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Freedom of Speech and the Criminal Law

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FREEDOM OF SPEECH AND THE CRIMINAL LAW

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Because the Free Speech Clause limits government power to enact penal statutes, it has a close relationship to American criminal law. This Article explores that relationship at a time when a fast-growing "decriminalization movement" has taken hold across the nation. At the heart of the Article is the idea that free speech law has developed in ways that have positioned the Supreme Court to use that law to impose significant new limits on the criminalization of speech. More particularly, this Article claims that the Court

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has developed three distinct decision-making strategies for decriminalizing speech based on constitutional principles. The first involves judicial blocking—that is, declaring some speech controls altogether out of bounds, whether they utilize either criminal or civil sanctions. The second involves judicial channeling—that is, requiring that government regulation of some types of speech must take the form of civil law, and not criminal law, restraints. The third involves judicial narrowing—that is, interpreting criminal statutes to restrict their reach and thus frustrate potential government prosecutions in light of free expression values. This Article identifies concrete ways in which the Court might deploy all three strategies to support the decriminalization of expressive conduct in the future, with regard to such topics as fighting words, hostile audience speech, infliction of emotional distress, mens rea rules, speech law "tortification," content discrimination, individualized-warning requirements, hybrid-rights analysis, and more.

INTRODUCTION

Courts often invoke the Free Speech Clause to invalidate criminal statutes. This point is important in and of itself, and it will remain important as long as our Constitution endures. But, for two related reasons, it is particularly important today. First, a "decriminalization movement" has taken hold across the nation, focusing the public mind on the far-reaching costs—both human and financial—created by the existing penal law system.[1] Second, concerns about

[1] *See* Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y 319, 348 (2014) (noting that "the decriminalization movement" has involved "the American body politic i[n] showing increasing interest in softening the harsh penal policies adopted over the past several decades"). The costs raised by the existing system begin with the fact that the United States has more individuals in its prisons and jails than any other nation in the world. *See* Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. TIMES, Apr. 23, 2008, at A1 (observing that while "[t]he United States has less than 5 percent of the world's population," it "has almost a quarter of the world's prisoners" with "2.3 million criminals behind bars"). While there exists little opposition to the imposition of harsh criminal punishments on many offenders, particularly violent offenders, increasing concern exists about the criminalization of non-violent and minor wrongs. This concern has arisen, in part, because the human effects of criminalization on offenders are both direct, in terms of time spent in incarceration, and "collateral," including through the loss of future employment opportunities, the destruction of positive relationships, and the like. *See* PEW CHARITABLE TR., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 3 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [https://perma.cc/U7TE-5BTS] (finding, for example, that "former inmates work fewer weeks each year, earn less money and have limited upward mobility"). These effects ripple through to family members, including innocent children, and to society as a whole, particularly as cycles of poverty are reinforced. *See* Timothy Williams, *Report Details the Economic Hardships That Many Families of Inmates Face*, N.Y. TIMES, Sept. 16, 2015, at A18. The rise of the decriminalization movement also has much to do with rising condemnation of racial injustice in the criminal justice system. *See* Jessica Johnson, *Removal*

"overcriminalization" have come to weigh on the decision-making calculus of the Supreme Court.[2] These facts matter because the Court's First Amendment decisions invalidating penal statutes have a decriminalizing impact that is especially powerful in light of the locked-in nature of constitutional rulings.[3]

Against this backdrop, I explore in this Article where the Court's crime-related free speech doctrine has been in the past, where it is now, and where it might go in the future. I posit that various doctrines, framed over many decades, have positioned the Court to develop free speech principles going forward in an energetic way. Because this Article explores how the Court might build on

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of Confederate Flag Doesn't Address Institutionalized Racism, ATHENS BANNER-HERALD (July 18, 2015, 11:14 PM), http://onlineathens.com/opinion/2015-07-18/johnson-removal-confederate-flag-doesnt-address-institutionalized-racism [https://perma.cc/78TM-Z3PQ] (reporting that "African Americans in prison or jail, or on probation or parole, outnumber blacks who were slaves in 1850"). And recent commentary even suggests that overcriminalization may foster lawbreaking, rather than deter it. *See generally* Todd Haugh, *Overcriminalization's New Harm Paradigm*, 68 VAND. L. REV. 1191 (2015).

[2] The point is illustrated by *Yates v. United States*, 135 S. Ct. 1074 (2015). In that case, five Justices bent over backwards to read a federal criminal law narrowly, finding that the term "tangible object" did not include a fish. *See id.* at 1081. Justice Kagan, joined by three other dissenters, concluded that no sound canon of statutory construction could support this text-defeating result. *See id.* at 1091 (Kagan, J., dissenting). Thus, according to Justice Kagan, the result reached by the majority could be explained only by the "the real issue" presented in the case—namely, "overcriminalization and excessive punishment in the U.S. Code." *Id.* at 1100. The challenged law, she noted, was "too broad and undifferentiated," and "unfortunately not an outlier, but an emblem of a deeper pathology." *Id.* at 1101. Put simply, the dissenters saw the majority as torturing the statutory language because it was so concerned about the far-reaching "real" problem of "overcriminalization." No less important for present purposes, the dissenting Justices themselves fully agreed with the proposition that a "pathology" of "overcriminalization" exists in federal law. *See id.* This view seems likely to cause the Justices to look for reasonable ways to rein in criminal laws in the future. *See* Haugh, *supra* note 1, at 1195 (noting that at oral argument in *Yates* "[a]t least six Justices asked questions about overcriminalization's impact on Yates's arrest and conviction").

[3] To be sure, the term "decriminalization" has no single definition, and analysts use it in different ways. For example, the term might or might not be understood to include sentence reductions or the use of prosecutorial discretion to overlook certain offenses. For purposes of this Article, however, the details of these definitional refinements are not significant. Regardless of how one defines "decriminalization," the term includes at its core governmental decision-making that makes what once was a crime not a crime any more. Perhaps one could claim that "decriminalization" can occur only through the legislative repeal of criminal statutes. But this definitional restriction is artificial. Put simply, when the legislature repeals a criminal law, it obviously engages in decriminalization. And when a court strikes down a criminal law as unconstitutional, it accomplishes the same result. To be sure, there are differences between legislative repeals and judicial invalidations of criminal statutes. But when it comes to the central feature of "decriminalization"—rendering a previously operative criminal prohibition inoperative—there is no difference at all. It thus is appropriate to allude to "judicial decriminalization" or "constitutional decriminalization," as is done throughout this Article.

already-existing First Amendment law, it offers a *descriptive* treatment of that law, albeit one that focuses largely on subtle and little-noticed doctrinal details. This descriptive work sets the stage for the *suggestive* components of this Article, which highlight particular ways in which the Court might build on current doctrine to rein in the use of criminal law to punish speech. In short, this Article shows that many features of the contemporary First Amendment landscape—with regard to police-challenging speech, hate speech, the "tortification" of speech law, the infliction of emotional harms, antidiscrimination law, content discrimination, and so on—have created an environment that is favorable to the Court's crafting of significant new limits on the government's power to criminalize expression.[4]

How has the Court put itself in this position? It has (albeit without quite saying so) developed three distinct methodologies for safeguarding speech from criminal prohibition. The most basic strategy involves judicial *blocking*—that is, establishing constitutional rules that prohibit outright certain types of speech restrictions without regard to whether they impose criminal or civil sanctions. The second strategy involves judicial *channeling*—that is, formulating constitutional rules that tolerate government restrictions on certain forms of expression if, but only if, those restrictions make use of civil law, rather than criminal law, controls. The third strategy involves judicial *narrowing*—that is, invoking free speech values in interpreting criminal statutes so as to give those statutes a restricted reach, thus inhibiting prosecutions.

In developing these ideas, I consider many fields of First Amendment doctrine, ranging from fighting words to hostile audience speech to incitement to obscenity to defamation to content-discrimination law.[5] It follows that my coverage of free speech doctrine is broad and detailed, and that is by design. It is broad and detailed because I mean to suggest that the multifaceted and wide-ranging evolution of First Amendment law in a crime-limiting direction has created conditions in which lawyers may find the Court hospitable to free-speech-based arguments that not long ago might have been a bridge too far.

The rise of the decriminalization movement also may prove helpful to advocates of doctrine-pushing, speech-safeguarding positions. To be sure, the connection between social movements and the Court's work is complex. But the key point for present purposes has been aptly made by Robert Post and Reva Siegel: "Throughout American history, in contexts both liberal and conservative,

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[4] Notably, in this regard, expression-based prosecutions continue to arise with frequency. *See generally* Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667 (2015). This is the case, in part, because legislatures continue to adopt new speech-related penal laws. *See* Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607, 609 (2015) (highlighting such new crimes as bans on "harassment" and "bullying").

[5] On the other hand, I also do not discuss in any detail some high-profile areas of free speech doctrine—most notably, the areas of campaign finance law and commercial speech—because they present problems that are distinct and too vast to work through in this one Article.

the Court has consistently interpreted the Constitution to reflect fundamental contemporary values. . . . Seen from this angle, the Constitution by which we are governed is plainly not outside of politics."[6] Some readers might gloss over this observation, dismissing it as fuzzy, theoretical, or overwrought. But they should not do so. In the making of constitutional law, there is a richly complex "ongoing dialogue" between the Justices and the citizenry at large.[7] And for this reason, the decriminalization movement may well exert a gravitational pull on the Court as it thinks about imposing new First Amendment limits on government use of criminal restraints.[8]

To be clear, while the decriminalization movement looms over this subject, neither the descriptive nor the suggestive component of my analysis hinges on its existence. In particular, with regard to my descriptive thesis, there is no suggestion here that the Court's creation of free speech doctrine over the past half century itself arose out of the frustrations about overcriminalization that underlie the modern decriminalization movement. To the contrary, given the only recent emergence of widespread societal concerns on that score, it seems apparent that such concerns weighed little on the minds of the Justices for most of the period canvassed in this Article. Similarly, with respect to the suggestive components of this Article, the claims for recognition of the potential free-speech-law reforms that I identify do not hinge on popular views about the wisdom of decriminalization. Put simply, the Court might well pursue these reforms even in the absence of the present-day decriminalization movement. However, that movement does exist, and it may thus create forces that render

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[6] ROBERT POST & REVA SIEGEL, NAT'L CONST. CTR., DEMOCRATIC CONSTITUTIONALISM, http://constitutioncenter.org/interactive-constitution/white-pages/democratic-constitutionalism [https://perma.cc/7GUT-E4HN] (last visited Mar. 18, 2017). Many of the most thoughtful observers of our constitutional history have made the same point. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2014).

[7] *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 584-85 (1993).

[8] Indeed, distinctive features of the decriminalization movement may cause it to exert a particularly strong influence on the thinking of the Justices. One reason why is that deep concerns about racial inequities have contributed significantly to the movement's rise, and similar concerns contributed in part to the expansion of free-speech-based protections in the recent past. In addition, the decriminalization movement differs from past reform movements in an important way—it enjoys strong support from large numbers of leaders and citizens from every point on the political spectrum. *See, e.g.*, Peter Baker, *'16 Rivals Unite in Push to Alter Justice System*, N.Y. TIMES, Apr. 28, 2015, at A1 ("Democrats and Republicans alike are putting forth ideas to reduce the prison population and rethink a system that has locked up a generation of young men, particularly African-Americans."). This fact may prove to be important for a variety of reasons, including by giving the movement a heightened measure of credibility for all or most members of the Court.

the Court newly open to the possibility of pursuing speech-protective doctrinal reforms.

This Article develops these ideas in four Parts. Part I addresses judicial blocking, with a particular emphasis on the Court's efforts to limit the reach of so-called "unprotected" expression (including fighting words, hostile audience speech, and some sexually oriented communication) so as to exempt much expression as a general matter from both criminal and civil controls.[9] Part II considers judicial channeling, with a focus on what the Court has done with the tort of defamation and such specialized First Amendment doctrines as those that target statutory vagueness and overbreadth. Part III investigates judicial narrowing, highlighting how free speech values interact with the process of statutory interpretation to constrain the reach of criminal laws.

Part IV shifts attention to what I call the "frontiers" of free speech law. Section IV.A examines in particular the possibility that the Court might increasingly require non-judicial authorities to (1) focus on actual harms, rather than potential harms, as they regulate speech; and (2) give individualized prearrest notice to certain speakers, so as to permit them to escape criminal punishment by halting activities otherwise subject to government control. Section IV.B turns to the subject of so-called "hybrid rights," including the possibility that the Court might soon derive new expression-related protections from the joint operation of the Free Speech Clause and the Free Exercise Clause, including in the field of antidiscrimination law. In addition, this Section touches on how courts might draw on the blocking, channeling, and narrowing methodologies to push forward constitutional decriminalization by invoking constitutional provisions other than the First Amendment.

Judges, precisely because they are judges, always must operate within the frame of preexisting law. As a result, if the Court—whether motivated by the decriminalization movement or not—considers expanding crime-related free speech protections in the near future, the content of that preexisting law will play a role in shaping whether and how it might do so. This Article shows that current law in fact provides the Court with many opportunities to push free speech law in a direction that promotes individual liberty. These opportunities exist because the Court's previous First Amendment decisions—in ways that are both numerous and nuanced—have set the stage for future rulings that can, and likely will, significantly broaden the Court's decriminalization of speech.

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[9] The term "as a general matter" appears in the preceding sentence in part because there are exceptional types of non-criminal sanctions that may remain applicable to speech even though it is not subject to criminal, or most forms of civil, control. The First Amendment, for example, might not allow a criminal prosecution or a tort-based damages recovery against a public school student who uses a racial slur while discussing political candidates during a class. But the teacher might still have the authority to remove the student from the class, at least for a time, because of such crude and offensive language. Because this Article focuses on the criminal law, it does not consider speech-related conditions on access to government payments, jobs, and educational benefits.

I. BLOCKING

Judicial blocking fosters decriminalization for a simple reason: insofar as political actors cannot regulate speech at all, they cannot regulate speech by way of criminal sanctions. As this Part reveals, the Court has blocked the government's control of speech in two major ways. Section I.A addresses the basic blocking strategy that involves the Court's use of doctrines that distinguish between so-called "protected" and "unprotected" speech. Section I.B shows that another strategy of blocking involves invalidating certain *forms* of government control, such as content-discriminatory laws, regardless of whether they impose criminal or civil restraints.

A. *Blocking and "Unprotected" Speech*

Because of the First Amendment, most speech is exempt from government regulation. Nonetheless, as the Court explained in *Chaplinsky v. New Hampshire*[10]:

> There 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. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[11]

As the Court's use of the word "include" suggests, this list is not exhaustive. The Court, for example, has recognized that fraud, perjury, and verbal threats do not enjoy First Amendment protection.[12] Recognizing these fiefdoms of unprotected speech has speech-inhibiting consequences because it facilitates the prosecution of persons based on the words they use. There is, however, a flipside to declaring that some forms of speech lack First Amendment protection—namely, that other forms of speech have such protection, at least as a general rule.[13] And to the extent that speech is protected, it is (at least presumptively) not subject to government criminalization because it is (at least presumptively) not subject to any sort of penalty at all.

With regard to the subject considered here, a critical question thus arises: Has the modern Court's drawing of the dividing line between protected and unprotected speech produced speech-sheltering results? The short answer to this question is "yes." The long answer—which occupies the rest of this Section—requires a broad examination of the free speech jurisprudence developed by the Court over the past five decades. As it turns out, this doctrinal work reflects a

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[10] 315 U.S. 568 (1942).

[11] *Id.* at 571-72 (footnote omitted).

[12] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (fraud and threats); United States v. Dunnigan, 507 U.S. 87, 97 (1993) (perjury).

[13] *See Alvarez*, 132 S. Ct. at 2544 (noting that "content-based restrictions . . . have been permitted, as a general matter, only when confined" to unprotected speech).

movement toward the exemption of speech-related activity from government control that reaches across all areas of "unprotected speech" law. Indeed, three separate aspects of the Court's work have pushed this movement along. First, the Court has established that even supposedly "unprotected" speech is not wholly unprotected. Second, the Court has held firm in rejecting efforts to place additional forms of speech within the unprotected zone. Third, the Court has moved to narrow even the *Chaplinsky* list of unprotected categories of expression. Of particular importance, in all of these contexts, the Court has planted seeds that may flower into new doctrines that further restrict the scope of unprotected expression, thus creating broadened blocking-based protections of speech from both non-criminal and criminal sanctions.

1. The Protection of Unprotected Speech

In *R.A.V. v. City of St. Paul*,[14] the Court clarified that the First Amendment can operate to protect even supposedly "unprotected" speech. There, the petitioner burned a cross inside the fenced yard of an African American family in St. Paul, Minnesota.[15] Charges were brought under the city's Bias-Motivated Crime Ordinance, which outlawed the placement on property of an "object . . . which one knows . . . arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[16] The Minnesota Supreme Court interpreted the ordinance to reach only fighting words, thereby confining its operation to unprotected speech.[17] According to the Supreme Court, however, that interpretation did not save the statute from constitutional invalidation because the city could not "impose special prohibitions on those speakers who express views on disfavored subjects."[18] Thus, just as the government could not discriminate on the basis of the content of speech in regulating the unduly loud use of bullhorns, it could not (at least ordinarily) discriminate on the basis of the content of speech in regulating fighting words.[19]

R.A.V. had a clear speech-sheltering thrust because it mandated the invalidation of many government restrictions even though they took aim at only "unprotected" expression. This aspect of the Court's ruling was important because the Court had never before applied content-discrimination limits in this type of case. At the same time, the Court's ruling on this point hardly qualified as radical. *R.A.V.* did not involve the overruling of any past authority, and no

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[14] 505 U.S. 377 (1992).

[15] *Id.* at 379.

[16] *Id.* at 380.

[17] *Id.* at 391.

[18] *Id.*

[19] *See id.* at 392. The Court recognized some exceptions to this rule, including by observing that content-based regulations of unprotected speech are permissible if based on the "very reason" for deeming that form of speech unprotected. *See id.* at 388. The Court determined, however, that no such exception applied in this case. *See id.* at 391.

Justice declared that the Constitution never prohibits content-based discrimination among different forms of fighting words, obscenity, or the like.[20]

The Court in *R.A.V.*, however, did make one controversial blocking move. That move did not involve the Court's decision to apply strict scrutiny to the challenged ordinance, but rather its decision to do so in a distinctly aggressive way. In particular, the majority acknowledged that local governments have a compelling interest in attacking unprotected-speech-based assaults on members of historically disadvantaged minority groups.[21] But having recognized the compelling nature of this goal, the Court proceeded to strike down the ordinance even though it targeted that very interest. The difficulty, according to the Justices, was that the city could have deployed an "adequate content-neutral alternative" to achieve its objective.[22] But the "adequate content-neutral alternative" the Court identified was one that involved outlawing all fighting words.[23] Put another way, the Court demanded that local lawmakers enact a much broader restriction on speech even though their purpose was to attack a narrow and targeted problem—a problem that the Court itself declared those lawmakers had a compelling interest in eradicating. In short, the Court applied strict scrutiny in an especially strict way to safeguard not "protected," but "unprotected," speech.

The key point for present purposes is that the Court in *R.A.V.* engaged in decriminalization by way of blocking. It did so by invalidating a criminal law, thus barring the targeting of "hate speech" with similar laws throughout the nation.[24] To be sure, if the Court in *R.A.V.* aspired to foster speech protection over the longer term, that ruling could well backfire. This is the case because local legislators could respond to the ruling by passing supposedly "less restrictive" laws that ban fighting words in an across-the-board way, thus subjecting more speech rather than less speech to criminal sanctions. This important point is addressed later in this Article.[25] For now, it suffices to note that legislative bodies otherwise inclined to outlaw hate-speech-based fighting words, and only hate-speech-based fighting words, may not have much interest in passing generalized bans on fighting words that do not focus on the problem of hate speech at all. The key point here is that *R.A.V.* indicates that political officials do not have carte blanche when it comes to regulating unprotected speech. Rather, that ruling provides an opening for judges to protect "unprotected speech" in some, perhaps many, cases.

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[20] *See id.* at 428 (Stevens, J., concurring in the judgment) (agreeing that fighting words are not "wholly unprotected").

[21] *See id.* at 395 (majority opinion).

[22] *See id.* at 395-96.

[23] *See id.*

[24] *See id.* at 402 (White, J., concurring in the judgment).

[25] *See infra* notes 197-202 and accompanying text.

The same point is illustrated by *Stanley v. Georgia*.[26] That case arose out of the defendant's possession of obscene materials in his home.[27] Because "obscenity" appeared front and center on the *Chaplinsky* list of unprotected speech, the State argued that there was no constitutional problem in its decision to prosecute a defendant who possessed such material.[28] Indeed, the Court acknowledged that its precedents "declare, seemingly without qualification, that obscenity is not protected by the First Amendment."[29] Even so, the Court distinguished its earlier rulings on the ground that each of them "dealt with the power of the State or Federal Governments to prohibit or regulate certain *public* actions either taken or intended to be taken with respect to obscene matter."[30] As a result, those rulings did not authorize a prosecution of this defendant for what he read within "the privacy of his own home."[31]

There is much to be said about *Stanley*, and that case will resurface in a later discussion.[32] For now, the critical point is this: In *Stanley*, as in *R.A.V.*, the Court signaled its willingness to safeguard forms of speech-related activity even though the targeted expression was supposedly "unprotected." And especially if the Justices continue to value the notion of "spatial" privacy,[33] *Stanley* may provide courts with an opening for more broadly safeguarding unprotected speech meant for use in the home.[34]

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[26] 394 U.S. 557 (1969).

[27] *Id.* at 558.

[28] *Id.* at 559-60.

[29] *Id.* at 560.

[30] *Id.* at 561 (emphasis added).

[31] *Id.* at 565.

[32] *See infra* note 161 and accompanying text.

[33] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[34] For example, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), and *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123 (1973), the Court ruled that *Stanley* did not apply to the importation of obscenity by travelers, even if solely for the purpose of home use. *See 12 200-Ft. Reels*, 413 U.S. at 128; *Thirty-Seven Photographs*, 402 U.S. at 376. But other Justices disagreed. *See Thirty-Seven Photographs*, 402 U.S. at 379 (Stewart, J., concurring) (finding inconsistent with *Stanley* the idea that customs officials can seize a book to be read at home); *id.* at 381 (Black, J., dissenting) (same); *id.* at 360 (Marshall, J., dissenting) (rejecting the view that "Stanley's conviction was reversed because his home, rather than his person or luggage, was the locus of a search"); *see also* United States v. Orito, 413 U.S. 139, 146 (1973) (Douglas, J., dissenting) (arguing that reading an "'obscene' book on an airline or bus or train" should be protected, as should be "carr[ying] an 'obscene' book in [one's] pocket during a journey"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 107 (1973) (Brennan, J., dissenting) (advocating a rule permitting the viewing by adults of obscenity in private clubs). While the views of each of these Justices found expression in only a concurring or dissenting opinion, the principles they espoused could find a more receptive audience in a new Court operating under new conditions. *See* Claudia Tuchman, Note, *Does Privacy Have Four Walls? Salvaging* Stanley v. Georgia, 94 COLUM. L. REV. 2267, 2290-96 (1994).

2. Non-Expansion of the "Unprotected Speech" List

Speech causes injuries. But not all forms of injury-causing speech appear on the *Chaplinsky* list. As a result, the Court often faces pressure to add to that list by recognizing new categories of unprotected speech.[35] And the temptation to make such additions is great because some injuries caused by speech are profound.[36]

In the face of these forces, the Court might have chosen the path of least resistance, deferring to legislative choices by stripping away "protected" status from speech formerly situated in the First Amendment's hands-off zone. Instead, the Court has tied itself to the mast, again and again resisting calls for judicial tolerance of more speech regulation. The list of Supreme Court rulings of this sort is a long one. Illustrative are decisions in which the Court declined to deem "unprotected" each of the following forms of expression: (1) flag burning,[37] as well as the public destruction of other valued symbols;[38] (2) interruptions of police officers while engaged in the execution of their duties;[39] (3) "pornography"—that is, sexually graphic, but non-obscene, materials that promote the abuse or subordination of women—even if those materials contribute to "discrimination in the workplace and violence away from it";[40] (4) parading in Nazi uniforms through a community whose residents included Holocaust survivors;[41] (5) the purposeful infliction of severe emotional injury (including by way of anti-gay declamations hurled at the parents of a dead service-member during his burial ceremony) so long as the communication addresses a matter of "public concern";[42] (6) cross burning;[43] (7) the sale of violent video games to impressionable minors;[44] (8) depictions of animal cruelty;[45] and (9) intentional lying, including such lying about one's receipt of the Congressional Medal of Honor or other military awards.[46]

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[35] *See infra* notes 37-46 and accompanying text.

[36] *See* Am. Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985) (accepting the posited connection of pornography to "battery and rape on the streets"), *aff'd*, 475 U.S. 1001 (1986).

[37] *See* Texas v. Johnson, 491 U.S. 397, 420 (1989).

[38] *See id.* at 417; Schacht v. United States, 398 U.S. 58, 62-63 (1970) (overturning a law that banned negative portrayals of military uniforms).

[39] *See* City of Houston v. Hill, 482 U.S. 451, 466-67 (1987).

[40] *Am. Booksellers*, 771 F.2d at 324-25.

[41] *See* Nat'l Socialist Party v. Vill. of Skokie, 432 U.S. 43, 43-44 (1977) (per curiam).

[42] Snyder v. Phelps, 562 U.S. 443, 458 (2011); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 56-57 (1988); Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 108 (noting how *Snyder* reached beyond *Hustler* by focusing solely on whether the speech addressed a matter of public concern).

[43] *See* Virginia v. Black, 538 U.S. 343, 347, 367 (2003).

[44] *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 788, 805 (2011).

[45] *See* United States v. Stevens, 559 U.S. 460, 464, 472 (2010).

[46] *See* United States v. Alvarez, 132 S. Ct. 2537, 2542-43, 2551 (2012).

In each of these cases the Court took a speech-protective stance by invalidating laws that targeted forms of expression found by lawmakers to cause serious harms. In addition, the Court built these decisions around a body of First Amendment rhetoric that has set the stage for an expanding speech-protecting role. In the animal cruelty case, for example, the Court pointedly disclaimed any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[47] Indeed, it rejected as "startling and dangerous" the proposition that courts could add new items to the *Chaplinsky* list by engaging in "a categorical balancing of the value of the speech against its societal costs."[48] Likewise, in its violent-video-game ruling, the Court insisted that it could not exempt a category of speech from First Amendment safeguards in the absence of "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[49] In ringing terms, the Roberts Court has proclaimed that "[t]he First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs" and that "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."[50]

To be sure, the modern Court has never renounced the possibility of recognizing new categories of unprotected speech. Almost as telling as the many cases in which the Court has rejected efforts to expand the *Chaplinsky* list, however, is the single case in which the modern Court did unearth a previously undiscovered form of "unprotected" expression. In *New York v. Ferber*,[51] the Court concluded that "child pornography"—defined as "any performance . . . which includes sexual conduct by a child"[52]—should not receive First

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[47] *Stevens*, 559 U.S. at 472.

[48] *Id.* at 470.

[49] *Entm't Merchs. Ass'n*, 564 U.S. at 792.

[50] *Stevens*, 559 U.S. at 470. In the face of this rhetoric, Eugene Volokh has observed: "[I]t's not clear just how speech-protective this [rhetoric of the Roberts Court] will end up being: There are many speech-restrictive traditions in American law; [and] many proposed restrictions could be justified by a sufficiently creative connection to one or another traditionally recognized exception." Eugene Volokh, *First Amendment Exceptions and History*, VOLOKH CONSPIRACY (Apr. 20, 2010, 5:28 PM), http://volokh.com/2010/04/20/first-amendment-exceptions-and-history/ [https://perma.cc/S4JQ-LLPT]. The point is a good one, partly because it provides a reminder that the meaning of *general* rhetoric must play out in the context of particular cases. It is noteworthy, however, that the pronouncements collected in the preceding paragraph—including the pronouncement about "long . . . tradition" focused on by Volokh—were issued in decisions in which the Court repeatedly afforded protection to controversial forms of speech. *See* 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:70 (34th ed. 2016) (viewing *Stevens* as signaling "extreme skepticism . . . towards efforts to expand the categories of speech deemed outside the protection of the First Amendment").

[51] 458 U.S. 747 (1982).

[52] *Id.* at 751 (quoting N.Y. PENAL LAW § 263.05 (McKinney 1980)).

Amendment protection.[53] Yet, even in *Ferber*, the Court was at pains to emphasize "the inherent dangers of undertaking to regulate any form of expression,"[54] and the Court later emphasized that child pornography "presented a special case."[55] Nor have the Court's words gone unmatched by its deeds. In the thirty-three years since *Ferber*, the Court has not identified a single additional category of wholly unprotected speech.

How does this body of rulings on unprotected speech fit together with the Court's handling of speech-based crimes? First and foremost, it stands as a bulwark against subjecting more categories of expression to government controls—including criminal law controls—on the theory that such expression is unprotected. But there is a broader point too: the sweeping speech-protective rhetoric of these cases lies in wait for use in any sort of free expression case. Of particular significance in this regard are those cases that involve not the existence, but the scope, of unprotected speech categories. We turn now to this subject, with a focus on fighting words, incitement, hostile audience speech, and sexually oriented expression.

3. Restricting the Range of Unprotected Speech

The preceding discussion shows how the Court has implemented its strategy of constitutional blocking by refusing (except in its one-off ruling in *Ferber*) to identify new forms of unprotected expression. Refusing to expand the *Chaplinsky* list, however, is not the only way in which the Court has engaged in constitutional blocking in its work with "unprotected" speech. The Court also has limited—indeed, greatly limited—the reach of unprotected speech in two key ways: First, it has moved some one-time forms of "unprotected" speech from the constitutional hinterlands into the sheltered confines of the "protected" First Amendment fortress. Second, the Court has significantly narrowed the definitions of fighting words, incitement, and other still-recognized categories of unprotected expression. Along the way, the Court also has done something more: in part through the issuance of little-noticed dicta, it has created opportunities for further blocking-based cutbacks on the operative range of unprotected speech.

a. *Removing Items from the Unprotected Speech List*

In *Chaplinksy*, the Court suggested that "lewd" and "profane" speech might qualify as unprotected even if it did not constitute obscenity or fighting words.[56] In *Cohen v. California*,[57] however, the Court knocked the legs out from under these potential theories for removing speech from full-bore First

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[53] *Id.* at 774.

[54] *Id.* at 755 (quoting Miller v. California, 413 U.S. 15, 23 (1973)).

[55] *Stevens*, 559 U.S. at 471.

[56] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[57] 403 U.S. 15 (1971).

Amendment protection.[58] After Paul Robert Cohen wore a jacket that bore the words "Fuck the Draft" into a local courthouse, he was prosecuted for disturbing the peace.[59] The Court, however, threw out the resulting conviction, holding that this public display of the F-word was broadly protected by the First Amendment.[60] No less important, the Court emphasized that speech—including highly discomforting speech—merited strong judicial protection. The Court insisted, for example, that the First Amendment is "powerful medicine" and that the often-disturbing impact of speech was to be celebrated, rather than condemned.[61] Banning non-vanilla forms of expression, the Court made clear, threatened to silence the very political outsiders whom the Framers of the First Amendment had sought to safeguard.[62] Moreover, excluding particular words from the public lexicon posed risks not only to the value of individual autonomy, but also to the meaningful exchange of ideas.[63] As Justice Harlan famously declared, "one man's vulgarity is another's lyric."[64]

Nor was *Cohen*, at the time, an easy case. Four members of the Court dissented, including the great free speech absolutist, Justice Hugo Black.[65] Writing for the dissenters, Justice Blackmun argued that the prosecuted jacket-wearing was "mainly conduct and little speech."[66] He also suggested that Cohen's chosen verbiage might constitute fighting words.[67] Under present-day law—which requires fighting words to be directed at a specific person—this analysis might seem strained or even frivolous.[68] But that is the point: in *Cohen* and later cases, the Court pushed the law so forcefully in a libertarian direction that a once-difficult First Amendment issue became not difficult at all.

In *Chaplinsky*, the Court did not mention the juridical category of "commercial speech." But it well might have done so because just one month later, in *Valentine v. Chrestensen*,[69] the Court declared that this form of

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[58] *See id.* at 26. Also significant in this respect was the Court's ruling in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), which held that blasphemous speech enjoyed constitutional protection. *See id.* at 506.

[59] *Cohen*, 403 U.S. at 16.

[60] *See id.* at 26.

[61] *See id.* at 24-25.

[62] *See id.* at 26 (highlighting the danger that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views").

[63] *See id.* (noting that the emotive component of expression "practically speaking, may often be the more important element of the overall message").

[64] *Id.* at 25.

[65] Justice Black joined Justice Blackmun's dissenting opinion. *See id.* at 27 (Blackmun, J., dissenting).

[66] *Id.*

[67] *See id.*

[68] *See infra* notes 81-86 and accompanying text.

[69] 316 U.S. 52 (1942).

expression fell outside the First Amendment's protective orbit.[70] As it went with the lewd and profane, however, so too it went with commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[71] the Court overruled *Valentine*, holding that a state may not ban truthful advertising about the prices of prescription drugs.[72] While the Court has purported to afford commercial speech less than all-out protection,[73] some Justices have advanced the view that such speech merits more than merely second-class citizenship.[74] Whatever the ultimate result of their efforts, the on-the-ground impact of the Court's post-*Virginia State Board of Pharmacy* jurisprudence is unmistakable: courts have struck down commercial speech restriction in hundreds of rulings, thus effectively decriminalizing a broad swath of day-to-day human activity.[75]

It bears mentioning that the Court's past speech-protective work with previously unprotected expression may put some uncertainty in the air with regard to its future dealings with the law of unprotected speech. So it is because the Court has suggested that the existence of already-recognized categories of unprotected speech might have helped to justify its past refusals to make additions to the *Chaplinsky* list.[76] Reasoning from this starting point, one might say that, as the Court abandons previously recognized categories of unprotected speech, it should become more hospitable to recognizing other, new categories of such speech. In other words, so the argument goes, any lack-of-need justification for declining to recognize more forms of unprotected speech falls away as preexisting categories of unprotected speech are repudiated or narrowed.

Might the Court in the future embrace this two-way-street approach to evaluating unprotected speech law? That result seems improbable for a simple reason: the Court has never suggested that it has even the slightest sympathy for

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[70] *See id.* at 55.

[71] 425 U.S. 748 (1976).

[72] *See id.* at 770.

[73] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[74] *See, e.g.*, Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 391, 393 (2012) (noting past opinions in which Justices urged rejection of the low-value-speech approach).

[75] *See, e.g.*, Bigelow v. Virginia, 421 U.S. 809, 811, 829 (1975) (striking down a statute that made encouragement of procuring abortions by advertisement a misdemeanor); *see also* Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 176 (1999) (invalidating a criminal prohibition on advertisements of casino gambling); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.7 (3d ed. 2006) (collecting additional cases); Pomeranz, *supra* note 74, at 391 ("The U.S. Supreme Court has not upheld a commercial speech restriction since 1995.").

[76] *See* Cohen v. California, 403 U.S. 15, 24 (1971) (emphasizing that "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions").

this position. Rather, as we have seen, the Court has extolled the value of free expression as it has moved in steady fashion to expand the range of protected speech.[77] And amidst rising calls for broadened decriminalization, there is especially good reason to think that the Court will not hasten to add new items to the *Chaplinsky* list.

b. *Contracting the Reach of Unprotected Speech*

The Court's work with the law of unprotected speech has involved more than bringing once-excluded forms of expression under the protective First Amendment umbrella. No less important, the Court has recrafted the definition of each of the surviving categories of unprotected expression in an almost always speech-protective way. This part of the blocking story begins with the type of unprotected speech at issue in *Chaplinsky* itself—namely, "fighting words."

i. Fighting Words

In *Chaplinsky*, the Court adverted without hesitation to two different types of "fighting words": (1) statements "which by their very utterance inflict injury"; and (2) declarations that "tend to incite an immediate breach of the peace."[78] In post-*Chaplinsky* rulings, however, the Court has cut back on the "fighting words" concept in two ways. First, it has—from all appearances—abandoned the notion that certain words are subject to regulation on the theory that "their very utterance" causes harm.[79] Some academic observers have sought to revitalize this subcategory of fighting words, based on the idea that particularly injurious "hate speech" should be subject to government control.[80] The Court, however, has not endorsed this idea. Rather, in a steady line of post-*Chaplinsky* cases, it has defined "fighting words" in a way that does *not* include speech that by its nature inflicts injury.[81] This move comports with the Court's continuing insistence, across a broad range of cases, that the rough and tumble of public discourse inevitably will cause psychological distress.[82]

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[77] *See supra* Section I.A.2.

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

[79] *See, e.g.*, Purtell v. Mason, 527 F.3d 615, 623-24 (7th Cir. 2008) (deeming the "inflict injury" prong of *Chaplinsky* no longer operative due to subsequent Supreme Court rulings); *accord* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 509; Linda Friedlieb, Note, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words*, 72 U. CHI. L. REV. 385, 390 (2005).

[80] *See, e.g.*, Richard Delgado & Jean Stefancic, *Four Observations About Hate Speech*, 44 WAKE FOREST L. REV. 353, 368 (2009) ("If hate speech offers little of social value yet taxes society with very real costs, why should we not straightforwardly regulate it?"); *see also* JEREMY WALDRON, THE HARM IN HATE SPEECH 4-5 (2012).

[81] *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 519, 528 (1972) (focusing on the absence of "likelihood that the person addressed would make an immediate violent response").

[82] *See, e.g.*, Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[Speech] may . . . have profound unsettling effects as it presses for acceptance of an idea."); *see also* Snyder v. Phelps,

Nor has the Court's work in narrowing the "fighting words" concept stopped with its abandonment of the "very utterance" subcategory. Post-*Chaplinsky* cases also have established that courts should apply the invitation-to-fisticuffs prong of the fighting words concept in a tight-fisted way. Thus, for an utterance to qualify as fighting words, it must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[83] One consequence of this refinement is that the "fighting words" concept does not extend to words directed at a group of onlookers—as was the case in the flag-burning case, *Texas v. Johnson*[84]—or the world at large—as was the case in the attention-getting-jacket case, *Cohen*.[85] In addition, epithets can qualify as fighting words only if they are "plainly likely to cause a breach of the peace by the addressee."[86]

In *Lewis v. City of New Orleans*,[87] Justice Powell suggested that the Court might recognize another important limit on the fighting words concept—namely, that any expression directed at a law enforcement officer (as was the case in *Chaplinsky*) cannot qualify as fighting words, no matter how fraught with abusive nastiness the verbal assault might be.[88] After all, he reasoned, modern fighting words doctrine focuses on the danger presented by retaliatory violence in the particular context in which the words are spoken.[89] And for law enforcement officials who are properly doing their jobs, there is no excuse for responding to mere words with the blow of a nightstick.[90] This law-enforcement-listener limit on the fighting words doctrine has yet to secure a clear-cut endorsement from the Court. In *City of Houston v. Hill*,[91] however, a majority did note that "the 'fighting words' exception . . . might require a narrower application in cases involving words addressed to a police officer."[92] Indeed, the

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562 U.S. 443, 458 (2011) (noting the need to "tolerate . . . even outrageous . . . speech" (quoting Boos v. Barry, 485 U.S. 312, 322 (1988))).

[83] *Wilson*, 405 U.S. at 524 (quoting *Chaplinsky*, 315 U.S. at 573).

[84] 491 U.S. 397, 409 (1989).

[85] *See* Cohen v. California, 403 U.S. 15, 20 (1971); *see also* Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974) (per curiam) (reversing petitioner's conviction because his use of the phrase "chicken shit" was "not directed at the judge or any officer of the court"); Hess v. Indiana, 414 U.S. 105, 107-08 (1973) (per curiam) (noting that the statement at dispute was not "directed personally" at the sheriff); Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 536 (1980).

[86] *Wilson*, 405 U.S. at 523 (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1941)).

[87] 415 U.S. 130 (1974).

[88] *See id.* at 136 (Powell, J., concurring in the judgment).

[89] *See id.* at 135.

[90] *See id.*

[91] 482 U.S. 451 (1987).

[92] *Id.* at 462; *see also* Norwell v. City of Cincinnati, 414 U.S. 14, 16 (1973) (per curiam) (holding that verbally protesting a detention by an officer did not constitute fighting words). Lower courts have made a similar point. *See, e.g.*, Mackinney v. Nielson, 69 F.3d 1002, 1007 (9th Cir. 1995); Lamar v. Banks, 684 F.2d 714, 718 n.13 (11th Cir. 1982); Commonwealth v.

Court in that case went so far as to declare that "[t]he freedom of individuals to verbally oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[93] The key point is that this rhetoric stands ready for use if the Roberts Court sees fit to endorse Justice Powell's position in a bright-line-rule fashion.[94] Moreover, this particular reform of free speech law may accord in a special way with the modern decriminalization movement. Why? Because the risk of triggering a criminal law intervention for speech, and for the misuse of enforcement discretion in that process, is at its highest ebb when the relevant events concern not verbal exchanges between two ordinary individuals, but the hurling of words at the very set of public officers who have the power to arrest and detain.[95]

Modern-era work with the fighting words doctrine has opened up the possibility of another blocking reform, including in cases where the target of the

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Hock, 728 A.2d 943, 947 (Pa. 1999) (rejecting the idea that "the police are likely to respond to verbal insults with unlawful violence"; adding that "[i]ndeed, . . . that police officers have a legal duty to enforce the law is sufficient reason to presume that they will not violate the law").

[93] *Hill*, 482 U.S. at 462-63.

[94] Notably, at least some lower courts have endorsed (or all but endorsed) such a full-blown exception. *See* United States v. Poocha, 259 F.3d 1077, 1081 (9th Cir. 2001) ("[T]he area of speech unprotected as fighting words is at its narrowest, if indeed it exists at all, with respect to criminal prosecution for speech directed at public officials." (citing Garrison v. Louisiana, 379 U.S. 64, 73-74 (1964))); R.I.T. v. State, 675 So. 2d 97, 99 (Ala. Crim. App. 1995) ("[A] police officer's training should prevent the officer from physical retaliation to *any* vulgarities." (emphasis added)); Dawn Christine Egan, Case Note, *"Fighting Words" Doctrine: Are Police Officers Held to a Higher Standard, or per* Bailey v. State, *Do We Expect No More from Our Law Enforcement Officers than We Do from the Average Arkansan?*, 52 ARK. L. REV. 591, 598-99, 598 n.67 (1999) (noting lower court split on this issue).

[95] *See Lewis*, 415 U.S. at 135-36 (Powell, J., concurring in the judgment) (noting that "[m]any arrests are made in 'one-on-one' situations where the only witnesses are the arresting officer and the person charged," thus leading to an "opportunity for abuse"); Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990) ("[W]hile police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment."). Moreover, the increased scrutiny that officers have come to face in the wake of recent, high-profile police shootings may bolster the argument that, under present-day conditions, it is never "plainly likely," Gooding v. Wilson, 405 U.S. 518, 523 (1972) (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1941)), that the ordinary officer will respond to mere words with violence. *Cf.* David Boyer, *Obama Decries Excessive Force Against Missouri Police Shooting Protestors*, WASH. TIMES (Aug. 14, 2014), http://www.washingtontimes.com/news/2014/aug/14/obama-scolds-police-missouri-must-be-held-higher-s/ [https://perma.cc/99QR-LV3F] (quoting President Obama's remark in the wake of Michael Brown's death that "[w]e all need to hold ourselves to a high standard, particularly those of us in positions of authority").

bombast does not hold a law enforcement position. This is the case because traditional formulations of the fighting words doctrine have focused on the "tendency" of speech to cause retaliatory violence.[96] In *Chaplinsky*, for example, the Court endorsed a test that asked whether the speech at issue was "*likely* to cause an average addressee to fight,"[97] and later iterations of the doctrine have echoed the same idea.[98] Buried in the doctrinal weeds, however, may be the spring roots of a new approach. Might it be that words can be fighting words only if they *actually* cause a fight or at least bring two parties to the very brink of exchanging blows?[99] It may take some analytical adventurousness to extract such a limit from the existing judicial materials. But a "sticks and stones" approach to altercation-related speech law finds support in the thought that courts should give the narrowest possible scope to limits on speech inspired by worries that on-edge listeners might lash out lawlessly to silence otherwise-protected speakers.[100] Adopting such an approach also would comport with the

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[96] *Wilson*, 405 U.S. at 524.

[97] Chaplinksy v. New Hampshire, 315 U.S. 568, 573 (1942) (emphasis added) (quoting State v. Chaplinsky, 18 A.2d 754, 762 (N.H. 1941)).

[98] *See, e.g.*, Cohen v. California, 403 U.S. 15, 20 (1971) (referring to "abusive epithets . . . likely to provoke violent reaction").

[99] *See id.*; Phelps-Roper v. Koster, 713 F.3d 942, 948 (8th Cir. 2013) (finding absence of fighting words in part because there were "few to no reported instances of violence associated with Westboro's 500 protests at military funerals").

[100] *See* Bible Believers v. Wayne County, 805 F.3d 228, 247-48 (6th Cir. 2015) (en banc) (discussing comparable "heckler's veto" problem raised by state regulation of hostile audience speech), *cert. denied*, 136 S. Ct. 2013 (2016). There are other reasons for putting this sort of limit on the fighting words concept. In particular, courts confront significant challenges in defining who should qualify as a reasonable person or average addressee in this context. *See* Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1536 (1993) (contrasting a focus on "the potential reaction of the average addressee, determined in the abstract" with an inquiry into "how an ordinary person would react, given the particular fact situation presented"). For example, must courts distinguish between the reasonable man and the reasonable woman, and if so, how? *See* Kathleen M. Sullivan, *The First Amendment Wars*, NEW REPUBLIC, Sept. 28, 1992, at 35, 40 ("[I]t seems absurd to give more license to insult Mother Teresa than Sean Penn just because she is not likely to throw a punch."). There is also the question of whether, in today's culture, less marked than before by manhood-based violent self-effectuation, it is ever reasonable to suppose that mere words reasonably will—far less should—ever cause a fight. *See* Gard, *supra* note 85, at 573 (concluding that "[a]ll of the available evidence" suggests that "the ordinary reasonable law abiding person in today's society [will not] react with an uncontrollable violent impulse"). To be sure, attaching the fighting words label if (but only if) an actual fight occurs raises problems of its own. *See* Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 463 (2004) (questioning the soundness of a rule whose application is "wholly dependent upon the reaction of the addressee"). But it goes too far to say that this actual-fight-must-happen approach is ill-advised on the theory that under that approach it "does not matter whether the hearer is average, reasonable, intelligent or otherwise." *Id.* After all, the reaction

intuition that, if ever the machinery of criminal prosecution should remain on the shelf, it is where words alone are said to constitute the actus reus of the offense and no provable result follows from their utterance. Finally, and of particular significance here, the idea that words, to be fighting words, must trigger something that is (or is extremely close to) an actual fight, may gain traction from modern doctrinal developments in other areas of unprotected expression law—especially the law of incitement and hostile audience speech.[101] We turn now to those subjects.

ii. Incitement to Crime

The Court's first brushes with the Free Speech Clause raised questions about whether words that pushed along the commission of a crime, including violent crime or even outright revolution, could be subjected to government control. In general terms, the law in this area has evolved from a broadly government-favoring "bad tendency" approach[102] to a much invigorated "clear and present danger" test.[103] The modern synthesis found expression in *Brandenburg v. Ohio*,[104] in which the Court declared that no prohibition on supposed incitement can operate "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[105]

Though packaged in terse terms, the *Brandenburg* test appears to impose three requirements that the government must satisfy to strip crime-encouraging speech of constitutional protection: (1) the speech must be of a form that qualifies as incitement; (2) the speech must create a likelihood of imminent lawlessness; and (3) the speech must be made with the intent of producing such lawlessness.[106] In addition, both pre- and post-*Brandenburg* cases signaled the operation of a

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of the listener would not be the only element of a result-conscious fighting words offense, because some measure of reasonable foreseeability would remain an additional, indispensable ingredient of the crime. *Cf.* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 253-60 (2d ed. 2010) (discussing proximate cause in results-based intervening act cases and the importation of foreseeability by courts). In the end, there may be good reason to repudiate the fighting words doctrine altogether. But short of all-out repudiation, there is at least ample reason for greatly limiting the doctrine's operation.

[101] *Cf.* Mannheimer, *supra* note 100, at 1549 (opining that "[t]he fighting words doctrine performs much the same function as the clear and present danger test" applicable in incitement cases).

[102] *See* Debs v. United States, 249 U.S. 211, 216-17 (1919) (upholding a jury instruction that allowed conviction for utterances that "had as their natural tendency and reasonably probable effect" the proscribed result).

[103] The rhetoric of "clear and present danger" has its origins in *Schenck v. United States*, 249 U.S. 47, 52 (1919).

[104] 395 U.S. 444 (1969) (per curiam).

[105] *Id.* at 447.

[106] *See* Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 42-43 (2012) (listing the elements of the *Brandenburg* test).

fourth limitation—that the threatened lawbreaking must be "serious" in nature.[107]

The imposition of these limits has had important decriminalizing effects. In *Hess v. Indiana*,[108] for example, the Court overturned an antiwar demonstrator's conviction for saying, "We'll take the fucking street later," after police officers ordered a crowd to disperse.[109] The Court reasoned in part that, because the statement was "nothing more than advocacy of illegal action at some indefinite future time," it fell outside the boundaries of unprotected incitement.[110]

Might the Court scale back the reach of unprotected incitement even more?[111] The Court's 1982 decision in *NAACP v. Claiborne Hardware Co.*[112] gives rise to an argument that, in fact, it already has done so.[113] That case stemmed from a boycott of local businesses by African American residents of Claiborne County, Mississippi.[114] Frustrated owners of the boycotted establishments brought a state law tort action and recovered one million dollars in damages (said to reflect lost profits incurred over a seven-year period) against ninety-two defendants, including Charles Evers, Field Secretary of the NAACP.[115] Among other things, Evers had given emotional speeches during the boycott, including one in which he stated that boycott violators would be "disciplined" and another in which he said, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[116] The Mississippi Supreme Court upheld the judgment, including against Evers, on the theory that the boycott involved the wrongful use of "force, violence, and threats" against African American customers who otherwise would have purchased goods or services from the business-owner plaintiffs.[117]

One question posed by the case was whether Evers could be held liable for encouraging the use of criminal violence by boycott proponents against boycott

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[107] *See id.* at 44-45 (quoting Whitney v. California, 274 U.S. 357, 377-78 (1927) (Brandeis, J., concurring)).

[108] 414 U.S. 105 (1973) (per curiam).

[109] *Id.* at 106-07.

[110] *Id.* at 108-09. In *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1996), the court built on the indefinite-future logic of *Hess* in concluding that "the occurrence of limited violence and disorder on one day is not a justification for banning all demonstrations, peaceful and otherwise, on the immediately following day (or for an indefinite period thereafter)." *Id.* at 1372.

[111] *See* Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1174 (1970).

[112] 485 U.S. 886 (1982).

[113] *See id.* at 928-29.

[114] *Id.* at 889.

[115] *Id.* at 893.

[116] *Id.* at 902.

[117] *Id.* at 895 (quoting NAACP v. Claiborne Hardware Co., 393 So. 2d 1290, 1301 (Miss. 1980)).

violators.[118] In addressing this question, the Court observed that "[s]ince respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care."[119] It also noted that "a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period."[120] But here "[t]he emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*."[121] More particularly:

> If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with the possible exception of [one] incident—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech . . . [and] the chancellor made no finding of any violence after the challenged 1969 speech. . . . An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *When such appeals do not incite lawless action, they must be regarded as protected speech.* . . . For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech.[122]

Only three years ago, a plurality of the Court described the *Brandenburg* rule as targeting "advocacy intended, *and likely*, to incite imminent lawless action."[123] But *Claiborne Hardware* seems to speak in another tongue. It suggests that the case for incitement falls away if the speaker's "appeals . . . *do not incite lawless action*"—that is, "do not incite lawless action" in actual fact.[124] Under such an approach, the mere likelihood of a follow-up crime will not suffice. Or at least, it will not suffice in cases like *Claiborne Hardware* where "spontaneous and emotional appeals" are incorporated into "political rhetoric" with regard to a "common cause" (for example, boycotting) that itself involves lawful action. Whether the Court will endorse this actual-crime-must-result view of incitement remains to be seen. But any growing worry within the Court about

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[118] *See id.* at 926.

[119] *Id.* at 926-27.

[120] *Id.* at 927.

[121] *Id.* at 928.

[122] *Id.* at 928-29 (emphasis added) (footnote omitted).

[123] United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (emphasis added) (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam))).

[124] For a similar assessment, see Daniel T. Kobil, *Advocacy on Line:* Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 233-36, 233 n.236 (2000) (emphasis added) (indicating that, after *Claiborne Hardware*, "*Brandenburg* [now] offers a relatively 'bright line' dividing protected from unprotected speech based on a factual inquiry into whether unlawful conduct followed the speech").

overuse of the criminal law to target speech (especially political speech) is likely to push the Court toward taking *Claiborne Hardware* at its word.[125]

iii. Hostile Audience Speech

In one of its earliest treatments of the First Amendment, the Court recognized that a state could restrain a speaker who so infuriated an audience that a risk of retaliatory violence arose. Thus, according to *Cantwell v. Connecticut*,[126] the state could restrain speech that presents a "clear and present danger of riot . . . or other immediate threat to public safety, peace, or order."[127] The problem with this doctrinal approach is hard to miss: in effect, it permits the state to punish a speaker because of the unlawfully belligerent—indeed, the riotously belligerent—actions of unsympathetic listeners. As a result, it is not surprising that the law of hostile audience speech has arced in the direction of increasing protection for provocative speakers. Consider the following chronology:

1. In *Cantwell*, the Court went so far as to say that "[w]hen clear and present danger of riot . . . appears, the power of the state to prevent or punish is obvious."[128]
2. In *Feiner v. New York*,[129] the Court invoked *Cantwell* in upholding the conviction of an incendiary speaker on a hostile-audience-speech theory.[130] *Feiner* involved a public address in which, among other things, the defendant called the American Legion "a Nazi Gestapo."[131] Upon hearing this diatribe, one onlooker told a police officer, "If you don't get that son of a bitch off, I will go over and get him off there myself."[132] There followed two police warnings to the speaker to stop his address, two resulting refusals, and a follow-up arrest for breaching the peace.[133] In upholding the resulting conviction, the Court relied on "[t]he findings of . . . imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers."[134] *Feiner*, however, raised as many questions as it answered—including as to the role of police warnings in hostile-audience-speech cases and the requisite degree of "imminence" of retaliatory violence.

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[125] Indeed, the Court may well see the principle of that case—which carried the day in a mere tort case—as controlling *a fortiori* in the case of a criminal prosecution.

[126] 310 U.S. 296 (1940).

[127] *Id.* at 308.

[128] *Id.*

[129] 340 U.S. 315 (1951).

[130] *Id.* at 320-21.

[131] *Id.* at 330 (Douglas, J., dissenting).

[132] *Id.*

[133] *Id.* at 318 (majority opinion).

[134] *Id.* at 321.

3. The Court's rulings in *Edwards v. South Carolina*[135] and *Cox v. Louisiana*[136] cast light on these matters.[137] In *Edwards*, the Court overturned the convictions of civil rights marchers who ignored a police order to disperse when they encountered a large group of segregationist counter-demonstrators.[138] The case, Justice Stewart declared, was "a far cry from . . . *Feiner*" because "[t]here was no violence or threat of violence on [the marchers'] part, or on the part . . . of the crowd watching them."[139] In *Cox*, the Court again threw out a hostile-audience-speech-based conviction of civil rights protestors,[140] emphasizing that, although the marchers had ignored a command to disperse, there was "no indication . . . that any member of the [inhospitable] white group threatened violence."[141] In any event, the Court added, the police officers "could have handled the crowd."[142]
4. Finally, in *Cohen*, the Court rejected the possibility of applying the hostile-audience-speech theory to the defendant's wearing of his provocative "Fuck the Draft" jacket.[143] As Justice Harlan explained: "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. There is . . . no showing that anyone who saw Cohen was in fact violently aroused or that [Cohen] intended such a result."[144]

The law's progression from *Cantwell* to *Cohen* reflects an unmistakable trend toward protecting would-be hostile audience speech. *Feiner* suggests that a police warning must precede an arrest, and *Edwards* and *Cox* show that continuing to speak, even in the face of such a warning, often will be constitutionally protected. At the least, these cases suggest that prosecutions based on the refusal to honor a stop-order ordinarily must be supported by three separate showings: (1) that a demonstrable threat of retaliatory violence existed; (2) that the speaker "intended such a result"; and (3) that police officers would have been unable to manage the problem by controlling audience members.[145] *Cohen* also suggests that a generalized sense of looming danger is not enough to

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[135] 372 U.S. 229 (1963).

[136] 379 U.S. 536 (1965).

[137] *See Edwards*, 372 U.S. at 236; *see also Cox*, 379 U.S. at 538.

[138] *Edwards*, 372 U.S. at 231, 233, 238.

[139] *Id.* at 236.

[140] *Cox*, 379 U.S. at 537-38, 558.

[141] *Id.* at 550.

[142] *Id.*

[143] *See* Cohen v. California, 403 U.S. 15, 16, 26 (1971).

[144] *Id.* at 20 (citations omitted).

[145] *See supra* notes 126-44 and accompanying text.

justify intervention; rather, the state must show that a listener "was in fact violently aroused."[146] Perhaps the modern Court will read this four-word passage to require an *actual* resort to violence—just as it might require, after *Claiborne Hardware*, a showing of actual lawbreaking in some or all incitement cases.[147] At a minimum, this passage invites the conclusion that any supposedly threatened violence must be on the very verge of occurring—perhaps as evidenced by an audience member's giving of a focused ultimatum, as apparently occurred in *Feiner*.[148]

With these many limitations in view, one might fairly ask whether prosecutors today can ever succeed in pursuing a speaker on a hostile-audience-speech theory. And that is the point: in this First Amendment field, the law has tilted so decidedly toward speech protection that the Court may soon declare the heckler's-veto-based, hostile-audience-speech concept all but constitutionally extinct.[149]

iv. Sexually Oriented Expression

At first blush, the Court's treatment of sexually oriented speech might seem to contradict the idea that the modern Court has given First Amendment law an ever-more-libertarian cast. This is the case because in *Miller v. California*,[150] the Court gave states a wider berth to regulate obscene materials than they had under preexisting law.[151] In *Miller*'s companion case, *Paris Adult Theater I v. Slaton*,[152] the Court also passed up the chance to create a safe harbor for obscenity viewed within the well-marked confines of an all-adult-entertainment club.[153] As it went with the Fourth Amendment exclusionary rule, so it seemed to go with the law of obscenity: the recently assembled Burger Court, put in place by then-newly-elected President Richard Nixon, stood ready to take a more pro-statist approach.[154] In reality, however, the story of the modern Court's work

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[146] *Cohen*, 403 U.S. at 20.

[147] *See* NAACP v. Claiborne Hardware Co., 485 U.S. 886, 927-29 (1982).

[148] *See* Feiner v. New York, 340 U.S. 315, 317 (1951); *id.* at 330 (Douglas, J., dissenting).

[149] *See* Bible Believers v. Wayne County, 805 F.3d 228, 248 (6th Cir. 2015) (en banc) (concluding that "silencing a speaker due to crowd hostility will seldom, if ever, constitute the least restrictive means available" and that "the First Amendment does not countenance a heckler's veto"), *cert. denied*, 136 S. Ct. 2013 (2016).

[150] 413 U.S. 15 (1973).

[151] *E.g.*, E. Edward Bruce, Comment, *Prostitution and Obscenity: A Comment upon the Attorney General's Report on Pornography*, 1987 DUKE L.J. 123, 127 (noting *Miller*'s "repudiation of the [preexisting] requirement that the work must be 'utterly without redeeming social value'" (quoting A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen., 383 U.S. 413, 419 (1966))); *see Miller*, 413 U.S. at 36-37.

[152] 413 U.S. 49 (1973).

[153] *Id.* at 57.

[154] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 494-95 (1976) (sharply restricting access to federal habeas corpus relief based on state court misapplications of the Fourth Amendment exclusionary rule).

with sexually oriented speech includes significant expression-protecting components.

To begin, the Burger Court itself acknowledged that the First Amendment protects many forms of erotic material,[155] notwithstanding *Miller*'s expression of deference to jury members' assessments of "contemporary community standards."[156] Additionally, in *Pope v. Illinois*,[157] the Court held that one component of the *Miller* test—namely, whether the work lacks "serious literary, artistic, political, or scientific value"[158]—would not depend on "community standards" at all; instead, the decision makers were required to look at the work through the eyes of a "reasonable person" according to a national standard.[159] In still other cases, the Court made it clear that prosecutions for dealing in obscenity can proceed only under statutes that include a criminality-inhibiting mens rea element.[160]

Of particular importance, the Burger Court never retreated from the holding in *Stanley* that there is a right to view obscene materials within "the privacy of one's own home."[161] When it comes to doctrine, *Stanley* is about private places. But when it comes to decriminalization, it is about numbers because *Stanley* exempts every individual in the United States who views obscenity within the home from the criminal law's reach. Put another way, *Stanley* directs prosecutors not to focus their efforts on individual consumers of obscene materials, but on the far smaller number of business operators who undertake to purvey these materials.

The modern Court also has thwarted state efforts to regulate sexually oriented, but non-obscene, speech on the ground that it poses a danger to minors. Otherwise, the Court has reasoned, adults will be reduced to "reading only what is fit for children."[162] In *Sable Communications of California, Inc. v. FCC*,[163] for example, the Court struck down a statute denying adults access to non-obscene dial-a-porn messages to guard against the messages reaching the ears of unduly inquisitive youngsters.[164] In *United States v. Playboy Entertainment Group,*

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[155] *See* Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (holding the film "Carnal Knowledge" not "patently offensive" as a matter of law).

[156] *Miller*, 413 U.S. at 33-34 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (per curiam)).

[157] 481 U.S. 497 (1987).

[158] *Miller*, 413 U.S. at 24.

[159] *See Pope*, 481 U.S. at 500-01; *id.* at 501 n.3 (noting that the Court's approach countered the risk that"a jury member could consider himself bound to follow prevailing local views on value").

[160] *See infra* notes 290-94 and accompanying text.

[161] Stanley v. Georgia, 394 U.S. 557, 565 (1969).

[162] Butler v. Michigan, 352 U.S. 380, 383 (1957).

[163] 492 U.S. 115 (1989).

[164] *See id.* at 131.

Inc.,[165] the Court invalidated a statute, also designed to protect minors, that required cable television operators to channel sexually oriented programming into nighttime hours.[166] And in *Reno v. ACLU*[167]—a case of distinct importance because it brought to the Court its first encounter with speech in cyberspace—all nine Justices agreed to strike down federal legislation that restricted Internet transmissions of "indecent" communications.[168]

To be sure, roughly four decades ago the Court upheld a sanction imposed on a radio broadcaster that aired a "seven dirty words" monologue during daytime hours.[169] Moreover, new and difficult issues regarding sexually oriented speech are sure to arise in the future as technology advances. Especially in the midst of broad-based calls for decriminalization, however, the Court may gravitate to a synthesis that says in so many words: Enough already! Legislative bodies may outlaw the purveying of true (though narrowly defined) obscenity. But they will encounter major constitutional obstacles if they try to go farther than that.

The Court's work in the wake of *Ferber* signals a similar willingness to rein in the child pornography category of unprotected speech.[170] To be sure, the Court in *Osborne v. Ohio*[171] refused to carry over to child pornography the private-use-in-the-home exception made applicable to obscenity in *Stanley*.[172] The logic of *Stanley*, however, had no application in *Osborne* because the whole point of "unprotecting" child pornography was to safeguard children, otherwise physically exploited through forced participation in pornographic movies and photographs, by drying up the market for this material among individual viewers.[173] More important for present purposes is the Court's ruling in *Ashcroft v. Free Speech Coalition*,[174] which may prove to be so significant over time that it neutralizes any speech-inhibiting effect of *Osborne* and even of *Ferber* itself.[175] In *Free Speech Coalition*, the Court held that the regulatory prerogatives created by *Ferber* did not extend to so-called "virtual" child pornography—that is, pornography that does not involve the use of real children, as opposed to renderings of children generated by way of computer technology.[176] How might *Free Speech Coalition* in its practical effect render *Ferber* and *Osborne* largely beside the point? The answer to this question will

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[165] 529 U.S. 803 (2000).

[166] *See id.* at 806, 827.

[167] 521 U.S. 844 (1997).

[168] *Id.* at 849; *cf.* Ashcroft v. ACLU, 542 U.S. 656, 659-60, 673 (2004) (holding that measures in the Child Online Protection Act likely violated the First Amendment).

[169] *See* FCC v. Pacifica Found., 438 U.S. 726, 729, 750-51, 777 (1978).

[170] *See* New York v. Ferber, 458 U.S. 747, 751, 774 (1982).

[171] 495 U.S. 103 (1990).

[172] *See id.* at 111; Stanley v. Georgia, 394 U.S. 557, 558-61, 568 (1969).

[173] *See Osborne*, 495 U.S. at 109.

[174] 535 U.S. 234 (2002).

[175] *See id.* at 239.

[176] *See id.* at 250.

hinge on whether technology advances to the point that viewers no longer can distinguish computer-generated images from actual portrayals of exploited children. Why? Because if things turn out this way, it may be that both producers and viewers of child-sex materials will come, even overwhelmingly, to use only virtual material because they have no interest in spending time behind bars.

Put another way, the Court's virtual-child-pornography ruling may in time generate much of the same sort of sweeping decriminalizing effect generated by the Court's ruling in *Stanley*, although in a very different way.[177] What matters most about the law is how it operates in real life. And if *Free Speech Coalition* operates in real life to have a transformative effect on the child pornography market by diverting both supply and demand in the direction of virtual materials, it will have accomplished three things at once. First, it will have decriminalized a category of behavior previously targeted by legislators—that is, the creation, sale, and consumption of non-obscene materials that in no way involve the use of actual children. Second, it will simultaneously have stopped the cruelly coercive use of large numbers of children in the production of sexually oriented films and photographic materials. Third, it will have demonstrated that a speech-sheltering ruling may have an impact that reaches well beyond simply exempting targets of the invalidated statute from the reach of the criminal law; it may even be that judicially decriminalizing "Activity A" (here the making and viewing of virtual child pornography) is so consequential in its ripple effects that it will greatly reduce the occurrence of a far more intolerable "Activity B" (here the making and use of real child pornography).[178]

One way to think about this analysis of *Free Speech Coalition* is in terms of applying constitutional means-ends analysis to laws that raise dangers of

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[177] *See Stanley*, 394 U.S. at 565.

[178] Notably, in a concurring opinion, Justice Thomas raised serious questions about the down-the-road effects of technological improvements in the portrayal of "virtual" human beings. *See Free Speech Coal.*, 535 U.S. at 259 (Thomas, J., concurring in the judgment). In his view, if such improvements render it impossible to distinguish between virtual and non-virtual child pornography, then the state interest in exterminating non-virtual pornography should push against, rather than for, recognizing the distinction drawn by the majority. *See id.* This is so, he reasoned, because prosecutors faced with these conditions might come to lack the ability to bring to justice true child abusers in light of hard-to-disprove defense claims that targeted materials, however realistic in appearance, include only virtual images. *See id.* The hard-to-prosecute premise of this reasoning presents an empirical question worthy of further investigation as new conditions arise. Of particular significance, it may turn out to be the case that prosecutors can bring and win cases against makers and users of actual child pornography, even if the pornographic images do not constitute the key evidence of the crime. It may also be that the continuing potential of such prosecutions—coupled with a lack of prosecutions in connection with "virtual" materials—generates a restructuring of the child pornography market in the direction of making and viewing such "virtual" materials. The key point made here is of broader import: at least sometimes, it may be that decriminalizing a specified form of behavior in practical effect will do more, perhaps far more, than simply generate the garden-variety benefits of decriminalizing that behavior; it may also produce extremely desirable results because of its incidental effects.

perverse or counterproductive effects. On this view, courts should look to intervene when a challenged measure in fact (or probably or quite possibly) does more harm than good with respect to advancing the government end said to justify it. This style of means-centered review is a longstanding feature of constitutional law,[179] including under the Free Speech Clause.[180] The difficulty this approach poses concerns judicial capacities. In particular, assessing the presence of counterproductivity inevitably requires the making of predictive empirical judgments, and courts tend not to second-guess legislative assessments of this kind.[181] Again, however, if rising calls for decriminalization exert a pull on the mind of the Court, a shift in the judicial mood may occur. In particular, the Court's hesitancy to police legislative means may well diminish, at least when lawmakers themselves have not actually wrestled with the difficult empirical determination on which the case for judicial self-restraint is built.[182]

c. *Other Tools for Protecting Speech*

As the preceding discussion reveals, courts can effectively decriminalize expressive behavior by narrowing the categories of "unprotected" speech. Even

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[179] *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (striking down an amendment to the Food Stamp Act and noting that it "excludes from participation in the food stamp program . . . those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility"); S. Pac. Co. v. Arizona, 325 U.S. 761, 775 (1945) (applying the dormant commerce clause to invalidate a train-length law in the face of the State's safety justification, and acceding to the district court's finding that the law in fact "made train operation more dangerous" because "such increased danger of accident and personal injury as may result from the greater length of trains is more than offset by the increase in the number of accidents resulting from the larger number of trains").

[180] Indeed, two of the Court's most well-known First Amendment rulings involve variations on this style of review. *See* Citizens United v. FEC, 558 U.S. 310, 355 (2010) (holding the corporate expenditure ban unconstitutional and noting that, when the ban is combined with lobbying, "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"); Texas v. Johnson, 491 U.S. 397, 420 (1989) (striking down a flag burning ban in part because its operation tended to "dilute the freedom that this cherished emblem represents").

[181] *Compare* Michael M. v. Super. Ct., 450 U.S. 464, 472-73 (1981) (plurality opinion) (upholding a statutory rape statute that only applied to males in part because of perceived need to ensure that some participants are in a position to report the crime), *with id.* at 493-94 (Brennan, J., dissenting) ("Common sense . . . suggests that a gender-neutral statutory rape law is potentially a *greater* deterrent of sexual activity . . . for the simple reason that [it] . . . arguably has a deterrent effect on twice as many potential violators.").

[182] *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1675-85 (2001) (discussing First Amendment cases where the Court was "unprepared to recognize the implausibility of less speech-restrictive alternatives . . . when Congress had not even first studied the matter itself").

so, political officials remain free to regulate protected speech—including with criminal law controls—under certain circumstances. Even a candidate for public office, for example, cannot give a political speech in violation of a reasonable noise ordinance while driving a sound truck through a residential neighborhood at three o'clock in the morning. The scope of free speech rights thus hinges on how far courts will let lawmakers go in passing regulatory laws of this kind. Put another way, courts can place constitutional limits on different *modes* of government speech control, and the extent to which the First Amendment decriminalizes speech will depend on how expansive those limits are. For example, First Amendment "prior restraint" doctrine operates to hold back a particularly problematic mode of government speech restriction.[183] Specialized doctrines regarding overbreadth and vagueness serve to safeguard speech in a similar way, including with regard to both civil and criminal law restrictions.[184] The Court's work with "total medium bans" restricts state authority to target with any sanction certain methods of communication, including (for example) the putting up of small signs on one's own property.[185] And so does the increasingly expansive set of limits on government power to regulate the use of money to support or to undermine political campaigns.[186] These campaign finance decisions are controversial (to say the least), in part because they lend aid to persons whose wealth already offers them enhanced access to the levers of political power.[187] But whatever one thinks about these much-debated rulings, one thing about them cannot be denied: they have a broad decriminalizing effect.[188]

How else might the Court limit the ability of political decision-makers to meddle with free expression? One constitutional inhibition takes center stage: the long-recognized prohibition on content-based restrictions.[189] In *Police*

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[183] *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 722 (1931) (reasoning that "legislative interference with the initial freedom of publication" reduces the constitutional protection "to a mere form of words"); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 12 (1981).

[184] To be sure, each of these doctrines also has an added bite when it comes to criminal regulation, but each doctrine in its core application extends to both civil and criminal controls. *See infra* notes 286-89 and accompanying text.

[185] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 55, 58 (1994).

[186] *See, e.g.*, McCutcheon v. FEC, 134 S. Ct. 1434, 1462 (2014); Citizens United v. FEC, 558 U.S. 310, 319 (2010); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam).

[187] *See infra* notes 336-40 and accompanying text (discussing the *Carolene Products* footnote four approach to judicial review).

[188] *See Citizens United*, 558 U.S. at 337, 372 (invalidating a provision that made it a felony for corporations to engage in electioneering communications near an election date).

[189] *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 31-32; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (asserting that equality of treatment "lies at the heart of the first amendment's protections against government regulation of the content of speech"); Geoffrey

Department of Chicago v. Mosley,[190] for example, the Court confronted a Chicago ordinance that criminalized picketing near a school during working hours, but that also provided an exception for schools involved in labor disputes.[191] In invalidating this prohibition, the Court explained that "[t]he central problem with [the] ordinance is that it describes permissible picketing in terms of its subject matter."[192] And "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[193] This ruling had a speech-decriminalizing impact that was writ both small and large. The case-specific impact came for Earl Mosley, who was freed by the ruling to resume his daily picketing about the racial composition of Commercial High School without fear of prosecution. The sweeping impact came for every citizen of the United States who might otherwise be subject to regulation under a similar, content-discriminatory law.[194] Indeed, *Mosley* set the stage for a long series of follow-on rulings in which the Court blocked the operation of many statutes—including many criminal statutes—based on impermissible content discrimination.[195]

To be sure, the principle endorsed in *Mosley* has limits because content discrimination is permissible so long as "regulation is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end."[196] As in other areas where the Court wields the scalpel of strict scrutiny, however, the requirements of this test are seldom met.[197] An even more important feature of content-discrimination law involves its practical impact on legislative choices.[198] In particular, when a court invalidates a penal speech law as content discriminatory, the legislature can respond in either of two ways. First, it can let things be, thus keeping in place the ruling's speech-decriminalizing effect. Second, it can enact a new law that removes the discrimination problem by

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R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189-97 (1983).

[190] 408 U.S. 92 (1972).

[191] *Id.* at 92-93, 102.

[192] *Id.* at 92.

[193] *Id.*

[194] *See id.* at 92-93.

[195] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 380, 395-96 (1992); Boos v. Barry, 485 U.S. 312, 315, 334 (1988) (invalidating a prohibition on displaying certain signs within 500 feet of a foreign embassy); Carey v. Brown, 447 U.S. 455, 457, 471 (1980) (invalidating an anti-residential-picketing law with an exemption for picketing places of employment involved in labor disputes); Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 215 (1975) (invalidating a prohibition on showing films containing nudity on drive-in movie screens).

[196] Burson v. Freeman, 504 U.S. 191, 198 (1992) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[197] *Id.* at 211 ("[I]t is the rare case in which we have held that a [content-discriminatory] law survives strict scrutiny.").

[198] *See supra* note 24 and accompanying text.

broadening the law's coverage so as to make it content neutral.[199] As we have seen, for example, the St. Paul City Council could have responded to the *R.A.V.* decision—which invalidated its ban on fighting words related to race, religion, or gender—not by simply taking it on the chin, but by passing a more sweeping ordinance that outlawed all fighting words of any kind.[200]

Given this post-invalidation choice, it is not clear that law-invalidating content-discrimination rulings, either individually or in the aggregate, are necessarily speech-enhancing in nature. In fact, the full corpus of such invalidations will turn out to be *pro*-regulatory if legislatures more commonly respond to them by passing new and broadened speech prohibitions. It follows, from the point of view of a decriminalization-minded thinker, that the raising of a content-discrimination challenge to a statute in its nature presents a high-risk/high-reward move—high reward because decriminalization will occur if the legislature does not act in the wake of the judicial invalidation, but high risk because even greater criminalization will occur if the legislature responds by passing a more sweeping prohibition.

I leave it to others to explore how legislatures respond in the real world to judicial invalidations of content-discriminatory criminal laws. But three considerations suggest that such invalidations on balance are likely to promote, rather than undercut, the cause of decriminalization. First, it is simply hard to pass laws as a general matter; thus the "burden of inertia" always cuts against, rather than for, legislative follow-up action after a court invalidates a statute.[201] Second, it is ordinarily more difficult to pass more sweeping, as opposed to less sweeping, penalty-imposing statutes because legal burdens placed on "large[] numbers" of citizens create greater risks of "political retribution" than burdens placed on "only a few."[202] Third, there exists a special reason to anticipate legislative hesitance to enact broadened criminal prohibitions today precisely because of growing public concern about overcriminalization. For this reason, it may (rather curiously) be the case that the decriminalization movement itself will contribute to the decriminalizing impact of the Free Speech Clause content-discrimination rule. And if that is true, judges committed to the cause of decriminalization may not hold back in applying that rule despite its potential "boomerang" effect.

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[199] *See* Stone, *supra* note 189, at 205 (explaining that the content-discrimination-based invalidations "may invite government to 'equalize' . . . by adopting even more 'suppressive' content-neutral restrictions").

[200] *See supra* note 25 and accompanying text.

[201] *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 918 n.253 (1987) (noting that, because it is easier to defeat legislation than obtain its passage, a judicial remand to the legislature "may as a practical matter result in a policy's ultimate demise").

[202] Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Assuming that the content-discrimination rule produces less speech regulation in its overall operation, the scope of that impact will hinge on how often it is available for use. Like other legal formulations, after all, the term "content discrimination" is not self-defining. And so the degree of decriminalization that the *Mosley* doctrine generates will depend on how broadly or narrowly that term is read by the courts. It follows that the present state of the law on this topic is of great importance. And what is that law? According to Robert Post, the present-day Court has endorsed a concept of content discrimination that is so capacious it qualifies as "bold" and "sweeping."[203]

These depictions found their inspiration in *Reed v. Town of Gilbert*,[204] in which a six-Justice majority struck down an ordinance that put greater restrictions on signs that directed the public to upcoming gatherings (for example, soon-to-occur gatherings hosted by churches) than it put on signs of other kinds.[205] In objecting to the majority's approach, Justice Breyer, in a concurring opinion, predicted that it might well lead to the invalidation of many previously accepted forms of state control.[206] That prediction, moreover, has found support in post-*Reed* rulings that invoked that decision to invalidate rules regarding panhandling, robocalls, and ballot "selfies."[207]

In *Reed*, however, Justice Breyer's worries did not carry the day. Without questioning the premises of his slippery-slope critique, the majority declared that content discrimination was present in the challenged ordinance despite the City's claim that "its treatment of temporary directional signs does not raise any concerns that the government is 'endorsing or suppressing ideas or

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[203] *See* Adam Liptak, *Consequences Ripple After Court Expands Free Speech*, N.Y. TIMES, Aug. 17, 2015, at A15 (paraphrasing Post in reference to the decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)). Post's views do not stand alone. *See id.* (quoting First Amendment expert Floyd Abrams as indicating that the Court's ruling in *Reed* is a "blockbuster").

[204] 135 S. Ct. 2218 (2015).

[205] *See id.* at 2224.

[206] *See id.* at 2235 (Breyer, J., concurring in the judgment) (listing examples of laws that have been understood to be constitutional, but that now might be endangered, including securities law disclosure requirements, prescription drug label requirements, medical record confidentiality rules, and rules regarding the posting of petting zoo signs); Liptak, *supra* note 203 (quoting Post as expressing concern that *Reed*'s logic could "[e]ffectively . . . roll consumer protection back to the 19th century").

[207] *See* Cahaly v. Larosa, 796 F.3d 399, 402 (4th Cir. 2015) (citing *Reed* in invalidating a state law prohibiting unsolicited robocalls made for political purposes); Norton v. City of Springfield, 806 F.3d 411, 411-12 (7th Cir. 2015) (reversing a previous decision in light of *Reed* and striking down a prohibition on panhandling in certain areas), *cert. denied*, 136 S. Ct. 1173 (2016); Rideout v. Gardner, 123 F. Supp. 3d 218, 221 (D.N.H. 2015) (citing *Reed* in striking down a state law that prohibited voters from taking photographs of their completed ballots), *aff'd*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, No. 16-828, 2017 WL 1199481 (Apr. 3, 2017).

viewpoints."'[208] The majority went so far as to acknowledge that "[t]his type of ordinance may seem like a perfectly rational way to regulate signs."[209] But that was beside the point because "a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'"[210]

The rhetoric of *Reed* is sufficiently strong that it may portend the soon-to-come overruling of past decisions of the Court. In a line of authority beginning with *Young v. American Mini Theatres, Inc.*,[211] for example, the Court faced content-discrimination challenges to zoning laws that on their face placed special burdens on businesses that purvey sexual materials and performances.[212] As the Court explained in *City of Renton v. Playtime Theaters, Inc.*,[213] however, it rejected all of these challenges on the theory that the ordinances were "aimed not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community" with regard to such matters as the fostering of crime and the diminution of property values.[214] These rulings raise unmistakable tensions with *Reed*. There, after all, the Court declared in sweeping terms that "an innocuous justification cannot transform a facially content-based law into one that is content neutral" and that courts must "consider[] whether a law is content neutral on its face *before* turning to the law's justification or purpose."[215] These words do not bode well for a principle—that is, the principle of *Young* and its progeny—that exempts laws from otherwise applicable content-discrimination analysis because the government's goal is to remediate non-speech-related "secondary effects."

The bottom line is that, in many cases, proponents of Constitution-based speech decriminalization now have a powerful one-two punch to deliver. They can assert that: (1) content-based speech restrictions are almost always unconstitutional because they must survive the most exacting form of judicial scrutiny, and (2) the term "content discrimination" applies in a "clear and firm" way to render strict scrutiny broadly applicable to all laws that differentiate

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[208] *Reed*, 135 S. Ct. at 2229 (quoting Brief for Respondents at 27, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (No. 13-502)).

[209] *Id.* at 2231.

[210] *Id.* (quoting City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring)). The Court pointedly rejected the town's "reasoning . . . that 'content based' is a term of art that 'should be applied flexibly.'" *Id.* at 2229 (quoting Brief for Respondents, *supra* note 208, at 22). Rather, the Court declared, content discrimination inheres in any law that "defin[es] regulated speech by particular subject matter, and . . . by its function or purpose." *Id.* at 2227.

[211] 427 U.S. 50 (1976).

[212] *See id.* at 52.

[213] 475 U.S. 41 (1986).

[214] *Id.* at 47.

[215] *Reed*, 135 S. Ct. at 2228.

between one form of speech content and another.[216] Especially when one views *Reed* in light of rising social concerns about overcriminalization, there is reason to believe that the current Court will be ready to roll out the welcome mat when arguments of this sort come to its door.

II. CHANNELING

Government officials need not go "all in" when they regulate speech. Rather, they can impose speech controls without imposing criminal sanctions, thereby advancing the goal of decriminalization. As it turns out, the Court has developed a rich mix of doctrines that compel political officials to act in this way. These constitutional rules operate to *channel* speech regulation into non-criminal forms.

Overhanging this approach is the ubiquitous decisional technique of means-ends analysis. Under this mode of constitutional review, courts often ask whether there exist "less restrictive" alternatives for pursuing a challenged law's underlying goal.[217] This point matters because civil regulations always can be seen as less restrictive than criminal regulations when it comes to sanctioning speech.[218] The Court has drawn on this idea—though often without saying so—insofar as it has endorsed channeling rules. These rules do not preclude government regulation of speech, but they do preclude regulation by way of criminalization.

Much of the Court's channeling jurisprudence involves state defamation law. Section II.A considers this body of judicial work and its potential implications for non-defamation speech-related tort law. In particular, Section II.A highlights the possibility that the Court might "tortify" speech regulation in significant respects, thereby steering legal sanctions away from the criminal justice system. Section II.B shows that the Court's use of the channeling method is not limited to tort cases. Indeed, in rulings that range across a wide variety of doctrines and subjects—from overbreadth to vagueness to Internet regulation—the Court has put the channeling strategy to work. These decisions bring into focus a point of significance. Especially against the backdrop of the modern decriminalization movement, it may be that the Court will come to view the channeling strategy as increasingly attractive. And if the Court decides to use that strategy more

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[216] *See id.* at 2331; *supra* note 210 and accompanying text.

[217] *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring in the judgment) ("In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. . . . [This analysis includes] examin[ing] the extent to which the provision will tend to achieve [its] objectives, and whether there are other, less restrictive ways of doing so.").

[218] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 86 (1994) (Scalia, J., dissenting) ("[B]y imposing *criminal* liability upon those not knowingly dealing in pornography, [the statute] establishes a severe deterrent, *not narrowly tailored* to its purposes, upon fully protected First Amendment activities." (emphasis added)).

broadly in free speech cases, it will find that already-existing legal materials provide a sturdy platform from which to launch this project.

A. *Channeling and Tort Law*

Front and center on the *Chaplinsky* list of unprotected speech is defamation.[219] For centuries, American law treated libel and slander as serious wrongs, broadly subject to both civil and criminal redress.[220] Things changed dramatically, however, with the Court's landmark ruling in *New York Times Co. v. Sullivan*.[221] In deciding that case, the Court made two key moves. First, it prohibited state sanctions for defamation directed at public officials in the absence of "actual malice";[222] in other words, the Court *blocked* government regulation of defamation to a large extent by narrowing the scope of this unprotected expression category in much the same way that other cases chiseled away at fighting words, incitement, and hostile audience speech.[223] Second, by thrusting itself into an area of law not previously subject to meaningful First Amendment control, the Court set the stage for imposing further constitutional restrictions on state libel and slander law. And soon those further restrictions took hold. The Court installed special burden-of-proof rules for defamation actions,[224] extended protections to speech about public figures as well as public officials,[225] and crafted other doctrines designed to neutralize the "chilling" effect that state tort law imposed on speech of social value.[226]

Sullivan also opened the door to the possibility of limiting state defamation actions that targeted speech on matters of public concern not directed at public officials or public figures.[227] The Court walked through that door in 1974 with its ruling in *Gertz v. Robert Welch, Inc.*[228] A lawyer, Elmer Gertz, had brought a civil action on behalf of the family of a boy who had been killed by a Chicago policeman, who consequently became the subject of a criminal prosecution.[229]

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[219] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[220] *See generally* Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903) (detailing the early history of the law of defamation).

[221] 376 U.S. 254 (1964).

[222] *Id.* at 279-80 (defining "actual malice" as requiring that a defamatory statement be uttered "with knowledge that it was false or with reckless disregard of whether it was false or not").

[223] *See supra* Section I.A.3.

[224] *See* Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 529-51 (1970) (collecting authorities).

[225] *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (plurality opinion) (discussing similarities and differences between defamation against "public figure[s]" and defamation against other individuals).

[226] *See, e.g.*, Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986).

[227] *See Sullivan*, 376 U.S. at 282.

[228] 418 U.S. 323 (1974).

[229] *Id.* at 325.

While that prosecution was pending, an article published in the magazine *American Opinion* falsely claimed, among other things, that Gertz was a "Communist-fronter."[230] These facts resulted in the filing of a libel action by Gertz, which produced a $50,000 jury verdict and follow-on legal proceedings that eventually led to the Supreme Court's ruling.[231]

The Court first concluded that Gertz was not a "public figure," thus denying the defendant the core immunity established in the *New York Times* case.[232] But as surely as the Court took with one hand, it gave with the other. The First Amendment, the Court declared, imposes a separate limitation on state defamation law. At least so long as a speaker's statement involved a matter of public concern, the target of the statement could not recover resulting damages unless it was uttered with negligence; in other words, the state could not impose strict liability for defamatory speech—even for clearly false and deeply injurious speech—at least so long as it addressed a matter of "public concern."[233]

By way of this First Amendment holding, the Court broadened the blocking effect of *Sullivan* by expanding the range of defamatory speech protected from any legal sanction. But the Court did something more. In a move that put the channeling strategy to work, it indicated that state controls on defamation must focus on actual damages remedies even when negligence is proven.[234] Key in this regard was the way in which the Court identified the relevant state interest properly protected by state defamation law. As explained by Justice Powell, who wrote for a five-Justice majority: "The legitimate state interest underlying the law of libel is the *compensation of individuals for the harm inflicted on them* by defamatory falsehood."[235] In other words, the proper purpose of defamation law, for First Amendment purposes, was to provide "compensation for wrongful hurt to one's reputation."[236] To be sure, a compensatory award could reach beyond "out-of-pocket loss."[237] But, given the important free speech values at stake, "this countervailing state interest *extends no further than compensation for actual injury*."[238] Building on this idea, the Court went on to explain: "It is

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[230] *Id.* at 325-26.

[231] *Id.* at 329-30.

[232] *Id.* at 352.

[233] *See id.* at 347.

[234] *See id.* at 349 ("But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

[235] *Id.* at 341 (emphasis added); *accord id.* at 343 (characterizing the relevant "state interest" as "compensating injury to the reputation of private individuals").

[236] *Id.* at 343.

[237] *Id.* at 350 ("[T]he more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.").

[238] *Id.* at 349 (emphasis added).

therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to *compensation for actual injury*."[239]

Notably, the Court in *Gertz* did not only "talk the talk" of free speech channeling. It also "walked the walk" by declaring that this principle ordinarily would bar the award of *punitive* damages to plaintiffs who sued for defamation based on speech addressed to matters of public concern.[240] And it is this holding—together with the reasoning on which it is built—that has important implications with respect to free speech decriminalization. After all, if it is "appropriate to require that state remedies for defamatory falsehood reach no farther" than to provide "compensation for actual injury"[241]—thereby rendering even punitive damages in civil proceedings non-recoverable—it would seem to follow *a fortiori* that states cannot impose criminal sanctions for that same behavior.[242] Put another way, the Court in *Gertz* channeled state control of much

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

[240] *See id.*

[241] *Id.*

[242] *See, e.g.*, People v. Golb, 15 N.E.3d 805, 816 (N.Y. 2014) (Lippman, C.J., concurring in part and dissenting in part) (reasoning, in assessing the constitutionality of a criminal harassment statute, that "[i]f defendant has caused reputational injury, that is redressable, if at all, as a civil tort, not as a crime"). One can imagine arguments on the other side. Skeptics might say, for example, that a harsher penalty is defensible when the jury finds—as it must in a criminal case—culpability beyond a reasonable doubt. They might add that there is a special reason to honor interests in condemnation and deterrence when the state expresses its commitment to those interests in a criminal statute. Even so, these arguments run up hard against the Court's unqualified pronouncement in *Gertz* that the state's goals in dealing with defamation can "reach no farther" than providing compensation. *Gertz*, 418 U.S. at 349; *see also* Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (applying the *Sullivan* rule and rejecting "the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations"); *id.* at 74 ("The reasons which led . . . to . . . [*Sullivan*] apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy." (citation omitted)). To be sure, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Court upheld an award of punitive damages in a libel suit involving a private individual on a matter not of public concern. *See id.* at 761 (plurality opinion). And one might fairly ask how this could be in light of *Gertz*'s "reach no farther" rationale. But even in *Gertz*, the Court declined to declare that punitive damages were never recoverable in a defamation action. *See Gertz*, 418 U.S. at 349 (forbidding recovery of punitive damages "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth"). And *Dun & Bradstreet* itself involved a specialized setting in which no speech on a matter of public concern was present. *Dun & Bradstreet*, 472 U.S. at 762 n.8. *But cf. id.* at 793-94 (Brennan, J., dissenting) ("The Court in *Gertz* specifically held that unrestrained presumed and punitive damages were 'unnecessarily' broad . . . in relation to the legitimate state interests. Indeed, *Gertz* held that in a defamation action punitive damages, designed to chill and not to compensate, were

defamatory speech exclusively into the field of civil tort law, thus effectively decriminalizing a broad swath of behavior otherwise subject to government regulation.

This point has practical importance because the criminal law has taken aim at defamation over many centuries.[243] In 1769, William Blackstone explained that: "With regard to libels in general, there are as in many other cases, two remedies; one by indictment, and the other by action."[244] Moreover, both pre- and post-*Sullivan* defamation cases involved prosecutions under criminal statutes.[245] *Gertz* cut away at this tradition by constitutionally "tortifying" a broad sweep of defamation law. And that move invites consideration of how the Court might likewise channel non-defamation speech regulation away from criminal-law-based redress.[246]

'wholly irrelevant' to furtherance of any valid state interest." (citation omitted)). The vital point is that *Dun & Bradstreet* in no way undercut the "tortification" of defamation law that occurred in *Gertz* itself; it simply limited that tortification ruling to cases that involve speech on matters of "public concern."

[243] *See* Clive Walker, *Reforming the Crime of Libel*, 50 N.Y. L. SCH. L. REV. 169, 170-72 (2005) (discussing the common law history of criminal libel in England and Wales and its continued existence in the United States); *see also* Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 TEX. L. REV. 984, 985 (1956); Janet Boeth Jones, Annotation, *Validity of Criminal Defamation Statutes*, 68 A.L.R. 4th 1014 (1989).

[244] WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ABRIDGED 326 (William C. Sprague ed., 9th ed. 1915).

[245] *See Garrison*, 379 U.S. at 77 (invalidating application of Louisiana's criminal defamation statute); Beauharnais v. Illinois, 343 U.S. 250, 266-67 (1952) (upholding Illinois's criminal group libel law); David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 COMM. L. & POL'Y 303, 313 tbl.1, 333 (2009) (analyzing criminal libel prosecutions in Wisconsin from 1991 to 2007 and concluding that criminal libel is prosecuted more often than scholars realize).

[246] To be sure, in some instances (large) civil damages remedies will be more onerous than (small) criminal sanctions. But this fact does not provide a strong argument against use of the channeling methodology for two reasons. First, "[t]he possibility of imprisonment coupled with the stigma and disabilities which accompany a criminal conviction will most often lead an individual to view the criminal penalty as more harmful than a civil sanction." Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 697 (1978); *accord, e.g.*, Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 2-3 (2005). Second, use of the channeling methodology is in no way inconsistent with the adoption of further rules that separately limit certain forms of civil redress for speech so as to safeguard First Amendment values. *See* David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1139. Indeed, under the analysis suggested here, there may be room to argue that certain tort remedies (particularly punitive damages remedies) might operate in a way so closely akin to criminal penalties that the Court should preclude their use to avoid form-over-substance workarounds of constitutional channeling rules. This subject, however, is a large one beyond the scope of this Article.

Consider *Time, Inc. v. Hill*.[247] After *Life Magazine* published an allegedly inaccurate account of how escaped convicts took a family hostage, the parents sued for damages.[248] No defamation claim was available to the family members because they suffered no reputational injury; indeed, the article portrayed them as heroic.[249] Even so, the state courts upheld an award of $30,000 based on a "false light" invasion-of-privacy theory because the problematic article combined an account of facts that the plaintiffs wished to keep private with inaccuracies that resulted from negligent reporting.[250] In a pre-*Gertz* ruling, the Supreme Court overturned this award on the theory that the exacting *Sullivan* actual malice standard protected the publisher because the story concerned "matters of public interest."[251] As we have seen, however, *Gertz* held that addressing a topic of "public concern" in the defamation context does *not* exempt the speaker from liability under the law of torts.[252] The upshot is that many analysts agree that, in light of *Gertz*, the plaintiffs in *Time, Inc. v. Hill* could recover if their case arose today.[253]

Assuming that the First Amendment would permit the pursuit of false-light privacy claims in such a case, should it follow that the state can *criminalize* a report of personally traumatic, but newsworthy, events that includes significant inaccuracies? Not (or at least not ordinarily) if the Court were to follow *Gertz* in concluding that the relevant state interest "extends no farther" than providing

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[247] 385 U.S. 374 (1967).

[248] *Id.* at 377-79.

[249] *Id.* at 377-78.

[250] *See id.* at 379-80; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 863-66 (W. Page Keeton et al. eds., 5th ed. 1984).

[251] *Time, Inc.*, 385 U.S. at 387-88 (quoting Spahn v. Julian Messner, Inc., 221 N.E.2d 543, 545 (N.Y. 1966), *judgment vacated by* 387 U.S. 239 (1967)).

[252] *See supra* note 232 and accompanying text.

[253] *See* Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light That Failed*, 64 N.Y.U. L. REV. 364, 392 n.173 (1989) (identifying judicial decisions and scholarly commentaries that have deemed the *Gertz* standard, rather than the *Time, Inc.* standard, applicable to post-*Gertz* false-light cases). Particularly telling on this score is the later statement of Justice Powell, who authored *Gertz*, that "[t]he Court's abandonment of the 'matter of general or public interest' standard as the determinative factor for deciding whether to apply the *New York Times* malice standard to defamation litigation brought by private individuals [in *Gertz*] calls into question the conceptual basis of *Time, Inc. v. Hill*." Cox Broad. Corp. v. Cohn, 420 U.S. 469, 498 n.2 (1975) (Powell, J., concurring) (citations omitted). Indeed, in so many words, thoughtful commentators have suggested that this result should follow *a fortiori* from *Gertz* because privacy-invading speech, unlike defamatory speech, is in no way subject to cure through follow-up, fact-clarifying communications; indeed, if the gist of a claim is that one's privacy has been invaded, the "remedy" of more speech will only make things worse. *See, e.g.*, Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 961 (1968) (emphasizing this point); Zimmerman, *supra*, at 440 (noting that "even if the *Sullivan* standard were a perfect rule . . . its application to the false light tort would remain in question").

"compensation for actual injury."[254] Put another way, if the Court takes this approach in post-*Gertz* false-light cases, it will in effect be "tortifying" speech restrictions in the breach-of-privacy context, thus channeling operative restrictions into a civil form.

Nor do the possibilities for tortification end with defamation and false-light privacy violation claims. Similar questions arise, for example, with regard to the other longstanding privacy torts—namely, those that focus on the unauthorized use of another's name or likeness for one's own advantage[255] and the improper disclosure of private facts.[256] What if, for example, the holder of a previously unpublished photo of another person wearing no clothes posts it on the Internet after securing it in a lawful manner? Perhaps the person would be liable in tort. But can the state criminalize such conduct, and if so in what circumstances?[257] Even if the purveyor honestly, but negligently, believed that authorization to make the publication existed?[258] Even if the disclosure was part of an article that addressed a matter of public concern?[259] In the field of employment discrimination, federal law makes monetary damages available to victims of speech-created "hostile working environments,"[260] and courts have held that doing so is constitutionally permissible.[261] It might be, however, that the First Amendment does not permit the government to go further than providing a civil remedy.[262]

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[254] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

[255] *See* KEETON ET AL., *supra* note 250, § 117, at 851-54.

[256] *See id.* at 856-62.

[257] Several states have recently passed laws criminalizing "revenge porn," where nude photos are published online without the consent of the subject. *See generally* Taylor E. Gissell, Comment, *Felony Count 1: Indecent Disclosure*, 53 HOUS. L. REV. 273 (2015).

[258] *See supra* notes 240-42 and accompanying text (discussing the potential limits on criminal defamation prosecutions in such a context).

[259] *See infra* notes 290-94 and accompanying text (discussing the use of constitutionally imposed mens rea limits on criminal prosecutions in the First Amendment context); *see also supra* note 222 and accompanying text (noting constitutional decision rule that requires courts in defamation context to distinguish between statements made with or without actual malice).

[260] *See* Sexual Harassment, 29 C.F.R. § 1604.11 (2016).

[261] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1532-33 (M.D. Fla. 1991); *cf.* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) ("[S]exually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." (citing 42 U.S.C. § 2000e-2 (2012); 29 CFR § 1604.11 (1991))). For academic treatments of the subject, compare Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 510-31 (1991) (arguing that the First Amendment stands as a barrier to hostile-work-environment claims), with Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 532-54 (1995) (rejecting that view).

[262] *See infra* notes 399-416 and accompanying text (considering this topic in the context of "hybrid rights" analysis).

Recurring questions along these lines concern the infliction of emotional harm. Laurence Tribe, for example, once noted that "[s]tate courts have permitted the victims of abusive racial slurs to bring tort actions for intentional infliction of emotional distress."[263] In almost the same breath, however, he added that "it is doubtful whether more severe measures such as criminal penalties are constitutionally permissible" in such a case.[264] These remarks point the way to how courts might use the "tortification" strategy to deal with the wrongful infliction of emotional harm—a matter of rising interest because of the recent enactment of criminal statutes that target such behaviors as "cyberbullying" and "verbal harassment."[265] Are laws of this nature constitutional under the First Amendment? Are they so even if they authorize prosecution for only negligent behavior?[266]

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[263] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 838 n.17 (2d ed. 1988). *See generally* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

[264] TRIBE, *supra* note 263, § 12-8, at 838 n.17 (adverting to fighting words doctrine in going on to indicate that such words would not support criminalization unless they presented a "clear and present danger of imminent violence"). Tribe's seeming endorsement of the tortification approach was not limited to one-on-one forms of offensive behavior. He also observed that, while the Court was right to ban a city's effort to criminalize a neo-Nazi march in Skokie, Illinois, "a more narrowly drawn statute—one that, say, allowed for an after-the-fact award of damages for the intentional infliction of psychic trauma—might well have passed constitutional muster." *Id.* at 856. It may well be that this extrapolation (in contrast to Tribe's analysis of the purely one-on-one abusive racial slur considered in the text) is foreclosed by the Court's intervening ruling in *Snyder v. Phelps*, 562 U.S. 443 (2011). That case, after all, specifically precluded the recovery of tort damages based on an inflammatory, emotionally damaging street demonstration because it involved a matter of "public concern." *Id.* at 458. But the key point here is the broader proposition—namely, that properly constructed free-speech-based constitutional decision rules may (and sometimes do) distinguish sharply between criminal and civil regulations of exactly the same expressive behavior.

[265] *See* Buchhandler-Raphael, *supra* note 4, at 1730-31 (advocating that courts should opt for the use of tort controls, as preferable to criminal law controls, in this context); Eisenberg, *supra* note 4, at 610 ("[C]riminalizing the infliction of emotional distress conflicts with free-expression values and a strongly maintained distinction between speech and conduct."); *id.* at 613 (noting that "the blunt tool of the criminal law is not well suited for addressing emotional harm that is independent of physical injury"). Several commentators have reflected on the constitutionality and practicality of criminalizing cyberbullying. *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 655-57 (2011); Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 698 (2012); Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 437 (2012); *see also* Susan W. Brenner & Megan Rehberg, *"Kiddie Crime"? The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 83 (2009) (asserting that "hurting other people's feelings, intentionally and inadvertently, is an unpleasant but unavoidable aspect of life" and that "[t]here are some things that are not, and should not become, crimes").

[266] *See* Buchhandler-Raphael, *supra* note 4, at 1733-34 (advocating that, at the least,

The answer to these questions will be "no" if the Court concludes, as it did in *Gertz*, that the "state interest extends no farther than *compensation for actual injury*."[267] And there may be special reason for the Court to find merit in this view, at least when these cases involve a subject that our legal system historically has addressed by way of money damages remediation, as opposed to criminal penalties.[268] After all, it is often the case that "legal traditions . . . and practices" operate to define the scope of constitutional liberties.[269] Put simply, if the Court concludes that a form of speech has been long subject to sanction in most states only within the tort law system, it may conclude that "outlier" statutes[270] that also criminalize that same speech are invalid because they depart from "custom and contemporary norms," which "play such a large role in the constitutional analysis."[271]

To be sure, it is not easy to structure a constitutional regime for such a sweeping subject as all state law treatments of the infliction of emotional distress. And that is all the more the case because such a project raises foundational questions about the nature and purposes of the criminal justice

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"criminalization of endangerment speech ought to be limited only to cases where the defendant's intent has already risen to the level of firm resolution to inflict harm").

[267] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (emphasis added).

[268] *See, e.g.*, Buchhandler-Raphael, *supra* note 4, at 1700-01 (using workplace sexual harassment as an example of a speech-based harm remedied solely by the civil remedies provided by Title VII); *id.* at 1733 (emphasizing the traditional state law treatment of infliction of emotional distress, as a stand-alone injury, through the civil law tort system); Eisenberg, *supra* note 4, at 624 (noting that "courts have struggled to define limiting principles" in dealing with the infliction of emotional injury but that these matters "are firmly rooted in the civil-law lexicon").

[269] Washington v. Glucksberg, 521 U.S. 702, 721 (1997); *see also* Tennessee v. Garner, 471 U.S. 1, 11, 15-16 (1985) (relying on "prevailing rules in individual jurisdictions" in finding a challenged police practice with regard to fleeing felons unconstitutional); Coenen, *supra* note 182, at 1713-21 (documenting this style of constitutional analysis in many doctrinal settings); Friedman, *supra* note 7, at 597, 602 nn.119-20 (emphasizing that the Court has turned "time and again to a head count of states" in interpreting the scope of constitutional protections); Steven L. Winter, Tennessee v. Garner *and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 683-92 (1986). Notably, this method has surfaced before in First Amendment law. For example, while deeming the fact "not dispositive," the Court in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), noted that "more than 40 States having similar commissions have not found it necessary to enforce confidentiality by use of criminal sanctions against nonparticipants." *Id.* at 841.

[270] Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 55 SUP. CT. REV. 27, 54-55 (2003) (noting the Court's discussion in *Lawrence*, the homosexual sodomy case, of how the challenged statutes were national "outliers"); *see also* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 418 (2009) (noting that "outlier jurisdictions remain vulnerable to regulation just by virtue of their status as outliers").

[271] Payton v. New York, 445 U.S. 573, 600 (1980).

system.[272] Even so, three considerations cut against the argument for judicial caution in taking on this task. First, the Court already has waded deeply into the waters of placing First Amendment limits on state infliction-of-emotional-distress law.[273] Second, very similar questions faced the Court as it fashioned the now-controlling body of constitutional defamation law, which—at least in its essential structure—seems to have stood the test of time.[274] Third, under our system of government, it is "emphatically the province and duty of the judicial department"[275] to decide such matters as whether state interests qualify as legitimate, important, or compelling in assessing the validity of state-imposed speech controls.[276] As *Gertz* shows, the Court could declare that the only state interest sufficient to justify some speech regulations lies in providing compensatory damages for actual, proven individual harms.[277] To the extent the Court adopts this approach, it is in effect decriminalizing behavior through the channeling process. Moreover, the use of that process may become increasingly attractive to the Court if it is drawn more generally to look for ways to counteract overcriminalization.[278]

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[272] These questions include: Should speech ever be subject to criminal sanctions solely because it inflicts an emotional harm? *See generally* Youngjae Lee, *What Is Philosophy of Criminal Law? John Deigh and David Dolinko: The Oxford Handbook of Philosophy of Criminal Law*, 8 CRIM. L. & PHIL. 671, 674 (2014) (book review) (discussing the "harm principle" and noting that "there are wrongful behaviors that harm others that the state should not criminalize" and listing "defamation, insults, and emotional cruelty" as examples). Might criminal laws be permissibly used in at least some contexts—for example, when adults intentionally jeopardize the emotional well-being of minors or when a far-more-than-emotional injury (such as suicide) foreseeably or purposefully results from the targeted speech? Should we hold back the heavy artillery of the criminal law at least in the absence of a specific intent to cause serious emotional harm? And, in processing these questions, should courts take account of the demonstrable efficacy or inefficacy of the potentially criminal-law-displacing tort system? These are hard questions. But they are not far-removed from the sorts of questions the Court has grappled with in other free speech contexts. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 757 (1982) ("[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights."); *infra* notes 290-94 and accompanying text (discussing the role of mens rea rules in Free Speech Clause law).

[273] *See* Snyder v. Phelps, 562 U.S. 443, 458 (2011); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50, 56-57 (1988).

[274] *See supra* notes 221-26 and accompanying text.

[275] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[276] *See supra* note 242 and accompanying text; *see also* Buchhandler-Raphael, *supra* note 4, at 1730-31 (relying on "less restrictive alternative" means-ends analysis in suggesting that "less intrusive measures, mainly civil and administrative remedies, including common law tort actions" render criminal laws that target emotional injuries invalid under the First Amendment).

[277] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

[278] *Cf.* Eisenberg, *supra* note 4, at 647 (advocating hesitance to make use of emotional-distress-centered criminal laws "especially given the poor conditions and lack of rehabilitative

B. *Channeling and Non-Tort Law*

"Tortification" is not the only strategy open to judges who wish to engage in channeling-based speech-related decriminalization. Indeed, the Court already has drawn from its doctrinal toolbox a mix of channeling devices and put them to work in First Amendment cases. Consider these examples:

- In *FCC v. Pacifica Foundation*,[279] the Court addressed a First Amendment challenge to an administrative reprimand issued by the FCC against a radio station that had broadcast a comedic "Filthy Words" monologue in the middle of the day.[280] The Court upheld the reprimand, but in doing so it pointedly declined to declare that the same broadcast "would justify a criminal prosecution."[281]
- The Court took a similar tack in *Reno v. ACLU*.[282] That case concerned a law that criminalized the "knowing transmission of . . . indecent messages to any recipient under 18 years of age" by way of the Internet.[283] In striking the law down, the Court emphasized that "[t]he *severity of criminal sanctions* may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[284] Thus, the challenged law, precisely because it was a criminal law, posed

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services in overcrowded American prisons"). A related question concerns how courts might analyze legal regimes that criminalize the causing of emotional distress but only require the convicted defendant to pay restitution to the victim. On one view, such a system would comport with the dictates of *Gertz* because of the remedial focus on compensation. On the other hand, one might fairly ask whether such a remedial system "extends . . . farther" than one focused on providing compensation because of the far-reaching collateral consequences that attend a criminal conviction. *See Gertz*, 418 U.S. at 349; Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 97 (2014) (arguing that criminal restitution has transformed from "a primarily restorative mechanism to a primarily punitive one"). In addition, courts might conclude that the availability of purely civil law, actual damages remediation provides a "less restrictive alternative" to this form of criminal law restraint. *See supra* note 242 and accompanying text. It may be that courts, despite these countervailing considerations, would uphold restitution-only criminal statutes as compatible with the logic of *Gertz*. But even if they did, such a result would correspond with at least one aim of the decriminalization movement—namely, the aim of reducing those forms of criminalization that have produced mass incarceration.

[279] 438 U.S. 726 (1978).

[280] *Id.* at 729.

[281] *Id.* at 750; *see also* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1014-15 (2012) (examining this aspect of *Pacifica*).

[282] 521 U.S. 844 (1997).

[283] *Id.* at 859 (citing 47 U.S.C. § 223(a) (Supp. II 1994)).

[284] *ACLU*, 521 U.S. at 872 (emphasis added) (citing Dombrowski v. Pfister, 380 U.S. 479, 494 (1965)).

"greater First Amendment concerns than those implicated by . . . civil regulation."[285]

- The same theme has surfaced in the Court's application of First Amendment vagueness doctrine.[286] Indeed, in applying this doctrine, the Court has stated in no uncertain terms that "[c]riminal statutes must be scrutinized with particular care . . . ."[287] The practical effect of this principle is not hard to grasp: if the government wants to pass a speech-related law that tests the boundaries of constitutional vagueness limits, it would be well-advised to attach to that law a civil, rather than a criminal, penalty.[288]
- As with vagueness, so too with overbreadth. To be sure, the free-speech-specific overbreadth doctrine applies to both criminal statutes and civil law constraints. But in considering whether laws are subject to facial challenge because they reach too much First Amendment activity, the Court has signaled that criminal laws will receive more exacting judicial scrutiny than their civil law counterparts.[289]
- Finally, the Court has held that Free Speech Clause limits sometimes require incorporating specialized and exacting mens rea elements into criminal statutes.[290] In *Smith v. California*, for example, the Court invalidated a "strict liability penal ordinance" that permitted prosecution for possessing obscenity without requiring any "knowledge [by the defendant] of the contents of the book."[291] The crime-centered reasoning of *Smith*

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[285] *Id.* (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996)).

[286] *See, e.g.*, Smith v. California, 361 U.S. 147, 151 (1959) (endorsing "stricter standards" of vagueness when laws have a "potentially inhibiting effect on speech").

[287] City of Houston v. Hill, 482 U.S. 451, 459 (1987) (citing Winters v. New York, 383 U.S. 507, 515 (1948)).

[288] *See* Buchhandler-Raphael, *supra* note 4, at 1698 (arguing that the vagueness doctrine raises concerns about "verbal harassment" laws because "[g]rounding criminal liability on such equivocal notions limits individuals' freedom of action, resulting in a 'chilling effect'").

[289] *See Hill*, 482 U.S. at 459 ("Criminal statutes must be scrutinized with particular care . . . ." (citing *Winters*, 383 U.S. at 515)).

[290] *See* Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1259 (2014) (advocating inclusion of intent requirements in this setting because it "seems wrong to hold speakers strictly liable for speech-related harms"); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1640-48 (2013) (detailing various intent requirements in First Amendment jurisprudence); *The Supreme Court, 2014 Term—Leading Case*, 129 HARV. L. REV. 331, 340 (2015) (citing *"Brandenburg v. Ohio*'s constitutional requirement of a specific intent to incite violence before a defendant may be convicted on the basis of his language").

[291] *See Smith*, 361 U.S. at 148, 152-53, 155.

> suggests that the Court's insistence on such a heightened mens rea requirement may well not carry over to civil law obscenity controls.[292] And this same sort of thinking appears to support other constitutionally mandated speech-related mens rea requirements with regard to criminal law statutes that target such matters as child pornography[293] and verbal threats.[294]

How might the Court build on these precedents to expand the use of free speech channeling in future cases? First, it might deploy the tool of "less restrictive alternative" analysis more aggressively to require governmental use of civil, rather than criminal, speech controls. We have already seen how the Court might draw on less-restrictive-alternative analysis to "tortify" some areas of First Amendment law.[295] But it also might draw on the same style of reasoning to foster decriminalization in other ways. Consider the problems of "cyberstalking" and repeated-telephone-message harassment. Two possible constitutional approaches to dealing with these behaviors spring quickly to mind. On a libertarian view, the First Amendment would foreclose any form of constitutional sanction for such speech, at least until it gives rise to a true threat.[296] On a victim-centered view, however, such speech should be wholly unprotected—and thus subject to either criminal or civil sanctions—because of its continuous, and thus distinctively life-disrupting, nature. The methodology of channeling offers the possibility of a middle-way approach. On this analysis, the right response to such behavior is to steer it into civil courts that have the

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[292] *See id.* at 153 ("[I]f the bookseller is *criminally liable* without knowledge of the contents . . . he will tend to restrict the books he sells to those he has inspected," thus limiting "the distribution of constitutionally protected . . . literature" (emphasis added) (footnotes omitted)); *id.* at 154-55 (declining to specify in detail "what sort of mental state is requisite to a constitutionally permissible *prosecution* of a bookseller for carrying an obscene book," while noting the inhibitory effects of "any form of *criminal* obscenity statute" and the narrowness of its ruling as to "eliminating all mental elements from the *crime*" (emphases added)); *id.* at 150 (noting that the challenged statute involved "strict or absolute *criminal* responsibility" and that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo American *criminal* jurisprudence" (emphases added) (quoting Dennis v. United States, 341 U.S. 494, 500 (1951))).

[293] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 68-78 (1994) (finding that a serious constitutional question was presented by a child-pornography-targeting criminal statute insofar as it did not impose a knowledge requirement).

[294] *See* Elonis v. United States, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part); Buchhandler-Raphael, *supra* note 4, at 1733 (suggesting that although intent "is not a requisite element of all endangerment speech crimes," such a requirement would permit a "clearer distinction between criminal and noncriminal harm"); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 216-24 (discussing intent requirements for criminal threat statutes under the First Amendment).

[295] *See supra* Section II.A.

[296] *See supra* note 12 and accompanying text.

power to grant injunctive relief. To be sure, violations of these injunctions could and would produce convictions for criminal contempt. But criminality of that kind is founded not so much on speech itself as on disobedience of the judicial decree.[297] In short, "injunctification," no less than "tortification," can provide an alternative that is less restrictive than criminalization for dealing with problematic forms of antisocial speech.[298]

It is a point of no small significance that the Court's past non-tortification channeling rulings—which range across such matters as vagueness, Internet law, and mens rea rules—have something of a hodge-podge quality. Indeed, in some of them, the Court has done little more than point to the presence or absence of a criminal sanction as one fact among many that helps to justify the outcome it has reached.[299] For some observers, this here-and-there approach may suggest that the cases stand for little or nothing. On this view, the Court can brush their channeling rhetoric aside whenever doing so will help it produce an otherwise desired result. But decriminalization-minded analysts might glean from these precedents a fundamentally different message—namely, that the penal character of *any* challenged law might surface in *any* future First Amendment case as an indicator of unconstitutionality. At the least, this mix of past rulings provides a starting point from which the Court can expand upon its use of the channeling technique.

III. NARROWING

Blocking and channeling involve judicial application of "all or nothing" constitutional doctrines. In other words, courts apply these doctrines when asking whether the legislature can enact the challenged law in light of countervailing free speech rights. If the challenged law falters in the face of such

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[297] *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307, 320 (1967).

[298] *See* Buchhandler-Raphael, *supra* note 4, at 1730-31 (reasoning that "[c]riminalizing cyberharassment . . . [creates] serious doubts" about constitutionality, while "civil and administrative remedies, including common law tort actions . . . as well as injunctions, may . . . pass strict scrutiny review by satisfying the least restrictive means requirement" (footnotes omitted)). One specialized form of channeling might be characterized as "proportionalizing." According to this technique, the lawgiver can regulate via either criminal law or civil law controls, but if it uses criminal controls it can impose only a limited range of punishments. *See supra* note 278 (discussing criminal restitution systems). For example, it might be that the intentional infliction of emotional distress, while subject to a broad range of civil sanctions, would be subject to criminal penalties only in the form of fines as opposed to incarceration. In fact, the proportionalizing mode of channeling has some (though scant) support in the case law. But it may gain momentum, especially if the Court comes to conceptualize the decriminalization movement as essentially concerned with over-incarceration as opposed to overcriminalization more generally. A further treatment of the "proportionalizing" technique appears in Part IV, which explores various "frontiers" of free speech decriminalization.

[299] This description, for example, fits well the Court's discussion of the criminal-civil distinction in *Reno v. ACLU*. *See supra* notes 282-85 and accompanying text.

a challenge, the legislature cannot reenact it because the Constitution precludes it from doing so. Notably, this is just as true for challenged laws that fall victim to channeling decisions as it is for challenged laws that encounter full-scale blocking. If, for example, a court invalidates a criminal law that targets intentional infliction of emotional distress on the ground that such behavior is subject only to civil regulation, that is the end of the matter. Precisely because of the judicial ruling, the legislature cannot successfully go back and reenact the same criminal prohibition it had tried to put in place.

Narrowing operates in a different way because, in stark contrast to both blocking and channeling, it does not involve the use of all-or-nothing constitutional doctrines. Rather, constitutional narrowing involves judicial use of rules of statutory interpretation in a manner that is merely influenced by the Constitution. It follows that legislatures can effectively overturn judicial narrowing decisions because they can redraft in a coverage-expanding way laws that the courts have interpreted narrowly. Put another way, an important point about free-speech-based narrowing decisions is that they are legislatively reversible. But an even more important point is that, so long as those decisions stay on the books, they have a major decriminalizing effect because they bar prosecutions under the government's preferred (and often very plausible) reading of the criminal statute. And for present purposes, the most important point of all is that statutory-interpretation-based narrowing often occurs because of judicial sensitivity to Free Speech Clause values.

One doctrine of statutory interpretation that often surfaces in criminal cases is the so-called "rule of lenity."[300] This rule fosters decriminalization by way of narrowing because it favors the resolution of ambiguities in criminal statutes in favor of non-coverage, thus placing arguably covered conduct beyond the prosecutor's reach. The rule of lenity also has a kinship to channeling doctrines because it operates with respect only to criminal, and not to civil, statutes.[301] But the rule of lenity differs from true channeling doctrines in two key respects. First, it does not *compel* lawmakers to regulate certain forms of conduct through civil law, rather than criminal law, mechanisms; those lawmakers, after all, can always override judicial applications of the rule of lenity by amending the operative criminal statute to give it a broadened scope. Second, unlike the

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[300] *See* 73 AM. JUR. 2D *Statutes* § 188 (2012) ("The rule of lenity leads a court to favor a more lenient interpretation of a criminal statute when, after consulting traditional canons of statutory construction, the court is left with an ambiguous statute." (citing DePierre v. United States, 564 U.S. 70 (2011); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011); Burgess v. United States, 553 U.S. 124 (2008))); 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 59:4, at 189 (7th ed. 2008) ("[W]hen a court is faced with two reasonable interpretations of a criminal statute and congressional intent is ambiguous, the doctrine of lenity requires the court to adopt the less punitive alternative.").

[301] *See* 73 AM. JUR. 2D, *supra* note 300 (discussing the application of the rule of lenity to criminal statutes).

channeling rules we looked at earlier,[302] the rule of lenity is rooted not so much in the Constitution itself as in generalized notions of fairness and presumed legislative intent.[303] The rule may have some connection to the value of fair notice embodied in the constitutional guarantee of procedural due process,[304] but that linkage is loose if there is any linkage at all.

Another canon of statutory interpretation shares a much tighter bond with true constitutional protections—the so-called "rule of constitutional avoidance."[305] This rule dictates that courts should interpret all statutes, whether civil or criminal, in such a way as to avoid "serious constitutional problems."[306] In other words, if a statute is fairly subject to two readings—one that might result in a finding of unconstitutionality and another that raises no such constitutional doubts—the court should adopt the latter interpretation, thus dodging the higher-law complication.[307]

The canon of constitutional avoidance, unlike the rule of lenity, has much to do with the First Amendment's Free Speech Clause for a simple reason: that clause often gives rise to just the sort of serious constitutional questions that, pursuant to the canon, produce narrow statutory interpretations. In addition, because those interpretations commonly involve criminal statutes, the rule of constitutional avoidance fosters free speech decriminalization by way of the narrowing technique.

One question of importance is whether the Free Speech Clause and its underlying purposes provide any *special* justification for judicial narrowing of

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[302] *See supra* Part II.

[303] *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 906-10 (2004) (noting, but also critiquing, the traditional rationales used to support the rule of lenity founded on the provision of fair notice and the fostering of legislative supremacy).

[304] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 349 (noting the due process rationale).

[305] *See* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2110 (2015) ("In the last few years, the Supreme Court has resolved some of the most divisive and consequential cases before it with the same maneuver: construing statutes to avoid constitutional difficulty."); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948-49 (1997).

[306] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citing NLRB v. Catholic Bishop of Chi., 449 U.S. 490, 499-501, 504 (1979))).

[307] *See, e.g.*, Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 31-33 (1996) (noting that the rule of constitutional avoidance gives "additional weight to that Court's interpretation of constitutional precedents" by "reaching beyond existing precedent to recognize a new danger zone"); *see also* Katyal & Schmidt, *supra* note 305, at 2128 (suggesting that despite the avoidance canon's justification as a form of restraint, it "thwarts congressional intent without the need for outright invalidation").

statutes above and beyond the ordinary operation of the rule of constitutional avoidance. In other words, might the rule of constitutional avoidance have an added bite when speech is at issue? Or, to go one step further, might free speech values produce statutory narrowing even when there is insufficient ambiguity in a statute to bring the avoidance canon into operation? The Court's decision in *United States v. X-Citement Video, Inc.*[308] offers reason for answering these questions in the affirmative—that is, for concluding that a free-speech-specific, statutory-interpretation-based, judicial narrowing principle may in fact exist.[309]

X-Citement Video involved a criminal prohibition that applied to "[a]ny person who—(1) knowingly transports or ships in interstate or foreign commerce . . . any visual depiction, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct."[310] This language made it clear that the "knowingly" state of mind requirement applied to the element of "transport[ing] or ship[ping] . . . any visual depiction."[311] But the Government argued that the statutory language imposed no requirement that the defendant have knowledge that "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct" or that "such visual depiction is of such conduct."[312] In other words, the Government asserted that no knowledge-based mens rea element applied at all with respect to these two surrounding-circumstance elements of the crime. Writing for a majority of the Court, Chief Justice Rehnquist disagreed. He concluded instead that the "knowingly" requirement did apply to these surrounding-circumstance elements, thus requiring actual knowledge that the depicted person was less than eighteen years old.[313]

The Court embraced this interpretation in the face of the two dissenters' strident, text-based insistence that it "contradict[ed] the plain import of what Congress has specifically prescribed."[314] In particular, according to the

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[308] 513 U.S. 64 (1994).

[309] Notably, there may be an argument that goes in exactly the opposite direction. On this view, the avoidance canon does its best work when it helps give life to otherwise under-enforced constitutional rights. *See* Katyal & Schmidt, *supra* note 305, at 2159-60, 2160 n.256. And if any set of rights qualifies as *not* under-enforced, it might seem to be those rights included in the so-often-invoked Free Speech Clause. *See* Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1087 (1985) (discussing the Court's "customary strategy of overprotecting speech in order to protect speech that matters"). From this perspective, it might well follow that no *stronger* application of the avoidance canon should operate in free expression cases. If anything, a *weaker* application of the rule should be required.

[310] *X-Citement Video*, 513 U.S. at 67-68 (quoting 18 U.S.C. § 2252 (1988 & Supp. V)).

[311] *Id.* at 68.

[312] *See* Brief for the United States at 12-44, United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) (No. 93-723).

[313] *X-Citement* Video, 513 U.S. at 78.

[314] *Id.* at 81 (Scalia, J., dissenting).

dissenters, "[t]he word 'knowingly' is contained, not merely in a distant phrase, but in an entirely separate clause from the one into which today's opinion inserts it."[315] Notably, the majority did not take serious issue with the premise of the dissenters' argument. To the contrary, it acknowledged that its interpretation did not reflect "the most grammatical reading of the statute."[316]

In addition, Chief Justice Rehnquist did not invoke the rule of lenity in support of his defendant-friendly reading of the statutory language. This omission was telling because it suggested that even the majority found insufficient ambiguity in the text to trigger that rule's operation. In other words, some other and more powerful canon had to come into play to override, and expand upon, the textually specified elements of the crime. In the end the Court found that two other canons could and did work this magic. First, it reasoned that adopting the Government's interpretation was unacceptable because it would produce "positively absurd" results—for example, by reaching "a retail druggist who returns an uninspected roll of developed film to a customer" with no knowledge except that the film includes a "visual depiction" of something.[317] Second, the Court relied on the specialized canon, first laid down in *Morissette v. United States*, that favors "interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them."[318]

It merits emphasis that the rule of *Morissette* does not operate only in free expression cases; indeed, at issue in *Morissette* itself was a ban on the theft of federal property.[319] Even so, the Court in *X-Citement Video* clearly had one eye on the First Amendment. In particular, in distinguishing "public welfare" cases, to which the rule of *Morissette* has no application, the Chief Justice observed that: "Persons do not harbor settled expectations that the contents of magazines and film are generally subject to stringent public regulation. *In fact, First Amendment constraints presuppose the opposite view.*"[320] Later in the opinion, the Chief Justice returned to this same theme. He wrote: "[O]ne would reasonably expect to be free from regulation when trafficking in sexually explicit, though not obscene, materials involving adults"[321] precisely because

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[315] *Id.*

[316] *Id.* at 70 (majority opinion).

[317] *Id.* at 69.

[318] *Id.* at 70 (discussing Morissette v. United States, 342 U.S. 246 (1952)); *see also* Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 770 (2012) (tracing the origins of the mens rea principle to *Morissette*); Stephanie Siyi Wu, *Unknown Elements: The Mens Rea Question in 18 U.S.C. § 924(c)(1)(B)(ii)'s Machine Gun Provision*, 114 COLUM. L. REV. 407, 417 (2014) (deeming the requirement of mens rea in criminal statutes the "innocence rule"). *See generally* John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) (discussing "the rule of mandatory culpability," a rule of statutory interpretation requiring mens rea in federal criminal statutes).

[319] *Morissette*, 342 U.S. at 247-48.

[320] *X-Citement Video*, 513 U.S. at 71 (emphasis added).

[321] *Id.* at 73.

"sexually explicit materials involving persons over the age of 17 *are protected by the First Amendment.*"[322] In short, the Court's reasoning in *X-Citement Video* suggests that, in at least some criminal cases, courts faced with interpretive questions will take an especially close look at the challenged statute if it puts free speech values at risk.[323]

Elonis v. United States[324] supports the same conclusion. That case involved a federal statute that makes it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another."[325] As stated by the Court, the question was "whether the statute . . . requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing."[326] Relying on the *Morissette* line of cases, the Court sidestepped the First Amendment question by interpreting the statute—contrary to the Government's position—to impose a minimum mens rea requirement of recklessness with regard to the fear-instilling effect of the communication.[327] In other words, a successful prosecution required the Government to prove "what the defendant thinks"—that is, at least a conscious awareness on the part of the defendant that the communication was likely to produce fear.[328] Blending the strategies of both channeling and narrowing, the Court quoted with approval the observation that the "defendant could face 'liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind.'"[329]

The Court in *Elonis* never professed to ground its restrictive reading of the statute on the rule of lenity, on the rule of constitutional avoidance, or on specialized First Amendment concerns. Rather, it relied solely on the rule of *Morissette*.[330] But it did cite free speech precedents—including *X-Citement Video*—along the way, and there can be no doubt that the First Amendment loomed over the dispute, which focused on alleged threats made by way of the

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[322] *Id.* at 72 (emphasis added) (citing Alexander v. United States, 509 U.S. 544, 549-50 (1993); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 224 (1990); Smith v. California, 361 U.S. 147, 152 (1959)).

[323] The Court also took into account the harsh penalties imposed by the statute, which further suggests that courts will look to any possible punishment in answering these questions. *See id.* at 72 ("*Staples*' concern with harsh penalties looms equally large respecting § 2252: Violations are punishable by up to 10 years in prison as well as substantial fines and forfeiture.").

[324] 135 S. Ct. 2001 (2015).

[325] *Id.* at 2004 (quoting 18 U.S.C. § 875(c) (2012)).

[326] *Id.*

[327] *See id.* at 2012-13 (declining to determine the exact mens rea requirement under the statute).

[328] *Id.* at 2011.

[329] *Id.* (quoting Cochran v. United States, 157 U.S. 286, 294 (1895)).

[330] *See id.* at 2009 ("We have repeatedly held that 'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'" (quoting Morissette v. United States, 342 U.S. 246, 250 (1952))).

Internet.[331] At the least, the majority never endorsed the position of Justice Thomas, whose dissenting opinion squarely rejected the defendant's suggestion "that we read an intent-to-threaten element into [the statute] in light of the First Amendment."[332]

X-Citement Video and *Elonis* raise the question whether the Court in time will endorse a free-expression-specific narrowing approach to criminal statutes. The former case (which was specifically relied on in the latter) gives some reason to think it might because the Court in *X-Citement Video* specifically discussed the Free Speech Clause in giving the contested statute a narrowed reach.[333] The Court did so, however, only in applying the specialized mens rea rule of *Morissette*, so that *X-Citement Video* provides limited support at best for a *generalized* rule of statutory interpretation that takes special account of free speech values.[334]

But maybe such a generalized rule will emerge. If so, *X-Citement Video* probably will play a role in the decision. Even more influential, however, may be a well-aged body of precedents in which the Court has spoken of the First Amendment as protecting rights rooted in "[t]he preferred position of freedom of speech."[335]After all, if expressive freedoms are in fact "preferred," there is

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[331] *See id.* at 2009 (citing United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994)); *id.* at 2013 (citing Ginsberg v. New York, 390 U.S. 629, 644-45 (1968)).

[332] *Id.* at 2023 (Thomas, J., dissenting).

[333] *See X-Citement Video*, 513 U.S. at 71-72, 78. In *United States v. Cook*, 76 F.3d 596, 601 (4th Cir. 1996), the Court of Appeals for the Fourth Circuit stated that one of the five reasons the Court had for applying a scienter requirement in *X-Citement Video* was because "without a knowledge requirement the statute would impinge on protected conduct (the First Amendment right to free speech)." *Id.* at 600. The court went on to distinguish *X-Citement Video* on the ground that the statute at issue in *Cook* did "not impinge on constitutionally protected conduct" even though the terms of the statutes in the two cases were similar. *Id.* at 601. The Fourth Circuit's treatment of *X-Citement Video* thus indicates that courts should be especially cautious about reading the coverage of statutes broadly when they raise free-speech-related concerns.

[334] *See* Schneider v. Smith, 390 U.S. 17, 26 (1968) (construing narrowly a federal maritime statute because "statutory words are to be read narrowly so as to avoid questions concerning the 'associational freedom' . . . protected and concerning other rights within the purview of the First Amendment"); Best v. Berard, 776 F. Supp. 2d 752, 759 (N.D. Ill. 2011) ("The Court therefore considers whether it may interpret IRPA's 'non-commercial purpose' exemption consistent with its meaning but with any eye toward avoiding a First Amendment violation.").

[335] Kovacs v. Cooper, 336 U.S. 77, 88 (1949) (footnote omitted); *see also* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position."). The case for a preferred position is strengthened by constitutional doctrines that distinctively warrant judicial intervention in free speech cases to invalidate challenged laws. *See supra* notes 286-89 (discussing, for example, specialized First Amendment vagueness and overbreadth doctrines); *see also* Retail Dig. Network, LLC v. Appelsmith, 810 F.3d 638, 646 (9th Cir.) ("[W]hen [a] threatened enforcement effort implicates First Amendment rights, the standing inquiry tilts dramatically toward a finding of standing." (quoting LSO, Ltd. v. Stroh, 205 F.3d 1146, 1155 (9th Cir. 2000))), *reh'g en banc*

reason to conclude that courts should view things that way not only for purposes of true constitutional adjudication, but also for purposes of Constitution-based statutory interpretation. Indeed, the Court already may have moved toward this position in cases that bear only the faintest resemblance to *X-Citement Video* and *Elonis*.

This conclusion has its roots in the most celebrated of all judicial footnotes—footnote four of Chief Justice Stone's majority opinion in *United States v. Carolene Products Co.*[336] That 186-word text[337] famously presaged a distinctly activist judicial role in two settings: (1) when laws discriminate against "discrete and insular minorities" because such a status may "seriously . . . curtail the operation of those political processes ordinarily to be relied upon" to protect the interests of citizens; and (2) when a challenged rule "restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation," as is the case with "restraints upon the dissemination of information, on interferences with political organizations, [and the] prohibition of peaceable assembly."[338] In 1992, two leading scholars explained how the Court had built on footnote four to endorse a canon of statutory interpretation that gives special protection to "*Carolene* groups"—that is, historically disadvantaged groups, such as Native Americans.[339] This line of statutory interpretation decisions, so the argument goes, may help point the way to a principle under which courts give more weight to free expression concerns than to other constitutional concerns in the process of statutory interpretation. After all, if there is an interpretive canon that favors "*Carolene* groups," why should there not also be a canon that protects "*Carolene* processes"—including by helping to ensure "the dissemination of information" in keeping with both the text and the texture of footnote four.[340]

To be sure, the Court may eschew such a rule. Moreover, if it does so, it may reason that the rule of constitutional avoidance already affords sufficient protection to First Amendment values. Even if the Court goes down this path, however, the avoidance canon itself will have an especially broad impact in statutory interpretation cases that involve free speech. This is so because the avoidance canon by its very nature renders the method of judicial narrowing (whether free-speech-specific or not) inseparable from judicial blocking and

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granted, 842 F.3d 1092 (9th Cir. 2016).

[336] 304 U.S. 144, 152 n.4 (1938).

[337] This word count excludes internal citations.

[338] *Carolene Prods.*, 304 U.S. at 152 n.4 (internal citations omitted).

[339] William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 602-03 (1992); *see also* Coenen, *supra* note 182, at 1612-14 (discussing clear statement rules as they apply to *Carolene* groups); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 473 (1989) ("Aggressive construction of ambiguous statutes designed to protect disadvantaged groups provides a way for courts to protect the constitutional norm of equal protection in a less intrusive manner.").

[340] *Carolene Prods.*, 304 U.S. at 152 n.4.

judicial channeling (which are, as we have seen, free-speech-specific in important respects).[341] The operation of the avoidance canon, after all, always depends on—and reaches further than—the irreducible limits placed on the government by the Constitution itself. As Parts I and II show, the modern Court has expanded those irreducible limits through speech-protective use of both the blocking and channeling techniques, and there is every reason to think that the Court will continue to move in that direction in the future.

The practical result for purposes of judicial narrowing is apparent. As new speech-protective constitutional doctrines come into being, those doctrines will expand the opportunities for courts to read statutes to avoid the "serious constitutional problems" that those very doctrines create.[342] Put another way, as the circle of "true" constitutional protection of speech broadens, it necessarily pushes outward the surrounding band of "quasi-constitutional" protection afforded by the avoidance canon.[343] Thus, precisely because judicial narrowing in its nature is derivative of judicial blocking and channeling, expanded speech protection by way of judicial narrowing will be a built-in part of any judicial push in the direction of First Amendment decriminalization.

IV. THE FRONTIERS OF FREE SPEECH DECRIMINALIZATION

Parts I, II, and III of this Article include a descriptive component. They highlight how the Court in a steady stream of cases, handed down well before the emergence of the modern decriminalization movement, has carried along free speech law in the direction of decriminalization in practical effect. But even more important, those Parts have a suggestive component. They signal how the Court might build on its past rulings to support the cause of decriminalization in the free speech context. In the area of blocking, for example, the Justices might reshape the law of "fighting words" by excluding from that concept all verbal abuse directed at law enforcement officers.[344] With regard to channeling, the Court might carry over the "tortification" approach of its defamation rulings to the civil law that governs privacy, antidiscrimination, and the infliction of emotional distress.[345] With regard to narrowing, the Court might determine that

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[341] *See supra* Parts I, II.

[342] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[343] *See* Katyal & Schmidt, *supra* note 305, at 2128 ("[M]odern avoidance, because it is triggered only by doubt, can sweep more broadly than the Constitution. As Judge Posner has explained, avoidance results in 'a judge-made constitutional "penumbra" that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.'" (quoting Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983))).

[344] *See supra* notes 87-95 and accompanying text.

[345] *See supra* Section II.B.

clear statement rules of statutory interpretation should apply with added force whenever a regulation of speech is at issue.[346]

All of these matters concern not the past, but the future, of free-speech-based decriminalization. One goal of the earlier Parts of this Article is to show that these frontiers of First Amendment law are not as out of reach as initial impressions might suggest, especially when one comes to see how often the modern Court already has made use of the blocking, channeling, and narrowing techniques. Other frontiers of free speech law, however, may seem very far away, in part because (at least at first blush) they involve complex or novel uses of these analytical strategies.

In this Part, I direct attention to these more-distant frontiers of speech law. Section IV.A considers the ubiquitous tool of means-ends analysis. It suggests that this methodology opens up new opportunities for expanding speech-protective judicial controls, especially if the Court chooses to pursue a decriminalization agenda. Two possibilities along these lines may prove to be particularly important: (1) the use of means-ends analysis to require in many cases a showing of actual harm, as opposed to merely potential harm, to justify the criminalization of speech; and (2) the extension of the requirement of individualized warnings from hostile-audience-speech cases to other areas of free expression law.

Section IV.B turns to the very different subject of "hybrid rights." It highlights the possibility that the Court might read the Free Speech Clause together with some other constitutional provision—particularly the Free Exercise Clause—to block the regulation of expressive activity in ways that neither clause alone would support. Some analysts may view this style of judicial review as too untethered to constitutional text and too pliable in application to qualify as legitimate. But as surely as a largely below-the-radar body of precedent may help push along the many potential decriminalizing reforms identified in Parts I, II, and III, already-existing law offers much support for judicial use of hybrid-rights analysis.[347] Indeed, this technique may provide a key point of reference for resolving emerging constitutional battles, tied to the Court's recent ruling on same-sex marriage, that concern the limits of applying antidiscrimination laws to sincere religious objectors.[348]

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[346] *See supra* Part III.

[347] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015) ("Rights implicit in liberty may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right."); Lawrence v. Texas, 539 U.S. 558, 575 (2003) ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.").

[348] *See infra* note 408 and accompanying text.

Finally, Section IV.C briefly considers how the constitutional themes identified in this Article might exert an influence in realms of constitutional law that do not involve free expression at all. The key point is that there is no reason why the Court cannot use the same nuanced approaches to blocking, channeling, and narrowing identified in the preceding pages to pursue decriminalization in non-free-speech cases. Indeed, as we soon shall see, it already has done just that.

A. *The Frontiers of Free Speech Means-Ends Analysis*

Means-ends analysis pervades constitutional law. In thousands of cases—involving the Equal Protection Clause, the dormant commerce clause, so-called "substantive due process" and on and on—courts have asked whether a challenged law has a close enough relationship to a strong enough government purpose to justify that measure's adoption.[349] This style of analysis is laden with complexity. In every case in which it operates, the court (either explicitly or implicitly) must resolve a battery of questions: How does one characterize the state interest said to justify the challenged law? Must it qualify as "legitimate," "important," "compelling," or the like? Does it so qualify? How close of a relationship must mark the government's chosen means and its sought after end? In particular, must the government's means be "closely tailored," "substantially related," or only "rationally related" to the governmental end? Whatever standard applies, what particular problems of means-ends fit are presented by the rule at issue? Are those fit-related problems sufficiently serious to warrant judicial intervention? If so, in what way should the court respond? All of this involves judgment—indeed, matters of judgment so difficult that they may defy judicial use of standard interpretive methodologies.[350] Complicating matters still more is a little-noticed fact of constitutional life: oftentimes (for example, in cases that involve the identification of "unprotected" forms of speech) courts engage in means-ends analysis, or something quite like it, without acknowledging that they are doing so.[351] These cases, too, open up rich opportunities for the exercise of judicial discretion. The result is that means-ends analysis invites the development of decisional sub-rules—that is, doctrines that courts use, often in subtle ways, to guide them in evaluating government ends and means.

At least between the lines, Parts I, II, and III suggest that the Court might soon look to expand its work with two such sub-rules, perhaps as part of a broader

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[349] For one illustrative embodiment of a means-ends test, see *supra* notes 234-39 and accompanying text.

[350] By way of example, courts and analysts often make use of text-based, history-based, or representation-reinforcement-based styles of interpretation. But it seems far-fetched to think that these approaches can offer much aid as a court asks, for example, what constitutes the relevant "end" of a particular statute for purposes of means-ends analysis.

[351] *See, e.g.*, New York v. Ferber, 458 U.S. 757, 764 (1982) (citing the "welfare of children engaged in [the covered material's] production" and "the balance of competing interests" in finding child pornography to be unprotected).

effort to push forward the decriminalization of speech. These sub-rules would focus attention on (1) the key role of actual harm (as opposed to the mere risk of harm) in free speech cases, and (2) the prospect of requiring government officials to warn certain speakers that they must stop or postpone disruptive expressive activity before subjecting them to punishment.

1. Actual Harm Rules

Part I of this Article points to the possibility that a new doctrinal theme may be emerging in free speech law. As it shows, in the fields of fighting words, incitement, and hostile audience speech, past decisions raise the possibility that the occurrence of actual harm—as opposed to only the risk of harm—may be emerging as a necessary ingredient for rendering these forms of speech unprotected.[352] In considering the law of incitement in *Claiborne Hardware*, for example, the Court observed that: "When such appeals do not incite lawless action, they must be regarded as protected speech."[353] Rhetoric of this kind suggests that, because the permissible regulatory "end" in these cases is to address the actual harm of unlawful conduct, the "means" for achieving this end should focus on the actual occurrence of that harm, or at least something extremely close to it.

No less important, the modern Court's attentiveness to actual harm has shown itself in cases that reach beyond fighting words, incitement, and hostile audience speech. Part II, for example, demonstrated how a focus on actual harm has taken hold in the defamation context.[354] Thus, in *Gertz*, the Court held that money damages will be available only to "compensate" for "the harm inflicted" to reputation,[355] thereby foreclosing recovery of non-actual-harm-based presumed or punitive damages.

The Court's recent decision in *United States v. Alvarez*[356] reflects similar concerns about actual harm, albeit in a very different setting.[357] The Court in that case invalidated a criminal prohibition on purposely lying about one's receipt of the Medal of Honor or other military awards.[358] In defending the law, the Government relied primarily on the argument that it served to counter the risk that such lies would "dilute the value and meaning of military awards."[359] For a speech-sensitive four-Justice plurality of the Court, however, this value-protecting justification did not hold up. The problem was: "The Government has not shown, and cannot show, why counterspeech would not suffice to achieve

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[352] *See supra* Section I.A.3.b.iii.

[353] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

[354] *See supra* notes 235-36 and accompanying text.

[355] Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

[356] 132 S. Ct. 2537 (2012).

[357] *See id.* at 2539.

[358] *Id.* at 2543.

[359] *Id.* (quoting Brief for the United States at 49, 54, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210)).

its interest. . . . Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose."[360] Put another way, the plurality concluded that the challenged law did not target an actual harm because it sought to address a lie-produced diminution in value that simply did not exist.[361] In a separate opinion, two concurring Justices reached much the same conclusion with respect to a decisive number of the statute's applications.[362] For them it was determinative that the law went so far as to apply "in family, social, or other private contexts, where lies will often cause little harm."[363] Even the dissenters focused their gaze on actual injury.[364] But they disagreed with their colleagues on this point because in their estimation, "[a]s Congress recognized, the lies proscribed by the Stolen Valor Act inflict substantial harm."[365]

If a nascent and generalizable "actual harm" principle hovers over all these rulings, how might the Court apply it in future cases? One possibility is that the Court will look with increased skepticism at laws that target speech for prophylactic purposes. This possibility arises because prophylactic rules, by definition, do not target conduct that itself inflicts actual harms; rather, such rules address the prospect of future harms by preempting all forms of potentially problematic behavior or otherwise "over-regulating" in some way.[366] For example, one way to think about *Alvarez* is to say that Congress sought to address the possibility that, over time, the cumulative effect of many lies about the winning of military honors might lead to a harmful diminution of their intangible value.[367] Another possibility is that Congress purposefully cast a wide net of prohibition (as is often the case with so-called overinclusive laws) to make absolutely sure that no actual causers of harm, however small in number, would escape the law's wrath.[368]

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[360] *Id.* at 2549-50 (citations omitted).

[361] *See id.* at 2549 (emphasizing that the government presented "no evidence" on this score).

[362] *See id.* at 2555 (Breyer, J., concurring in the judgment).

[363] *Id.*

[364] *See id.* at 2557 (Alito, J., dissenting) ("[T]he Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict *real harm* and serve no legitimate interest." (emphasis added)).

[365] *Id.* at 2558.

[366] For significant treatments of the subject, see generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Michael C. Dorf, *The Morality of Prophylactic Legislation (with Special Reference to Speed Limits, Assisted Suicide, Torture, and Detention Without Trial)*, 61 CURRENT LEGAL PROBS. 23 (2008); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

[367] *See Alvarez*, 132 S. Ct. at 2549 (noting that the Government apparently conceded that "an isolated misrepresentation by itself would not tarnish the meaning of military honors" (quoting Brief for the United States, *supra* note 359, at 49)).

[368] *See generally* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

The way in which the Free Speech Clause interacts with prophylactic rules is deeply complex, in part because the cases have produced a mixed bag of limits that the First Amendment places on the use of such laws. For example, in *Schneider v. New Jersey*,[369] the Court invalidated a ban on leafletting that had the aim of preventing follow-up littering.[370] The city, the Court declared, had to go after the actual-harm-inflicting litterers themselves.[371] But in *Ward v. Rock Against Racism*,[372] the Court upheld a law that required performers to use a city sound engineer (as opposed to their own sound engineer) when using a band shell in New York's Central Park.[373] According to the Court, the city did not have to attack the harm of excessive noise solely through the direct route of a decibel-limit law; instead, it could deploy its sound-engineer prophylaxis because it was a "reasonable" means of guarding against the harm of urban din.[374]

These sorts of less-restrictive-alternative problems are pervasive and difficult.[375] One thing, however, is clear: if the Court moves speech law toward a generalized position of focusing on actual (as opposed to merely threatened) harm, it may increasingly look askance at laws that target speech in a prophylactic way. Of particular importance, the Court's recent decision to invigorate the content-discrimination concept[376]—with the result of exposing more laws to strict scrutiny—may expand opportunities for the Court to invalidate prophylactic speech bans on less-restrictive-alternative grounds.[377]

2. Individualized-Warning Rules

In large measure, the law has a backward-looking, one-size-fits-all quality. A criminal statute is passed. A civil tort is recognized. A person thereafter engages

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[369] 308 U.S. 147 (1939).

[370] *Id.* at 162.

[371] *Id.* (noting that the "obvious methods of preventing littering" include "punishment of those who actually throw papers on the street").

[372] 491 U.S. 781 (1989).

[373] *Id.* at 803.

[374] *See id.* at 801.

[375] *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978) (upholding a general prohibition on in-person solicitation by lawyers even as applied to clients who are happy to have been solicited); Martin v. City of Struthers, 319 U.S. 141, 147-48 (1943) (holding an ordinance banning door-to-door solicitation invalid where risks of fraud and disruption could "easily be controlled by traditional legal methods").

[376] *See supra* note 203 and accompanying text.

[377] As noted above, for example, the Court's recent ruling in *Reed* casts a long shadow over the Court's past rulings that averted content-discrimination problems by focusing on the Government's purpose of addressing so-called "secondary effects." *See supra* notes 211-15 and accompanying text. And notably, even in *Ward*, the Court relied on its "secondary effects" precedents in finding an absence of problematic content discrimination. *Ward*, 491 U.S. at 791-93. *But cf.* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (describing the regulation in *Ward* as content neutral).

in the conduct that those prohibitions target, and the person then is prosecuted or sued for violating the previously established restriction. But sometimes our law works in a different way. Consider the teacher who singles out the chattering student, Charley, with these words: "Stop your talking, Charley, or I will send you to the principal's office." The teacher has triggered a legal control, but one that works in a way that is very different from the typical crime-or-tort-creating constraint. The teacher has issued a focused warning, so as to put Charley on notice that a sanction will be imposed if, but only if, the problematic noisiness persists.

Individualized-warning rules can and do play a role in our legal system. In the land use field, for example, an ordinance might provide that government officials have to give a landowner the opportunity to cure a non-conforming use before imposing a penalty for that conduct.[378] When the government goes to court solely to enjoin ongoing behavior—such as the dumping of pollutants or failing to put safety devices in cars—its action can be seen as involving an individualized warning because, to escape the proposed legal sanction (in this case an injunction), the defendant (just like Charley the chatterbox) often needs only to discontinue the targeted behavior.[379]

Even more important, the issuance of individualized warnings is a key part of the law in practice. Every day, police officers warn individuals to leave another's property, to move from the street onto the sidewalk, or to drive more slowly. In these instances, the warned individual is already breaking the law. But the legal system, in its on-the-ground operation, deals with the problem through the issuance of a warning that permits the wrongdoer to sidestep the punitive snare. The real world effect of such warnings is to decriminalize a vast array of otherwise sanctionable conduct.[380] Put simply, massive numbers of people are not prosecuted because police give them, and they then respond to, individualized warnings.

The question thus arises: Might the Constitution sometimes *require* government officials to penalize speech-related activity only after the delivery, and the disobedience, of a focused warning that the activity should cease? As we saw in Part I, First Amendment doctrine already requires the government to employ exactly this approach in dealing with the problem of hostile audience speech.[381] And in the heyday of debate about obscenity law, Justice Douglas argued that a proper application of free speech principles mandated the delivery of similar individualized warnings with regard to possessing and purveying

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[378] *See* Horton v. Gulledge, 177 S.E.2d 885, 892 (N.C. 1970) ("To require [a building's] destruction, without giving the owner a reasonable opportunity . . . [to repair] . . . is arbitrary and unreasonable.").

[379] *See* United States v. W.T. Grant Co., 345 U.S. 629, 635-36 (1953).

[380] *See generally* Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012).

[381] *See supra* notes 131-34 and accompanying text.

sexually explicit communications.[382] Indeed, as part of this proposal, Justice Douglas advocated judicial endorsement of a sharp distinction between criminal and civil sanctions, thus fusing a legal requirement of individualized warnings with the strategy of free-speech-based constitutional channeling.[383]

Whatever today's Justices would think about Justice Douglas's approach to obscenity law, rising concerns about decriminalization (and especially concerns about problematically disparate exercises of police officer discretion) might cause them to consider imposing constitutionally mandated, uniformly applicable individualized-warning rules in settings well beyond the hostile-audience-speech context. Might the Court, for example, insist that police officers warn a panhandler to leave an area that is off limits to that activity before they haul her off to jail? Might it mandate that government authorities instruct musicians to turn down the volume before incarcerating them for violating local noise ordinances?[384] Might it require that law enforcement personnel, when implementing otherwise permissible public forum "time" regulations, give a soapbox speaker the chance to postpone a middle-of-the-night rant until after the sun rises? In many such cases, it may be that non-enforcement of the governing prohibition, in the absence of defiance of a previously delivered individualized warning, is already the operating norm. And especially if that is the case, proponents of individualized-warning rules may find that courts stand ready to give their claims a sympathetic hearing.[385]

B. *Free-Speech-Driven Hybrid Rights*

In 2013, the New Mexico Supreme Court handed down its decision in *Elane Photography, LLC v. Willock*.[386] The case arose out of the operation of a limited liability company, Elane Photography, that was co-owned by Elaine

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[382] *See* Miller v. California, 413 U.S. 15, 41 (1973) (Douglas, J., dissenting) (reasoning that, "until a civil proceeding has placed a tract beyond the pale, no criminal prosecution [for obscenity] should be sustained").

[383] *See id.* at 42 (justifying this initial-civil-proceeding approach because "we should not allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct").

[384] This approach is not without precedent. *See* Eanes v. State, 569 A.2d 604, 617 (Md. 1990) ("In order . . . to provide fair notice in a [free speech] case such as this, we believe that the application of § 121 ordinarily requires prior warning by police authority, so that the speaker is made aware that further communication at the offensive volume level may subject the individual to prosecution.").

[385] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573 (2003) (recognizing constitutional limits on states to prosecute individuals for sodomy in part because, even in states that still had sodomy statutes, "there is a pattern of nonenforcement"); Tennessee v. Garner, 471 U.S. 1, 17-19 (1985) (finding a constitutional violation in police handling of fleeing felons, in part "in light of the policies adopted by the police departments themselves" with regard to giving warnings). *See generally supra* notes 269-71 and accompanying text.

[386] 2013-NMSC-040, 309 P.3d 53 (N.M. 2013).

Huguenin.[387] As Vanessa Willock planned a wedding to her partner, Misti Collinsworth, she contacted Huguenin about handling photography work related to the ceremony.[388] Huguenin declined.[389] Her company, she explained, handled only "traditional weddings."[390] This policy, Huguenin later made clear, was based on the business owners' sincere religious opposition to same-sex marriage.[391]

That, however, was not the end of the matter. Willock and Collinsworth filed a complaint with the New Mexico Human Rights Commission, alleging that Huguenin's actions caused Elane Photography to violate a New Mexico statute that outlawed discrimination by certain businesses on the basis of sexual orientation.[392] In the face of a determination that Elane Photography was indeed subject to this statutory restriction as a matter of state law, the company's owners argued that their actions enjoyed two separate federal constitutional protections—one under the Free Speech Clause (in light of the communicative nature of the requested photography work) and one under the Free Exercise Clause (in light of the owners' religious motivations for not involving themselves in a same-sex wedding).[393] The New Mexico Supreme Court, however, rejected each of these constitutional arguments.[394]

No less noteworthy (at least as one contemplates the frontiers of free speech law) was the Court's decision *not* to consider a third possible line of defense—namely, that the Free Speech Clause and the Free Exercise Clause, acting in synergistic unison, created a hybridized constitutional protection that separately safeguarded the decision of Elane Photography to discriminate in this way.[395] In other words, the court declined to address the business owners' claim that their actions enjoyed constitutional protection—that is, that operation of the state law should be constitutionally blocked in its application to them—because of *both* the expressive nature of the photography work *and* their spirituality-based reason for declining to engage in that work.[396] Their argument, in other words, was that the constitutional whole was greater than the sum of the parts, in the sense that the Free Speech Clause and the Free Exercise Clause together gave rise to a decisive constitutional protection that neither clause alone afforded.[397]

First impressions might suggest that this "hybrid rights" theory of the case did not hold water. After all, the Constitution sets forth what seem to be distinct

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[387] *Id.* ¶ 7, 309 P.3d at 59.

[388] *Id.* (footnote omitted).

[389] *Id.*

[390] *Id.*

[391] *Id.*

[392] *Id.* ¶ 9, 309 P.3d at 60.

[393] *Id.* ¶ 20, 309 P.3d at 63.

[394] *Id.* ¶ 79, 309 P.3d at 77.

[395] *See id.* ¶ 71, 309 P.3d at 75.

[396] *See id.* ¶ 75, 309 P.3d at 76.

[397] *See id.*

protections of rights, and neither the Free Speech Clause nor Free Exercise Clause on its own offered aid to the discriminating photography company.[398] So how might it be that the two clauses, in collaborative tandem, would give rise to a separate shield of protection?

They might, in large part, because of the Court's ruling in *Employment Division v. Smith*.[399] There, the Court encountered an argument that the Free Exercise Clause required the state to supplement a generally applicable ban on ingesting peyote with an exemption for the sacramental use of that substance by sincere religious practitioners.[400] The Court rejected this contention,[401] but along the way it had to distinguish earlier rulings in which it had afforded some religious practitioners an exemption from the operation of generally applicable laws.[402] In doing so, the Court wrote:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children . . . .[403]

Pointing to its earlier speech-related rulings in *Cantwell* and *Murdock v. Pennsylvania*,[404] the Court emphasized that "[t]he present case does not present such a hybrid situation"; instead, it concerned only "a free exercise claim unconnected with any communicative activity."[405]

In *Elane Photography*, New Mexico's high court declined to address the company's hybrid-rights argument because it found that the company had not adequately briefed the issue.[406] As a result, we cannot know how that court would have responded to that blocking-based contention had it been properly raised. What we do know is that similar arguments are sure to surface before long[407]—and all the more so in light of Chief Justice Roberts's pointed

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[398] *See supra* notes 393-94 and accompanying text.

[399] 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), *superseded in part by statute*, Religious Land Use and Institutionalized Person Act of 2000, Pub. L. No. 106-274, 114 Stat. 804 (codified as amended at 42 U.S.C. § 2000cc (2012)).

[400] *Id.* at 874.

[401] *See id.* at 890.

[402] *See id.* at 878-82.

[403] *Id.* at 881 (citations omitted).

[404] *Id.* (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940)).

[405] *Id.* at 882.

[406] *See* Elane Photography, LLC v. Willock, 2013-NMSC-0040, ¶ 71, 309 P.3d 53, 75 (N.M. 2013).

[407] *See, e.g.*, Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶¶ 1, 2, 370 P.3d 272,

observation (in a dissent joined by Justices Scalia and Thomas) that the Court's same-sex marriage ruling creates "serious questions about religious liberty . . . when people of faith exercise religion in ways that may be seen to conflict with the new right of same-sex marriage."[408] As those arguments come to the fore, three overarching points related to free speech decriminalization are worth keeping in mind.

First, just as surely as the Court moved away from protecting free exercise rights in *Smith*, it simultaneously opened the door to a new line of arguments for the expansion of free expression liberty. This is the case because the Court in *Smith* flagged the possibility—if not the necessity—that judges should recognize and apply rights that stem from the coordinate operation of the Free Speech and Free Exercise Clauses.[409] The issuance of an invitation for such arguments was built into Justice Scalia's treatment of *Cantwell* and *Murdock* as involving a "hybrid situation" in which the Free Exercise Clause operated "in conjunction with other constitutional protections, such as freedom of speech and of the press."[410] Skeptics might argue that the Court's treatment of these earlier cases reflected nothing more than a result-driven means of dodging problematic precedents, so that "hybrid rights" analysis will never again see the light of day.[411] But both pre- and post-*Smith* rulings suggest that "hybrid rights" analysis has a place in the law.[412] The bottom line is that the cause of free speech

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276 (Colo. App. 2015) (holding that a Colorado bakery violated state public accommodations law when it refused to make a wedding cake for a same-sex wedding ceremony).

[408] Obergefell v. Hodges, 135 S. Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting). In particular, he observed:

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right of same-sex marriage—when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. . . . There is little doubt that these and similar questions will soon be before this Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Id. at 2625-26.

[409] *See Smith*, 499 U.S. at 881.

[410] *Id.*

[411] *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 594-95 (2003) (noting that most plaintiffs with hybrid claims fail); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case.").

[412] Pre-*Smith* cases that suggest the existence of hybrid rights are collected in Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1091-98 (2016); *see also* Ryan S. Rummage, Comment, *In Combination: Using Hybrid Rights to Expand Religious Liberty*, 64 EMORY L.J. 1175, 1200-01 (2015) (noting that "[t]he idea of combining factors into a successful claim, as the colorable claim approach does, is not unique to free exercise litigation" and providing examples, such as in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court combined the First, Third, Fourth, Fifth, and Ninth Amendments to

decriminalization has a friend—though not yet a close one—in the *Smith* decision.[413] Only time will tell whether a still-protean hybridized free-speech/free-exercise right will take hold in cases like *Elane Photography*.[414] But the modern Court has planted a seed. And, especially in an era of decriminalization, lawyers should be on the lookout for chances to leverage hybrid-rights analysis in any type of free-speech/free-exercise case.

Second, as lawyers consider the use of hybrid-rights analysis, they should keep in mind the differing methodologies of free speech decriminalization. In particular, Parts I and II show that judges who are decriminalization-minded may choose to use either the (more invasive) blocking or the (less invasive) channeling approach. Against this backdrop, it is entirely possible that a court might blend hybrid-rights analysis with the tool of constitutional channeling in cases like *Elane Photography*. The upshot of such a ruling would be that a state could provide for civil remedies against religious-objector business operators that violate antidiscrimination law commands, but not subject those same operators to criminal law redress. We have seen, for example, that the Court has

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recognize a right to privacy, *id.* at 485). As to post-*Smith* authority, particularly noteworthy is the Court's ruling in *Obergefell*. *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1309-10 (2017) ("[I]n *Obergefell v. Hodges*, the Court struck down state bans on same-sex marriage by pointing to several distinct but overlapping protections inherent in the Due Process Clause, including the right to individual autonomy, the right to intimate association, and the safeguarding of children, while also noting how the rights in question were simultaneously grounded in equal protection."); *supra* note 347 and accompanying text.

[413] *Smith*-based hybrid-rights analysis "still remains largely theoretical" in light of its limited use to this point. Abrams & Garrett, *supra* note 412, at 1329. Some courts, however, have recognized the potential of free-speech/free-exercise hybrid-rights analysis. *See id.* at 1328-29 (citing decisions from two circuits); Rummage, *supra* note 412, at 1202-03 ("[A]lthough there are not many victories for [post-*Smith*] religious claimants, those raising free exercise-free speech hybrid rights claims have had the most success by far.").

[414] Of potential significance in this regard may be the following sentence in *Smith*: "There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule [that ordinarily precludes judicial recognition of free-exercise-based exemptions to generally applicable statutes] plainly controls." *Smith*, 494 U.S. at 882 (referring to the rule first established in *Reynolds v. United States*, 98 U.S. 145, 166-67 (1879)). This language is significant because it might be read to limit the operation of any free-speech/free-exercise hybrid-rights principle to instances that involve the actual "communication of religious beliefs." *Id.* On this view, *Elane Photography* might well be deemed distinguishable from *Cantwell* and *Murdock* on the basis that the photographers in New Mexico were not subject to any governmentally imposed burden because of the religious content of their photographs. But if that is so, other questions would remain—for example, as to whether a religious-objector vocalist could be sanctioned for refusing to sing a particular song at a wedding or a baker could refuse to emblazon certain words on a cake. These observations illustrate the broader point that much work remains unfinished in fleshing out the contours of any hybrid-rights rule that might take hold in light of the Court's reasoning in *Smith*.

largely "tortifed" the law of defamation through use of the channeling technique.[415] Might the Court likewise "tortify" religious-speech-related applications of antidiscrimination laws, at least in settings where such laws traditionally have authorized only civil law remedies?[416] If the answer is "yes," it will be because hybrid-rights analysis has converged with the technique of constitutional channeling so as to decriminalize discriminatory conduct, while not exempting it from government regulation altogether.

The final point to be made about free-speech-based hybrid rights is this: the Free Speech Clause might be paired with constitutional provisions other than the Free Exercise Clause to give rise to clause-combining protections. Indeed, from all appearances, that already has happened. The Court's many rulings that apply special process requirements to adjudicatory actions that concern matters of free expression, for example, would seem to have its origins in both the Free Speech Clause and Fifth and Fourteenth Amendment safeguards of procedural due process.[417] In a similar vein, the Court in *Stanley* put to work a blend of free speech values and substantive-due-process privacy values in recognizing the right of an individual to view obscenity within the distinctly protected spatial confines of the home.[418] These cases reflect the development of speech-related hybrid-rights protections. And this process of development could well continue. By way of example, Section IV.A raised the possibility that courts might rely on the First Amendment to insist that law enforcement officers give certain speakers individualized warnings before subjecting them to the heavy artillery of the criminal law.[419] Another possibility is that courts might distill such a limitation from hybrid-rights analysis. On this view, such individualized-warning rules logically stem from the joint operation of the Free Speech Clause and procedural-due-process-based fair notice principles.[420]

Advocates of decriminalization might take an especially keen interest in the question of whether the Court might "hybridize" the First Amendment's protection of free speech and the Eighth Amendment's ban on cruel and unusual punishments.[421] Such an approach, after all, would give the Court a mechanism for pursuing in a direct way one key goal of the decriminalization movement—that is, to restrict state power to subject persons who commit minor offenses to incarceration, at least for extended periods of time. To be sure, the Court has hesitated in the past to assess whether prison terms qualify as constitutionally disproportionate to the severity of the underlying crime.[422] But the Court has not

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[415] *See supra* notes 219-46 and accompanying text.

[416] *See supra* notes 260-61 and accompanying text.

[417] *See supra* notes 224-26 and accompanying text.

[418] *See* Stanley v. Georgia, 394 U.S. 557, 558-60 (1969).

[419] *See supra* notes 379-85 and accompanying text.

[420] *See supra* note 224 and accompanying text.

[421] U.S. CONST. amend. VIII.

[422] *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 283-84 (1980).

altogether abandoned this project.[423] And a hoary authority offers hope that a more aggressive approach to proportionality review might surface in free speech cases.

In *Abrams v. United States*,[424] the defendant was sentenced to twenty years in prison under the Espionage Act for writing a pamphlet that instructed munitions workers that their "*reply to [the nation's] barbaric intervention [into Russia] has to be a general strike!*"[425] A seven-Justice majority upheld the conviction.[426] But in one of Justice Oliver Wendell Holmes's most famous opinions, the great dissenter concluded that the Constitution did not permit this result.[427] Justice Holmes's objection to the majority's action centered on his determination that the prosecutors had failed to prove the intent required to support a conviction under the Espionage Act.[428] But he also expressed speech-specific, penalty-sensitive concerns. As he explained: "[E]ven if what I think the necessary intent were shown[,] the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow."[429]

The passage of time has left no doubt that the Holmes opinion in *Abrams*, though in its own time a dissent, stands today as a classic exposition of governing free speech principles.[430] And particularly for this reason, that opinion could provide the platform for an invigorated proportionality analysis when criminal laws take aim at speech.[431] In addition, the Court might creatively draw on its mix of decriminalization strategies as it looks to take a more activist approach to free-speech-related proportionality review. In *X-Citement Video*, for example, the Court relied in part on proportionality-tied reasoning as it put to work the decriminalizing strategy of judicial narrowing.[432] Because that

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[423] *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide" and collecting earlier proportionality-based rulings).

[424] 250 U.S. 616 (1919).

[425] *Id.* at 617-18, 621.

[426] *See id.* at 624.

[427] *See id.* at 624 (Holmes, J., dissenting).

[428] *See id.* at 628-29.

[429] *Id.* at 629.

[430] *See, e.g.*, Joseph Russomanno, *Cause and Effect: The Free Speech Transformation as Scientific Revolution*, 20 COMM. L. & POL'Y 213, 215-16 (2015) (noting that Justice Holmes's "watershed" dissent in *Abrams* is often cited as the beginning of a "free speech transformation"); Andrew Cohen, *The Most Powerful Dissent in American History*, ATLANTIC (Aug. 10, 2013), http://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/ [https://perma.cc/9QCH-8869] (observing with regard to Holmes's *Abrams* dissent that, "[i]f there is a more relevant or powerful passage in American law, I am not aware of it").

[431] *See* Coenen, *supra* note 281, at 1002-05 (exploring in more detail the possibilities raised by the *Abrams* dissent and related authorities).

[432] *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 70 (1994). In particular, the

narrowing-based ruling depended in the end on statutory interpretation, it may not technically qualify as involving the application of a true constitutional hybrid right. But who cares? At bottom, that ruling had a broad decriminalizing effect, and that result flowed in part from a conjoined invocation of First and Eighth Amendment values.[433]

C. *Beyond Free-Speech-Based Decriminalization*

It is a principle of comparative law that jurisprudential regimes evolve through the assimilation of "legal transplants,"[434] including through the "borrowing" of legal rules from other nations.[435] Less commonly recognized is the fact that borrowing can occur within a single legal system by way of judicial action, including across different fields of constitutional law.[436] In the United States, for example, the rhetoric of "strict scrutiny" first surfaced in equal protection cases.[437] In time, however, courts carried over this concept to areas such as free exercise law[438] and the right to privacy.[439] In similar fashion, the government-limiting approaches noted or proposed in this Article, though rooted in the First Amendment, could in time take hold in entirely different fields of constitutional law.

Part I, for example, documents the emergence of an individualized-warning requirement in hostile-audience-speech cases, and Part IV highlights how the Court might apply this same approach in dealing with other free expression problems. The key point here is that courts in the future might also transplant this same individualized-warning approach into areas of constitutional law that

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Court "emphasized the harsh penalties attaching to violations of the statute as a 'significant consideration in determining whether the statute should be construed as dispensing with *mens rea*.'" *Id.* (quoting Staples v. United States, 511 U.S. 600, 616 (1994)). According to the majority, this concern "loom[ed] . . . large" in the case because the operative statute authorized the imposition of ten-year prison terms. *Id.* at 71-72. Given this aspect of the Court's reasoning, it is no surprise that one scholar has characterized its ruling as an "example of back-door proportionality at work in federal mens rea selection." Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 138 (2009).

[433] *See supra* notes 320-23 and accompanying text.

[434] *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 7-9 (1993).

[435] *See id.* at 30 (highlighting how one form of legal transplantation occurs "when a people voluntarily accepts a large part of the [legal] system of another people or peoples").

[436] *See generally* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010) (analyzing in detail "a common phenomenon [that] has gone surprisingly unnoticed in the literature: constitutional borrowing").

[437] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (noting that "legal restrictions which curtail the civil rights of a single racial group" must be subjected to "the most rigid scrutiny").

[438] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 544-45 (1993).

[439] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

do not involve free speech at all. For example, might the Constitution require—as a matter of procedural due process or of cruel and unusual punishment law or of a hybrid application of both—that persons subject to an otherwise lawful anti-loitering statute first be warned to stop loitering before the criminal justice system snaps its trap upon them?[440]

We also have seen that the Court might soon protect some types of religious objectors from the operation of antidiscrimination laws through a hybridized application of the Free Speech and Free Exercise Clauses.[441] But, as the preceding loitering-warning hypothetical itself reveals, opportunities to make use of hybrid-rights analysis are not limited to free expression cases. Indeed, the right to same-sex marriage, recently endorsed in *Obergefell*,[442] may have its moorings in a hybridized application of substantive due process and equal protection principles.[443] And *Obergefell* is not the first non-free-speech case in which this style of analysis made an appearance. For example, in *Bowers v. Hardwick*,[444] a decisive concurring opinion written by Justice Powell suggested that the Eighth Amendment and substantive-due-process privacy rights together would prohibit the imposition of any serious criminal punishment for engaging in homosexual sodomy.[445]

Notably, one big picture point of this Article might push the Court even to take a fresh look at Eighth Amendment law standing on its own. In this field, as we have seen, the Court has embraced a largely hands-off approach to proportionality review, at least with regard to sanctions less draconian than capital punishment and life imprisonment.[446] At the same time, the Court has justified this hands-off stance based largely on concerns about the limits of judicial competence—particularly in light of the democratic non-accountability of courts and the inevitably judgment-laden nature of line drawing of this kind.[447] Yet, as portions of the preceding discussion reveal (especially those portions that deal with judicial channeling and the *Abrams* and *X-Citement Video* cases), the Justices have seemed willing to cast these same concerns aside to a notable extent in assessing the severity of sanctions in the First Amendment

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[440] For further discussion of individualized-warning rules, see *supra* Section IV.A.2.

[441] *See supra* notes 399-416 and accompanying text.

[442] Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

[443] *See, e.g.*, Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 131 (2015) (characterizing the rationale of *Obergefell* as built on a "potent but analytically hazy hybrid of due process and equal protection that [also] animated . . . earlier gay rights decisions"); *see also* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 303 (2015) (attributing the result in *Obergefell* to a "hybrid, fluid approach to due process").

[444] 478 U.S. 186 (1986).

[445] *See id.* at 197-98 (Powell, J., concurring).

[446] *See supra* notes 422-23 and accompanying text.

[447] *See* Rummel v. Estelle, 445 U.S. 263, 283-84 (1980) ("[A]ny 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts.").

context. To be sure, free speech cases are potentially distinguishable from other cases, especially if one embraces the "preferred freedom" rhetoric that has surfaced in past free expression rulings.[448] But still the argument is there to be made: If the Court can let go of institutional competence worries in sanction-assessing speech cases, why not in other cases as well?

In a similar vein, there is no reason why courts cannot use the strategy of constitutional channeling outside the context of free expression law. One can imagine a world, for example, in which a gun owner would be subject to a tort suit for injuries caused by a lack of care in handling a weapon while remaining immune from criminal imprisonment for engaging in exactly the same behavior.[449] And if such a distinction were to take hold, it would be because a court (whether wittingly or not) had transplanted the First Amendment tortification principle of the *Gertz* case into the now quickly developing field of Second Amendment law.

Time, space, and energy limits render further exploration of these matters a subject for another day. The overarching point, however, merits reemphasis. If, and as, pressures for decriminalization mount, those pressures will come to bear not only on free speech cases but on other cases as well. And to the extent that courts look for ways to push along the cause of decriminalization through the use of constitutional law, they may discover in a large body of free speech rulings instructive materials for fashioning new limits that do not concern free speech at all.

CONCLUSION

No less an expert than now-Justice Kagan has described modern free expression law as built around "technical, complex classificatory schemes" that have "become only more intricate, as categories have multiplied, distinctions grown increasingly fine, and exceptions flourished and become categories of their own."[450] This statement might seem to have a negative cast, but there is reason to see it in a positive light. On this view, the Court has dealt with free

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[448] *See* Kovacs v. Cooper, 336 U.S. 77, 88 (1949); Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943); *supra* note 335 and accompanying text.

[449] On the legislative front, states are now engaged in the broad use of the channeling mechanism in responding to calls for decriminalization. For example, some states have made the first-time possession of small quantities of marijuana a civil offense. *See* Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 693 (2015). Similarly, "[s]ince 1970, twenty-two states have decriminalized the bulk of minor traffic offenses by removing criminal penalties and reclassifying the offenses as noncriminal offenses." *Id.* at 698. Such reforms in time might provide courts with the chance to intervene with rules that *require* this form of channeling—at least with respect to such matters as possessing small amounts of marijuana in the home—as a build-out of past constitutional rulings focused on large-scale legal endorsement of shifting national social norms. *See supra* note 271 and accompanying text.

[450] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 515 (1996).

expression law by bringing to it an adaptive, common-sense approach that attends to the complexities of life. To be sure, there is a place in First Amendment law for bright-line rules, both to protect certain forms of speech (political editorials, for example) and to exempt other forms of speech (perjury, for example) from constitutional protection. But there is a vast middle range of speech as to which context is key, and one element of context involves the penalty that the government seeks to impose on the speaker. From this observation, two implications follow. First, we can—and should—expect the Court to consider whether the sanction imposed for speech is criminal or civil in nature as it decides whether a First Amendment violation has occurred. Second, when it comes to borderline free speech cases, we can—and should—expect the Court to take account of a wide variety of considerations, including whether actual harm is shown, warnings have been given, non-speech rights also are in play, and the like. All of this, in turn, raises far-reaching opportunities for the Court to build on past law to decriminalize speech through the use of blocking, channeling, and narrowing methodologies.

What are lawyers to do in such a world? One possibility is to look in the Court's jurisprudence not so much for specific doctrinal rules as for overarching doctrinal themes.[451] Sometimes, the Court itself directs attention to relevant themes, as when it talks about viewpoint discrimination, public forums, or "total medium" bans.[452] Other times, organizing themes lie beneath the surface, as may be the case with the phenomena of tortification, strong forms of clear statement rules of statutory interpretation, or hybrid-rights review. In this Article, I have sought to unearth such themes and to explore their implications. Of particular importance, Parts I, II, and III show that the Court has at its disposal three separate and distinctly powerful techniques for pursuing the goal of free speech decriminalization—the techniques of blocking, channeling, and narrowing. These same Parts suggest that the Court, in free speech cases decided in recent decades, has moved toward using these tools more commonly, more creatively, and more aggressively than first impressions might suggest. Because the past is always prologue to the future—and especially so in the precedent-driven world of law—there is reason to expect more of the same as new cases arise. And that is all the more the case for a Court that has the wind of a rising social movement at its back.

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[451] *See* Walter E. Oberer, *On Law, Lawyering, and Law Professing:* The Golden Sand, 39 J. LEGAL EDUC. 203, 204-05 (1989) (claiming that the force of any doctrine "waxes or wanes with factual change," so that it "operates as a 'rule' only in the easy, bull's-eye cases; in the hard cases, it is at most a 'tool'"; thus describing doctrines, with regard to most litigated disputes, as "approaches" and "guides for lawyers to present the case").

[452] *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994) (addressing "laws that foreclose an entire medium of expression").