Ludlow Holt's *The Law of Libel* (1812), which says that "[t]he liberty of the press . . . is only one of the personal rights of the printer."[37] But other parts of the same chapter suggest that Holt viewed the right as belonging to authors—including ones who aren't printers or their employees—and not just printers.

Two pages later, Holt defines "[t]he liberty of the press" as "the personal liberty of *the writer* to express his thoughts in the more [im]proved way invented by human ingenuity in the form of the press."[38] He likewise describes the "liberty of the press" as "what is necessarily included in its equivalent and progressive terms, thinking, speaking, and writing,"[39] as "one of the forms of the liberty of speech and communication,"[40] and later in the book as "[t]he natural liberty of the people" to engage in "opinion, . . . inquiry, and . . . discussion" about Parliament.[41] And Holt notes that "with a very few exceptions, whatever any one has a right both to think and to speak, he has likewise a consequential right to print and to publish."[42] This seems more consistent with all speakers' and writers' right to express their views using the press-as-technology, rather than with a right limited to the few people who are members of the press-as-industry.

The second source is a civics schoolbook called *First Lessons in Civil Government* (1843), in which the author writes, with regard to the New York Constitution,

> The section which remains to be noticed, is that which secures to all the right "freely to speak, write, and publish their sentiments;" that is, *the lib-*

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[37] HOLT, *supra* note 10, at 36.

[38] *Id.* at 38 (emphasis added). The original reads "the more approved," but the author must have meant "the more improved," and the 1816 revision makes that correction. FRANCIS LUDLOW HOLT, THE LAW OF LIBEL 51 (London, J. Butterworth et al. 2d ed. 1816).

[39] HOLT, *supra* note 10, at 37.

[40] *Id.* at 45.

[41] *Id.* at 128.

[42] *Id.* at 46-47.

> *erty of speech and of the press.* A *press* is a machine for printing; but the word is also used to signify the business of printing and publishing; hence liberty of the press is the free right to publish books or papers without restraint.[43]

This too is ambiguous. The first sentence speaks of a right of "all," and the "free right to publish books or papers" could be read as a right of all, since "publishing" was a general term for what authors did and not just for what printers did.[44] But the "business of printing and publishing" clause suggests that the right is limited to those in the press-as-industry.

Yet however one reads these two sources, I think they do not overcome the evidence of the other sources mentioned earlier in this Part, coupled with the sources discussed below.[45]

D. *The Grammatical Structure of "the Freedom of Speech, or of the Press"*

The grammatical structure of the First Amendment likewise suggests that the freedom was the freedom "of every freeman" or "every citizen" *to use* the press-as-technology, and not a freedom *belonging* to the press-as-industry.

As Justice Scalia pointed out in *Citizens United*, the shared words "freedom of" in the phrase the "freedom of speech, or of the press" are most reasonably understood as playing the same role for both "speech" and "press."[46] The "freedom of speech" is freedom to engage in an activity, much like "freedom of movement" or "freedom of religion." In particular, it is the freedom to use the faculty of speech.

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[43] ANDREW W. YOUNG, FIRST LESSONS IN CIVIL GOVERNMENT: INCLUDING A COMPREHENSIVE VIEW OF THE GOVERNMENT OF THE STATE OF NEW-YORK 155 (Auburn, N.Y., H. & J.C. Ivison 10th ed. 1843) (citing N.Y. CONST. of 1822, art. 7, § VIII). Another edition says, with regard to the Ohio Constitution, that "*the liberty of speech and of the press*" is the right "to speak, write, or print upon any subject, as he thinks proper . . . . The word *press* here signifies the business of printing and publishing; hence liberty of the press is the right to publish books and papers without restraint." ANDREW W. YOUNG, FIRST LESSONS IN CIVIL GOVERNMENT: INCLUDING A COMPREHENSIVE VIEW OF THE GOVERNMENT OF THE STATE OF OHIO 139 (Cleveland, M.C. Younglove 1848) (citing OHIO CONST. of 1802, art. VIII, § 6).

[44] *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1081-82 (2009) (explaining the Framing-era understanding that "publishing" meant communicating something to the public).

[45] *See infra* Parts II and III.

[46] *See* Citizens United v. FEC, 130 S. Ct. 876, 928 n.6 (2010) (Scalia, J., concurring) (arguing that "no one" thought the First Amendment meant "everyone's right to speak or the institutional press's right to publish"); Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 345-46 (2008) ("The construction makes it likely that the Framers meant 'of speech' and 'of the press' to be interpreted in a parallel manner.").

This suggests that "freedom of the press" is likewise freedom to engage in an activity by using the faculty of the printing press.

This is supported by sources that discuss the "freedom *in the use* of the press." Thus, James Madison, in his 1800 *Report on the Virginia Resolutions*, wrote that American law provided "a different degree of freedom in the use of the press" than English law did.[47] The Massachusetts response to the Virginia resolutions replied that the "freedom of the press" "is a security for the rational use, and not the abuse of the press."[48] St. George Tucker's influential 1803 work, in discussing the freedom of the press, spoke of "[w]hoever makes use of the press as the vehicle of his sentiments on any subjects."[49] The freedom of the press was "freedom in the use of the press," much as freedom of speech was freedom in the use of speech.

Likewise, Madison's *Report* also quoted a phrase from Virginia's ratifying convention: "We, the Delegates of the people of Virginia . . . declare and make known . . . that among other essential rights, the liberty of conscience and of the press cannot be cancelled, abridged, restrained or modified by any authority of the United States."[50] Again, the phrase "the liberty of" is seen as applying equally to "conscience" and "the press." Here too this suggests that, just as the liberty of conscience was seen during that era as each person's freedom to worship or to think and speak as he wished on religious matters,[51] so the liberty of the press meant each person's freedom to publish.[52]

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[47] JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS TO THE HOUSE OF DELEGATES (1800), *reprinted in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 570 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT'S DEBATES]; *see also* Lee, *supra* note 46, at 342 ("The inclusion of the word 'use' in . . . 'freedom in the use of the press' makes it unmistakably clear that Madison . . . w[as] referring to the machine of the printing press.").

[48] Reply of the Legislature to Resolutions of the State of Virginia, ch. 119, 1798 Gen. Court, Jan. Sess. (Mass. 1799), 1798–1799 Mass. Acts 257, 260, *reprinted in* 4 ELLIOT'S DEBATES, *supra* note 47, at 533, 535.

[49] 2 TUCKER, *supra* note 22, app. 29.

[50] MADISON, *supra* note 47, at 576 (quoting Form of Ratification, 1788 Ratifying Convention (Va. 1788), *reprinted in* 3 ELLIOT'S DEBATES, *supra* note 47, at 656).

[51] *See* N.Y. CONST. of 1777, art. XXXVIII (treating "liberty of conscience" as synonymous with "the free exercise and enjoyment of religious profession and worship"); HORTENSIUS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS 41 (Philadelphia, The Aurora Office 1799) (defining the constitutional "freedom of religion" "to mean the power uncontrolled by law of professing and publishing any opinions on religious topics, which any individual may choose to profess or publish, and of supporting those opinions by any statements he may think proper to make"). George Hay was appointed U.S. Attorney for the District of Virginia in 1803 and eventually finished his career

Of course, "freedom of" is also sometimes used in the possessive sense to refer to the freedom of a particular group. One might, for instance, speak of "the freedom of Americans to speak,"[53] or "the freedom of Catholics to practice their religion."[54]

But writers generally don't yoke together two such different meanings with the same words: it would be odd for "the freedom of" in "the freedom of speech, or of the press" to mean one thing in the first part of the phrase (i.e., everyone's freedom to use the faculty of speech) and a different thing in the second part (i.e., the freedom belonging to a particular group, the press-as-industry).[55] And as the sources mentioned in Part III suggest, the First Amendment was not read in this odd way—the freedom of the press was understood as the freedom of everyone to publish, just as the freedom of speech was the freedom of everyone to speak.

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as a federal judge. *Biographical Directory of Federal Judges: Hay, George*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetInfo?jid=1006 (last visited Nov. 15, 2011).

[52] "Freedom of the press" was also sometimes yoked with "licentiousness of the press," but "licentiousness of the press" was understood as including publications by people who were using the press-as-technology, and not just by members of the press-as-industry. Thus, for instance, Judge Mansfield's oft-quoted statement that "[t]he liberty of the press consists in printing without any previous license, subject to the consequences of law" while "[t]he licentiousness of the press is Pandora's box, the source of every evil" came in his opinion justifying the conviction of a clergyman who had published a pamphlet using the press-as-technology, but who was not a member of the press-as-industry. R v. Shipley (*The Dean of St. Asaph's Case*), (1784) 99 Eng. Rep. 774 (K.B.) 824; 4 Dougl. 73, 170; *see also infra* subsection III.A.1. Likewise, Judge Chase's statement that the Sedition Act was "a law to check this licentiousness of the press" came in charging the jury in Thomas Cooper's trial for publishing a leaflet, not a newspaper article. United States v. Cooper, 25 F. Cas. 631, 639 (Chase, Circuit Justice, C.C.D. Pa. 1800) (No. 14,865); *see also infra* subsection III.B.1. *Cato's Letters* similarly argued that oppressors "have been loud in their Complaints against Freedom of Speech, and the Licence of the Press; and always restrained, or endeavoured to restrain, both. In consequence of this, they have brow-beaten Writers, punished them violently, and against Law, and burnt their Works." 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 101-02 (London, W. Wilkins et al. 4th ed. 1737). This is a reference to the alleged licentiousness of books (books being more commonly burned than newspapers) used as a reason to punish writers of books, and isn't limited to the alleged licentiousness of the institutional press.

[53] *E.g.*, Nike, Inc. v. Kasky, 539 U.S. 654, 667 (2003) (Breyer, J., dissenting).

[54] *E.g.*, James Lowell Underwood, *The Dawn of Religious Freedom in South Carolina: The Journey from Limited Tolerance to Constitutional Right*, 54 S.C. L. REV. 111, 151 (2002).

[55] *See* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003) ("Absent some very strong reason to the contrary, we should conclude that a word or phrase in a particular clause or sentence has the same meaning throughout the clause or sentence.").

E. *Responding to the Redundancy Objection*

The freedom of the press-as-technology, of course, was not seen as redundant of the freedom of speech.[56] St. George Tucker, for instance, discussed the freedom of speech as focusing on the spoken word and the freedom of the press as focusing on the printed:

> The best speech cannot be heard, by any great number of persons. The best speech may be misunderstood, misrepresented, and imperfectly remembered by those who are present. To all the rest of mankind, it is, as if it had never been. The best speech must also be short for the investigation of any subject of an intricate nature, or even a plain one, if it be of more than ordinary length. The best speech then must be altogether inadequate to the due exercise of the censorial power, by the people. The only adequate supplementary aid for these defects, is the absolute freedom of the press.[57]

Likewise, George Hay, who later became a U.S. Attorney and a federal judge, wrote in 1799 that "freedom of speech means, in the construction of the Constitution, the privilege of speaking *any thing* without control" and "the words freedom of the press, which form a part of the same sentence, mean the privilege of printing *any thing* without control."[58] Massachusetts Attorney General James Sullivan (1801) similarly treated "the freedom of speech" as referring to "utter[ing], in words spoken," and "the freedom of the press" as referring to "print[ing] and publish[ing]."[59]

And these sources captured an understanding that was broadly expressed during the surrounding decades. Bishop Thomas Hayter, writing in 1754, described the "Liberty of the Press" as applying the

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[56] Justice Stewart argued that the Free Press Clause should be read as protecting the press-as-industry since otherwise it would be a "constitutional redundancy." Stewart, *supra* note 4, at 633-34; *see also* West, *supra* note 6, at 1040-41 (likewise).

[57] 2 TUCKER, *supra* note 22, app. 17. Tucker suggested that other material—such as pictures, symbolic expression, and writing—would be protected as well. *Id.* at 11-14; *see also* sources cited *supra* note 28. But since in-person speech and printing were the most common subjects of suppression, and of debates about constitutional protection, Tucker naturally focused on those two matters.

[58] HORTENSIUS, *supra* note 51, at 40-41.

[59] AN IMPARTIAL CITIZEN [JAMES SULLIVAN], A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 17 (Boston, David Carlisle 1801). Sullivan used those phrases in ridiculing an overexpansive view of the First Amendment, in which the freedom of the press was read as entirely unlimited; he was arguing for the freedom as being limited to examination of public matters, and not to personal slanders. But in the process he was treating "freedom of speech" as referring to the freedom to use spoken words, to whatever extent that might be properly limited, and the "freedom of the press" as referring to the freedom to use printing technology.

traditionally recognized "Use and Liberty of Speech" to "Printing," an activity that Hayter described as "only a more extensive and improved Kind of Speech."[60] Hayter's work was known and quoted in Revolutionary-era America.[61]

Similarly, William Bollan (1766) described "printing" as "a species of writing invented for the more expeditious multiplication of copies," and asserted that "freedom or restraint of speech and writing upon public affairs have generally been concomitant"; because of this, Bollan argued, "restraints of writing" were likely to erode the "liberty of speech" and not only of writing, and "those who desire to preserve the [liberty of speech] ought by all means to take due care of the [freedom of writing]."[62] And Bollan used "liberty of the press" and "the freedom of writing" (in a context suggesting printing) interchangeably.[63]

Later, Francis Holt (1812) defined the liberty of the press as "the personal liberty of the writer to express his thoughts in the more [im]proved way invented by human ingenuity in the form of the press."[64] William Rawle (1825) likewise characterized "[t]he press" as "a vehicle of the freedom of speech," adding that "[t]he art of printing illuminates the world, by a rapid dissemination of what would otherwise be slowly communicated and partially understood."[65]

Without the freedom of the press, the freedom of speech might not have been viewed as covering printing, given that printing posed dangers that ordinary "speech" did not. Indeed, in the centuries before the Framing, governments tried to specifically constrain the use of the press-as-technology because they found it to be especially dangerous. The free press guarantees made clear that this potential-

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[60] HAYTER, *supra* note 10, at 8.

[61] *See, e.g.*, Civis, Letter to the Editor, VA. GAZETTE, May 18, 1776, at 1 ("Printing is a more extensive and improved kind of speech."); Letter to the Editor, PA. PACKET & DAILY ADVERTISER, Nov. 12, 1785, at 2 (same); *London, Nov. 7*, MASS. GAZETTE, Jan. 30, 1786, at 1 (same); *London, Oct. 29*, CONN. J., Jan. 4, 1786, at 1 (same).

[62] WILLIAM BOLLAN, THE FREEDOM OF SPEECH AND WRITING UPON PUBLIC AFFAIRS, CONSIDERED 3-4 (London, S. Baker 1766). Bollan was "a distinguished Massachusetts lawyer who served the colony as its advocate general and then as its agent in England, [and] earned John Adams' praise as 'a faithful friend of America.'" FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 83 (Leonard W. Levy ed., 1966). Bollan's work was quoted in American free press debates shortly before the Revolution. *Id.* at 84.

[63] BOLLAN, *supra* note 62, at 137.

[64] HOLT, *supra* note 10, at 38; *see also* Lee, *supra* note 46, at 344-45 (quoting *id.*).

[65] WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 119 (Philadelphia, H.C. Carey & I. Lea 1825).

ly dangerous technology was protected alongside direct in-person communications.[66]

Of course, over the last several decades, the phrase "freedom of speech" has often been used to mean "freedom of expression" and to encompass all means of communication. This might have stemmed partly from technological change. New media of communication such as radio, films, television, and the Internet may fit more naturally in lay English within the term "speech" rather than "press." And once some mass communication technologies are labeled "speech," it becomes easier to label their traditional print equivalent "speech" as well.

The broadening of the phrase "freedom of speech" might also have been aided by the success of the "freedom of the press" clause in assuring protection for the press-as-technology.[67] Once constitutional law applies the same legal rules to spoken and printed communication, with no extra constraint on the press, it becomes easier to use a common label to refer to the common protection.

But the canon against interpreting legal writings in a way that makes one clause redundant of another rests on the notion that the authors and ratifiers of those writings wouldn't have written something that was redundant *under their understanding*. And under the late 1700s understanding, the freedom of the press-as-technology was not at all redundant of the freedom of speech.

II. EVIDENCE FROM AROUND THE FRAMING: THE FREEDOM OF THE PRESS COVERING AUTHORS OF BOOKS AND PAMPHLETS

Any Framing-era understanding limiting the "freedom of the press" to the press-as-industry is especially unlikely, given the then-existing understanding that the freedom protected books and pamphlets alongside newspapers.

A. *The Non-Press-as-Industry Status of Many Book and Pamphlet Authors*

Books and pamphlets of that era were written largely by scientists, philosophers, planters, ministers, politicians, and ordinary citizens, ra-

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[66] *See* Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 599-600 (1979) (so arguing); William W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HASTINGS L.J. 761, 769 n.16 (1977) (likewise).

[67] *Cf.* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 458 (1983) (explaining that when the Court's early First Amendment "cases were decided, the existence of a press clause may have been crucial").

ther than by members of the institutional press. In the words of Benjamin Rush—a leading American physician and intellectual—writing in 1790, "Our authors and scholars are generally men of business, and make their literary pursuits subservient to their interests. . . . Men, who are philosophers or poets, without other pursuits, had better end their days in an old country."[68]

Some books of the era were funded by printers who were members of the press-as-industry. Others were funded by authors themselves,[69] by ideological groups,[70] or by "subscribers" who supported the cost of production by paying the printer up front for printing the book.[71] Some books were likely published with hope of profit, and others chiefly out

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[68] BENJAMIN RUSH, ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 190 (Philadelphia, Thomas & William Bradford 2d ed. 1806); *see also* ROLLO G. SILVER, THE AMERICAN PRINTER, 1787–1825, at 97 (1967) ("Printed authors were of necessity amateurs with some dependable [outside] income.").

[69] *See* CHARLES A. MADISON, BOOK PUBLISHING IN AMERICA 6 (1966) ("Until publishing was well developed in the early decades of the 19th century, an American author customarily brought out his books at his own [financial] risk."); SILVER, *supra* note 68, at 98 ("Often an author considered publication a sufficient reward and he risked his own funds to achieve it."). Thus, for instance, Thomas Paine self-published *Common Sense* (1776) and his first work, *Case of the Officers of Excise* (1772). *See* Bill Henderson, *Independent Publishing: Today and Yesterday*, 421 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 95-96 (1975). Jeremy Belknap's *The History of New-Hampshire* (1784), one of the earliest works of serious history in America, was also self-published. *See* JEREMY BELKNAP, THE HISTORY OF NEW-HAMPSHIRE, at tit. page (Philadelphia, Robert Aitken 1784) (indicating that the book was "printed for the author"); George B. Kirsch, *Jeremy Belknap: Man of Letters in the Young Republic*, 54 NEW ENG. Q. 33, 35-36 (1981) (describing Belknap's efforts to self-publish his history, and noting the significance of Belknap's work). Alexander Hamilton paid more than half of the cost of the first printing of *The Federalist* in book form. *See* MAIER, *supra* note 31, at 84. And Tunis Wortman's early work on the freedom of the press was likewise self-published. *See* TUNIS WORTMAN, A TREATISE, CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS, at tit. page (photo. reprint 1970) (1800). The notation "printed for the author," seen on Belknap's and Wortman's title pages, meant the book was published at the author's expense. Keith Maslen, *Printing for the Author: From the Bowyer Printing Ledgers, 1710–1775*, [5 Ser. 27] THE LIBR. 302, 305 (1972).

[70] *See, e.g.*, CASES ADJUDGED IN THE SUPREME COURT OF NEW JERSEY; RELATIVE TO THE MANUMISSION OF NEGROES AND OTHERS HOLDEN IN BONDAGE, at tit. page (Burlington, Isaac Neale 1794) ("Printed for 'The New-Jersey Society for Promoting the Abolition of Slavery.'").

[71] *See, e.g.*, HANNAH ADAMS & HANNAH FARNHAM SAWYER LEE, A MEMOIR OF MISS HANNAH ADAMS 19-21 (Boston, Gray & Bowen 1832) (describing the 1791 publication of the second edition of Adams's dictionary of religions as funded partly by subscriptions and partly by the printer); JOEL BARLOW, THE VISION OF COLUMBUS 259-70 (Hartford, Hudson & Goodwin 1787) (listing the book's many subscribers); 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 113, 116, 133, 158-60 (1972) (discussing eighteenth century subscription publishing in America).

of a desire to spread ideas. But in each of these categories, people outside the press-as-industry wrote many of these books.

Such authors were outside the "art or business of printing and publishing," to quote the 1828 Noah Webster definition of "press" that most closely fits the press-as-industry model.[72] They did not fit within the "press" in the sense of "[n]ewspapers, journals, and periodical literature collectively," to quote the comparable definition from the *Oxford English Dictionary*.[73] They likewise would not have fit within the "press" as understood by the few modern decisions that adopt a press-as-industry view of the First Amendment.[74]

Such authors were akin to a modern businessman writing and distributing a book[75] or funding a video program:[76] they rented facilities and services from printers, but they were not in the printing business themselves. Yet books and pamphlets, which were predominantly written by such authors, were routinely understood to be covered by the "freedom of the press," which suggests that this liberty was understood as encompassing more than just the press-as-industry.

To be sure, one could define such authors as part of "the press" on the grounds that they used the press to communicate, even if they didn't own presses or make a living from presses. But that would be the same as adopting the press-as-technology model. Book authors' relationship to "the press" was in essence the same as the relationship of the modern authors of occasional newspaper articles to the newspaper owners, or the relationship of modern advertisers to the newspaper owners.[77] All such authors used the press-as-technology by bor-

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[72] *See* 2 WEBSTER, *supra* note 24 (under "press").

[73] First Definition of "Press," OXFORD ENG. DICTIONARY ONLINE (Sept. 2011), http://www.oed.com/view/Entry/150765.

[74] *See, e.g.*, *infra* notes 318-19, 333, 380 and accompanying text; *see also* Matera v. Superior Court, 825 P.2d 971, 973 (Ariz. Ct. App. 1992) (interpreting a state statutory privilege for members of the "media" as "intended to apply to persons who gather and disseminate news on an ongoing basis as part of the organized, traditional, mass media").

[75] *See infra* note 380 (discussing the view of some FEC commissioners that book authors aren't entitled to the "media exemption" from campaign finance law).

[76] *See, e.g.*, Citizens United, Advisory Opinion 2004-30, at 2-3 (Fed. Election Comm'n Sept. 10, 2004); *see also infra* notes 382-33. I analogize here to a hypothetical individual speaker, not a corporation; to what extent the First Amendment protects corporate speech, whether by newspapers or by the public, is a story for another day. This Article focuses on the separate question of whether the "freedom . . . of the press" protects newspapers, magazines, and the like—whether corporations or not—more than it protects other organizations.

[77] See, for example, *People v. Judah*, discussed *infra* subsection III.B.3.

rowing or renting space on printing presses from members of the press-as-industry.

B. *Specific References to the Freedom of the Press as Covering Books and Pamphlets*

Around the Framing, books were clearly seen as covered by the liberty of the press. David Hume's *The History of England*, for instance, said this to describe the 1694 expiration of the statute that required a license to print:

> The liberty of the press did not even commence with the revolution [of 1689]. It was not till 1694, that the restraints were taken off; to the great displeasure of the king, and his ministers, who, seeing nowhere in any government, during present or past ages, any example of such unlimited freedom, doubted much of its salutary effects, and probably thought, that no books or writings would ever so much improve the general understanding of men, as to render it safe to entrust them with an indulgence so easily abused.[78]

Likewise, in his 1741 essay *Liberty of the Press*, Hume noted that "[w]e need not dread from [the liberty of the press] any such ill Consequences as followed from the Harangues of the popular Demagogues of Athens and Tribunes of Rome" because a "Man reads a Book or Pamphlet alone and coolly" rather than surrounded by a mob that may inflame him.[79] Similarly, in 1788, James Iredell—then a defender of the proposed Constitution and a soon-to-be Supreme Court Justice—spoke of the liberty of the press as including books:

> The liberty of the press is always a grand topic for declamation, but the future Congress will have no other authority over this than to secure to authors for a limited time an exclusive privilege of publishing their works.—This authority has been long exercised in England, where the press is as free as among ourselves or in any country in the world; and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own, and so far as this may be deemed a restraint upon others it is certainly a reasonable one . . . . If the Congress should exercise any other power over the press than this, they will do it without any warrant from

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[78] 8 DAVID HUME, THE HISTORY OF ENGLAND 332 (London, T. Cadell 1782) (1754–1762); *see also* Lewis, *supra* note 66, at 597-98 ("Those who called for 'freedom of the press' in the seventeenth and eighteenth centuries had in mind books and pamphlets and all kinds of occasional literature as much as newspapers.").

[79] DAVID HUME, ESSAYS, MORAL AND POLITICAL 15 (Edinburgh, R. Fleming & A. Allison 1761). As to pamphlets and other short publications, see *infra* notes 136-37 and accompanying text.

> this constitution, and must answer for it as for any other act of tyranny.[80]

Copyright law at the time covered books, maps, and charts, but not newspapers.[81] To talk about copyright law as even potentially related—however benignly—to the freedom of the press suggests that the freedom of the press was seen as applicable to books.

Judge Alexander Addison's 1799 grand jury charge similarly stated that "the freedom of the press consists in this, that any man may, without the consent of any other, print any book or writing whatever, being . . . liable to punishment, if he injure an individual or the public."[82] A law "that no book should be printed without permission from a certain officer," Addison said in the same charge, "would be a law abridging the liberty of the press."[83] And St. George Tucker, in 1803, echoed Hume in writing that the expiration of the licensing of printers in 1694 "established the freedom of the press in England," partly by freeing the printing and distribution of books.[84]

C. *Freedom of the Press as Extending to Literary, Religious, and Scientific Works*

Many leading sources of that era also spoke of the liberty of the press as extending to literary, religious, and scientific writings, which were often (probably much more often than not) published by people who did not engage in journalism or printing for a living. Hume's *Of the Liberty of the Press*, for instance, discussed "the Liberty of the Press, by which all the Learning, Wit, and Genius of the Nation may be employ'd on the side of [freedom] and everyone be animated to its Defence."[85] The Continental Congress's 1774 *Letter to the Inhabitants of Quebec* discussed the importance of the freedom of the press as con-

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[80] JAMES IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION RECOMMENDED BY THE LATE CONVENTION AT PHILADELPHIA, *reprinted in* 2 LIFE AND CORRESPONDENCE OF JAMES IREDELL 186, 207-08 (Griffith J. McRee ed., New York, D. Appleton & Co. 1858).

[81] *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790) (repealed 1802); *see also* Clayton v. Stone, 5 F. Cas. 999, 1003 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1829) (No. 2872) ("We are . . . of opinion that [a newspaper] is not a book, the copyright to which can be secured under the act of congress."). Copyright law didn't protect newspapers until 1909. *See* 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:60, at 3-172 n.2 (2010).

[82] ALEXANDER ADDISON, CHARGES TO GRAND JURIES OF THE COUNTIES OF THE FIFTH CIRCUIT, IN THE STATE OF PENNSYLVANIA 279 (Washington, John Colerick 1800).

[83] *Id.* at 282.

[84] 1 TUCKER, *supra* note 22, app. 298.

[85] HUME, *supra* note 79, at 14.

sisting in part of "the advancement of truth, science, morality, and arts," as well as of politics.[86] Nor was this an original view at the time; the French philosopher Helvetius, who was well known to the Framing generation,[87] similarly wrote that "[i]t is to contradiction, and consequently to the liberty of the press, that physics owes its improvements. Had this liberty never subsisted, how many errors, consecrated by time, would be cited as incontestible axioms! What is here said of physics is applicable to morality and politics."[88]

Justice Iredell expressed the same view in a 1799 grand jury charge: "The liberty of the press . . . has converted barbarous nations into civilized ones—taught science to rear its head—enlarged the capacity—increased the comforts of private life—and, leading the banners of freedom, has extended her sway where her very name was unknown."[89] Likewise, James Madison's 1799 *Address of the General Assembly to the People of the Commonwealth of Virginia* stated—in the middle of the discussion of the "liberty . . . of the press"—that "it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion, for disclosing her genuine lustre, and disseminating her salutary doctrines."[90]

Yet science, religion, morality, the arts, and civilization were mostly advanced by works written by people who were scientists, theologians, philosophers, or artists, not journalists or printers. It seems hard to imagine that Hume, Iredell, Madison, and the Continental Congress were speaking about a freedom of the press that extended only to newspapermen and excluded the Newtons, Luthers, Humes, Lockes, Jeffersons, and Madisons of the world.

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[86] Letter from the Continental Congress to the Inhabitants of the Providence of Quebec (Oct. 26, 1774), *in* 1 JOURNALS OF CONTINENTAL CONGRESS 1774–1789, at 105, 108 (1904).

[87] *See, e.g.*, A COLUMBIAN PATRIOT [MERCY OTIS WARREN], OBSERVATIONS ON THE NEW CONSTITUTION, AND ON THE FEDERAL AND STATE CONVENTIONS 2 (Boston, n. pub. 1788) (quoting Helvetius); Letter from Thomas Jefferson to Colonel William Duane (Sept. 16, 1810) (same), *in* 5 THE WRITINGS OF THOMAS JEFFERSON 538, 539 (H.A. Washington ed., Washington, Taylor & Maury 1853).

[88] 2 HELVETIUS, A TREATISE ON MAN, HIS INTELLECTUAL FACULTIES AND HIS EDUCATION 319 (W. Hooper ed. & trans., London, B. Law & G. Robinson 1777) (translating 2 HELVETIUS, DE L'HOMME, DE SES FACULTÉS INTELLECTUELLES, ET DE SON ÉDUCATION (London, La Société Typographique 1773)).

[89] *In re* Fries, 9 F. Cas. 826, 838 (Iredell, Circuit Justice, C.C.D. Pa. 1799) (No. 5124).

[90] James Madison, Address of the General Assembly to the People of the Commonwealth of Virginia (Jan. 23, 1799), *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 509, 511 (Philadelphia, J.B. Lippincott & Co. 1865).

III. EVIDENCE FROM THE FRAMING AND THE EARLY REPUBLIC: CASES FROM 1784 TO 1840

Fifteen early cases also show that courts and lawyers during the early years of the Republic understood the freedom of the press as extending to authors regardless of whether they were members of the press-as-industry. Though the American cases follow the drafting of the First Amendment by one to five decades, they are entirely consistent with the 1700s evidence discussed above. I have seen no reason to think there was some change from a press-as-industry understanding in the 1700s to a press-as-technology understanding as shown in those cases.

If anything, the common definition of "press" was *more* clearly focused on the press-as-technology in the late 1700s than it was in the 1820s and 1830s. The only possibly relevant definition of "press" in Samuel Johnson's 1755–1756 dictionary referred just to the printing press;[91] the same was true of the 1790 edition[92] and of Noah Webster's 1806 *A Compendious Dictionary of the English Language*, published in America.[93] Noah Webster's 1828 dictionary, on the other hand, included both the technology and the industry as possible meanings of

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[91] *See* 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, W. Strahan 2d ed. 1756) (defining "press" as "[t]he instrument by which books are printed"). Johnson's was "for well over a century . . . without peer as the most authoritative dictionary in English." SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY 56 (1984).

[92] *See* 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 9th ed. 1790) (defining "press" as "[t]he instrument by which books are printed").

[93] *See* NOAH WEBSTER, A COMPENDIOUS DICTIONARY OF THE ENGLISH LANGUAGE 235 (Hartford, Sidney's Press 1806) (defining "press" as an "instrument used for printing"). The first American dictionary is short and has no entry for "press" or "liberty of the press." *See* SAMUEL JOHNSON, JR., A SCHOOL DICTIONARY 114, 142 (New Haven, Edward O'Brien n.d.) (the author is not the more famous Samuel Johnson). Neither do two of the leading English law dictionaries of the era. *See* 2 RICHARD BURN, A NEW LAW DICTIONARY (London, A. Strahan & W. Woodfall 1792); 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, J.F. & C. Rivington 3d ed. 1783). A third major law dictionary lists "press, *(Liberty of the)*," but simply cites back to Blackstone, and adds the passage, "The printers of the public papers, should for ever recollect the motto *libertas sine licentia*, or they, who doubtless wish well to that principal bulwark of our constitution, may, tho' without design, ultimately prove its greatest enemies." GILES JACOB, A NEW LAW DICTIONARY 3 (London, W. Strahan & W. Woodfall 10th ed. 1782). The instruction to "printers of the public papers" suggests that their misbehavior was seen as a serious threat to the liberty of the press; but it does not assert that the liberty belonged only to such printers, especially given Blackstone's discussion of this as a liberty of "every freeman." The first American law dictionary does not define "press," but defines "liberty of the press" without shedding light on the question before us. JOHN BOUVIER, A LAW DICTIONARY 42 (Philadelphia, T. & J.W. Johnson 1839).

"press" (though the dictionary specifically defined the "liberty of the press" as a right of "every citizen" and as including the right to publish "books" and "pamphlets").[94] Likewise, the *Oxford English Dictionary* reports that the press-as-industry definition was just developing in the late 1700s and early 1800s, giving this as definition 3(d) of "press":

> Newspapers, journals, and periodical literature collectively. . . . This use of the word appears to have originated in phrases such as the *liberty of the press*, *to write for the press*, *to silence the press, etc.*, in which 'press' originally had sense 3c [The printing-press in operation, the work or function of the press; the art or practice of printing], but was gradually taken to mean the products of the printing press. Quotations before 1820 reflect the transition between these senses.[95]

Yet despite that development, the 1820s and 1830s cases continued to treat the "freedom of the press" as being everyone's freedom to use the technology. If judges used such a meaning in the 1820s and 1830s, it would have been even more certainly used in 1791, when the alternative meaning of "press" to refer to the industry was just beginning to emerge.

A. *Discussions of the Freedom of the Press as Protecting Non-Press-as-Industry Writers (England)*

Twelve of the fifteen cases I discuss involve "freedom of the press" or "liberty of the press" being expressly discussed with regard to the rights of people who were not members of the press-as-industry. These were not printers, newspaper publishers, or editors, but rather people who wrote books, pamphlets, newspaper ads, or letters and other submissions to the editor.

Sometimes the authors won and sometimes they lost: the freedom of the press, even when it was implicated, was often not seen as providing particularly broad protection. But in all these cases, the lawyers and the judges were willing to discuss the non-press-as-industry defendants' rights under the freedom of the press. And there is no record of anyone arguing that the defendants lacked such rights because they were not members of the press-as-industry.

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[94] WEBSTER, *supra* note 24 (under "press"). The main rival of Webster's dictionary contained shorter entries and included "an instrument for . . . printing" as the only relevant definition of "press." JOSEPH EMERSON WORCESTER, A COMPREHENSIVE PRONOUNCING AND EXPLANATORY DICTIONARY OF THE ENGLISH LANGUAGE 243 (Boston, Hillard et al. 1830); *see also* LANDAU, *supra* note 91, at 56 (listing Worcester as Webster's chief American rival).

[95] First Definition of "Press," *supra* note 73.

Of these twelve cases, three are English, but I include them because American judges and lawyers understood them as being relevant to American constitutional law—both as evidence of the English "liberty of the press" as inherited by Americans at the Framing, and as influences on post-Framing American legal developments. Justice Story's *Commentaries on the Constitution of the United States*, to give just one example, refers to only five cases in the "liberty of the press" section, and two of them are English (the *Dean of St. Asaph's Case* and *Burdett*, both discussed below).[96]

The American freedom of the press was often seen as broader than the English common law definition,[97] but I haven't seen sources suggesting that it was seen as narrower. And, as the discussion below shows, the English cases are entirely consistent with the American cases on the question that we are discussing.

1. *Rex v. Shipley* (*Dean of St. Asaph's Case*) (1784)

William Shipley, a minister who held the position of Dean of St. Asaph Cathedral, was prosecuted in 1784 for seditious libel for reprinting a pamphlet.[98] (The pamphlet itself was also written by someone who was not a journalist or printer, William Jones, a lawyer and judge.)[99] Thomas Erskine defended Shipley, arguing that the liberty of the press meant the jury had to determine whether the pamphlet was indeed libelous[100]—an argument that assumed the liberty covered Shipley, who was not a member of the press-as-industry.

Lord Mansfield's opinion in *Shipley* rejected Erskine's argument, and followed the then-orthodox English rule that the judge would decide whether the publication was libelous.[101] But Mansfield did not suggest that the liberty of the press was limited to members of the press-as-industry, which would have categorically excluded Shipley.

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[96] 3 STORY, *supra* note 24, §§ 1879–1883, at 737 & nn.1 & 3, 742 n.1.

[97] *See, e.g.*, MADISON, *supra* note 47, at 569-70 ("Th[e constitutional] security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive, as in Great Britain, but from legislative restraint also . . . .").

[98] R v. Shipley (*The Dean of St. Asaph's Case*), (1784) 21 How. St. Tr. 847 (K.B.) 847-58.

[99] *Id.* at 876-77.

[100] *Id.* at 900, 903, 924, 1005, 1023. This was the same argument made by Andrew Hamilton on behalf of John Peter Zenger in 1735 in New York. R v. Zenger (N.Y. Sup. Ct. 1735) (statement of defense counsel Andrew Hamilton), *reprinted in* JOHN PETER ZENGER, A BRIEF NARRATIVE OF THE CASE AND TRYAL OF JOHN PETER ZENGER, PRINTER OF THE NEW-YORK WEEKLY JOURNAL 29-30 (Boston, Thomas Fleet 1738).

[101] 21 How. St. Tr. at 1035, 1040.

Rather, Mansfield wrote (echoing Blackstone) that "[t]he liberty of the press consists in printing without any previous licence, subject to the consequences of law."[102] Under this view, all publications—including those by non-press-as-industry authors such as Shipley—were protected only from prior restraints, and all could be punished by the law of seditious libel.

And Erskine's defense was known and approved of in America. Both the case and Erskine's arguments were cited extensively in *People v. Croswell*, the leading 1804 New York case that dealt with whether truth was a defense in libel cases.[103] Erskine's position was quoted by the defense in the 1806 case *United States v. Smith*;[104] though the reference was to the role of the jury generally, and not to free speech in particular, the detailed quotation of Erskine's speech to the jury suggests that the speech was known and respected in early America. Later, Justice Story mentioned the "celebrated defense of Mr. Erskine, on the trial of the Dean of St. Asaph" in the freedom of the press section of his 1833 *Commentaries on the Constitution*.[105]

The quotations gave no hint that Erskine's use of the liberty of the press to defend a churchman rather than a newspaperman was at all questionable. Rather, they seem consistent with the American understanding of the right's being a right of "every citizen."

2. *Rex v. Rowan* (1794)

Archibald Hamilton Rowan was an Irish radical politician and one of the leaders of the Society of United Irishmen. The Society published a 1500-word broadside, titled "An Address to the Volunteers of

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[102] *Id.* at 1040.

[103] *See* 3 Johns. Cas. 337, 341, 351 (N.Y. Sup. Ct. 1804) (2-2 decision) (noting that the trial court cited *Shipley* to the jury and the prosecution relied on it in defending the judgment on appeal); *id.* at 371-72 (opinion of Kent, J.) (discussing *Shipley*); *id.* at 405, 408 (opinion of Lewis, C.J.) (citing Erskine's arguments). A 1797 U.S. Attorney General opinion likewise quoted *Shipley*, though focusing only on Lord Mansfield's opinion. Libellous Publ'ns, 1 Op. Att'y Gen. 71, 72 (1797).

[104] United States v. Smith (C.C.D.N.Y. 1806), *reprinted in* THOMAS LLOYD, THE TRIALS OF WILLIAM S. SMITH, AND SAMUEL G. OGDEN, FOR MISDEMEANOURS 177 (New York, I. Riley & Co. 1807).

[105] 3 STORY, *supra* note 24, § 1879, at 737 n.3; *see also* BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 325 (Boston, Marsh, Capen & Lyon 1832) (noting that Erskine's "argument on the trial of the Dean of St. Asaph . . . is now the settled law of the land" in both the United States and England).

Ireland"; Rowan distributed it, which led to his being prosecuted for seditious libel.[106]

Rowan was a politician, not an editor or a printer.[107] Nonetheless, both the prosecutors and the defense counsel, John Philpot Curran, told the jury that the case touched on the "freedom of the press" or the "liberty of the press";[108] their disagreement was about whether Rowan's actions were an abuse of the freedom, and thus punishable.[109] As in *Shipley*, the liberty of the press was apparently seen as applying to all, not just to members of the press-as-industry.

Rowan's case was well publicized in America. A full-length report of the trial was reprinted in New York,[110] and advertised both there and in Baltimore.[111] The trial was discussed in newspapers,[112] as was Rowan's imprisonment and escape.[113] Shortly after his escape, Rowan fled to America,[114] where he received some attention from fellow

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[106] R v. Rowan, (1794) 22 How. St. Tr. 1033 (K.B.) 1034-37.

[107] *See, e.g.*, ARCHIBALD HAMILTON ROWAN, AUTOBIOGRAPHY 147 (Dublin, Thomas Tegg & Co. 1840) (discussing Rowan's entry into Irish politics).

[108] *See Rowan*, 22 How. St. Tr. at 1069, 1087-88 (statement of defense counsel); *id.* at 1105-06 (statement of prosecutor); *id.* at 1157 (statement of Solicitor General).

[109] *Id.* at 1069-70 (statement of defense counsel).

[110] *See* REPORT OF THE TRIAL OF ARCHIBALD HAMILTON ROWAN, ESQ. (New York, Thiebout & O'Brien 1794) (1794). The Dublin printing is labeled "printed for Archibald Hamilton Rowan," which reflects the fact that Rowan was not the printer, but just a politician who paid a printer to have the report printed. REPORT OF THE TRIAL OF ARCHIBALD HAMILTON ROWAN, ESQ., at tit. page (Dublin, Archibald Hamilton Rowan 1794); *see also supra* note 69 (discussing the meaning of notations that a book was published for the author).

[111] *See* Advertisement, N.Y. DAILY GAZETTE, May 31, 1794, at 3; Advertisement, DIARY (New York), June 18, 1794, at 3 (same); Advertisement, BALT. DAILY INTELLIGENCER, June 30, 1794, at 3.

[112] *See Miscellany: Sketch of the Trial of Arch. Hamilton Rowan, Esq.*, THE MERCURY (Boston), May 30, 1794, at 1 (describing the trial); *Sketch of the Trial of Arch. Hamilton Rowan, Esq.*, N.Y. DAILY GAZETTE, May 19, 1794, supp. 1 (reporting, among other things, the defense lawyer's speech that discussed the freedom of the press); *see also* John B. Duckett, *An Oration on the Liberty of the Press*, FED. INTELLIGENCER & BALT. DAILY GAZETTE, Dec. 6, 1794, at 2 (mentioning Rowan's case as an example of the "insatiable cruelty" of judges who fail to properly protect the liberty of the press).

[113] *See War Expences of Prussia*, DUNLAP & CLAYPOOLE'S AM. DAILY ADVERTISER (Philadelphia), June 2, 1794, at 3 (condemning the alleged conditions of Rowan's confinement); *see also A Proclamation*, AM. MINERVA (New York), July 2, 1794, at 2 (reporting on the reward offered by British authorities for information leading to Rowan's recapture); *Particulars of the Escape of Archibald Hamilton Rowan*, GAZETTE U.S. (Philadelphia), July 5, 1794, at 2 (reporting on Rowan's escape).

[114] *See* ROWAN, *supra* note 107, at 280 (describing Rowan's arrival in Philadelphia).

democrats[115] and became an acquaintance of Thomas Jefferson.[116] The case was remembered in later years as well: Curran's speech in Rowan's defense, which included discussion of the liberty of the press, was reprinted in America in separate collections, in 1805, 1807, and 1811,[117] and the Rowan trial was mentioned by prosecutor William Wirt in Aaron Burr's 1808 trial for treason.[118]

3. *Rex v. Burdett* (1820)

Rex v. Burdett[119] stemmed from a letter to the editor[120] written by Sir Francis Burdett, a nobleman and reformist politician rather than a printer or journalist. Though Burdett was not a member of the press-as-industry, the presiding judge referred to the "liberty of the press" four times in his opinion,[121] and twice in his instructions to the jury.[122] The judge's opinion also stressed that "the liberty of the press" means that "*every man* ought to be permitted to instruct his fellow subjects."[123] The prosecutor mentioned the "liberty of the press" as well.[124]

Burdett was well-known in America. It was cited as to "liberty of the press" in Chancellor Kent's 1827 *Commentaries on American Law*[125] and

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[115] *See* PETER PORCUPINE [WILLIAM COBBETT], THE DEMOCRATIC JUDGE: OR THE EQUAL LIBERTY OF THE PRESS 78 (Philadelphia, William Cobbett 1798) (detailing Rowan's warm welcome with "many cheers").

[116] *See* 2 GEORGE TUCKER, THE LIFE OF THOMAS JEFFERSON 39 (London, Charles Knight & Co. 1837) (summarizing the communication between Rowan and Jefferson); Letter from Thomas Jefferson to A.H. Rowan (Sept. 26, 1798) (offering support to Rowan and outlining rights available in the United States), *in* 3 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON, *supra* note 34, at 408-09.

[117] *See* FORENSIC ELOQUENCE: SKETCHES OF TRIALS IN IRELAND FOR HIGH TREASON, ETC. 1 (Baltimore, G. Douglas 2d ed. 1805); 3 NATHANIEL CHAPMAN, SELECT SPEECHES, FORENSICK AND PARLIAMENTARY 153-93 (Philadelphia, B.B. Hopkins, & Co. 1807); 1 SPEECHES OF JOHN PHILPOT CURRAN, ESQ. 64-104 (New York, I. Riley 1811).

[118] 1 DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 402 (Philadelphia, Hopkins & Earle 1808).

[119] R v. Burdett, (1820) 106 Eng. Rep. 873 (K.B.); 4 B. & Ald. 95.

[120] *See* FAIRBURN'S EDITION OF THE TRIAL OF SIR F. BURDETT, ON A CHARGE OF A SEDITIOUS LIBEL AGAINST HIS MAJESTY'S GOVERNMENT 2-3, 10-11 (London, John Fairburn 1820).

[121] *Burdett*, 106 Eng. Rep. at 887-88; 4 B. & Ald. at 132. As in some of the other cases discussed in this Section, the judge concluded that the liberty of the press was limited and extended only to statements made "with temper and moderation" rather than "vituperation." *Id.* at 888; 4 B. & Ald. at 133.

[122] FAIRBURN'S EDITION OF THE TRIAL OF SIR F. BURDETT, *supra* note 120, at 37-38.

[123] *Burdett*, 106 Eng. Rep. at 887; 4 B. & Ald. at 132 (emphasis added).

[124] FAIRBURN'S EDITION OF THE TRIAL OF SIR F. BURDETT, *supra* note 120, at 9.

[125] 2 KENT, *supra* note 28, at 15.

in Joseph Story's 1833 *Commentaries on the Constitution*,[126] as to venue in libel cases in *Commonwealth v. Blanding* (1825),[127] and in a general note on libel law following *People v. Simons* (1823).[128]

B. *Discussions of the Freedom of the Press as Protecting Non-Press-as-Industry Writers (America)*

1. *United States v. Cooper* (1800)

One of the leading cases under the Sedition Act of 1798 involved the prosecution of Thomas Cooper for publishing a one-page handbill criticizing President Adams.[129] At the time of the trial, Cooper was not a member of the institutional press. He had edited the *Northumberland Gazette* for two months, but that task had ended four months before the leaflet was distributed.[130] Moreover, the leaflet that led to his prosecution was unrelated to his past editorial tasks.[131]

Yet the trial was seen as implicating the freedom of the press. In response to the argument that his leaflet diminished the confidence of the people in the government, Cooper argued to the jury that this confidence should be earned, and not "exacted by the guarded provisions of Sedition Laws, by attacks on the Freedom of the Press, by prosecutions, pains, and penalties on those which boldly express the truth."[132] He went on to say that "in the present state of affairs, the press is open to those who will praise, while the threats of the Law hang over those who blame the conduct of the men in power."[133] Lat-

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[126] 3 STORY, *supra* note 24, §§ 1878–1879, at 737 nn.1 & 3.

[127] 20 Mass. (3 Pick.) 304, 311 (1825); *see also* Commonwealth v. Child, 30 Mass. (13 Pick.) 198, 200 (1832) (noting that the Attorney General cited *Burdett*).

[128] 1 Wheel. Cr. Cas. 339, 359 (N.Y. Ct. Spec. Sess. 1823).

[129] *See* Eugene Volokh, *Thomas Cooper, Early American Public Intellectual*, 4 N.Y.U. J.L. & LIBERTY 372, 376-77 (2009) (describing Cooper's libel prosecution).

[130] DUMAS MALONE, THE PUBLIC LIFE OF THOMAS COOPER 1783–1839, at 91, 105 (1926); *see also* THOMAS COOPER, POLITICAL ESSAYS, at preface, 4, 31-32 (Northumberland, Andrew Kennedy 1799) (corroborating the dates in Malone's report).

[131] For a modern perspective on this, see, for example, FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 250-51 (1986), which held that even an organization that publishes a regular newsletter isn't entitled to the election law "press exemption" for a different publication that the organization distributes through other channels. *See also* Henry v. Halliburton, 690 S.W.2d 775, 781 (Mo. 1985) (holding that even a newsletter publisher should be treated as a nonmedia defendant when he sends an article to specific people, rather than just publishing it in his regular newsletter).

[132] United States v. Cooper (Chase, Circuit Justice, C.C.D. Pa. 1800), *reprinted in* THOMAS COOPER, AN ACCOUNT OF THE TRIAL OF THOMAS COOPER OF NORTHUMBERLAND 19 (Philadelphia, John Bioren 1800).

[133] *Id.*

er, complaining about the court's requiring him to produce certain original documents to support his defense, he argued that such requirements "would be an engine of oppression of itself sufficiently powerful to establish a perfect despotism over the press."[134]

And Justice Samuel Chase's charge to the jury seems to support the notion that the prosecution involved "the press," which in context must have meant use of the press-as-technology and not the press-as-industry. Seditious libel prosecutions, Chase argued, were proper because

> [a] republican government can only be destroyed in two ways; the introduction of luxury, or the licentiousness of the press. This latter is the more slow but most sure and certain means of bringing about the destruction of the government. The legislature of this country knowing this maxim, has thought proper to pass a law to check this licentiousness of the press—by a clause in that law it is enacted (reads the second section of the sedition law).[135]

Others also characterized Cooper's prosecution as involving "the freedom of the press." John Thomson echoed Cooper's assertions that his prosecution violated the freedom of the press in *An Enquiry, Concerning the Liberty, and Licentiousness of the Press*:

> What was James Thomson Callender pros[e]cuted for at Richmond? For publishing his opinions through the medium of the Press. What was Charles Holt, the Editor of the New London Bee, prosecuted for? Because he published the opinions of another person. What was Thomas Cooper prosecuted for? For publishing his opinions through the same mode of communication:—viz. the *Press*. . . . [T]he Constitution has been violated, both by the Sedition law under which they were convicted, and by the prosecutions themselves.[136]

And the following year, John Wood's *History of the Administration of John Adams* likewise stated,

> The prosecutions of Lyon and Callender, of Cooper and Holt, are the best commentary upon the Sedition law. The names of these gentlemen will be quoted in support of the liberty of the press, and of the tyranny of

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[134] *Id.* at 35. This difficulty was peculiar to this trial, rather than to all Sedition Act prosecutions; Cooper thus wasn't complaining about what the Sedition Act did in other prosecutions (which indeed mostly targeted press-as-industry speakers), but rather was asserting his own rights as a user of "the press."

[135] *Id.* at 42-43.

[136] JOHN THOMSON, AN ENQUIRY, CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCONTROULABLE NATURE OF THE HUMAN MIND 25 (New York, Johnson & Stryker 1801).

> Mr. Adams, when the labored arguments of Paterson and Peters, of Iredell, Addison and Chase, are no longer remembered.[137]

Thompson and Wood discussed Cooper, who had a leaflet printed for him, the same way they discussed Lyon, Callender, and Holt, who published their libels in the newspapers they edited.

2. Impeachment of Justice Chase (1805)

Five years later, Justice Chase found himself as a defendant in an impeachment proceeding. The House prosecution argued that Justice Chase had misbehaved in criticizing the administration from the bench.[138]

In the course of the trial, one of the managers of the prosecution, Congressman John Randolph—the leader of the House Democratic-Republicans[139]—noted that his only objection was to "the prostitution of the bench of justice to the purposes of an hustings" and "declaim[ing] on [political topics] from his seat of office."[140] Randolph stressed that he was not objecting to any extrajudicial publications that Chase might produce: "Let him speak and write and publish as he pleases. This is his right in common with his fellow citizens. The press is free." Thus, Chase—not a member of the press-as-industry—was seen as being free to, "in common with his fellow citizens," "publish as he pleases" using the "free" "press."[141]

Unlike in the other cases in this subsection, the only statement about the "press" in this case came from an advocate, not from a judge. But Randolph had little to gain by using a controversial definition of "free" "press," or by trying to broaden the liberty of the press beyond its established boundaries. Indeed, he had something to lose, since using a controversial definition would have made his argument less persuasive. His willingness as an advocate to refer to Chase as having the right to use the "free" "press" suggests that he knew his audience would accept the argument.

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[137] JOHN WOOD, THE HISTORY OF THE ADMINISTRATION OF JOHN ADAMS, ESQ. 221 (New York, n. pub. 1802).

[138] *See* 1 TRIAL OF SAMUEL CHASE 123 (Washington, Samuel H. Smith 1805).

[139] *See* HENRY ADAMS, JOHN RANDOLPH 55 (Boston & New York, Houghton, Mifflin & Co. 1898) (describing the close working relationship between President Jefferson and John Randolph).

[140] 1 TRIAL OF SAMUEL CHASE, *supra* note 138, at 123.

[141] *Id.*

3. *People v. Judah* (1823)

In *People v. Judah*,[142] Samuel Judah, the apparently nineteen-year-old author of a self-published,[143] book-length poem called *Gotham and the Gothamites*, was prosecuted for libeling various noted New Yorkers in the poem.[144] Though the defendant had written and published some plays,[145] the category "playwright" would likely not have been considered part of the press-as-industry. Playwrights of the era chiefly wrote as a sideline to their normal occupations[146] and published as a sideline to trying to get their plays staged.[147] Nor is it likely that *Gotham and the Gothamites* itself, a self-published poem mocking local notables, would have been a viable commercial venture for the author. Moreover, even if Judah had been seen as a professional book author, it's not clear that this would have made him a member of the press-as-industry.[148]

Yet the court thought it necessary to instruct the jury about the liberty of the press, though stressing that such liberty was limited to examining the character of candidates for public office and did not

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[142] 2 Wheel. Cr. Cas. 26 (N.Y. Gen. Sess. Ct. 1823).

[143] *See* SAMUEL B.H. JUDAH, GOTHAM AND THE GOTHAMITES, at tit. page (New York, S. King 1823) (indicating that the book was "published for the author"); *supra* note 69 (discussing the meaning of "published for the author").

[144] I say "apparently" because defense counsel asserted that Judah was nineteen, 2 Wheel. Cr. Cas. at 32, and the court said that Judah was "under age," *id.* at 41, which suggests that the court was accepting defense counsel's assertion. There is some uncertainty, though, about whether Judah was nineteen or twenty-four. *See* 1 JACOB RADER MARCUS, UNITED STATES JEWRY: 1776–1985, at 460 (1989).

[145] *See, e.g.*, SAMUEL B.H. JUDAH, THE MOUNTAIN TORRENT (New York, Thomas Longworth 1820); SAMUEL B.H. JUDAH, ODOFRIEDE (New York, Wiley & Halsted 1822); SAMUEL B.H. JUDAH, THE ROSE OF ARRAGON (New York, S. King 2d ed. 1822); SAMUEL B.H. JUDAH, A TALE OF LEXINGTON (New York, Dramatic Repository 1823).

[146] *See* Gary A. Richardson, *Plays and Playwrights: 1800–1865* ("[P]laywriting as a profession arguably did not exist in early nineteenth-century America."), *in* 1 THE CAMBRIDGE HISTORY OF AMERICAN THEATRE 250, 251-52 (Don B. Wilmeth & Christopher Bigsby eds., 1998).

[147] *See* ARTHUR HOBSON QUINN, A HISTORY OF THE AMERICAN DRAMA: FROM THE BEGINNING TO THE CIVIL WAR 161 (2d ed. 1943) (reporting that playwrights made little money from their plays, and what money they made generally came not from publishing but from the proceeds of special third-night performances designated for their benefit); Richardson, *supra* note 146, at 254 (concluding that printing one's play wasn't likely to make money, because then-existing copyright law wouldn't block rival productions of a play and theater managers could therefore stage a published play without compensating the playwright).

[148] The few modern cases that take a press-as-industry view of the freedom of the press, and that consider whether book authors qualify as members of the press-as-industry, conclude that they do not so qualify. *See* cases cited *supra* note 74.

include "invad[ing] the sanctity of private repose."[149] Likewise, when pronouncing sentence, the court again mentioned the liberty of the press, but reasoned that the punishment imposed on Judah did not violate the liberty because his libels were an abuse of the liberty.[150]

4. *People v. Simons, Commonwealth v. Blanding*, *In re Austin*, *Commonwealth v. Thomson*, and *Taylor v. Delavan*

These five cases all involved materials submitted to newspapers—as a paid ad, as a letter to the editor, or as a similar submission—by people who were not publishers, editors, or employees of the newspaper.

a. People v. Simons *(1823)*

People v. Simons involved a newspaper advertisement bought by defendants, businessmen who accused two other businessmen of being insolvent.[151] Defendants were prosecuted for criminal libel, and appealed to the liberty of the press secured by the New York Constitution's Bill of Rights.[152] The prosecution acknowledged the applicability of the constitutional provision, but argued that the provision was limited to "publication . . . made with good motives, and for justifiable ends."[153] The court instructed the jury about the constitutional provision, echoing the prosecution's point.[154] The jury acquitted.[155]

The reporter's note following *Simons* was consistent with the court's implicit assumption that businessmen buying an advertisement were protected by the "liberty of the press." "In this country," the note said, "*every man* may publish temperate investigations of the nature and forms of government."[156] "It has always been a favourite privilege of the American *citizen*" (a "right . . . guaranteed to us by the constitution") "to investigate the tendency of public measures, and the character and conduct of public men."[157]

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[149] 2 Wheel. Cr. Cas. at 34.
[150] *Id.* at 36.
[151] People v. Simons, 1 Wheel. Cr. Cas. 339, 340 (N.Y. Ct. Gen. Sess. 1823).
[152] *Id.* at 349.
[153] *Id.* at 350.
[154] *Id.* at 353.
[155] *Id.* at 354.
[156] *Id.* at 355 (emphasis added).
[157] *Id.* (emphasis added).

b. Commonwealth v. Blanding *(1825)*

In *Commonwealth v. Blanding*, James Blanding—a farmer and the city clerk[158]—was convicted of libeling someone by submitting an item for publication in a newspaper.[159] The appellate court rejected Blanding's freedom of the press argument, but only because it concluded that libels weren't covered by the freedom of the press, and because the freedom of the press was only a freedom from prior restraint: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction."[160]

c. In re Austin *(1835)*

The court in *In re Austin* reversed the disbarment of several lawyers who had submitted to a newspaper an open letter urging a judge to resign.[161] The Pennsylvania Supreme Court concluded that a lawyer may be disciplined for "scrutiny into the official conduct of the judges"[162] only when such scrutiny was libelous, which at the time was seen as turning on the author's motive.[163] And "when thus limited" to libel, the court concluded, the possibility of "professional responsibility for libel" does not "impinge on the liberty of the press,"[164] precisely because everyone, lawyer or not, could be legally punished for libel. The non-press-as-industry lawyer authors in this case were thus seen as potentially protected by "the liberty of the press" on precisely the same terms as others were.

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[158] *See* 3 REPRESENTATIVE MEN AND OLD FAMILIES OF SOUTHEASTERN MASSACHUSETTS 1314-15 (1912).

[159] *See* 20 Mass. (3 Pick.) 304, 304 (1825).

[160] *Id.* at 314.

[161] *In re* Austin, 5 Rawle 191, 208 (Pa. 1835).

[162] *Id.* at 205.

[163] *Compare id.* ("It is the motive therefore that makes an invasion of the judge's rights a breach of professional fidelity . . . ."), *with* Respublica v. Dennie, 4 Yeates 267, 270 (Pa. 1805) (holding, in a newspaper case, that "[t]he liberty of the press consists in publishing the truth, from *good motives* and for *justifiable ends*" (quoting New York v. Croswell, 3 Johns. Cas. 337, 352 (N.Y. Sup. Ct. 1804) (statement of defense counsel Alexander Hamilton))).

[164] *In re Austin*, 5 Rawle at 205.

d. Commonwealth v. Thomson *(1839)*

In *Commonwealth v. Thomson*, Thomson—an herbalist who claimed to have invented a new system for treating diseases—placed an advertisement in a newspaper denouncing as an impostor another doctor who was claiming to practice the same system.[165] Thomson was prosecuted for libel, and his lawyers argued that he was protected by the liberty of the press.[166] The judge's instructions to the jury mentioned the liberty of the press, but stated that libel law did not violate that liberty.[167] The jury convicted.[168]

e. Taylor v. Delavan *(1840)*

The defendant in *Taylor v. Delavan* was a temperance activist who submitted an item for publication in a newspaper,[169] alleging that a local brewer was using dirty water to brew his beer. The brewer sued for libel. The judge's instructions to the jury noted that the law "affords to every citizen the free use of the press to publish for the information or protection of the public," but also "restrains this liberty by requiring an adherence to truth."[170] The jury acquitted.[171]

5. *Brandreth v. Lance* (1839)

Brandreth v. Lance[172] was the first American court decision to strike down an injunction as an unconstitutional interference with the freedom of the press. Lance was a business rival of Brandreth, who commissioned a man named Trust to write an allegedly libelous biography of Brandreth and then contracted with a printer named Hodges to publish it. Brandreth asked for, and got, an injunction barring busi-

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[165] *See* Commonwealth v. Thomson (Boston Mun. Ct. 1839), *reprinted in* REPORT OF THE TRIAL OF DR. SAMUEL THOMSON 3-5 (Boston, Henry P. Lewis 1839). In the 1830s, two publications, the *Thomsonian Recorder* and the *Thomsonian Manual*, publicized Thomson's theories and were at various times endorsed by Thomson; but neither was edited or published by Thomson. *See* JOHN S. HALLER JR., THE PEOPLE'S DOCTORS: SAMUEL THOMSON AND THE AMERICAN BOTANICAL MOVEMENT, 1790–1860, at 107-10, 215 (2000). In any event, neither publication is mentioned in the case.

[166] *Thomson*, *supra* note 165, at 40-41.

[167] *Id.* at 46.

[168] *Id.* at 48.

[169] Taylor v. Delavan (N.Y. Cir. Ct. 1840), *reprinted in* A REPORT OF THE TRIAL OF THE CAUSE OF JOHN TAYLOR VS. EDWARD C. DELAVAN, PROSECUTED FOR AN ALLEGED LIBEL 6-7 (Albany, Hoffman, White & Visscher 1840).

[170] *Id.* at 45.

[171] *Id.* at 48.

[172] 8 Paige Ch. 24, 26 (N.Y. Ch. 1839).

nessman Lance, writer Trust, and printer Hodges from publishing the biography.[173] The New York Chancery Court reversed, holding that the injunction violated the liberty of the press.[174] Nothing in the court's opinion suggested that the liberty of the press was a right that belonged only to printer Hodges; the injunction was dissolved as to all defendants, including Trust and Lance.[175]

6. Summary

All these cases suggest that the "freedom of the press" was seen as applicable not just to newspapermen, but also to ministers, politicians, businessmen, physicians, and others. One or another of the cases might be seen as an anomaly (for instance, because a particular defendant might have been viewed by the court as being closely enough linked to the press). But put together, these cases suggest that the press-as-technology model was widely accepted, and that there was nothing controversial about discussing the freedom of the press as belonging to people who weren't members of the press-as-industry.

C. *Cases Involving Newspaper Defendants*

Three more cases involved newspaper editors as defendants, but in a context that shed light on the broader definition of the freedom of the press.

1. *Commonwealth v. Buckingham* (1822)

Commonwealth v. Buckingham concluded that the liberty of the press secured to a defendant the right to introduce the truth of the statement as evidence that he published with a good motive, and therefore the accused wouldn't be guilty of libel.[176] In the process, the judge discussed what "the press" meant:

> What is the press?
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> It is an instrument; an instrument of great moral and intellectual efficacy.
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> The liberty of the press, therefore, is nothing more than the liberty of

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[173] *Id.* at 24-25.

[174] *Id.* at 27.

[175] *Id.* at 28.

[176] Commonwealth v. Buckingham (Boston Mun. Ct. 1822), *reprinted in* TRIAL: COMMONWEALTH VS. J.T. BUCKINGHAM, ON AN INDICTMENT FOR LIBEL 13 (Boston, J.T. Buckingham 4th ed. 1830).

> a moral and intellectual being, (that is, of a moral agent) to use that particular instrument.
>
> . . . .
>
> If A. thrust B. through with a sword, and he dies, A. has used an instrument over which he had power; whether in that he was guilty of an act of licentiousness, for which he is obnoxious to punishment, or merely exercised an authorized liberty, for which he shall go free, depends not upon the fact, or the effect, but upon the motive and end, which induced the thrust.
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> . . . .
>
> . . . [I]f the liberty to use the press depended, like the liberty to use every other instrument, upon the quality of the motive and the end . . . then the right to give the truth in evidence would follow necessarily and of course.
>
> . . . .
>
> Is there any thing in the nature of the instrument, called the press, which makes the liberty of a moral agent to use it, different from his liberty to use any other instrument?
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> . . . .
>
> In other words, is it possible, that in a free country, under a Constitution which declares the liberty of the press is essential to the security of freedom, and that it ought not to be restrained; is it possible, that it is not the right of every citizen to use the press for a good motive and justifiable end?
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> . . . .
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> In the opinion of this court, this right is inherent in every citizen, under our Constitution, and a court of justice ha[s] no more right to deny to a person charged with a malicious use of the press, the liberty to show that its use was, in the particular case, for a good motive and a justifiable end, than it has a right to deny to a man indicted for murder, the liberty to show that he gave the blow for a purpose which the law justifies.[177]

The liberty of the press, according to the court, was a right belonging to "each citizen" to use the press as an "instrument"—an instrument in the same sense that a "sword" is an instrument.[178] This

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[177] *Id.* at 11-13.

[178] One might view the "press" in the sense of the collective industry of newspaper publishing as an "instrument" in the hands of a politician, but one would not view it as an instrument in the hands of a particular newspaper publisher. The "press" as a publisher's instrument is likely the printing press. *See, e.g.*, Beebe v. State, 6 Ind. 501, 515 (1855) (noting that under the Indiana Constitution's free press clause, libel could lead to "loss, by forfeiture, of the particular press made the instrument of abuse" of the

reasoning suggests that the press was indeed seen as a technology that "every citizen" had a right to use, and not as an industry whose members alone had a right to publish.

2. *Dexter v. Spear* (1825) and *Root v. King* (1827)

Finally, two cases expressly stressed that printers and editors had precisely the same rights under the freedom of the press as other writers did. Thus, in *Dexter v. Spear*, Justice Story (riding circuit) wrote that "[t]he liberty of speech and the liberty of the press do not authorize malicious and injurious defamation. There can be no right in printers, any more than in other persons, to do wrong."[179] Similarly, *Root v. King* stated that, under the state constitution's "liberty of the press," newspaper editors have no "other rights than such as are common to all."[180]

As the cases suggest, lawyers for newspapers had by the 1820s indeed begun to make arguments for special protection for the press-as-industry.[181] But these arguments were consistently rejected.

IV. THE UNDERSTANDING AROUND THE RATIFICATION OF THE FOURTEENTH AMENDMENT

By the years surrounding the ratification of the Fourteenth Amendment, the freedom of the press-as-technology understanding was even more clearly established. To begin with, a long line of cases expressly held—as did *Dexter v. Spear* and *Root v. King* in the 1820s—that the institutional press had no greater rights than anyone else. Thus, *Aldrich v. Press Printing Co.* (1864) held, "The press does not pos-

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right to speak, write or print, freely, on any subject whatsoever), *overruled in part on other grounds by* Schmitt v. F.W. Cook Brewing Co., 120 N.E. 19, 21 (Ind. 1918); HOLT, *supra* note 10, at 49-50 (characterizing the "press," in the discussion of "liberty of the press," as a "newly discovered instrument," and stating that "[w]hen we have termed the press a new and enlarged instrument of publication, whether of good or evil, we have, in fact, pointed out that part of its nature which defines and circumscribes the law which attaches to it"); THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS 163 (London, W. Clarke & Sons 1813) ("The pencil of the caricaturist is frequently an instrument of ridicule more powerful than the press . . . ."); THOMAS STARKIE, A TREATISE ON THE LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM, AND FALSE RUMOURS 142 (Edward D. Ingraham ed., New York, George Lamson 1st Am. ed. 1826) (same).

[179] 7 F. Cas. 624, 624-25 (Story, Circuit Justice, C.C.D.R.I. 1825) (No. 3867).

[180] 7 Cow. 613, 628 (N.Y. Sup. Ct. 1827).

[181] *See, e.g.*, Hotchkiss v. Oliphant, 2 Hill 510, 513 (N.Y. Sup. Ct. 1842) (acknowledging such an argument about the common law rule, though not about the constitutional protection).

sess any immunities, not shared by every individual."[182] *Sheckell v. Jackson* (1852) likewise upheld a jury instruction that stated,

> [I]t has been urged upon you that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more.[183]

Smart v. Blanchard (1860),[184] *Palmer v. City of Concord* (1868),[185] *Atkins v. Johnson* (1870),[186] *People v. Storey* (1875),[187] *Johnson v. St. Louis Dispatch Co.* (1877),[188] *Sweeney v. Baker* (1878),[189] *Barnes v. Campbell* (1879),[190] and *Delaware State Fire & Marine Ins. Co. v. Croasdale* (1880)[191] all echoed this position.

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[182] 9 Minn. 123, 129 (1864).

[183] 64 Mass. (10 Cush.) 25, 26-27 (1852); *see also* Stone v. Cooper, 2 Denio 293, 304 (N.Y. Sup. Ct. 1845) ("[Libel law] is quite consistent with that freedom of speech and of the press which all regard as sacred and inviolable. Public journalists have no peculiar exemption from the general rules of law on this subject, and are liable for injurious publications in precisely the same cases in which individuals in other professions or employments would be.").

[184] *See* 42 N.H. 137, 151 (1860) ("The conductor of a public press has the same rights to publish information that others have, and no more. He has no peculiar rights or special privileges or claims to indulgence.").

[185] *See* 48 N.H. 211, 216 (1868) ("Conductors of the public press have no rights but such as are common to all." (citing *Sheckell*, 64 Mass. (10 Cush.) at 26-27)).

[186] *See* 43 Vt. 78, 82 (1870) ("The publisher of a newspaper has no more right [under the 'freedom of the press'] to publish a libel upon an individual, tha[n] he or any other man has to make a slanderous proclamation by word of mouth.").

[187] *See* People v. Storey (Cook Cnty. Crim. Ct. 1875) ("Editors must understand that their rights are the same, and no greater, than other citizens, and their responsibilities no less."), *as reprinted in* 1 JAMES APPLETON MORGAN, THE LAW OF LITERATURE 271, 275-76 (New York, James Cockcroft & Co. 1875), *rev'd on other grounds*, 79 Ill. 45 (1875).

[188] *See* 65 Mo. 539, 541-42 (1877) (stating that the "press should not, and under our constitution cannot, be muzzled," but going on to say that a "'newspaper proprietor . . . is liable for what he publishes in the same manner as any other individual'" (quoting JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL § 252, at 343 (New York, Baker, Voorhis & Co. 1868))).

[189] *See* 13 W. Va. 158, 182 (1878) (quoting *Sheckell*, 64 Mass. (10 Cush.) at 26-27, though citing it by the wrong name), *overruled on other grounds by* Bailey v. Charleston Mail Ass'n, 27 S.E.2d 837 (W. Va. 1943), *but reaffirmed on this point by* Swearingen v. Parkersburg Sentinel Co., 26 S.E.2d 209 (W. Va. 1943).

[190] *See* 59 N.H. 128, 128-29 (1879) ("[P]rofessional publishers of news . . . have the same right to give information that others have, and no more." (citing *Sheckell*, 64 Mass. (10 Cush.) 25)).

[191] *See* 11 Del. (6 Houst.) 181, 210 (Del. Super. Ct. 1880) ("Every man has the right, guaranteed to him by the constitution, to print upon any subject, being responsible for the abuse of that liberty . . . . This law applies to publishers and editors as well

So did leading treatises and other reference works. Thomas Cooley's *A Treatise on the Constitutional Limitations* (1868) noted, in the section on "Liberty of Speech and of the Press," that "the authorities have generally held the publisher of a paper to the same rigid responsibility with any other person who makes injurious communications."[192] Townshend's *A Treatise on the Wrongs Called Slander and Libel* (1868) likewise noted, in the section on "freedom of the press," that, "independently of certain statutory provisions[,] the law recognizes no distinction in principle between a publication by the proprietor of a newspaper, and a publication by any other individual. A newspaper proprietor . . . is liable for what he publishes in the same manner as any other individual."[193] Morgan's *Law of Literature* (1875) noted, "[A] writer for a newspaper . . . stands in the same light precisely as other men; he is in no way privileged. . . . [T]he freedom of the press is, when rightly understood, commensurate and identical with the freedom of the individual, and nothing more."[194]

The one partial exception to this pattern appeared in the "Liberty of the Press" discussion in Cooley's *Treatise on the Law of Torts* (1879), which suggested (without citation) that it "is not so clear" "whether the conductor of a public journal has any privilege above others in publishing."[195] But even that treatise stated that "the freedom of the press implies . . . a right in *all persons* to publish what they may see fit, being responsible for the abuse of the right"[196] and that "[t]he privilege of the press is not confined to those who publish newspapers and other serials, but extends to all who make use of it to place information before the public."[197]

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as to other individuals, and they have no privilege in this State not common to everybody else.").

[192] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 455 (Boston, Little, Brown & Co. 1868).

[193] TOWNSHEND, *supra* note 188, § 252, at 343. Earlier, Townshend says that "[w]hatever else may be intended by the phrase 'freedom of the press,' or 'liberty of the press,' it means the freedom or liberty of those who conduct the press," and in particular freedom from the requirement of a license to print. *Id.* at 342. But the more specific statements quoted in the text make clear that Townshend is recognizing that "those who conduct the press" had the same legal right as "any other individual" under the "freedom of the press."

[194] 2 MORGAN, *supra* note 187, at 410.

[195] THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 217 (Chicago, Callaghan & Co. 1879).

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

[197] *Id.* at 219. A 1990 book quotes *Detroit Daily Post Co. v. McArthur,* 16 Mich. 447 (1868), as saying, "A special protection for newspapers within the common law was

Some of the sources mentioned in this Section spoke of the press-as-industry as having no special rights generally, while others noted this specifically in the context of libel law. But it's not surprising that many of these assertions were made in libel cases. Freedom of the press arguments in the 1800s were most commonly made in libel cases; libel law was probably the main restriction on publication. And there were credible arguments for giving newspapers some special exemption from the severest aspects of libel law. As the "Freedom of the Press" section of Townshend's *Slander and Libel* treatise noted, with sympathy,

> [A]s respects newspapers, it is argued that the exigencies of the business of a newspaper editor demand a larger amount of freedom. That circumstances do not permit editors the opportunity to verify the truth, prior to publication, of all they feel called upon to publish, and that they

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necessary,", but this appears to be an error. TIMOTHY W. GLEASON, THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH-CENTURY AMERICA 67 (1990). No such passage is present in the cited case, and the purported quote does not seem like an accurate summary of the case either. The court opinion concludes only that punitive damages are unavailable when a publisher took suitable care to avoid publishing libels written by others, including by hiring "competent editors." 16 Mich. at 454. This seems to be much the same rule that some courts applied to other employers, who were not held liable in punitive damages for the actions of their employees unless the employers were aware of the employees' negligent habits or failed to properly supervise them. *See generally* THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 601, at 655 (New York, Baker, Voorhis & Co. 1869). And two decades later, the Michigan Supreme Court actually held unconstitutional a statute that limited presumed and punitive damages for publications in newspapers, on the grounds that the statute violated the constitutional right to protect reputation and that "the public press occupies no better ground than private persons publishing the same libelous matter." Park v. Detroit Free Press Co., 40 N.W. 731, 734 (Mich. 1888).

Likewise, *Wilson v. Fitch*, 41 Cal. 363 (1871), which the 1990 book cited, GLEASON, *supra*, at 73-74, did not appear to extend any special protection to newspapers. The court did state,

> The public interest, and a due regard to the freedom of the press, demands that its conductors should not be mulcted in punitive damages for publications on subjects of public interest, made from laudable motives, after due inquiry as to the truth of the facts stated, and in the honest belief that they were true.

Id. at 383. But punitive damages were generally available in libel cases only when the jury found the defendant acted from "ill-will" (which would not be a "laudable motive[]"), TOWNSHEND, *supra* note 188, § 290, at 382; and absence of an "honest belief that [defendant's statements] were true" would itself be evidence of 'ill-will," *id.* § 388, at 475-76. The court thus seemed to be applying to newspapers only the same protection against punitive damages that the law generally gave libel defendants. A later California decision treated *Wilson* as consistent with the view that a reporter "has no more right" to convey allegedly defamatory material "than has a person not connected with a newspaper." Gilman v. McClatchy, 44 P. 241, 243 (Cal. 1896) (quoting McAllister v. Free Detroit Press Co., 43 N.W. 431, 437 (Mich. 1889)).

> should not be responsible for the truth of what they publish.[198]

But despite the presence and plausibility of these arguments, the cases kept saying (in Townshend's words): "A newspaper proprietor . . . is liable for what he publishes in the same manner as any other individual."[199]

Some other cases spoke of the liberty of the press in cases where the speaker was not a member of the institutional press. In 1876, *Life Ass'n of America v. Boogher* held, just as *Brandreth v. Lance* had held, that it would violate "the freedom of the press or of speech"—"the right to speak, write, or print, . . . secured to every one" by the state constitution—for a court to enjoin publications and oral statements by a businessman that criticized another business.[200] In 1846, *Fisher v. Patterson*, like many of the earlier cases from 1784 to 1840, mentioned the liberty of the press in a case that involved a defendant who was apparently a businessman and a politician, not a newspaperman, though the court concluded that the liberty did not substantively extend to libels.[201]

Finally, Thomas Cooley, the leading American constitutional commentator of the second half of the nineteenth century,[202] wrote in 1880 that "[b]ooks, pamphlets, circulars, &c. are . . . as much within [the freedom of the press] as the periodical issues."[203] This too shows that the liberty of the press extended to material that was generally not written by full-time newspaper and magazine writers and—at least in the case of circulars—to material that was often not funded by members of the press-as-industry.

The rule thus had not changed from the early Republic to the Ratification era: "the press" in "[t]he freedom . . . of the press" was

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[198] TOWNSHEND, *supra* note 188, § 252, at 343; *see also* Hotchkiss v. Oliphant, 2 Hill 510, 513 (N.Y. Sup. Ct. 1842) (noting that the defendant had argued for special privilege as a newspaper editor, but rejecting that argument).

[199] TOWNSHEND, *supra* note 188, § 252 at 343.

[200] 3 Mo. App. 173, 180 (1876); *see also Suit Against the Life Association of America*, 1 INS. L.J. 239, 239 (1871) (reporting that Boogher was "a trustee of the Life Association of America, and one of the oldest policy holders in the company").

[201] Fisher v. Patterson, 14 Ohio 418, 426-27 (1846); *see also* NELSON W. EVANS & EMMONS B. STIVERS, A HISTORY OF ADAMS COUNTY, OHIO 260-61 (1900) (describing John Fisher as a politician, judge, and businessman who was "fond of contributing political articles to newspapers," but not suggesting that he ever owned or operated a newspaper).

[202] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 616 (2008) (describing Cooley as the "most famous" of the "late-19th-century legal scholar[s]"); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (referring to "the great constitutional scholar Thomas Cooley").

[203] THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 282 (Boston, Little, Brown & Co. 1880).

seen as referring to the press-as-technology, not to the press-as-industry.

V. THE UNDERSTANDING FROM 1881 TO 1930

By 1881, the view that the press-as-industry has no special constitutional rights had become a firmly entrenched orthodoxy that would continue for the next fifty years and beyond. Consider, for instance, *Coleman v. MacLennan* (1908), the case that first recognized something like an "actual malice" test for speech about public officials, and that was later cited prominently for this proposition by *New York Times Co. v. Sullivan*:[204]

> Section 11 of the [Kansas] Bill of Rights sets off the inviolability of liberty of the press from the right of all persons freely to speak, write, or publish their sentiments on all subjects, and this fact has given rise to claims on the part of newspaper publishers of special privileges not enjoyed in common by all. . . . So far [such claims] have been rejected by the courts, and the present consensus of judicial opinion is that the press has the same rights as an individual, and no more.[205]

Likewise, *Negley v. Farrow* (1883) held that "[t]he liberty of the press guaranteed by the Constitution is a right belonging to every one, whether proprietor of a newspaper or not."[206] And these were just two of the many cases to acknowledge the press-as-technology view during the last decades of the nineteenth century[207] and during the start of the twentieth.[208]

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[204] 376 U.S. 254, 280-82 (1964).

[205] 98 P. 281, 286 (Kan. 1908).

[206] 60 Md. 158, 176 (1883).

[207] *See, e.g.*, Riley v. Lee, 11 S.W. 713, 714 (Ky. 1889) ("By the provisions of the United States and the state constitutions guarantying the 'freedom of the press' it was simply intended to secure to the conductors of the press the same rights and immunities that are enjoyed by the public at large."); Park v. Detroit Free Press Co., 40 N.W. 731, 734 (Mich. 1888) ("[T]he public press occupies no better ground than private persons publishing the same libelous matter . . . ."); Bronson v. Bruce, 26 N.W. 671, 672 (Mich. 1886) ("The law makes no distinction between the newspaper publisher and any private person who may publish an article in a newspaper or other printed form."); Pratt v. Pioneer Press, 14 N.W. 62, 63 (Minn. 1882) ("[I]n the publication of news, or in criticising men and things, the publisher of a newspaper has no privileges or immunities not possessed by any citizen."); Kahn v. Cincinnati Times-Star, 10 Ohio Dec. 599, 603 (Super. Ct. Cincinnati 1890) ("The publisher of a newspaper has exactly the same [constitutional] rights and [is] responsible to exactly the same extent for the abuse of that right as any other citizen."); Regensperger v. Kiefer, 7 A. 284, 285 (Pa. 1887) ("The publisher or proprietor of a newspaper stands before a Court and before a jury like any other man." (quoting jury instructions)); Commonwealth v. Murphy, 8 Pa. C. 399, 405 (Pa. Quarter Sess. 1890) (stating that the constitutional free press pro-

Reference works of the era echoed this press-as-technology view, explaining that newspapers had the same freedoms of speech as private citizens. For instance, one 1917 work noted that "[i]t is well settled that a newspaper or other printed publication has, as such, no peculiar privilege in commenting on matters of public interest. It has no greater privilege with respect to such comment than has any private person."[209] Similarly, a 1901 encyclopedia described the freedom of the press as "only a more extensive and improved use of the liberty of speech which prevailed before printing became general, and is the right belonging to every one, whether the conductor of a newspaper or not."[210] And a 1905 reference work noted that newspapers are treated the same as other speakers when it comes to freedom of the press claims in libel cases, and that this view "has been affirmed by the courts of this country and England with great uniformity."[211]

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vision "does not give to newspapers, as such, any privileges or rights which are not given to every citizen of the state. . . . There is no distinction between newspapers as a privileged class, and other citizens as enjoying inferior rights"); Banner Publ'g Co. v. State, 84 Tenn. 176, 183-84 (1885) (concluding that, with reference to the state constitutional provision for liberty of the press, "the conductor of a public journal has . . . no more rights than the private citizen").

[208] *See, e.g.*, State *ex rel.* Crow v. Shepherd, 76 S.W. 79, 94 (Mo. 1903) (stating, in the discussion of "the liberty of the press," "It is no new claim that newspapers have a greater privilege than the ordinary citizen. This is a grave error."); Fitch v. Daily News Publ'g Co., 217 N.W. 947, 948 (Neb. 1928) ("The usual constitutional guaranty of the freedom of the press . . . is intended simply to secure to the conductors of the press the same rights and immunities, and such only, as are enjoyed by the public at large." (quoting 17 RULING CASE LAW § 95, at 349-50 (William M. McKinney & Burdett A. Rich eds., 1917))); Streeter v. Emmons Cnty. Farmers' Press, 222 N.W. 455, 457 (N.D. 1928) (concluding that "[n]ewspapers . . . have no greater privilege [under libel law] than private individuals," when it comes to the dividing line between "license" and "liberty of the press" (citing 17 RULING CASE LAW, *supra*, § 95, at 349)); Williams v. Hicks Printing Co., 150 N.W. 183, 188 (Wis. 1914) (stating that "[t]he law as to what is within the field of conditional privilege . . . applies to newspapers as well as to individuals" because "[t]he freedom of the press has never been . . . extended so as to accord to [newspapers] special rights to injure or destroy human character by libelous publications").

[209] Annotation, *Comment on Matter of Public Interest as Libel or Slander*, 1917B ANNOTATED CASES AM. & ENG. 409, 417 (William M. McKinney & H. Noyes Greene eds., 1917); *see also* 17 RULING CASE LAW, *supra* note 208, § 95, at 349-50 ("The usual constitutional guaranty of the 'freedom of the press' . . . is intended simply to secure to the conductors of the press the same rights and immunities, and such only, as are enjoyed by the public at large.").

[210] 18 THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW 1051 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1901); *see also* McAllister v. Detroit Free Press Co., 43 N.W. 431, 437 (Mich. 1889) (repeating this idea almost verbatim); HAYTER, *supra* note 10, at 8 (similarly explaining, in 1754, that "[p]rinting is only a more extensive and improved Kind of Speech"); *see also supra* text accompanying note 60.

[211] 8 JUDICIAL AND STATUTORY DEFINITIONS OF WORDS AND PHRASES 7706 (1905).

VI. THE MODERN FIRST AMENDMENT ERA: 1931 TO NOW IN THE SUPREME COURT

A. *Three Models*

The first Supreme Court decisions striking down government action under the First Amendment came in 1931.[212] Within the following decade, the Court adopted the press-as-technology view of the Free Press Clause, and the Court's decisions since then have stuck to that view.

But since 1970, this state of the law has been cast into some doubt. Though the Court's majority holdings have solidly supported the press-as-technology view, some dicta in the opinions have suggested that the Court might be open to the press-as-industry view in at least some cases. And a few lower court decisions have indeed adopted a press-as-industry position as to some First Amendment questions.

To accurately summarize the disagreements among the courts—and the continuing dominance of the press-as-technology view, despite those disagreements—it's helpful to identify three possible approaches to the question:

1. Under the "all-speakers-equal" view, communicators are treated the same whether or not they use mass communications. "The freedom of speech, or of the press," the theory goes, provides the same protection for the rights to "speak," "write," and "print."[213]
2. Under the "mass-communications-more-protected" view, the Free Press Clause provides special protection to all users of the press-as-technology.
3. Under the "press-as-industry-specially-protected" view, the Free Press Clause provides special protection to the institutional press.

The first two approaches both fit the press-as-technology model. (The historical origin of the distinction between the first two ap-

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[212] *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 701-02, 722-23 (1931); Stromberg v. California, 283 U.S. 359, 369 (1931). *Fiske v. Kansas*, the other possible candidate for the first such decision, rested on the conclusion that the Due Process Clause was violated because there wasn't adequate evidence to convict the speaker under the statute. 274 U.S. 380, 387 (1927). *Stromberg* and *Near*, on the other hand, expressly relied on the freedom of speech and the freedom of the press.

[213] *See supra* text accompanying notes 23-24.

proaches is outside the scope of this Article.[214] I mention them separately only because understanding the difference helps explain some of the court decisions discussed below.) The third approach is, of course, the press-as-industry model.

Here, then, is what has happened.

B. *The Supreme Court: "All Speakers Equal"*

1. Generally

As discussed below, the Court's decisions since 1931 generally take the all-speakers-equal view. The one possible exception comes in Justice Powell's influential concurrence in *Branzburg v. Hayes* (1972),[215] which has been read by some lower courts as adopting a mass-communications-more-protected approach.

Many of the post-1931 cases do sometimes refer to the concerns and rights of "newspapers" and "the media." Consider, for instance, the passage in *New York Times Co. v. Sullivan* that says, "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."[216] But this seems to stem just from courts' tendency to focus on the facts of the cases before them. Thus, for instance, within about a year of *Sullivan*, the Court applied its holding to two non-newspaper defendants—a district attorney who made allegedly libelous statements at a press conference,[217] and an arrestee who was sued for sending an allegedly libelous letter to a sheriff and an alleg-

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[214] For evidence suggesting that the freedom of the press was seen as quite different from the freedom of speech, see generally Anderson, *supra* note 67, at 521-27. For evidence suggesting that the two were seen as providing essentially the same protections, though one covered printing and the other speaking, see United States v. Sheldon, 5 Blume Sup. Ct. Trans. 337, 346 (Mich. 1829), which stated that "[t]he constitution of the United States places the freedom of speech and of the press upon the same footing," Lange, *supra* note 17, at 88-99, and sources cited *supra* Section I.E.

[215] 408 U.S. 665, 709-10 (1972).

[216] 376 U.S. 254, 278 (1964); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348 (1974) (stating that the Court's decision "shields the press and broadcast media from the rigors of strict liability for defamation"); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 292 (1974) (characterizing an earlier labor law case as "adopt[ing] as a rule of labor law pre-emption the constitutional standard of media liability for defamation originally enunciated for libel actions by public officials in *New York Times Co.* [*v. Sullivan*]").

[217] Garrison v. Louisiana, 379 U.S. 64, 64-67 (1964).

edly libelous press release to the wire services.[218] The references to newspaper speech, then, may simply describe the speech involved in each case, rather than limiting the constitutional protection just to newspapers.

Because of this, the analysis below looks at the aggregate holdings of the cases and at the specific discussions of the all-speakers-equal vs. mass-communications-more-protected vs. press-as-industry-specially-protected question. And such a focus makes clear the Court's general adoption of the all-speakers-equal model (again, with the possible exception of Justice Powell's *Branzburg v. Hayes* concurrence).

2. The "Generally Applicable Laws" Cases

The Court's first case on whether the press-as-industry had special constitutional rights was *Associated Press v. NLRB* (1937).[219] The Associated Press argued that the Free Press Clause secured a right to fire writers and editors for any reason, including labor union membership (which the AP thought could lead to bias in reporting news), notwithstanding federal labor law.[220] The Court disagreed, holding that "[t]he publisher of a newspaper has no special immunity from the application of general laws."[221]

The Court has repeated this rejection of the press-as-industry-specially-protected model in cases involving many subjects, including the Fair Labor Standards Act, antitrust law, and others.[222] In *Branzburg v. Hayes* (1972), for instance, the majority rejected a newsgatherer's privilege, adopting the all-speakers-equal—and equally unprotected—approach.[223] The Court's decision was partly motivated by its unwillingness to give special constitutional protection to a particular industry:

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[218] *See* Henry v. Collins, 158 So. 2d 28, 30-31 (Miss. 1963), *rev'd per curiam*, 380 U.S. 356 (1965).

[219] 301 U.S. 103 (1937).

[220] *Id.* at 115-17.

[221] *Id.* at 132.

[222] *See, e.g.*, Citizen Publ'g Co. v. United States, 394 U.S. 131, 139 (1969) (stating that the press receives no special treatment under the First Amendment with respect to the antitrust laws); Mabee v. White Plains Publ'g Co., 327 U.S. 178, 184 (1946) (stating, in the labor context, that the press "has no special immunity from laws applicable to business in general"); Associated Press v. United States, 326 U.S. 1, 20 (1945) (stating that the press receives no special treatment under the First Amendment with respect to the antitrust laws).

[223] *See* 408 U.S. 665, 689-93 (1972) ("We are asked to create another [privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.").

> The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. . . .
>
> Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U.S. 444, 450, 452 (1938). See also *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.[224]

Justice Powell's three-paragraph concurrence in *Branzburg*, which was open to a relatively weak newsgatherer's privilege,[225] did implicitly reject the all-speakers-equal approach. Under Justice Powell's approach, a person who gathers information for future mass communication would get a privilege of some unspecified force. But a person who gathers information just to convey it to business partners or friends would presumably not be entitled to a privilege, since allowing the privilege to apply so broadly would eviscerate the general duty to testify.

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[224] *Id.* at 703-05. In *Zurcher v. Stanford Daily*, the Court likewise rejected a claim of special press immunity from search warrants. 436 U.S. 547, 565-67 (1978). Only Justice Stewart, joined by Justice Marshall, would have adopted what appears to be a press-as-industry-specially-protected model. *See id.* at 571-72 (Stewart, J., dissenting). Justice Powell's concurrence suggested that "independent values protected by the First Amendment" should be considered in deciding whether a warrant should be issued, *id.* at 570 (Powell, J., concurring), but Justice Powell might well have been referring to First Amendment interests of speakers generally, and not just of the press-as-industry. Indeed, the *Zurcher* majority, which Justice Powell joined, cited an earlier nonpress opinion which determined that the particularity of the Warrant Clause should be read more strictly when the search was for "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments." Stanford v. Texas, 379 U.S. 476, 485-86 (1965), *quoted in Zurcher*, 436 U.S. at 564.

[225] *See Branzburg*, 665 U.S. at 709-10 (Powell, J., concurring). Justice Powell did not endorse the proposed absolute privilege urged by Justice Douglas's dissent, nor the proposed qualified privilege urged by Justice Stewart's dissent, which could only be overcome by a showing of necessity to serve a compelling government interest. *Id.*

Nonetheless, Justice Powell's concurrence is probably most reasonably read as following the mass-communications-more-protected model rather than the press-as-industry-specially-protected model. Justice Powell joined the majority's opinion, which rejected the press-as-industry model. And though Justice Powell's concurrence spoke of the rights of "newsmen,"[226] it didn't go into any detail about whether "newsman" meant simply someone who worked for a newspaper or whether the term also included someone who gathered the news for just one project or occasional projects. Indeed, as Section VII.A will discuss, nearly all lower court cases have either dismissed Justice Powell's opinion as merely a concurrence, or have read it as endorsing the mass-communications-specially-protected approach rather than the press-as-industry-specially-protected" approach.

Finally, and most recently, in *Cohen v. Cowles Media Co.* (1991), the Court rejected a newspaper's attempt to use the First Amendment as a defense to a promissory estoppel suit brought by a source whose name was published despite the newspaper's promise of anonymity.[227] "[G]enerally applicable laws," the Court held, "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[228]

The Court has long been willing to give *speakers generally* some exemptions from "generally applicable laws." This is especially true when the laws end up applying to speakers because of the content of their speech—for instance, when a breach of the peace prosecution, an intentional infliction of emotional distress lawsuit, an interference with business relations claim, or an antitrust claim is based on the content of the speaker's message.[229] But within this category of speakers, neither members of the press-as-industry nor users of the press-as-technology have received more protection than other speakers.

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[226] *Id.*

[227] 501 U.S. 663, 665-66 (1991).

[228] *Id.* at 669. Three of the four dissenters expressly agreed on this point. *See id.* at 673 (Blackmun, J., joined by Marshall & Souter, JJ., dissenting) (stating that "[n]ecessarily, the First Amendment protection" against promissory estoppel liability for revealing the name of a source "afforded respondents would be equally available to nonmedia defendants"). The fourth dissenter, Justice O'Connor, expressed no opinion on the issue.

[229] *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1287-93 (2005) (citing pre-2005 examples of such cases); *see also* Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (applying this principle to a lawsuit for intentional infliction of emotional distress).

3. The Literature Distribution Cases

The Court has likewise rejected the press-as-industry view in the cases dealing with people prosecuted for handing out printed material. The first such case, *Lovell v. City of Griffin* (1938), expressly held that the freedom of the press extends beyond the press-as-industry:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[230]

And *Lovell* was reaffirmed in *Schneider v. State* (1939),[231] *Martin v. City of Struthers* (1943),[232] and *Jamison v. Texas* (1943),[233] in which the Court cited the Free Press Clause in striking down ordinances that limited the distribution of handbills, circulars, and advertisements—ordinances that, unlike the *Lovell* ordinance, didn't even apply to typical newspapers or magazines. In *Schneider* and *Martin*, the Court discussed both the freedom of the press and the freedom of speech, but in *Jamison* it mentioned only the freedom of the press.

Moreover, at around the time the Court decided these cases, it also applied the same rules to speakers who weren't using mass communications technology at all—door-to-door canvassers, picketers, speakers in public places, and the like.[234] Put together, these cases thus embrace the all-speakers-equal view, and reject the press-as-industry-specially-protected view.

4. The Communicative Tort Cases

The results of the Supreme Court's communicative tort cases seem to be most consistent with the all-speakers-equal approach, though they

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[230] 303 U.S. 444, 452 (1938). The city's brief had argued that nothing in the record suggested "that the appellant is a member of the press or that an ordinance abridging the freedom of the press would apply to her." Brief of Appellee at 12, *Lovell*, 303 U.S. 444 (No. 391). But the brief cited no precedents supporting the view that the freedom of the press protected only "member[s] of the press"—I suspect because no such precedents were available.

[231] 308 U.S. 147, 160-64 (1939).

[232] 319 U.S. 141, 143 (1943).

[233] 318 U.S. 413, 416 (1943).

[234] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 311 (1940) (door-to-door canvassing); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940) (picketing); Hague v. CIO, 307 U.S. 496, 512-14 (1939) (speeches in public places and in privately owned halls).

might also be reconciled with the mass-communications-more-protected approach. In *New York Times Co. v. Sullivan* (1964), Sullivan sued over an advertisement that criticized him, naming both the *New York Times*, which published the advertisement, and several ministers who signed it.[235] The Court reversed the verdict against both the newspaper and the signers, applying the same "actual malice" rule to both.[236]

In the process, the Court seemed to suggest that this identical rule stemmed from two different sources—the Free Press Clause as to newspapers, and the Free Speech Clause as to the signers:

> That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. . . . Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—*who wish to exercise their freedom of speech even though they are not members of the press.* Cf. *Lovell* v. *Griffin*, 303 U.S. 444, 452; *Schneider* v. *State*, 308 U.S. 147, 164.[237]

Though *Lovell* had asserted the Free Press Clause rights of pamphleteering and leafleting defendants who were not "members of the press," *Sullivan* recharacterized such rights as being the "freedom of speech," not the "freedom of the press."

But it's not clear what to make of the particular label that the Court used for the rights involved, since in the last half century the Court has tended to use "freedom of speech" broadly. And in any event, the bottom line was that the signers of the *New York Times* advertisement—who were communicating through the mass media but weren't themselves newspaper owners or writers—were given the benefit of precisely the same constitutional rule as the newspaper.

The same principle was applied in *Garrison v. Louisiana* (1964).[238] Garrison, a district attorney, was prosecuted for criminal libel because of his statement at a press conference condemning several judges.[239] The Court held that Garrison was entitled to the protection of the *Sullivan* "actual malice" rule, without being influenced by Garrison's not being a member of the press-as-industry.

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[235] 376 U.S. 254, 256 (1964).
[236] *Id.* at 283-84.
[237] *Id.* at 266 (emphasis added) (select citations omitted).
[238] 379 U.S. 64 (1964).
[239] *Id.* at 64-65.

The *Garrison* decision did speak of the "freedom of expression,"[240] rather than the "freedom of the press." But though Garrison could have been seen as exercising the "freedom of the press"—he was trying to convey his views through the press, though filtered by the reporters who wrote the actual stories—the broader "freedom of expression" likely seemed to be a more natural label for the right involved here. And in any event, nothing turned on the label: the Free Speech Clause rule that protected Garrison was identical to the Free Press Clause that protected the *New York Times*.

Likewise, in *Henry v. Collins* (1965), the Court applied the *Sullivan* rule to an arrestee who issued a statement—sent to the sheriff and to wire services[241]—alleging that his arrest stemmed from a "diabolical plot."[242] In *St. Amant v. Thompson* (1968), the Court applied the *Sullivan* rule to a politician who was sued for libel based on a statement he read on a televised program.[243] The Court didn't indicate in either case whether the decisions were based on the Free Speech Clause or the Free Press Clause, likely because it made no difference. And *McDonald v. Smith* (1985) further reinforced the notion that the rules are the same under all the expression-related clauses of the First Amendment, by holding that the Petition Clause provided the same protection against libel lawsuits in petitions to the government as did cases such as *Garrison* and *Sullivan*.[244]

Cohen v. Cowles Media Co. (1991) echoed this view by holding that the press-as-industry gets no exemption from laws that don't single out the press[245] and by citing a communicative tort case, *Zacchini v. Scripps-Howard Broadcasting Co.*, as an example of this principle.[246] The opinion cited *Zacchini* for the proposition that "[t]he press, like others interested in publishing," is bound by copyright law.[247] It thus appears that the Court believes that the press-as-industry gets no exemptions

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[240] *Id.* at 75.

[241] 158 So. 2d 28, 30 (Miss. 1963), *rev'd per curiam*, 380 U.S. 356 (1965).

[242] 380 U.S. at 356.

[243] 390 U.S. 727, 728, 733 (1968).

[244] 472 U.S. 479, 485 (1985).

[245] 501 U.S. 663, 669 (1991). For more on why *Cohen v. Cowles Media Co.* is properly read as discussing laws that apply equally to the press and to other speakers, see Volokh, *supra* note 229, at 1294-97.

[246] 501 U.S. at 669 (quoting Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576-79 (1977)).

[247] *Id.*

from communicative torts generally—not just libel, but also copyright infringement, and likely, as in *Zacchini* itself, the right of publicity.[248]

Bartnicki v. Vopper (2000) likewise held that the First Amendment equally protected a radio broadcaster and the person who gave him allegedly actionable material.[249] *Bartnicki* arose under federal statutes that banned both the interception of cellular phone conversations and the willful dissemination of such conversations, including dissemination by people who were unconnected to the person who did the interception.[250] An unknown person had intercepted a conversation in which local teachers' union leaders seemed to be discussing possible violent attacks on school board members.[251] That tape was left in the mailbox of Jack Yocum—"the head of a local taxpayers' organization" and a political foe of the union—and Yocum delivered it to radio show host Frederick Vopper.[252] The union leaders sued both Yocum and Vopper.[253]

The Court concluded that the First Amendment trumped the ban on dissemination, at least on the facts of the case.[254] But in the process of deciding the First Amendment question, the Court stressed that it "dr[ew] no distinction between the media respondents and Yocum."[255] The first citation the Court gave in support of this statement was to the passage from *New York Times Co. v. Sullivan* mentioned above, which noted that "persons who do not themselves have access to publishing facilities" are protected by the First Amendment when they pay others for access to their media platforms.[256] The Court's second citation was to a passage in *First National Bank of Boston v. Bellotti* in which the Court held that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not de-

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[248] *See* Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1128 (9th Cir. 2010) (observing that "copyright infringement . . . is often characterized as a tort," and treating it as such (citation omitted)). Copyright infringement is the intellectual property analog of trespass—an interference with a property owner's exclusive rights. And in *Zacchini*, the Court treated copyright infringement as analogous to the right of publicity tort. *See* 433 U.S. at 567.

[249] 532 U.S. 514, 525 n.8 (2001).

[250] *Id.* at 523-24.

[251] *Id.* at 518-19.

[252] *Id.* at 519.

[253] *Id.*

[254] *Id.* at 535.

[255] *Id.* at 525 & n.8.

[256] 376 U.S. 254, 266 (1964).

pend upon the identity of its source, whether corporation, association, union, or individual."[257]

Finally, *Snyder v. Phelps* (2011) held that picketers near a funeral had a First Amendment defense to the tort of intentional infliction of emotional distress.[258] The foremost precedent on the subject, *Hustler Magazine, Inc. v. Falwell*,[259] involved a media defendant, but *Snyder* followed and extended *Hustler*'s reasoning without any suggestion that the picketers merited less protection than the professional publisher in *Hustler*. The *Snyder* Court didn't expressly discuss whether media defendants should be treated differently from speakers—such as the picketers in *Snyder* itself—who are neither members of the press-as-industry nor directly using channels of mass communication (except insofar as they are hoping for media coverage). But the Court's firm acceptance of the analogy between *Snyder* and *Hustler* is consistent with the press-as-technology view adopted by the other cases cited in this Section.

The Court thus has not accepted the press-as-industry-specially-protected view in communicative torts cases. And it also seems—though the matter is less clear—that it has taken the all-speakers-equal view rather than the mass-communications-more-protected view.

First, the cases above show that the Court considers the same rules to apply interchangeably under both the Free Speech Clause and the Free Press Clause. This suggests that these rules apply to speakers in non-mass-communications settings exercising their Free Speech Clause rights (say, a hypothetical Garrison or Yocum who is making accusations only to his political allies) as much as to speakers who are exercising their Free Speech Clause rights by speaking to the media. Whatever distinction the Free Press Clause might or might not draw between mass communications and other communications, there's no indication that the Free Speech Clause could embody such a distinction.

Second, the Court in *McDonald v. Smith* (1985) took the view that the Petition Clause rules are the same as those applicable under both the Free Speech Clause and the Free Press Clause.[260] Speech in most petitions to the government is *not* an attempt to engage in mass communications; for instance, the petitions in *McDonald* were letters to the President.[261] If such non-mass-communications speech to the gov-

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[257] 435 U.S. 765, 777 (1978).
[258] 131 S. Ct. 1207, 1220 (2011).
[259] *See* 485 U.S. 46, 47-48 (1988).
[260] 472 U.S. 479, 485 (1985).
[261] *Id.* at 480.

ernment is protected by the Petition Clause, and the First Amendment rules are the same under all three clauses, then non-mass-communications speech to others should also be protected by the Free Speech Clause.

Third, one of the Supreme Court's libel cases, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985), did involve speech that wasn't intended for mass communications technology.[262] The *Dun & Bradstreet* Court held that a credit report sent out to five subscribers was less protected than speech on matters of "public concern."[263] But while Justice Powell's opinion concluded that the limited audience for the speech suggested that the speech was less likely to be of "public concern"—and the other Justices in the majority presumably agreed on this score—the Court expressly declined to adopt the media/nonmedia distinction the Vermont Supreme Court adopted below.[264] Indeed, five Justices (Justice White in his concurrence, and Justices Brennan, Marshall, Blackmun, and Stevens in dissent) specifically repudiated such a distinction.[265]

Moreover, the test that the Court adopted, which only applies full constitutional protection to speech on matters of "public concern," stemmed from a case in which some non-mass-communications speech *was* found to be of "public concern"—*Connick v. Myers* (1983).[266] In *Connick*, a government employee's question to coworkers about whether supervisors illegally pressured employees to work on political campaigns was deemed to raise issues of "public concern."[267] *Connick* itself characterized an earlier case, *Givhan v. Western Line Consolidated School District* (1979),[268] as involving speech on a matter of "public

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[262] *See* 472 U.S. 749, 751 (1985) (Powell, J., plurality opinion) (noting that the communication at issue was a "confidential" credit report).

[263] *Id.* at 763; *see also id.* at 764 (Burger, C.J., concurring in the judgment) (agreeing with Justice Powell on this point); *id.* at 774 (White, J., concurring in the judgment) (same).

[264] *Id.* at 753, 762 (Powell, J., plurality opinion).

[265] *See id.* at 781 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting) (arguing that "[s]uch a distinction is irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source'" (alteration in original) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978))).

[266] 461 U.S. 138, 147-49 (1983).

[267] *Id.* The *Dun & Bradstreet* plurality expressly relied on *Connick* in reaching its holding. 472 U.S. at 759-61. Other speech in *Connick* was found not to be of public concern, but only because it was seen as motivated merely by the speaker's personal employment dispute with her employer. 461 U.S. at 148-49.

[268] 439 U.S. 410 (1979).

concern," even though that speech consisted solely of an employee's statement to her employer.[269] And two years after *Dun & Bradstreet*, *Rankin v. McPherson* (1987) held that a county employee's statement to a coworker qualified as speech on a matter of "public concern."[270]

So on balance, *Dun & Bradstreet*, *McDonald*, and the other cases cited above suggest that the Court is taking the all-speakers-equal view of the First Amendment. And the cases certainly do not support the press-as-industry-specially-protected view.

5. The Campaign Speech Cases

Campaign finance laws have restricted various kinds of election-related speech, including corporate speech,[271] speech that costs more than $1000,[272] and speech coordinated with a candidate.[273] Newspapers and magazines, of course, routinely engage in such speech, but so-called "media exemptions" to campaign finance laws have excluded the press-as-industry from such restrictions.[274] The Supreme Court has thus never considered a case in which the press-as-industry directly sought a *constitutional* entitlement to exemptions from campaign finance law.

But in *Citizens United v. FEC* (2010), the Court did specifically reject the press-as-industry-specially-protected model.[275] The majority argued that if restrictions on corporate expression about candidates were constitutional, then newspapers—which are mostly owned by

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[269] *Connick*, 461 U.S. at 146.

[270] 483 U.S. 378, 386-87 (1987).

[271] *See* Citizens United v. FEC, 130 S. Ct. 876, 913 (2010) (invalidating such a restriction).

[272] *See* Buckley v. Valeo, 424 U.S. 1, 51 (1976) (per curiam) (invalidating such a restriction).

[273] *See id.* at 46-47 (discussing such a restriction).

[274] *See, e.g.*, 2 U.S.C. § 431(9)(B)(i) (2006) (exempting from mandatory campaign disclosures expenditures for the production of "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate"); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 666-67 (1990) (describing a state election law that exempted any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting" (alteration in original)).

[275] *See* 130 S. Ct. at 905-06 ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not . . . . This differential treatment cannot be squared with the First Amendment.").

corporations—could likewise be restricted.[276] The dissent suggested that this need not be so, since newspapers and similar publications might still have Free Press Clause rights that other corporations interested in publishing material did not have.[277] But the majority rejected this argument, instead deciding that "the institutional press" has no "constitutional privilege beyond that of other speakers"—so that any restrictions that could be constitutionally imposed on nonmedia corporations could likewise be imposed on media corporations.[278]

And though *Citizens United* overruled portions of *McConnell v. FEC* (2003)[279] and *Austin v. Michigan Chamber of Commerce* (1990),[280] those earlier cases were not inconsistent with *Citizens United* on this point. *McConnell* was silent on the issue.[281] *Austin* noted that "the press' unique societal role may not entitle the press to greater protection under the Constitution," and held only that a media exemption was constitutionally *permissible*, not that it was constitutionally *mandatory*.[282]

In the process, the Court in *Austin* cited *First National Bank of Boston v. Bellotti* (1978), another campaign speech case that rejected the "suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by" nonmedia corporations.[283] Three of the four dissenters in *Bellotti* agreed with the majority on this point, concluding that "the First Amendment does not immunize media corporations any more than other types of corporations from restrictions upon electoral contributions and expenditures," presumably including expenditures incurred to convey their views about the election.[284]

In the Court's first campaign finance speech case, *United States v. CIO* (1948), a four-Justice concurrence—written by Justice Rutledge and joined by Justices Black, Douglas, and Murphy—likewise rejected the press-as-industry-specially-protected model.[285] In that case, the CIO challenged a federal ban on the use of corporate and union

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[276] *Id.* at 906.

[277] *Id.* at 951 n.57 (Stevens, J., dissenting).

[278] *Id.* at 905 (majority opinion) (quoting *Austin*, 494 U.S. at 691 (Scalia, J., dissenting)).

[279] 540 U.S. 93 (2003).

[280] 494 U.S. 652.

[281] *Citizens United*, 130 S. Ct. at 913.

[282] *Austin*, 494 U.S. at 668.

[283] 435 U.S. 765, 782 n.18 (1978).

[284] *Id.* at 808 n.8 (White, J., dissenting, joined by Brennan & Marshall, JJ.).

[285] 335 U.S. 106, 154-55 (1948) (Rutledge, J., concurring in the judgment).

funds for election-related speech.[286] The majority interpreted the statute narrowly, as excluding union-owned newspapers.[287] But the concurring Justices would have gone further and invalidated the statute altogether, holding as a general matter that sporadic publication by nonmedia organizations is entitled to the same constitutional protection as regular publications:

> I know of nothing in the Amendment's policy or history which turns or permits turning the applicability of its protections upon the difference between regular and merely casual or occasional distributions. Indeed pamphleteering was a common mode of exercising freedom of the press before and at the time of the Amendment's adoption. It cannot have been intended to tolerate exclusion of this form of exercising that freedom.[288]

The majority's conclusion that the statute did not cover the CIO's speech made it unnecessary for the majority to respond to this argument.

Finally, there has been no indication from campaign speech cases that the Court would accept even the mass-communications-more-protected model of the Free Press Clause; in fact, *McConnell v. FEC* (2003) quickly rejected this model.[289] It seems unlikely that the Justices would treat spending $10,000 to print and mail campaign literature as constitutionally different from spending $10,000 to organize a political rally.[290]

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[286] *Id.* at 108-09 (majority opinion).

[287] *Id.* at 123-24.

[288] *Id.* at 155 (Rutledge, J., concurring in the judgment).

[289] *See* 540 U.S. 93, 209 n.89 (2003). A Congressman, an advocacy group, and some other plaintiffs in *McConnell* argued at the district court level that they were entitled to Free Press Clause protection, on a press-as-technology theory. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 233-34 & n.61 (D.D.C.) (per curiam), *aff'd in part*, 540 U.S. 93 (2003), *overruled in part as to other matters by* Citizens United v. FEC, 130 S. Ct. 876 (2010). But the district court took an all-speakers-equal view, and concluded that the Free Press Clause provided no more protection for mass communications speakers than does the Free Speech Clause, and that the reasoning of *Buckley v. Valeo* allows some restrictions on both Free Speech Clause and Free Press Clause rights as to campaign-related speech. *Id.* at 234-36. And the Supreme Court expressly agreed with the district court on this point. 540 U.S. at 209 n.89.

[290] The Court's campaign finance cases have all discussed the First Amendment generally, with occasional references to the freedom of speech. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (mentioning the First Amendment 109 times, and the "freedom of speech" and "free speech" only thirteen times in total).

6. The Access to Government Facilities Cases

In *Pell v. Procunier* (1974), the Court likewise adopted the all-speakers-equal view as to access to government facilities. Three "professional journalists" sought the right to interview prison inmates face-to-face, but the Court disagreed:

> "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." *Branzburg* v. *Hayes*, [408 U.S. 665, 684-85 (1972)]. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.
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> The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.[291]

Saxbe v. Washington Post Co. (1974), decided the same day, took the same view.[292] Even Justice Powell's dissent, joined by Justices Brennan and Marshall, expressly said,

> [N]either any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals. For me, at least, it is clear that persons who become journalists acquire thereby no special immunity from governmental regulation. To this extent I agree with the majority.[293]

Justice Douglas, dissenting in *Pell* and *Saxbe*, disagreed, arguing in *Pell* that "the press" is "the institution which '[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs,'" and that the press-as-industry stood on a different footing from the public when it came to access.[294] But the majority did not accept this view; and even though Justices Brennan and Marshall joined Douglas's dissent, their views on this issue are hard to pin down—they

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[291] Pell v. Procunier, 417 U.S. 817, 833-34 (1974) (citation altered).

[292] 417 U.S. 843, 850 (1974); *see also id.* ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." (quoting *Pell*, 417 U.S. at 834)).

[293] *Id.* at 857 (Powell, J., dissenting).

[294] 417 U.S. at 841 (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.) (alteration in original) (citation omitted).

also joined Justice Powell's dissent in *Saxbe*, which contradicted Douglas's view on this point.

A majority of the Justices in *Houchins v. KQED, Inc.* (1978) likewise accepted the *Pell* view in rejecting a claimed right of access to prisons for videorecording purposes.[295] Three of the seven participating Justices asserted that the press has no extra First Amendment rights beyond those held by the public at large.[296] Three more quoted similar language from *Pell*, without any suggestion that they disagreed with it.[297] Only Justice Stewart, concurring in the judgment, concluded that the media should have the right to videorecord prison conditions even if the general public lacked that right.[298]

Finally, in *Richmond Newspapers, Inc. v. Virginia* (1980), which held that the First Amendment generally prohibited the closure of trials, Justice Brennan's concurrence (joined by Justice Marshall) expressly noted that the case didn't raise the question "whether the media should enjoy greater access rights than the general public."[299] But the majority in *Nixon v. Warner Communications, Inc.* (1978) had answered the question in the negative, holding that "[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public."[300] And before *Nixon*, *Estes v. Texas* (1965) stated in dicta that "[a]ll [journalists] are entitled to the same rights [of access to trials] as the general public."[301]

7. The Footnotes

So it seems that the Court is likely following the all-speakers-equal approach and is definitely not following the "special protection for the press as industry" approach. Still, from 1979 to 1990, footnotes in five

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[295] *See* 438 U.S. 1, 15-16 (1978) (plurality opinion).

[296] *Id.* at 11.

[297] *Id.* at 27-28 (Stevens, J., joined by Brennan & Powell, JJ., dissenting) (quoting *Pell*, 417 U.S. 834). The dissent's view was that the policy unconstitutionally interfered with access to information about the prison, both for the press and the public as a whole. *Id.* at 28-30.

[298] *Id.* at 16-17 (Stewart, J., concurring in the judgment) ("[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists . . . .").

[299] 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring in the judgment).

[300] 435 U.S. 589, 609 (1978); *see also id.* (denying a claimed right to make copies of tape recordings introduced at a criminal trial). Three Justices dissented in *Nixon*, but none of the dissenters discussed the First Amendment question. *See id.* at 611.

[301] 381 U.S. 532, 540 (1965).

majority opinions expressly reserved the question whether "nonmedia defendant[s]" were unprotected by parts of the Court's emerging libel case law,[302] even though a majority of the Justices who sat on the Court during that era—Justices Brennan, Marshall, Blackmun, Stevens, and White—had, on various occasions, concluded that nonmedia defendants should be treated the same as media defendants.[303] This has signaled to lower courts that the question remains open. And a few lower courts have indeed applied the First Amendment differently to media and non-media defendants, both before 1979 and after.

VII. THE PRESS-AS-INDUSTRY IN THE LOWER COURT CASES: 1970 TO NOW

From the 1930s to the 1960s, lower court cases often repeated that the institutional press had no special First Amendment rights, whether generally[304] or regarding libel law,[305] the duty to testify notwithstanding

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[302] *See* Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 309 n.16 (1979); Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979); Bose Corp. v. Consumers Union, 466 U.S. 485, 492 n.8 (1984); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 779 n.4 (1986); Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 n.6 (1990). Likewise, Chief Justice Burger noted that "[t]he Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others," though he argued that the Free Press Clause should be read as not conferring any such special protection. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 798-802 (1978) (Burger, C.J., concurring).

[303] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 781 (1985) (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting) (concluding that the proposed distinction between "media" and nonmedia defendants is "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual'" (quoting *Bellotti*, 435 U.S. at 777)); *id.* at 773 (White, J., concurring in the judgment) ("I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech."); *see also Milkovich*, 497 U.S. at 23-24 n.2 (Brennan, J., joined by Marshall, J., dissenting) (repeating Justice Brennan's position in *Dun & Bradstreet* on the subject); *Hepps*, 475 U.S. at 780 (Brennan, J., joined by Blackmun, J., concurring) (same); *cf.* Cohen v. Cowles Media Co., 501 U.S. 663, 674 (1991) (Blackmun, J., joined by Marshall & Souter, JJ., dissenting) ("Necessarily, the First Amendment protection [against promissory estoppel liability for revealing the name of a source] afforded respondents would be equally available to nonmedia defendants."). In *Dun & Bradstreet*, the other four Justices expressed no opinion on the issue; the dissent and Justice White discussed it because the lower court and the parties had done so. *See* 472 U.S. at 773-74 (White, J., concurring in the judgment); *id.* at 781 (Brennan, J, dissenting).

[304] *See, e.g.*, Curry v. Journal Publ'g Co., 68 P.2d 168, 174-75 (N.M. 1937) (stating, in the discussion of the "freedom of the press," that "[a] publisher of a newspaper has the same rights, no more or less, than individuals, to speak, write, or publish his views and sentiments, and is subject to the same restrictions"), *overruled on other grounds by*

a promise of confidentiality made to a source,[306] access to trials,[307] or access to government documents.[308]

When, then, did the press-as-industry-specially-protected decisions (and the mass-communications-more-protected decisions) first arise, and how common have they been? Answering this might be both historically interesting and practically useful for determining just how firmly rooted—or not—these models have become. And examining cases that have adopted these models, especially the press-as-industry-specially-protected model, may identify helpful test cases for future discussions of whether the models are wise.

The answer seems to be that the first cases departing from the all-speakers-equal model were decided in the 1970s. Moreover, even since the 1970s, there have only been about a dozen press-as-industry-

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Ramirez v. Armstrong, 673 P.2d 822 (N.M. 1983); Layne v. Tribune Co., 146 So. 234, 238 (Fla. 1933) (concluding that the "constitutional guaranty of 'freedom of the press'" "was simply intended to secure to the conductors of the press the same rights and immunities, and such rights and immunities only, as were enjoyed by the public at large").

[305] *See, e.g.*, Leers v. Green, 131 A.2d 781, 788-89 (N.J. 1957) (concluding that the American "freedom . . . of press" tracked the English rule that "the press and the public have the same right of fair comment," a conclusion that in this case helped the nonmedia defendants get the same protection as the media defendants); Swearingen v. Parkersburg Sentinel Co., 26 S.E.2d 209, 215 (W. Va. 1943) ("The publisher of a newspaper has no greater privilege to publish defamatory matter than any other person.").

[306] *See, e.g.*, State v. Buchanan, 436 P.2d 729, 731 (Or. 1968) ("Indeed, it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal-privileges and equal-protection concepts also found in the Constitution. Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing." (footnote omitted)). Another case from the 1950s, *Rumely v. United States*, concluded that a publisher had a right to refuse to reveal the names of his customers to the House Select Committee on Lobbying Activities; but the court's reasoning rested on anonymous speech principles that applied beyond the press-as-industry and would have covered nonprofessional distributors of leaflets or pamphlets. 197 F.2d 166, 176 (D.C. Cir. 1952), *aff'd on other grounds*, 345 U.S. 41 (1953). The opinion repeatedly treated "books, pamphlets and other writings" equally, *id.* at 173, 174, and stressed the value of protecting attempts to influence public opinion—an activity in which nonmedia actors have long participated, *id.* at 175.

[307] *See, e.g.*, Kirstowsky v. Superior Court, 300 P.2d 163, 169 (Cal. Ct. App. 1956) ("[M]embers of the press are in the same position as other members of the public and have no greater right to be present at court hearings than has any other member of the public," and therefore "[t]he freedom of the press is in no way involved in this proceeding."); United Press Ass'ns v. Valente, 123 N.E.2d 777, 783 (N.Y. 1954) ("The fact that petitioners are in the business of disseminating news gives them no special right or privilege, not possessed by other members of the public.").

[308] *See, e.g.*, Grand Forks Herald, Inc. v. Lyons, 101 N.W.2d 543, 547 (N.D. 1960) (concluding that "the freedom of the press" gives "plaintiff as a newspaper . . . no greater right of inspection than that given to the public generally"); Trimble v. Johnston, 173 F. Supp. 651, 655-56 (D.D.C. 1959) (same).

specially-protected cases. Some of these cases seem to be motivated by some lower courts' unease with the First Amendment jurisprudence announced by the Court in recent decades—especially in libel cases—and are aimed at minimizing the scope of those protections. Other cases seem to be motivated by other lower courts' desire to extend First Amendment protections, especially in cases of press access to private property, but to do so in a limited way.

But whatever the motivation, the press-as-industry-specially-protected cases represent a minority view: most lower court cases have continued to follow the all-speakers-equal model.[309] Below, I discuss both the press-as-industry-specially-protected cases and the cases that reject this view, arranged by topic: (a) cases involving a newsgatherer's privilege; (b) cases involving communicative torts (chiefly libel); (c) cases involving claimed First Amendment exemptions from anti-discrimination laws; (d) cases involving a claimed First Amendment right to access government operations, government property, and private property; and (e) campaign speech cases.

A. *The Newsgatherer's Privilege*

The first decision rejecting the all-speakers-equal model—the district court decision in *In re Caldwell*,[310] which was largely reversed by the Supreme Court in *Branzburg v. Hayes*—was a newsgatherer's privilege decision. *Caldwell* did not determine whether the privilege would follow the mass-communications-more-protected model or the press-as-industry-specially-protected model. But lower court cases considering this issue have nearly unanimously rejected the press-as-industry-

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[309] See, for example, cases rejecting the journalist's privilege *infra* note 311 and cases rejecting a media/nonmedia distinction in libel cases *infra* note 321.

[310] *See* 311 F. Supp. 358, 360 (N.D. Cal.) (ruling that a journalist's testimony before a grand jury should not "reveal confidential associations that impinge upon the effective exercise of his First Amendment right to gather news for dissemination to the public through the press"), *vacated*, 434 F.2d 1081 (9th Cir. 1970), *rev'd sub nom.* Branzburg v. Hayes, 408 U.S. 665 (1972). *Garland v. Torre*, written by then-Judge Stewart shortly before he was appointed to the Supreme Court, noted "that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality." 259 F.2d 545, 549-50 (2d Cir. 1958). This seems to suggest that a privilege might be available if the news source is indeed "of doubtful relevance or materiality," but the opinion never said outright that such a privilege was available, and noted in a footnote two cases "to the effect that a journalist's professional status does not entitle him to sources of news inaccessible to others." *Id.* at 548 n.4 (citing Tribune Review Pub. Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); *Valente*, 123 N.E.2d 777).

specially-protected model: some reject any First Amendment newsgatherer's privilege, reasoning that Justice Powell's concurrence doesn't undercut the majority opinion,[311] and others accept the privilege but apply it equally to non-press-as-industry newsgatherers.

Thus, the First, Second, Third, Ninth, and Tenth Circuits, the Minnesota Supreme Court, and several district courts together have held that would-be book authors,[312] professors doing research for a possible future article,[313] a film student and a professor trying to produce a documentary film,[314] a political candidate,[315] and political advocacy groups[316] were all potentially eligible for the privilege on the same terms as ordinary journalists. The common threshold requirement seems to be that the newsgatherer, "at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation."[317] The newsgatherer need not be a member of the press-as-industry.

The only newsgatherer's privilege case I could find that seemed to endorse the press-as-industry-specially-protected view is *People v. LeGrand*, a 1979 New York intermediate appeals court case.[318] The

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[311] *See, e.g.*, *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1148 (D.C. Cir. 2006); McKevitt v. Pallasch, 339 F.3d 530, 531-32 (7th Cir. 2003); *In re* Grand Jury Proceedings, 810 F.2d 580, 585 (6th Cir. 1987); *In re* Farber, 394 A.2d 330, 334 (N.J. 1978).

[312] *See* Ayala v. Ayers, 668 F. Supp. 2d 1248, 1250 (S.D. Cal. 2009); Shoen v. Shoen, 5 F.3d 1289, 1293 (9th Cir. 1993); von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987); United States v. Hubbard, 493 F. Supp. 202, 205 (D.D.C. 1979); *see also In re* Madden, 151 F.3d 125, 128-30 (3d Cir. 1998) (endorsing *Shoen* and *von Bulow*, though concluding that they were inapplicable to the case at hand).

[313] *See* Cusumano v. Microsoft Corp., 162 F.3d 708, 714-15 (1st Cir. 1998); *see also* United States v. Doe, 332 F. Supp. 938, 941 (D. Mass. 1971) (concluding that academics should be treated the same way as journalists, but deciding that the privilege was inapplicable for other reasons (citing Lovell v. Griffin, 303 U.S. 444, 452 (1938))).

[314] *See* Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977) (citing *Lovell*, 303 U.S. at 452).

[315] *See In re* Charges of Unprofessional Conduct Involving File No. 17139, 720 N.W.2d 807, 816 (Minn. 2006).

[316] *See* Schiller v. City of New York, 245 F.R.D. 112, 118-20 (S.D.N.Y. 2007); Builders Ass'n of Greater Chi. v. Cnty. of Cook, No. 96-1121, 1998 WL 111702, at *4-5 (N.D. Ill. Mar. 12, 1998).

[317] *Von Bulow*, 811 F.2d at 143.

[318] I don't count the district court and court of appeals decisions in *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd*, 436 U.S. 547 (1978), because they were reversed, and because it isn't clear which model they adopted. The decisions addressed whether searches of newspaper premises violated the Fourth Amendment, *id.* at 125-26, so the courts had no occasion to decide whether they would have reached the same result as to the search of the office of a would-be book author or a creator of non–mass communications speech, such as pick-

LeGrand court rejected a newsgatherer's privilege claim raised by someone researching a book about a mafia family, reasoning:

> Under these facts, I conclude that the author's interest in protecting the confidential information is manifestly less compelling than that of a journalist or newsman. To report the news and remain valuable to their employer and the public, professional journalists must constantly cultivate sources of information. Newsmen must also maintain their credibility and trustworthiness as repositories of confidential information.
>
> However, appellant, like most authors, is an independent contractor whose success invariably depends more on the researching of public and private documents, other treatises, and background interviews, rather than on confidential rapport with his sources of information. Thus, his contacts with confidential sources, being minimal vis-a-vis those of an investigative journalist, would be far less likely to have any impact on the free flow of information which the First Amendment is designed to protect.
>
> The court defers comment at this time with respect to some future situation in which an author's role would be clearly that of an investigative journalist whose work product will be published in book form.[319]

The court thus distinguished "professional journalist[s]" from those who are only one-time authors, endorsing the press-as-industry-specially-protected approach. But I know of no other newsgatherer's privilege cases that take this view.

State statutes—whether related to newsgatherer's privileges, retractions in libel cases, campaign finance law, or other subjects—often do single out the institutional media, and sometimes even just certain segments of the media.[320] But such line drawing is part of what legislators do. When the broad constitutional language "freedom . . . of the press" is involved, courts deciding journalist's privilege cases have been unwilling to distinguish the press-as-industry from other newsgatherers.

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eting or in-person speeches. And while the district court did reject the view "that newspapers, reporters and photographers have no greater Fourth Amendment protections than other citizens," *id.* at 133-34, it spoke more broadly of the principle that "[t]he First Amendment is *not* superfluous," *id.* The court didn't argue that the Free Press Clause "is not superfluous," and thus that the Clause provides special protection to the press-as-industry that the rest of the First Amendment denies to other speakers. Indeed, the court cited, among other cases, *NAACP v. Alabama*, 357 U.S. 449 (1958), which protected an organization that was not part of the press-as-industry. 353 F. Supp. at 134.

[319] People v. LeGrand, 415 N.Y.S.2d 252, 257-58 (N.Y. App. Div. 1979).

[320] *See, e.g.*, DEL. CODE ANN. tit. 10, § 4320(4) (West 1999) (defining reporter narrowly by requiring a large time commitment and future large-scale public dissemination of the work).

B. *Communicative Torts*

Many communicative torts decisions in the lower courts have continued to follow the all-speakers-equal model.[321] Moreover, most of the lower court cases that have departed from this approach have done so with regard to speech that was never intended for mass dissemination, such as credit reports,[322] employer references related to ex-employees,[323] complaints about a franchisee sent to a franchisor,[324] complaints sent to the government,[325] business responses to customer complaints,[326] people talking to their coworkers, supervisors, or neigh-

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[321] *See, e.g.*, Snyder v. Phelps, 580 F.3d 206, 219 n.13 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011); Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 149 (2d Cir. 2000); *In re* IBP Confidential Bus. Docs. Litig., 797 F.2d 632, 642 (8th Cir. 1986); Garcia v. Bd. of Educ., 777 F.2d 1403, 1410 (10th Cir. 1985); Avins v. White, 627 F.2d 637, 649 (3rd Cir. 1980); Davis v. Schuchat, 510 F.2d 731, 734 (D.C. Cir. 1975); Doe v. Alaska Superior Ct., 721 P.2d 617, 628 (Alaska 1986); Antwerp Diamond Exch. of Am. v. Better Bus. Bureau, 637 P.2d 733, 734 (Ariz. 1981); Miller v. Nestande, 237 Cal. Rptr. 359, 364 n.7 (Cal. Ct. App. 1987); Moss v. Stockard, 580 A.2d 1011, 1022 n.23 (D.C. 1990); Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984); Rodriguez v. Nishiki, 653 P.2d 1145, 1149-50 (Haw. 1982); Kennedy v. Sheriff of E. Baton Rouge, 935 So. 2d 669, 677-78 (La. 2006); Jacron Sales Co. v. Sindorf, 350 A.2d 688, 695 (Md. 1976); Shaari v. Harvard Student Agencies, Inc., 691 N.E.2d 925, 928-29 (Mass. 1998); Henry v. Halliburton, 690 S.W.2d 775, 784 (Mo. 1985); Williams v. Pasma, 656 P.2d 212, 216-17 (Mont. 1982); Wheeler v. Neb. State Bar Ass'n, 508 N.W.2d 917, 921 (Neb. 1993); Berkery v. Estate of Stuart, 988 A.2d 1201, 1208 (N.J. Super. Ct. App. Div. 2010); Poorbaugh v. Mullen, 653 P.2d 511, 520 (N.M. Ct. App. 1982); Gross v. N.Y. Times Co., 724 N.Y.S.2d 16, 17 (N.Y. App. Div. 2001) (endorsing Hammerhead Enters. v. Brezenoff, 551 F. Supp. 1360, 1369 (S.D.N.Y. 1982), which contains a more detailed First Amendment discussion); Wampler v. Higgins, 752 N.E.2d 962, 972 (Ohio 2001); DeCarvalho v. daSilva, 414 A.2d 806, 813 (R.I. 1980); Trigg v. Lakeway Publishers, 720 S.W.2d 69, 75 (Tenn. Ct. App. 1986); Casso v. Brand, 776 S.W.2d 551, 554 (Tex. 1989); Long v. Egnor, 346 S.E.2d 778, 783 (W. Va. 1986); *see also* RESTATEMENT (SECOND) OF TORTS § 580B cmt. e (1977).

[322] *See, e.g.*, Grove v. Dun & Bradstreet, Inc., 438 F.2d 433, 437 (3d Cir. 1971); Greenmoss Builders v. Dun & Bradstreet, Inc., 461 A.2d 414, 417-18 (Vt. 1983), *aff'd on other grounds*, 472 U.S. 749 (1985), *but overruled in part on other grounds by* Lent v. Huntoon, 470 A.2d 1162 (Vt. 1983).

[323] *See, e.g.*, Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 258 (Minn. 1980); Berg v. Cons. Freightways, Inc., 421 A.2d 831, 834 (Pa. Super. Ct. 1980); Calero v. Del Chem. Corp., 228 N.W.2d 737, 745-46 (Wis. 1975).

[324] *See, e.g.*, Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1362-65 (Or. 1977), *reaffirmed in* Wheeler v. Green, 593 P.2d 777 (Or. 1979).

[325] *See, e.g.*, Swengler v. ITT Corp. Electro-Optical Prods. Div., 993 F.2d 1063, 1071 n.5 (4th Cir. 1993). The court did not consider the possibility that such speech should have been fully protected by the Petition Clause, even if not by the Free Speech Clause.

[326] Perry v. Cosgrove, 464 So. 2d 664, 665 n.1 (Fla. Dist. Ct. App. 1985). *Perry* actually involved a newspaper and a newspaper editor as defendants, but the court concluded that their speech—sending a letter to a customer in response to a complaint—

bors,[327] and the like. So though such cases often say they are drawing a media/nonmedia distinction, their results could be consistent with the mass-communications-more-protected view, and not just the press-as-industry-specially-protected view.

Indeed, some cases rejecting the all-speakers-equal model expressly hold that nonmedia speakers should be as protected as the media when they speak through the media—for instance, through letters to the editor or as people interviewed for news stories. This perspective fits well within the mass-communications-more-protected view.[328]

I could find only a handful of cases holding that ordinary citizens get less First Amendment protection than press-as-industry speakers would, even when the ordinary citizens are communicating to the public. Most of these cases deny nonmedia defendants the benefit of the prohibition—established by the Supreme Court's holding in *Gertz v. Robert Welch, Inc.*—on awards of presumed damages in the absence of a showing of "actual malice."[329]

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was not as protected as speech intended for mass communication. *Id.* *Perry*'s reasoning seems inconsistent with *Nodar v. Galbreath*, which rejected the press-as-industry-specially-protected view. *See* Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984) ("We believe . . . that the constitutionally protected right to discuss, comment upon, criticize, and debate . . . is extended not only to the organized media but to all persons."). Since *Perry* doesn't cite *Nodar*, it is possible that the parties and the court were unaware of *Nodar*, which was decided less than three months before the decision in *Perry*, and likely after the briefing in *Perry* was complete.

[327] *See, e.g.*, Schomer v. Smidt, 170 Cal. Rptr. 662, 665 (Cal. Ct. App. 1980), *disapproved by* Miller v. Nestande, 237 Cal. Rptr. 359 (Cal. Ct. App. 1987); Williams v. Cont'l Airlines, Inc., 943 P.2d 10, 18 (Colo. App. 1996); Battista v. United Illuminating Co., 523 A.2d 1356, 1361 n.5 (Conn. App. Ct. 1987); Columbia Sussex Corp. v. Hay, 627 S.W.2d 270, 277 (Ky. Ct. App. 1981).

[328] *See, e.g.*, Metabolife Int'l, Inc. v. Wornick, 72 F. Supp. 2d 1160, 1175 n.21 (S.D. Cal. 1999) (applying same standard to a nonmedia defendant doctor as to media defendants because the doctor's statements were published through the media), *rev'd on other grounds*, 264 F.3d 832, 847 (9th Cir. 2001); Richie v. Paramount Pictures Corp., 544 N.W.2d 21, 26 n.5 (Minn. 1996) ("Because Tatone's communication utilized the television media, we place her in the same legal position . . . as we place [the media defendants]."); Pollnow v. Poughkeepsie Newspapers, 486 N.Y.S.2d 11, 16 (N.Y. App. Div. 1985) ("Whatever may be the rule with respect to purely private defamations having no nexus to the public media, we conclude, as have virtually all State and lower Federal Courts passing on the issue . . . that a nonmedia individual defendant who utilizes a public medium for the publication of matter deemed defamatory should be accorded the same constitutional privilege as the medium itself." (citation omitted)); *see also* Dairy Stores, Inc. v. Sentinel Publ'g Co., 465 A.2d 953, 962-63 (N.J. Super. Ct. Law Div. 1983) (reaching a similar result, though chiefly because of journalists' right to gather news from non-press-as-industry speakers and the public's right to hear such speakers).

[329] 418 U.S. 323, 348-50 (1974).

1. Political Advertisements and Letters to the Editor

Fleming v. Moore concluded that a real estate developer who bought a newspaper ad to criticize a citizen opponent of a development project was a "non-media defendant," and thus wasn't protected under *Gertz*.[330] (This sort of speaker would be the analog of the signers of the ad in *New York Times Co. v. Sullivan*, if Sullivan had been a private figure.) *Wheeler v. Green* held the same as to a racehorse owner who sent a letter to the editor of a horse racing newsletter, alleging that a horse trainer had behaved unethically.[331] Similarly, *Johnson v. Clark* denied *Gertz* protection to the author of a letter to the editor of a newspaper complaining about an attorney's alleged mishandling of the estate of the author's uncle.[332]

2. Books and Authors' Own Websites

Lassiter v. Lassiter treated a self-published author—a woman who wrote a book accusing her ex-husband of physical abuse and adultery—as a nonmedia defendant, and held that only "media defendants" could assert First Amendment defenses to private figures' defamation claims.[333] Because of this, the court concluded that the First

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[330] 275 S.E.2d 632, 638 (Va. 1981). Fleming was a real estate developer who was trying to develop a tract; Moore was a neighbor who spoke out against the application at local Planning Commission and Board of Supervisors meetings. *Id.* at 634. Fleming responded by buying a newspaper ad captioned "RACISM," which asserted that Moore (who was white) opposed the development because it would likely have many black residents. *Id.* at 634 & n.3.

In this case, the court held that even presumed damages were unavailable as a matter of state law because the statement wasn't actionable per se (i.e., didn't accuse the plaintiff of a crime or conduct incompatible with proper performance of his profession). *Id.* at 636-67. But the broader holding was that presumed damages could be awarded in some libel cases (those that fit the state-law libel per se rules) brought by private figure plaintiffs against nonmedia defendants, even without a showing of "actual malice." *Id.*

[331] 593 P.2d 777, 784, 787-89 (Or. 1979). The court held that punitive damages in defamation cases were foreclosed by the Oregon Constitution, but allowed the recovery of presumed damages. *Id.* at 788-89.

[332] 484 F. Supp. 2d 1242, 1250-51, 1254 (M.D. Fla. 2007). *Johnson* didn't cite *Gertz* directly, didn't discuss the First Amendment, and didn't cite the Florida Supreme Court's opinion in *Nodar v. Galbreath*, which rejected any media/nonmedia distinction. *See* Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984) ("If common-law remedies for defamation are to be constitutionally restricted [under *Gertz*] in actions against media defendants, they should also be restricted in actions against private, non-media speakers and publishers."). Rather, *Johnson* relied on only two pre-*Gertz* cases and a post-*Gertz* Florida Court of Appeals case that didn't discuss the media/nonmedia distinction.

[333] 456 F. Supp. 2d 876, 881 (E.D. Ky. 2006), *aff'd per curiam*, 280 Fed. App'x 503 (6th Cir. 2008).

Amendment did not bar holding the defendant strictly liable for false and defamatory factual assertions, notwithstanding the *Gertz v. Robert Welch, Inc.* rule that barred such strict liability in many cases.[334] Likewise, *Ben-Tech Industrial Automation v. Oakland University* treated a professor as a nonmedia defendant with regard to material posted on his website, and thus didn't apply the *Gertz* requirement that punitive and presumed damages be awarded only on a showing of "actual malice."[335]

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[334] The court ultimately concluded that the defendant's speech was either true or mere opinion and thus not actionable under Kentucky law. 456 F. Supp. 2d at 879, 882. The court might have reached the same First Amendment result—that strict liability might be allowed if the statements were proven to be false factual assertions—another way. The court concluded that the speech was "about a matter that is not of public interest," *id.* at 880, which is consistent with the plurality view in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 & n.7 (1985) (plurality opinion), which gave as an example of speech on matters of purely private concern a false claim that a neighbor is a "whore." *Dun & Bradstreet* in turn had held that speech on non-public-concern matters was not covered by the *Gertz* rule that presumed punitive damages could be awarded even in the absence of "actual malice." And the logic of *Dun & Bradstreet* may be read to suggest that statements that are not of "public concern" are likewise not covered by the *Gertz* prohibition on strict liability. *Compare, e.g.*, Sleem v. Yale Univ., 843 F. Supp. 57, 63-64 (M.D.N.C. 1993) (so interpreting *Gertz*), Ross v. Bricker, 770 F. Supp. 1038, 1043-44 (D.V.I. 1991) (suggesting that *Gertz* might be so interpreted), *and* Pearce v. E.F. Hutton Grp., Inc., 664 F. Supp. 1490, 1505 n.21 (D.D.C. 1987) (likewise), *with* L. Cohen & Co. v. Dun & Bradstreet, Inc., 629 F. Supp. 1425, 1431 (D. Conn. 1986) (suggesting the contrary). Nonetheless, this was not the reasoning that the *Lassiter* court used to decide that the First Amendment protections did not apply; rather, it limited those protections to "public officials and public figures and/or against media defendants."

[335] *See* No. 247471, 2005 WL 50131, *6-7 & n.9 (Mich. Ct. App. Jan. 11, 2005) (concluding that "[t]he actual malice standard d[id] not apply," but rather a negligence standard did, since the case "involv[ed] a private plaintiff, a non-media defendant, and alleged defamatory statements regarding a private matter"). The court didn't cite *Gertz*, but its articulation of the First Amendment rules suggested that it was considering whether the *Gertz* rule was applicable here. The result might have been the same regardless of whether the defendant was a media defendant, because *Dun & Bradstreet*—which the court also didn't cite—had held that speech on "private matter[s]" was not covered by the *Gertz* rule. But I include the case in this Section because the court did rely on the defendant's status as a "non-media" entity.

The professor posted a student paper that happened to contain defamatory allegations as an example for other students, apparently without the intent of endorsing the allegations. This might conceivably be seen as speech that's not part of mass communications because it is addressed only to a small audience (even though it was theoretically available to everyone on the Internet). *Id.* at *1. But the court didn't rely on any such argument, and instead simply stated that the First Amendment libel rules are for press-as-industry defendants alone. *Id.* at *6 n.8.

The defendant didn't raise, *see* Brief on Appeal of Defendant-Appellee Donald O. Mayer, *Ben-Tech Indus. Automation*, No. 247471, 2005 WL 25531938, and the court didn't discuss a possible defense under 47 U.S.C. § 230, which has been held to im-

3. Quoted Statements to the Media

Five cases have held that people who spoke to the media did not have the full First Amendment protection that the media itself had, even though the speakers were expressing their views through mass communications technology. *Stokes v. CBS, Inc.* so held with regard to on-camera interviews "built around the statements of" the defendant, a detective investigating a case.[336] *Denny v. Mertz* reached the same conclusion about a defendant's statement to a reporter about why the defendant—the CEO of a large company—had fired the plaintiff, his general counsel.[337]

Guilbeaux v. Times of Acadiana, Inc. also came to the same conclusion regarding a casino developer's statements to a newspaper about

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munize online speakers from liability when they choose to post material provided by others. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003) (holding that a listserv and website operator is immunized from liability for posting an allegedly defamatory email authored by a third party).

[336] 25 F. Supp. 2d 992, 1000-01 (D. Minn. 1998). The exact effect of the detective's nonmedia status wasn't entirely clear, but it seems to have been that the detective could be held liable for compensatory damages, even without a showing of negligence, so long as he acted out of "actual ill-will or a design causelessly and wantonly to injure plaintiff." *Id.* at 1002 (quoting Bol v. Cole, 561 N.W.2d 143, 149 (Minn. 1997)). The court specifically held that "on [the] issue of [presumed or punitive] damages, private parties 'utiliz[ing] the television media' are placed 'in the same legal position' as media defendants." *Id.* at 1003 (third alteration in original) (quoting Richie v. Paramount Picture Corp., 544 N.W.2d 21, 26 n.5 (Minn. 1996)).

Likewise, in *Obsidian Finance Group, LLC v. Cox*, No. 11-0057, 2011 WL 5999334 (D. Or. Nov. 30, 2011)—a case that came too late to be included in the text—the court concluded that a blogger who published a blog that was sharply critical of plaintiff was not a member of the "media," and thus not entitled to the *Gertz* rule that "plaintiffs cannot recover damages without proof that defendant was at least negligent and may not recover presumed damages absent proof of 'actual malice.'" *Id.* at *5. In the court's view, *Gertz* extended only to speakers as to whom there was some

> evidence of (1) any education in journalism; (2) any credentials or proof of any affiliation with any recognized news entity; (3) proof of adherence to journalistic standards such as editing, fact-checking, or disclosures of conflicts of interest; (4) keeping notes of conversations and interviews conducted; (5) mutual understanding or agreement of confidentiality between the defendant and his/her sources; (6) creation of an independent product rather than assembling writings and postings of others; or (7) contacting "the other side" to get both sides of a story. Without evidence of this nature, defendant is not "media."

Id.

[337] *See* 318 N.W.2d 141, 152-53 (Wisc. 1982) ("[W]e do not read *Gertz* as requiring that the protections provided therein apply to non-media defendants nor . . . do we consider it good public policy to so decide.").

another casino developer.[338] *Kanaga v. Gannett Co.* held the same about a patient's statements to the media accusing a doctor of recommending unnecessary hysterectomies.[339] And *Landrum v. Board of Commissioners* suggested that any possible First Amendment barriers to tort lawsuits for disclosure of allegedly private facts (there, that a police officer had failed a marijuana test[340]) did not apply to a nonmedia defendant who had conveyed the information to newspapers.[341]

4. Nonmedia Defendants Generally

The Florida Supreme Court's standard jury instructions expressly put the burden of proving truth on nonmedia defendants,[342] even though *Philadelphia Newspapers, Inc. v. Hepps* requires that the burden of proving falsehood be placed on plaintiffs in cases with media defendants involving matters of public concern.[343] The comments to the instructions seem to treat "media defendant"[344] as meaning "a member of the press or broadcast media,"[345] which suggests that the court was endorsing the press-as-industry-specially-protected view.

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[338] 693 So. 2d 1183, 1188 (La. Ct. App. 1997) (citing Sassone v. Elder, 626 So. 2d 345, 351 (La. 1993)).

[339] 687 A.2d 173, 181-82 (Del. 1996). A later decision in the same case concluded that Kanaga was a nonmedia defendant despite her having written several articles in the past, and "her (unsuccessful) efforts to publish an article about [the incident giving rise to the libel lawsuit] in a magazine." No. 92C-12-182-JOH, 1998 WL 729585, at *4 (Del. Super. Ct. July 10, 1998), *aff'd in part, rev'd in part*, 750 A.2d 1174 (Del. 2000).

[340] 685 So. 2d 382, 386 (La. Ct. App. 1996).

[341] *Id.* at 392 ("We reject the [Orleans Levee Board]'s argument that Mr. Landrum must show actual malice in order to recover from the [Board] for an invasion of privacy. While such a requirement has been discussed in cases involving media defendants, we find nothing in Louisiana law to suggest that a non-media defendant can only be liable for an invasion of privacy involving a falsehood." (citations omitted)).

[342] *See In re* Standard Jury Instructions (Civil Cases 89-1), 575 So. 2d 194, 197-200 (Fla. 1991) (per curiam). The court noted that "our approval for publication is not an adjudication on the merits of the form, substance, or correctness of the instructions nor an approval of the notes and comments of the committee. Any litigant, in an appropriate forum, may raise any issue in connection with their use." *Id.* at 195 (quoting *In re* Standard Jury Instructions (Civil Cases 88-2), 541 So. 2d 90, 90 (Fla. 1989) (per curiam)) (internal quotation marks omitted). Nonetheless, the court appears to suggest that the instructions are a sound statement of the law. *See id.* ("We . . . decline the invitation of respondents to remand to the Committee for reconsideration of the [legal issues] raised.").

[343] 475 U.S. 767, 775-77 (1986). The court in *Hepps* specifically noted that it was not deciding whether the same standard would apply to nonmedia defendants. *Id.* at 779 n.4.

[344] 575 So. 2d at 199-200.

[345] *Id.* at 195.

Finally, *Senna v. Florimont* concluded that the inquiry into whether speech is on a matter of public concern for First Amendment libel law purposes should have a separate subprong for media defendants: if "published by a media or media-related defendant, a news story concerning public health and safety, a highly regulated industry, or allegations of criminal or consumer fraud or a substantial regulatory violation will, by definition, involve a matter of public interest or concern."[346] But it seems very likely that any item published through mass communications technology about those subjects, whether by the media or otherwise, would indeed be found to be on a matter of public concern.[347] And the court gave commercial advertising—which is generally a less protected category of speech, and which was the speech at issue in the case itself—as one example of non-public-concern speech.[348] So it seems unlikely that the media/nonmedia distinction would in practice play a significant role under the *Senna* rule.

C. *Antidiscrimination Law*

Four dissenters in *Associated Press v. NLRB* (1937) took the view that the Free Press Clause secured the Associated Press's right to refuse to employ union members as writers.[349] And the Washington Supreme Court's 1997 decision in *Nelson v. McClatchy Newspapers, Inc.* seemed to follow that dissent.[350]

Washington state law bars employers from discriminating against employees based on their political activities.[351] The Tacoma-based

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[346] 958 A.2d 427, 443-44 (N.J. 2008).

[347] Indeed, the court in *Senna* specifically stated that "speech concerning significant risks to public health and safety" would always qualify as involving a matter of public concern. *Id.* at 444.

[348] *Id.* In fact, the Third Circuit, which includes New Jersey, has held that traditional First Amendment libel analysis doesn't apply to cases brought based on commercial advertisements. *See* U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 931-33 (3d Cir. 1990). Another district court case out of the Third Circuit, *Fanelle v. Lojack Corp.*, likewise held that "in defamation cases involving commercial speech by non-media defendants about private individuals, even when that speech touches on matters of public concern, the speech is not entitled to elevated levels of First Amendment protection, and therefore proof of falsity [under *Hepps*] is not required." 29 Med. L. Rep. 1513, 1521 (E.D. Pa. 2000).

[349] 301 U.S. 103, 136-41 (1937) (Sutherland, J., dissenting); *see also supra* subsection VI.B.2.

[350] *See* 936 P.2d 1123, 1128-33 (Wash. 1997) (holding that "editorial control is a necessary component of the free press and a state law infringing thereon will be unconstitutional as applied").

[351] WASH. REV. CODE ANN. § 42.17.680 (West 2006).

News Tribune demoted a reporter for violating the newspaper's policy barring "high profile political activity" by its reporters, and the reporter sued.[352] The court concluded that the dismissal did violate the state statute, but the statute couldn't be applied in this case because it conflicted with the newspaper's First Amendment right to "editorial control," which included control over who would write for its newspaper.[353] *Associated Press v. NLRB*, the court held, was "limited to the [National Labor Relations Act] and union activity."[354]

But it's not clear whether the *Nelson* decision falls in the all-speakers-equal" category, the mass-communications-more-protected category, or the press-as-industry-specially-protected category. Though the decision often mentions "free press" rights, it also often refers to "free speech" rights and "First Amendment" rights. The main precedent it relies on, *Miami Herald Publishing Co. v. Tornillo*,[355] though a newspaper case, has been equally applied to non-press-as-industry speech, such as a business's right to choose what to include in its mailings,[356] and non-mass-communications speech, such as a parade organizer's right to choose the floats that appear in its parade.[357] And the logic of the *Tornillo* opinion would likewise apply to a political campaign's or political advocacy group's choice of employees who would give speeches on behalf of the organization.

In fact, today the strongest precedent for securing some First Amendment exemption from antidiscrimination laws is a nonmedia case, *Boy Scouts of America v. Dale*, which held that the Boy Scouts of America has a First Amendment right to bar gays from being scoutmasters.[358] The job of a scoutmaster, the Court noted, is to "incul-

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[352] *Nelson*, 936 P.2d at 1125.

[353] *Id.* at 1131.

[354] *Id.* at 1132.

[355] *See* 418 U.S. 241, 258 (1974) (holding that a state statute granting a political candidate the right to answer a newspaper's criticism in print violates the First Amendment).

[356] *See* Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 11 (1986) (plurality opinion) ("The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press. See *First National Bank of Boston* v. *Bellotti*, 425 U.S., at 782-84. Cf. *Lovell* v. *Griffin*, 303 U.S., at 452."). Justice Marshall's concurrence in the judgment did not note any disagreement with the plurality on this matter. *Id.* at 21-26.

[357] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 575-76 (1995).

[358] 530 U.S. 640, 651 (2000). Cases holding that religious organizations have a right to discriminate in choice of clergy under the Free Exercise Clause might also offer an analogy, though more distant because they do not directly involve "the freedom of the speech, or of the press." *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455,

cate . . . values . . . both expressly and by example,"[359] and because the organization opposes homosexuality, allowing openly gay scoutmasters would interfere with the Boy Scouts' ability to convey its message.[360] The Court thus seems committed to protecting, to some extent, organizations' right to control their message by choosing those who speak on their behalf—the same right the newspaper asserted in *Nelson*. Likewise, the three other lower court cases recognizing First Amendment exemptions from antidiscrimination laws involved speakers who were not part of the press-as-industry: Ku Klux Klan parade organizers[361] and Nation of Islam organizers of single-sex lectures.[362]

It's not clear whether the rulings in *Boy Scouts* and the lower court cases would extend to employment discrimination, in which people's livelihoods are at stake, and not just to the selection of group members, volunteers, marchers, and audience members. But *Boy Scouts* and the other cases show that speaking organizations are likely to have at least as strong a First Amendment right to discriminate as do printing organizations. Following *Boy Scouts*, then, any cases that track *Nelson* are likely to follow the all-speakers-equal model.[363]

D. *Access to Government Operations and Government and Private Property*

The lower court cases that discuss whether the press is constitutionally entitled to special access to government operations or to private property generally follow the Court's all-speakers-equal holdings.[364] Many courts do provide special access to the media, whether

461-63 (D.C. Cir. 1996) (holding that the Free Exercise Clause bars judicial review of a church's employment decisions); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994) (same); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360, 363 (8th Cir. 1991) (same); Van Osdol v. Vogt, 908 P.2d 1122, 1126-28 (Colo. 1996) (same); *see also* Empl. Div. v. Smith, 494 U.S. 872, 882 (1990) (suggesting that the Free Exercise Clause might mandate exemptions from generally applicable laws if it is linked with a freedom of association claim).

[359] *Boy Scouts*, 530 U.S. at 649-50.

[360] *Id.* at 653.

[361] Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281, 289-90 (D. Md. 1988).

[362] City of Cleveland v. Nation of Islam, 922 F. Supp. 56, 59 (N.D. Ohio 1995); Donaldson v. Farrakhan, 762 N.E.2d 835, 841 (Mass. 2002).

[363] I have found no post-*Nelson* case so far that tracks *Nelson* in allowing newspapers—or other speakers—to discriminate in choice of employees.

[364] *See, e.g.*, Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 840 (6th Cir. 2000) (holding that journalists have no greater rights of access under the First Amendment to city parking ticket records than does the public because "[t]he First Amendment

television or print.[365] But they generally do not hold that the press-as-industry has a *constitutional* right to such preferential treatment.

I could find only four possible exceptions to this principle, all from 1971 to 1981, and all involving press exemptions from trespass law and from laws that limit access to crime scenes. Two are New Jersey appellate cases. First, in *Freedman v. New Jersey State Police*, the court interpreted the New Jersey Constitution's Free Press Clause to hold that reporters—including those from a university student newspaper—have a right to go into privately owned farmworker camps, notwithstanding the property owners' objections.[366] Second, the court in *State v. Lashinsky* stated that in various newsgathering contexts "the reporter stands apart from the ordinary citizen," though the court refused to grant access to a crime scene in that particular case.[367]

Two more are trial court cases from other jurisdictions. In *People v. Rewald*, a New York trial court decided that a newspaper reporter seeking access to a migrant labor camp had a First Amendment exemption from trespass law.[368] Likewise, the federal district court decision in *Allen v. Combined Communications* held that a "reporter" facing a trespass claim should be immune from trespass law if (1) the reporter

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does not guarantee the press a constitutional right of special access to information not available to the public generally" (alteration in original) (quoting Branzburg v. Hayes, 408 U.S. 665, 684 (1972))); Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 520-22 (4th Cir. 1999) (holding that journalists have no greater right than others to trespass on private property (citing Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991))); Belo Broad. Corp. v. Clark, 654 F.2d 423, 428 (5th Cir. 1981) (concluding that "the press enjoys no constitutional right of physical access to courtroom exhibits," notwithstanding Justice Brennan's suggestion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring in the judgment), that the press might have special constitutional access rights); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 902 n.70 (E.D. Pa. 1981) (stating, in discussing a claimed right "to copy video and audio tapes that had been received as exhibits in a public criminal trial," that "[u]nder the First Amendment, the press enjoys no greater access rights than the public generally"); *In re* Attorney Gen.'s "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," 981 A.2d 64, 80 n.13 (N.J. 2009) (rejecting special access for the press to protected polling zones).

[365] Likewise, some legislatures have chosen to provide the institutional media with special access to other places, such as disaster areas. *See, e.g.*, CAL. PENAL CODE § 409.5(d) (West 1999).

[366] 343 A.2d 148, 151 (N.J. Super. Ct. Law Div. 1975). An earlier case, *State v. Shack*, suggested that this same result might be reached under state property law, 277 A.2d 369, 374 (N.J. 1971), but *Freedman* expressly relied on the New Jersey Constitution's Free Press Clause, 343 A.2d at 150.

[367] 404 A.2d 1121, 1128 (N.J. 1979) (quoting *In re* Farber, 394 A.2d 330, 350 (N.J. 1978) (Handler, J., dissenting)).

[368] 318 N.Y.S.2d 40, 45 (N.Y. Cnty. Ct. 1971).

was unaware that he was trespassing, and (2) the property owner suffered no "damage as a result of the trespass."[369]

These holdings, though, are likely no longer sound—at least where the federal First Amendment is concerned—after *Cohen v. Cowles Media Co.*, which held that the press-as-industry gets no special exemption from generally applicable laws.[370] This equal treatment principle would presumably include trespass laws that bar unauthorized access to real property, given *Cohen*'s statements that "[t]he press may not with impunity break and enter an office or dwelling to gather news" and that the press gets no exemption from laws that bar unauthorized use of intellectual property.[371]

Moreover, *Marsh v. Alabama,* on which *Rewald* relied, upheld Jehovah's Witnesses' right to distribute religious pamphlets in a company town—not an activity obviously reserved to the press-as-industry—and may well extend to non-press-as-industry speakers.[372] Likewise, *Freedman* relied on an earlier New Jersey Supreme Court decision that carved out an exception from state trespass law not just for the press, but also for public interest lawyers who were trying to help farmworkers.[373] To the extent that *Freedman* constitutionalized this right of access for the press under the New Jersey Constitution's Free Press Clause, its logic—coupled with the logic of the earlier decision—suggests the same rule might apply to other speakers under the New Jersey Constitution's Free Speech Clause.

In any event, *Freedman*, *Lashinsky*, *Rewald*, and *Allen* are the only cases that I have found that can be read as taking the press-as-industry-specially-protected view. And even in New Jersey—the one jurisdiction in which such decisions were handed down by appellate courts—

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[369] 7 Med. L. Rep. 2417, 2420 (D. Colo. 1981); *see also* Garrett v. Estelle, 424 F. Supp. 468, 471-72 (N.D. Tex.) (holding that the media had a right to videorecord an execution), *rev'd*, 556 F.2d 1274, 1278 (5th Cir. 1977) ("The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally." (citing Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974); Pell v. Procunier, 417 U.S. 817, 834 (1974))).

[370] 501 U.S. 663, 669 (1991).

[371] *Id.* One could imagine different First Amendment rules for speakers' claimed right of access to unenclosed land than for speakers' access to others' dwellings or offices. But *Cohen*'s point that the *press-as-industry* gets no special exemptions from generally applicable laws, compared to the rights of other speakers, applies equally to both kinds of trespass.

[372] 326 U.S. 501, 509-10 (1946).

[373] State v. Shack, 277 A.2d 369, 372-75 (N.J. 1971).

these cases have not seemed to produce further special constitutional treatment for the press-as-industry.[374]

E. *Campaign Speech Restrictions*

As discussed above, statutory media exemptions from most campaign finance laws have made it unnecessary for courts to decide whether the media is constitutionally entitled to such an exemption.[375] Nonetheless, at least three lower court decisions have confronted the question, and all adopted the all-speakers-equal position. The district court decision in *McConnell v. FEC* upheld certain campaign speech restrictions on the grounds that the Free Press Clause and Free Speech Clause provide equivalent constitutional protection.[376] A federal district court held that a city campaign finance ordinance that lacked a media exemption could constitutionally be applied to the media.[377] And a Kentucky appellate court struck down certain campaign speech restrictions, reasoning that a bar association had the same right as a newspaper to publish judicial candidate endorsements, because the "freedom of the press and freedom of speech" belong to all.[378]

The Federal Election Commission, however, seems to view the federal election law media exemption—which is limited to broadcasting and periodicals[379] and thus excludes books,[380] occasional newslet-

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[374] *See, e.g.*, *In re* Attorney Gen.'s "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," 981 A.2d 64, 80 n.13 (N.J. 2009) (rejecting special access for the press to protected polling zones); State v. Cantor, 534 A.2d 83, 86 (N.J. Super. Ct. App. Div. 1987) (rejecting special right for the press to violate laws against impersonating public officials).

[375] *See supra* note 274 and accompanying text.

[376] McConnell v. FEC, 251 F. Supp. 2d 176, 236 (D.D.C.) (per curiam), *aff'd in part*, 540 U.S. 93 (2003), *overruled in part by* Citizens United v. FEC, 130 S. Ct. 876 (2010); *see also supra* note 289.

[377] Olson v. City of Golden, No. 07-1851, 2011 WL 3861433, at *9-10 (D. Colo. Sept. 1, 2011) (holding that newspapers, like other speakers, had to comply with the ordinance's disclosure requirements and that "[i]n the absence of a press exemption like that in the [Federal Election Campaign Act], a court simply applies the regulation to the publisher of a specific publication").

[378] Ky. Registry of Election Fin. v. Louisville Bar Ass'n, 579 S.W.2d 622, 627 (Ky. Ct. App. 1979) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978)).

[379] *See supra* note 274.

[380] *See, e.g.*, George Soros, MUR 5642, Statement of Reasons of Chairman Robert D. Lenhard and Commissioner Ellen L. Weintraub, at 2 (Fed. Election Comm'n Dec. 31, 2007), *available at* http://eqs.nictusa.com/eqsdocsMUR/29044223685.pdf (describing proposed action against businessman George Soros for, among other things, printing and distributing a book containing statements opposing the reelection of George W. Bush and noting that the FEC general counsel—along with three commis-

ters,[381] and occasionally produced documentaries[382]—as tracking a First Amendment mandate. Implicitly, then, the FEC appears to be taking a press-as-industry-specially-protected view of the First Amendment.[383] But I could find no court decision that agreed with the FEC on this.

CONCLUSION

The historical evidence points powerfully in one direction—throughout American history, the dominant understanding of the "freedom of the press" has followed the press-as-technology model. This was likely the original meaning of the First Amendment. It was almost certainly the understanding when the Fourteenth Amendment was ratified. It remained the largely unchallenged orthodoxy until about 1970.

Since 1970, a few lower courts have adopted the press-as-industry model, but this has been a decidedly minority view. The Supreme Court continues to provide equal treatment to speakers without re-

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sioners—considered such book publishing as outside the federal election law media exemption); Am. Int'l Grp., Inc., Advisory Opinion 1987-8, at 5-6 (Fed. Election Comm'n May 4, 1987), *available at* http://saos.nictusa.com/aodocs/1987-08.pdf (advising that the media exemption does not apply to books).

[381] *See, e.g.*, Me. Right to Life Comm., Inc., Advisory Opinion 1989-28, at 6 (Fed. Election Comm'n Feb. 14, 1990), *available at* http://saos.nictusa.com/aodocs/1989-28.pdf (advising that the media exemption does not apply to occasionally published newsletters or nonprofit organizations); San Joaquin Valley Republican Assocs., Advisory Opinion 1988-22, at 3 (Fed. Election Comm'n July 5, 1988), *available at* http://saos.nictusa.com/aodocs/1988-22.pdf (advising that occasionally published newsletters do not qualify for the media exemption).

[382] *See, e.g.*, Citizens United, Advisory Opinion 2004-30, at 7 (Fed. Election Comm'n Sept. 10, 2004), *available at* http://saos.nictusa.com/aodocs/2004-30.pdf (stressing that Citizens United was not entitled to the media exemption because it "does not regularly produce documentaries or pay to broadcast them on television" and that "Citizens United has produced only two documentaries since its founding in 1988 . . . neither of which it paid to broadcast on television"). *But see* Citizens United, Advisory Opinion 2010-08, at 5 (Fed. Election Comm'n June 11, 2010), *available at* http://saos.nictusa.com/aodocs/AO%202010-08.pdf (advising that Citizens United was entitled to the media exemption because it had by then produced a sufficient number of documentaries).

[383] *See, e.g.*, Citizens United, Advisory Opinion 2010-08, at 3-5; Viacom, Inc., Advisory Opinion 2003-34, at 3 (Fed. Election Comm'n Dec. 19, 2003), *available at* http://saos.nictusa.com/aodocs/2003-34.pdf. The *Viacom* opinion did say that "[t]he Commission does not undertake a constitutional analysis in this advisory opinion," but said this was so because "the press exemptions at 2 U.S.C. 431(9)(B)(i) and 434(f)(3)(B)(i), [are] themselves clearly drawn with the First Amendment in mind." *Id.* at 4. This suggests that the FEC does itself see the First Amendment, like federal election law, as embodying the press-as-industry-specially-protected view.

gard to whether they are members of the press-as-industry. And though several Supreme Court opinions have noted that the question remains open, the bulk of the precedent points toward equal treatment for all speakers—or at least to equal treatment for all who use mass communications technology, whether or not they are members of the press-as-industry.

This evidence can prove valuable in interpreting the Free Press Clause, to the extent we focus on its "purpose,"[384] its "history,"[385] the long-term traditions of the American legal system,[386] and precedent. It also suggests how we should interpret the Clause to the extent we focus on the "text."[387] Appeals to the text that the Framers ratified are naturally affected by what that text meant when it was ratified. "[T]ext and meaning ultimately are inseparable; to understand what the Framers said, we inevitably seek to discover what they meant."[388] Even Justices who do not broadly endorse originalism accept that original meaning evidence may be relevant to interpreting ambiguous legal phrases, even if it is not dispositive.[389]

And evidence of original meaning is especially valuable for assessing arguments based on the supposed literal meaning of an am-

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[384] *See supra* text accompanying note 4.

[385] *See supra* Parts I-III. The more conservative Justices have of course long stressed the significance of the historical understanding of constitutional provisions, including the Free Speech Clause and the Free Press Clause. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 925-29 (2010) (Scalia, J., concurring, joined by Alito & Thomas, JJ.); Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 424 n.9 (2000) (Thomas, J., dissenting, joined by Scalia, J.); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358-59 (1995) (Thomas, J., concurring).

[386] *See* United States v. Stevens, 130 S. Ct. 1577, 1584-85 (2010) (stressing, in an opinion joined by all the Justices except Justice Alito, the importance of considering "histor[y] and tradition[]" when determining whether a particular exception to First Amendment protection should be recognized (citation omitted)); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (focusing on the value of considering traditions in the context of recognizing unenumerated rights); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1450-51 (2009) (discussing Justice Scalia's occasional focus on post-Framing traditions, including in First Amendment cases).

[387] *See supra* note 3.

[388] Anderson, *supra* note 67, at 462.

[389] *See, e.g., Citizens United*, 130 S. Ct. at 952 (Stevens, J., dissenting, joined by Breyer, Ginsburg & Sotomayor, JJ.); Davis v. FEC, 128 S. Ct. 2759, 2778 (2008) (Stevens, J., concurring in part and dissenting in part); Randall v. Sorrell, 548 U.S. 230, 274, 280-81 (2006) (Stevens, J., dissenting); Stogner v. California, 539 U.S. 607, 626 (2003) (Breyer, J., majority opinion); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 787-89 (1995) (Stevens, J., majority opinion); Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583-84 (1983) (O'Connor, J., majority opinion).

biguous text. By way of analogy, consider the Seventh Amendment, which secures the right to civil jury trial in "Suits at common law." "Suits at common law" could refer to claims brought under Anglo-American law as opposed to civil law, claims brought under judge-made law as opposed to statutory law, or claims that have been historically decided by courts of law as opposed to equity or admiralty.

Our legal system resolves this type of ambiguity not by adopting the meaning most commonly used today—which is probably judge-made law as opposed to statutory law—but rather by considering how the ambiguous phrase was originally understood (claims of a sort historically decided by courts of law, back when law, equity, and admiralty courts were separate).[390] The same reasoning applies to "the press." Arguments based on an ambiguous text should consider which of the several possible meanings the text was originally understood to have.

Of course, the Supreme Court has never limited itself to analyzing constitutional provisions based solely on historical sources. Justices remain free to decide for themselves what they think best serves the values they deem protected by constitutional provisions.[391] The goal of this Article is simply to say that an argument for a press-as-industry interpretation of the Free Press Clause must rely on something other than original meaning, text, purpose, tradition, or precedent.

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[390] *See, e.g.*, Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830) (looking to Framing-era history in deciding that "[t]he phrase common law, found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence"); *see also* Curtis v. Loether, 415 U.S. 189, 193 (1974) (referring to the historical understanding of the Seventh Amendment as explained by the Court in *Parsons*); Golden v. Kelsey-Hayes Co., 73 F.3d 648, 659 (6th Cir. 1996) (same).

[391] Many scholars have discussed this question of First Amendment theory, and I have nothing new to add to this debate. For articles supporting the press-as-industry-specially-protected view, see Dyk, *supra* note 6; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Stewart, *supra* note 4; West, *supra* note 6; and Glen S. Dresser, Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974). For articles supporting the mass-communications-more-protected view, see Robert D. Sack, *Reflections on the Wrong Question: Special Constitutional Privilege for the Institutional Press*, 7 HOFSTRA L. REV. 629, 633 (1979), which is perhaps limited to those speakers who publish "regularly"; and John J. Watkins & Charles W. Schwartz, Gertz *and the Common Law of Defamation: Of Fault, Nonmedia Defendants and Conditional Privileges*, 15 TEX. TECH. L. REV. 823 (1984). For articles supporting the all-speakers-equal view, see Anderson, *supra* note 9; Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91 (1987); Lange, *supra* note 17; Lewis, *supra* note 66; David W. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978); and Van Alstyne, *supra* note 66.

Supreme Court of the United States
Clarence BRANDENBURG, Appellant,
v.
State of OHIO.

No. 492.
Argued Feb. 27, 1969.
Decided June 9, 1969.

Defendant was convicted of violating the Ohio Criminal Syndicalism Act. The Supreme Court of Ohio dismissed his appeal, and appeal was taken. The United States Supreme Court held that Ohio Criminal Syndicalism Act, which by its own words and as applied, purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, and which failed to distinguish mere advocacy from incitement to imminent lawless action, violates First and Fourteenth Amendments.

Reversed.

West Headnotes

[1] Constitutional Law 92 1801

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(H) Law Enforcement; Criminal Conduct
92k1801 k. Incitement or Encouragement of Crime or Lawless Action. Most Cited Cases
(Formerly 92k90.1(2), 92k90)

Constitutional Law 92 2070

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(U) Press in General
92k2070 k. In General. Most Cited Cases
(Formerly 92k90.1(2), 92k90)

Constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. U.S.C.A.Const. Amend. 1.

[2] Constitutional Law 92 1430

92 Constitutional Law
92XIV Right of Assembly
92k1430 k. In General. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274.1(1), 92k274)

Constitutional Law 92 1865

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(L) Challenging or Resisting Government
92k1865 k. Syndicalism. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274.1(1), 92k274)

Constitutional Law 92 4509(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(1) k. In General. Most Cited Cases
(Formerly 92k274.1(2.1), 92k274.1(2), 92k274.1(1), 92k274)

Insurrection and Sedition 218 2

218 Insurrection and Sedition
218k2 k. Offenses and Prosecutions. Most Cited

Cases

Ohio Criminal Syndicalism Act, which by its own words and as applied, purported to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action, and which failed to distinguish mere advocacy from incitement to imminent lawless action, violates First and Fourteenth Amendments; overruling Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095. R.C. Ohio § 2923.13; U.S.C.A.Const. Amends. 1, 14.

[3] Constitutional Law 92 1430

92 Constitutional Law
92XIV Right of Assembly
92k1430 k. In General. Most Cited Cases
(Formerly 92k274.1(1), 92k274)

Statutes affecting right of assembly, like those touching on freedom of speech, must observe established distinctions between mere advocacy and incitement to imminent lawless action. U.S.C.A.Const. Amends. 1, 14.

****1828 *444** Allen Brown, Cincinnati, Ohio, for appellant.

Leonard Kirschner, Cincinnati, Ohio, for appellee.

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for 'advocat(ing) * * * the duty, necessity, or propriety ***445** of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' Ohio Rev. Code Ann. s 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the consitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, sua sponte, 'for the reason that no substantial constitutional question exists herein.' It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U.S. 948, 89 S.Ct. 377, 21 L.Ed.2d 360 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan 'rally' to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present ***446** other than the participants and ****1829** the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews.[FN1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> FN1. The significant portions that could be understood were:
>
> 'How far is the nigger going to-yeah.'
>
> 'This is what we are going to do to the niggers.'
>
> 'A dirty nigger.'
>
> 'Send the Jews back to Israel.'
>
> 'Let's give them back to the dark garden.'
>
> 'Save America.'

'Let's go back to constitutional betterment.'

'Bury the niggers.'

'We intend to do our part.'

'Give us our state rights.'

'Freedom for the whites.'

'Nigger will have to fight for every inch he gets from now on.'

'This is an organizers' meeting. We have had quite a few members here today which are-we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

'We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.'

***447** The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of 'revengeance' was omitted, and one sentence was added: 'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.' Though some of the figures in the films carried weapons, the speaker did not.

[1] The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code ss 11400-11402, the text of which is quite similar to that of the laws of Ohio. Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). The Court upheld the statute on the ground that, without more, 'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108 (1927). But Whitney has been thoroughly discredited by later decisions. See Dennis v. United States, 341 U.S. 494, at 507, 71 S.Ct. 857, at 866, 95 L.Ed. 1137 (1951). These later decisions have fashioned 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 of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[FN2] ****1830** As we ***448** said in Noto v. United States, 367 U.S. 290, 297-298, 81 S.Ct. 1517, 1520-1521, 6 L.Ed.2d 836 (1961), 'the mere abstract teaching * * * of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' See also Herndon v. Lowry, 301 U.S. 242, 259-261, 57 S.Ct. 732, 739-740, 81 L.Ed. 1066 (1937); Bond v. Floyd, 385 U.S. 116, 134, 87 S.Ct. 339, 348, 17 L.Ed.2d 235 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. Cf. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937); Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). See also United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

FN2. It was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. s 2385, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). That this

was the basis for Dennis was emphasized in Yates v. United States, 354 U.S. 298, 320-324, 77 S.Ct. 1064, 1077-1079, 1 L.Ed.2d 1356 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

[2][3] Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy; or who 'justify' the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism'; or who 'voluntarily assemble' with a group formed 'to teach or advocate the doctrines of criminal syndicalism.' Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime ***449** in terms of mere advocacy not distinguished from incitement to imminent lawless action.[FN3]

FN3. The first count of the indictment charged that appellant 'did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform * * *.' The second count charged that appellant 'did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism * * *.' The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, State v. Kassay, 126 Ohio St. 177, 184 N.E. 521 (1932), where the constitutionality of the statute was sustained.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.[FN4] Such a statute falls within ****1831** the condemnation of the First and Fourteenth Amendments. The contrary teaching of Whitney v. California, supra, cannot be supported, and that decision is therefore overruled.

FN4. Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for as Chief Justice Hughes wrote in De Jonge v. Oregon, supra, 299 U.S. at 364, 57 S.Ct. at 260: 'The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.' See also United States v. Cruikshank, 92 U.S. 542, 552, 23 L.Ed. 588 (1876); Hague v. CIO, 307 U.S. 496, 513, 519, 59 S.Ct. 954, 963, 965, 83 L.Ed. 1423 (1939); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-461, 78 S.Ct. 1163, 1170-1171, 2 L.Ed.2d 1488 (1958).

Mr. Justice BLACK, concurring.

I agree with the views expressed by Mr. Justice DOUGLAS in his concurring opinion in this case that the 'clear and present danger' doctrine should have no place ***450** in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951), but does not indicate any agreement on the Court's part with the 'clear and present danger' doctrine on which Dennis purported to rely.

Mr. Justice DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a caveat.

The 'clear and present danger' test was adumbrated by Mr. Justice Holmes in a case arising during World War I-a war 'declared' by the Congress, not by the Chief Executive. The case was Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was

tendered as a defense. Mr. Justice Holmes in rejecting that defense said:

'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'

Frohwerk v. United States, 249 U.S. 204, 39 S.Ct. 249, 63 L.Ed. 561, also authored by Mr. Justice Holmes, involved prosecution and punishment for publication of articles very critical of the war effort in World War I. Schenck was referred to as a conviction for obstructing security 'by words of persuasion.' Id., at 206, 39 S.Ct. at 250. And the conviction in Frohwerk was sustained because 'the circulation of the paper was ***451** in quarters where a little breath would be enough to kindle a flame.' Id., at 209, 39 S.Ct., at 251.

Debs v. United States, 249 U.S. 211, 39 S.Ct. 252, 63 L.Ed. 566, was the third of the trilogy of the 1918 Term. Debs was convicted of speaking in opposition to the war where his 'opposition was so expressed that its natural and intended effect would be to obstruct recruiting.' Id., at 215, 39 S.Ct. at 253.

'If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program in expressions of a general and conscientious belief.' Ibid.

In the 1919 Term, the Court applied the Schenck doctrine to affirm the convictions of other dissidents in World War I. Abrams v. United States, 250 U.S. 616, 40 S.Ct. 17, 63 L.Ed. 1173, was one instance. Mr. Justice Holmes, with whom Mr. Justice Brandeis concurred, dissented. While adhering to Schenck, he did not think that on the facts a case for overriding the First Amendment had been made out:

'It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in ****1832** setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country.' 250 U.S., at 628, 40 S.Ct., at 21.

Another instance was Schaefer v. United States, 251 U.S. 466, 40 S.Ct. 259, 64 L.Ed. 360, in which Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. A third was Pierce v. United States, 252 U.S. 239, 40 S.Ct. 205, 64 L.Ed. 542, in which again Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented.

Those, then, were the World War I cases that put the gloss of 'clear and present danger' on the First Amendment. Whether the war power-the greatest leveler of them all-is adequate to sustain that doctrine is debatable.***452** The dissents in Abrams, Schaefer, and Pierce show how easily 'clear and present danger' is manipulated to crush what Brandeis called '(t)he fundamental right of free men to strive for better conditions through new legislation and new institutions' by argument and discourse (Pierce v. United States, supra, at 273, 40 S.Ct. at 217) even in time of war. Though I doubt if the 'clear and present danger' test is congenial to the First Amendment in time of a declared war, I am certain it is not reconcilable with the First Amendment in days of peace.

The Court quite properly overrules Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095, which involved advocacy of ideas which the majority of the Court deemed unsound and dangerous.

Mr. Justice Holmes, though never formally abandoning the 'clear and present danger' test, moved closer to the First Amendment ideal when he said in dissent in Gitlow (Gitlow v. People of State of New York, 268 U.S. 652, 45 S.Ct. 626, 69 L.Ed. 1138):

'Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given

their chance and have their way.'

We have never been faithful to the philosophy of that dissent.

***453** The Court in Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066, overturned a conviction for exercising First Amendment rights to incite insurrection because of lack of evidence of incitement. Id., at 259-261, 57 S.Ct., at 739-740. And see Hartzel v. United States, 322 U.S. 680, 64 S.Ct. 1233, 88 L.Ed. 1534. In Bridges v. California, 314 U.S. 252, 261-263, 62 S.Ct. 190, 192-194, 86 L.Ed. 192, we approved the 'clear and present danger' test in an elaborate dictum that tightened it and confined it to a narrow category. But in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, we opened wide the door, distorting the 'clear and present danger' test beyond recognition.[FN1]

FN1. See McKay, The Preference For Freedom, 34 N.Y.U.L.Rev. 1182, 1203-1212 (1959).

In that case the prosecution dubbed an agreement to teach the Marxist creed a 'conspiracy.' The case was submitted to a jury on a charge that the jury could not convict unless it found that the defendants 'intended to overthrow the Government 'as speedily as circumstances would permit.'' Id., at 509-511, 71 S.Ct., at 867. The Court sustained convictions under the charge, construing ****1833** it to mean a determination of "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[FN2] Id., at 510, 71 S.Ct., at 868, quoting from United States v. Dennis, 183 F.2d 201, 212.

FN2. See Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295, where a speaker was arrested for arousing an audience when the only 'clear and present danger' was that the hecklers in the audience would break up the meeting.

Out of the 'clear and present danger' test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. Yates v. United States, 354 U.S. 298, 318, 77 S.Ct. 1064, 1076, 1 L.Ed.2d 1356. But an 'active' member, who has a guilty knowledge and intent of the aim to overthrow the Government ***454** by violence, Noto v. United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836, may be prosecuted. Scales v. United States, 367 U.S. 203, 228, 81 S.Ct. 1469, 1485, 6 L.Ed.2d 782. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. Barenblatt v. United States, 360 U.S. 109, 130, 79 S.Ct. 1081, 1094, 3 L.Ed.2d 1115. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in Dennis, coined the 'not improbable' test, United States v. Dennis, 2 Cir., 183 F.2d 201, 214, which this Court adopted and which Judge Hand preferred over the 'clear and present danger' test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the 'clear and present danger' test, he said, 'I cannot help thinking that for once Homer nodded.'

My own view is quite different. I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.

When one reads the opinions closely and sees when and how the 'clear and present danger' test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

Action is often a method of expression and within the protection of the First Amendment.

***455** Suppose one tears up his own copy of the Constitution in eloquent protest to a decision of this Court. May he be indicted?

Suppose one rips his own Bible to shreds to celebrate his departure from one 'faith' and his em-

brace of atheism. May he be indicted?

Last Term the Court held in United States v. O'Brien, 391 U.S. 367, 382, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672, that a registrant under Selective Service who burned his draft card in protest of the war in Vietnam could be prosecuted. The First Amendment was tendered as a defense and rejected, the Court saying:

'The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.' 391 U.S., at 377-378, 88 S.Ct., at 1679.

****1834** But O'Brien was not prosecuted for not having his draft card available when asked for by a federal agent. He was indicted, tried and convicted for burning the card. And this Court's affirmance of that conviction was not, with all respect, consistent with the First Amendment.

The act of praying often involves body posture and movement as well as utterances. It is nonetheless protected by the Free Exercise Clause. Picketing, as we have said on numerous occasions, is 'free speech plus.' See Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 315 U.S. 769, 775, 62 S.Ct. 816, 819, 86 L.Ed. 1178 (Douglas, J., concurring); Giboney v. Empire Storage Co., 336 U.S. 490, 501, 69 S.Ct. 684, 690, 93 L.Ed. 834; Hughes v. Superior Court, 339 U.S. 460, 465, 70 S.Ct. 718, 721, 94 L.Ed. 985; National Labor Relations Board v. Fruit and Vegetable Packers, 377 U.S. 58, 77, 84 S.Ct. 1063, 1073, 12 L.Ed.2d 129 (Black, J., concurring), and id., at 93, 84 S.Ct. at 1081 (Harlan, J., dissenting); Cox v. Louisiana, 379 U.S. 559, 578, 85 S.Ct. 466, 468, 476, 13 L.Ed.2d 487 (opinion of Black, J.); Amalgamated Food Employees v. Logan Plaza, 391 U.S. 308, 326, 88 S.Ct. 1601, 1612, 20 L.Ed.2d 603 (Douglas, J., concurring). That means that it can be regulated when it comes to the 'plus' or 'action' side of the protest. It can be regulated as to ***456** the number of pickets and the place and hours (see Cox v. Louisiana, supra), because traffic and other community problems would otherwise suffer.

But none of these considerations are implicated in the symbolic protest of the Vietnam war in the burning of a draft card.

One's beliefs have long been thought to be sanctuaries which government could not invade. Baerenblatt is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an 'active' Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See Speiser v. Randall, 357 U.S. 513, 536-537, 78 S.Ct. 1332, 1346, 2 L.Ed.2d 1460 (Douglas, J., concurring.) They are indeed inseparable and a prosecution can be launched for the overt ***457** acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in Yates and advocacy of political action as in Scales. The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.[FN3]

FN3. See Mr. Justice Black, dissenting, in American Communications Assn. C.I.O. v.

Douds, 339 U.S. 382, 446, 449, 70 S.Ct. 674, 707, 709, 94 L.Ed. 925 et seq.

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Brandenburg v. Ohio
395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430, 48 O.O.2d 320

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Supreme Court of the United States
Robert WATTS
v.
UNITED STATES.

No. 1107, Misc.
Decided April 21, 1969.

Prosecution for threatening life of President of the United States. The United States Court of Appeals for the District of Columbia Circuit, 131 U.S.App.D.C. 125, 402 F.2d 676, affirmed defendant's conviction. On petition for writ of certiorari, the United States Supreme Court held that defendant's alleged statement that he would refuse induction into armed forces and 'if they ever make me carry a rifle the first man I want in my sights is L.B.J.' did not amount to a threat against the life of the President of the United States.

Judgment of Court of Appeals reversed and case remanded with instructions.

Mr. Justice Fortas, Mr. Justice Harlan and Mr. Justice White dissented.

West Headnotes

[1] Homicide 203 736

203 Homicide
203V Assault with Intent to Kill
203k736 k. Threats to Take Life. Most Cited Cases
(Formerly 203k92)

Statute prohibiting threats against life of President of the United States is constitutional on its face. 18 U.S.C.A. § 871(a).

[2] Homicide 203 736

203 Homicide
203V Assault with Intent to Kill
203k736 k. Threats to Take Life. Most Cited Cases
(Formerly 203k92)

United States has valid, even overwhelming, interest in protecting safety of the President and allowing him to perform his duties without interference from threats of physical violence. 18 U.S.C.A. § 871(a).

[3] Constitutional Law 92 1832

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(I) Harassment and Threats
92k1829 Threats
92k1832 k. Public Employees or Officials, Threats Against. Most Cited Cases
(Formerly 92k90.1(1), 92k90)

Statute prohibiting threats against President of the United States, which makes criminal a form of pure speech, must be interpreted with commands of the First Amendment clearly in mind. 18 U.S.C.A. § 871(a); U.S.C.A.Const. Amend. 1.

[4] Constitutional Law 92 1832

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(I) Harassment and Threats
92k1829 Threats
92k1832 k. Public Employees or Officials, Threats Against. Most Cited Cases
(Formerly 92k90.1(1), 92k90)

What is a threat against the life of the President of the United States must be distinguished from what is constitutionally protected speech. 18 U.S.C.A. § 871(a); U.S.C.A.Const. Amend. 1.

[5] Homicide 203 736

203 Homicide

203V Assault with Intent to Kill
203k736 k. Threats to Take Life. Most Cited Cases
(Formerly 203k92)

Statute prohibiting threats against the President of the United States initially requires the government to prove a true "threat". 18 U.S.C.A. § 871(a).

[6] Homicide 203 736

203 Homicide
203V Assault with Intent to Kill
203k736 k. Threats to Take Life. Most Cited Cases
(Formerly 203k92)

Defendant's alleged statement that he would refuse induction into the Armed Forces and "if they ever make me carry a rifle the first man I want in my sights is L. B. J." did not amount to a threat against the life of the President of the United States. 18 U.S.C.A. § 871(a).

[7] Homicide 203 736

203 Homicide
203V Assault with Intent to Kill
203k736 k. Threats to Take Life. Most Cited Cases
(Formerly 92k48(4.1), 92k48(4), 92k48)

Court must interpret language Congress chose in statute prohibiting threats against life of President of the United States against background of profound national commitment to principle that debate on public issue should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials. 18 U.S.C.A. § 871(a).

****1400 *705** Joseph Forer, for petitioner.

Solicitor General Griswold, for the United States.

Ralph J. Temple, Melvin L. Wulf and Lawrence Speiser, for the American Civil Liberties Union and others, as amici curiae.

PER CURIAM.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of violating a 1917 statute which prohibits any person from 'knowingly and willfully * * * (making) any threat to take the life of or to inflict bodily harm upon the President of the United States * * *.' FN* The incident ***706** which led to petitioner's arrest occurred on August 27, 1966, during a public rally on the Washington Monument grounds. The crowd present broke up into small discussion groups and petitioner joined a gathering scheduled to discuss police brutality. Most of those in the group were quite young, either in their teens or early twenties. Petitioner, who himself was 18 years old, entered into the discussion after one member of the group suggested that the young people****1401** present should get more education before expressing their views. According to an investigator for the Army Counter Intelligence Corps who was present, petitioner responded: 'They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' 'They are not going to make me kill my black brothers.' On the basis of this statement, the jury found that petitioner had committed a felony by knowingly and willfully threatening the President. The United States Court of Appeals for for the District of Columbia Circuit affirmed by a two-to-one vote. 131 U.S.App.D.C. 125, 402 F.2d 676 (1968). We reverse.

FN* 18 U.S.C. s 871(a) provides:

'Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-

elect, shall be fined not more than $1,000 or imprisoned not more than five years, or both.'

At the close of the Government's case, petitioner's trial counsel moved for a judgment of acquittal. He contended that there was 'absolutely no evidence on the basis of which the jury would be entitled to find that (petitioner) made a threat against the life of the President.'***707** He stressed the fact that petitioner's statement was made during a political debate, that it was expressly made conditional upon an event-induction into the Armed Forces-which petitioner vowed would never occur, and that both petitioner and the crowd laughed after the statement was made. He concluded, 'Now actually what happened here in all this was a kind of very crude offensive method of stating a political opposition to the President. What he was saying, he says, I don't want to shoot black people because I don't consider them my enemy, and if they put a rifle in my hand it is the people that put the rifle in my hand, as symbolized by the President, who are my real enemy.' We hold that the trial judge erred in denying this motion.

[1][2][3][4] Certainly the statute under which petitioner was convicted is constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence. See H.R.Rep. No. 652, 64th Cong., 1st Sess. (1916). Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

[5][6][7] The judges in the Court of Appeals differed over whether or not the 'willfullness' requirement of the statute implied that a defendant must have intended to carry out his 'threat.' Some early cases found the willfullness requirement met if the speaker voluntarily uttered the charged words with 'an apparent determination to carry them into execution.' Ragansky v. United States, 253 F. 643, 645 (C.A.7th Cir. 1918) (emphasis supplied); cf. ***708**Pierce v. United States, 365 F.2d 292 (C.A.10th Cir. 1966). The majority below seemed to agree. Perhaps this interpretation is correct, although we have grave doubts about it. See the dissenting opinion below, 131 U.S.App.D.C., at 135-142, 402 F.2d, at 686-693 (Wright, J.). But whatever the 'willfullness' requirement implies, the statute initially requires the Government to prove a true 'threat.' We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). The language****1402** of the political arena, like the language used in labor disputes, see Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted and the judgment of the Court of Appeals is reversed. The case is remanded with instructions that it be returned to the District Court for entry of a judgment of acquittal.

It is so ordered.

Judgment for Court of Appeals reversed and case remanded with instructions.

Mr. Justice STEWART would deny the petition for certiorari.

Mr. Justice WHITE dissents.

***709** Mr. Justice DOUGLAS, concurring.

The charge in this case is of an ancient vintage.

The federal statute under which petitioner was convicted traces its ancestry to the Statute of Treasons (25 Edw. 3) which made it a crime to 'compass or imagine the Death of * * * the King.' Note, Threats to Take the Life of the President, 32 Harv.L.Rev. 724, 725 (1919). It is said that one Wal-

ter Walker, a 15th century keeper of an inn known as the 'Crown,' was convicted under the Statute of Treasons for telling his son: 'Tom, if thou behavest thyself well, I will make three heir to the CROWN.' He was found guilty of compassing and imagining the death of the King, hanged, drawn, and quartered. 1 J. Campbell, Lives of the Chief Justices of England 151 (1873).

In the time of Edward IV, one Thomas Burdet who predicted that the king would 'soon die, with a view to alienate the affections' of the people was indicted for 'compassing and imaging of the death of the King,' 79 Eng.Rep. 706 (1477)-the crime of constructive treason[FN1] with which the old reports are filled.

> FN1. The prosecution in those cases laid bare to the juries that the treasonous thoughts were the heart of the matter; 'the original of his Treasons proceeded from the imagination of his heart; which imagination was in itself High-Treason, albeit the same proceeded not to any overt fact: and the heart being possessed with the abundance of his traitorous imagination, and not being able so to contain itself,' burst forth in vile and traitorous Speeches, and from thence to horrible and heinous actions.' Trial of Sir John Perrot, 1 Sow.St.Tr. 1315, 1318 (1592). '(T)he high treason charged, is the compassing or imagining (in other words, the intending or designing) the death of the king; I mean his NATURAL DEATH; which being a hidden operation of the mind, an overt act is any thing which legally proves the existence of such traitorous design and intention-I say that the design against the king's natural life, is the high treason under the first branch of the statute; and whatever is evidence, which may be legally laid before a jury to judge of the traitorous intention, is a legal overt act; because an overt act is nothing but legal evidence embodied upon the record.' Trial of Thomas Hardy, 24 How.St.Tr. 199, 894 (1794). And see 84 Eng.Rep. 1057 (1708).
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> For a discussion of the adequacy of mere words as overts acts see 3 W. Holdsworth, History of English Law 293 (1927).

***710** In the time of Charles II, one Edward Brownlow was indicted 'for speaking these words, that he wished all the gentry in the land would kill one another, so that the comminalty might live the better.' 3 Middlesex County Rec. 326 (1888). In the same year (1662) one Robert Thornell was indicted for saying 'that if the Kinge ****1403** did side with the Bishops, the Divell take Kinge and the Bishops too.' Id., at 327.

While our Alien and Sedition Laws were in force, John Adams, President of the United States, en route from Philadelphia, Pennsylvania, to Quincy, Massachusetts, stopped in Newark, New Jersey, where he was greeted by a crowd and by a committee that saluted him by firing a cannon.

A bystander said 'There goes the President and they are firing at his ass.' Luther Baldwin was indicted for replying that he did not care 'if they fired through his ass.' He was convicted in the federal court for speaking 'sedicious words tending to defame the President and Government of the United States' and fined, assessed court costs and expenses, and committed to jail until the fine and fees were paid. See J. Smith, Freedom's Fetters 270-274 (1956).

The Alien and Sedition Laws constituted one of our sorriest chapters; and I had thought we had done with them forever.[FN2]

> FN2. 'In the Sedition Act cases, the tendency of words to produce acts against the peace and security of the community was stretched to its utmost latitude. Likewise, judges and juries, in their willingness to presume evil intent on the part of Republican writers, largely nullified the safeguards erected by the Sedition Act itself. Criticism of the President and Congress-in which every American indulges as his birthright-was severely punished; yet this practice manifestly has only a remote tendency to injure and bring into contempt the government of the United States. In short, much that has become commonplace in American political life was put under the ban by the Federalist lawmakers and judges of 1798.' J. Miller, Crisis in Freedom 233 (1951).

***711** Yet the present statute has hardly fared better. 'Like the Statute of Treasons, section 871 was passed in a 'relatively calm peacetime spring,' but has been construed under circumstances when intolerance for free speech was much greater than it normally might be.' Note, Threatening the President: Protected Dissenter or Political Assassin, 57 Geo.L.J. 553, 570 (1969). Convictions under 18 U.S.C. s 871 have been sustained for displaying posters urging passersby to 'hang (President) Roosevelt.' United States v. Apel, 44 F.Supp. 592, 593 (D.C.N.D.Ill.1942); for declaring that 'President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself.' United States v. Stickrath, 242 F. 151, 152 (D.C.S.D.Ohio 1917); for declaring that 'Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell, and if I had the power I would put him there,' Clark v. United States, 250 F. 449 (C.A.5th Cir. 1918). In sustaining an indictment under the statute against a man who indicated that he would enjoy shooting President Wilson if he had the chance, the trial court explained the thrust of s 871:

'The purpose of the statute was undoubtedly not only the protection of the President, but also the prohibition of just such statements as those alleged in this indictment. The expression of such direful intentions and desires, not only indicates a spirit of disloyalty to the nation bordering upon treason, but is, in a very real sense, a menace to the peace and safety of the country. * * * It arouses resentment ***712** and concern on the part 933 (D.C.E.D.Mich.1918).

Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution.

Mr. Justice FORTAS, with whom Mr. Justice HARLAN joins, dissenting.

The Court holds, without hearing, that this statute is constitutional and that it is here wrongly applied. Neither of these rulings should be made without hearing, even if we assume that they are correct.

****1404** Perhaps this is a trivial case because of its peculiar facts and because the petitioner was merely given a suspended sentence. That does not justify the Court's action. It should induce us to deny certiorari, not to decide the case on its merits and to adjudicate the difficult questions that it presents.

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