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## Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law

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## Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law

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“[A] true threat is not protected by the First Amendment.”<sup>1</sup>

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These materials are the product of a “Socratic dialogue” between Murray and Blakey on the criminal law and free speech begun when Murray was a student in Blakey's criminal law class in 1997, continued while Murray was a student at the Notre Dame Law School's London Program in 1998–99, maintained while Blakey visited at the Michigan Law School during Winter Term 2000, and carried forward while Murray was a law clerk to Judge O'Scannlain. The discussion resulted in Murray's publication of *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999). The Note was awarded the Arthur Abel Memorial Competition Writing Award at the Notre Dame Law School. Blakey is not in agreement with all that appears in the Note. *See, e.g., id.* at 728 n.169. These materials reflect where that discussion is now; a general consensus is not obtained, nor is the discussion at an end.

The authors express their appreciation to John Baker, Gerard Bradley, Craig Bradley, Clarke Forsythe, John Finnis, Rick Garnett, John Garvey, Henry Monaghan, Steve Smith, and Walter Weber for their insightful comments on earlier drafts of these materials. Needless to say, the views expressed in these materials are solely those of the authors. In particular, nothing in these materials should be interpreted as reflecting the views of Judge O'Scannlain. Murray did not work on this case during his year clerking for Judge O'Scannlain, nor did he discuss the case with him, and nothing contained herein was derived from Murray's experience working on the Ninth Circuit. Besides, no one who knows Judge O'Scannlain doubts his ability to express his own views in his own way. The authors also express their appreciation to Roger F. Jacobs, Director of the Kresge Law Library and his capable staff, in particular Patti Ogden and Dwight King, Research Librarians, who found the unfindable with alacrity and a sense of humor, and Jeremy Gayed and Eric Tamashasky for able research assistance.

Finally, Blakey expresses his appreciation to his daughters, Katherine, Margaret, and, in particular, Marie, who took care of their mother while their father finished working on these materials.

These materials are current, in so far as practicable, through June 30, 2002.

1. *United States v. Whiffen*, 121 F.3d 18, 22 (1st Cir. 1997) (citing *United States v. Fulmer*, 108 F.3d 1486, 1492–93 (1st Cir. 1997)); *accord* *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990).

“To the extent that the [lower] court’s judgment rests on the ground that . . . citizens were ‘intimidated’ by ‘threats’ of ‘social ostracism, vilification, and traduction,’ it is flatly inconsistent with the First Amendment.”<sup>2</sup>

If political discourse is to rally public opinion and challenge conventional thinking, it cannot be subdued. Nor may we saddle political speakers with implications their words do not literally convey but are later “discovered” by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control.<sup>3</sup>

Violence is not a protected value. Nor is a true threat of violence with intent to intimidate. [Defendant] may have been staking out a position for debate when it merely advocated violence . . . or applauded it. . . . Likewise, when it created . . . [an Internet Website] in the abstract, because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or vilification to advocate a political position. [But the defendant’s conduct in publishing “wanted posters” like those that proceeded the murders of doctors in the recent past and a “score card” of the murders of doctors on its Website] was not staking out a position of debate but of a threatened demise.<sup>4</sup>

“The concept of individual responsibility for wrongdoing is sacrosanct in American society, and [it] applies equally to all . . . .”<sup>5</sup>

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2. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 921 (1982); *see also id.* at 916 (“No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, ‘precision of regulation’ is demanded.”).

3. Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists, 244 F.3d 1007, 1019 (9th Cir. 2001), *aff’d in part, vacated in part, remanded by* 290 F.3d 1058 (9th Cir. 2002). The panel’s opinion in *American Coalition* hardly represented an innovation. *See, e.g.*, People v. Jones, 28 N.W. 839, 840 (Mich. 1886) (“It is not the policy of the law to punish those unsuccessful threats which it is not presumed would terrify ordinary persons excessively; and there is so much opportunity for magnifying or misunderstanding undefined menaces that probably as much mischief would be caused by letting them be prosecuted as by refraining from it.”). It is now an unfulfilled promise.

4. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1086 (9th Cir. 2002).

5. USA Patriot Act of 2001, Pub. L. No. 107-56, § 102(a)(3), 115 Stat. 272, 276 (2001).

## TABLE OF CONTENTS

I. INTRODUCTION .....	833
II. THE AMERICAN COALITION LITIGATION .....	843
A. The District Court Opinion.....	843
B. The Ninth Circuit Panel Opinion .....	850
C. The Ninth Circuit En Banc Opinion.....	858
D. Analysis .....	874
III. THE FIRST AMENDMENT: THEORY AND PRACTICE .....	891
A. Creative Interpretation: Rationales for the Freedom of Speech .....	892
B. The First Amendment, the Marketplace, and Content Discrimination .....	915
IV. “TRUE THREATS” AND THE SUPREME COURT .....	921
A. The Decisions .....	923
B. Analysis.....	932
V. THE CIRCUITS ON “TRUE THREATS” .....	937
A. Construing Around the First Amendment: The Predominant Approach .....	940
1. The objective, speaker-based test .....	940
a. The First Circuit.....	940
b. The Third Circuit .....	949
c. The Seventh Circuit.....	954
d. The Ninth Circuit .....	966
2. The objective, hearer-based test .....	970
a. The Fourth Circuit .....	970
b. The Eighth Circuit.....	972
c. The Tenth Circuit .....	979
3. The objective, viewpoint-neutral approach .....	982
a. The Fifth Circuit .....	982
b. The Eleventh Circuit.....	990
c. The District of Columbia Circuit .....	997
d. The Federal Circuit.....	1000
B. An Independent First Amendment Standard for Threats: The Second Circuit (and the Sixth?).....	1003
1. The Second Circuit .....	1003

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BRIGHAM YOUNG UNIVERSITY LAW REVIEW [2002

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2. The Sixth Circuit.....	1007
VI. BASIC PRINCIPLES OF FEDERAL CRIMINAL LAW.....	1010
VII. DEALING WITH TRUE THREATS: A PROPOSAL .....	1051
A. Roles of Court and Fact Finder.....	1052
1. Independent decision maker .....	1052
2. The gatekeeper function.....	1056
B. The Appropriate Standard .....	1060
1. The subjective element .....	1066
2. The objective element .....	1075
C. A Proposed Standard for “True Threats” .....	1076
D. The Problem of Context .....	1078
VIII. CONCLUSION.....	1082
APPENDIX A: DEFINITION .....	1090
APPENDIX B: NATURAL LANGUAGE: GENERALITY, AMBIGUITY, AND VAGUENESS .....	1111
APPENDIX C: THE SPEECH OF CHARLES EVERS .....	1126

## I. INTRODUCTION

The sun has not set yet, but it is surely twilight for meaningful First Amendment freedoms in the nine western states covered by the Ninth Circuit Court of Appeals. For nearly fourteen months, freedom of speech appeared to be secure in the Ninth Circuit. In a ringing reaffirmation of the First Amendment, a panel of the circuit in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*<sup>6</sup> struck down a ruinous \$107 million jury verdict and a wide-ranging and highly restrictive injunction imposed on a group of social and political protesters and all of those who could be connected with them for creating and disseminating various “wanted” posters and using an Internet Web site to feature vividly its opposition to abortion.<sup>7</sup> Fully consistent with controlling Ninth Circuit and Supreme Court precedent, the panel found that the First Amendment completely protected the defendants’ speech and conduct, and it reversed the damage award and the issuance of the injunction.<sup>8</sup>

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6. 244 F.3d 1007.

7. Reaction to the panel’s ruling was immediate and predictably split. Supporters vigorously heralded the opinion as “a reaffirmance of 1st Amendment liberty.” Henry Weinstein, *Free-Speech Ruling Boon for Abortion Foes*, L.A. TIMES, Mar. 29, 2001, at A1 (quoting Christopher A. Ferrara, who represented the defendants); *see also id.* at A13 (quoting an Oregonian anti-abortion protester: “This is great news. The Constitution still stands.”); David Kravets, *Anti-Abortion Site Verdict Overturned*, MILWAUKEE J. SENTINAL, Mar. 29, 2001, at 3A (quoting Susan Armacost, Legislative Director for the Wisconsin Right to Life Group: “We don’t like people who condone (violence), but it’s a separate issue from whether a person should have their First Amendment rights taken away.”). Sadly, though predictably, criticism of the opinion largely focused on the subject-matter of the appeal—anti-abortion protest—rather than its holding under the First Amendment freedoms. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (“those more numerous among us who, vouching no philosophy to warrant, frankly or covertly, make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support”).

Planned Parenthood President Gloria Feldt expressed “outrage” with the decision, arguing that “[r]easonable people understand the difference between free speech and harassment that creates a violent social climate. This Web site represents the latter.” Tim McDonald, *U.S. Court Clears Anti-Abortion Web Site*, NEWSFACTOR NETWORK, at <http://www.newsfactor.com/perl/story/8587.html> (last visited Mar. 31, 2001). Dr. Warren M. Hern, one of the plaintiffs, remarked, “This decision is clearly a green light to the most violent and radical anti-abortion fanatics in the country that they can get away with it and not worry.” Weinstein, *supra* at A13. Not so predictably, the media sided with the plaintiffs, even though the issue involved the First Amendment, which the media usually vigorously defends. *See, e.g., id.* at A1 (describing the decision as “a major victory for militant abortion foes”).

8. *See Am. Coalition*, 244 F.3d at 1019–20.

Concluding that the posters and Internet Web site were protected speech, not a “true threat,” which is unprotected under the law, the panel made three crucial points. First, the posters and the Internet Web site were pure speech significantly in a public discourse, not direct personal communications or other unprotected conduct.<sup>9</sup> Second, the language employed in the posters and the Internet Web site did not contain any *explicit* threat of present or future harmful conduct.<sup>10</sup> Finally, while context may disambiguate language and render it unprotected under the law, that context must substantially relate to the speaker, not be attributed to a speaker based on the speech or conduct of unrelated other persons. In short, context for which a speaker is not legally responsible—that is, he does not authorize, direct, or ratify—cannot limit the speaker’s own, personal, constitutional rights.<sup>11</sup>

But the en banc court rendered the panel’s work a nullity, leaving its promise of protection to protesters unfulfilled.<sup>12</sup> In a massive opinion (but one hardly characterized by precision of analysis) and over three powerful dissents, the en banc Ninth Circuit reversed the panel opinion by a vote of six to five.<sup>13</sup> Strangely, the en

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9. *See id.* at 1018.

10. *See id.* at 1017. Because no threat was expressly made, it *necessarily* left unspoken who, if anyone, would engage in unprotected conduct in the future, the speaker, or one legally associated with him, or a third party. *See id.* at 1017–18.

11. *See id.* at 1018. We summarize the law here and elsewhere in these materials with the use of “authorize or direct” as a short hand way of referring to the traditional categories of secondary participation in criminal conduct: accomplice and conspiracy liability. Those categories are analyzed in detail in G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting, and Conspiracy Liability under RICO*, 33 AM. CRIM. L. REV. 1345, 1385–1459 (1996) (discussing, among other decisions, *Nye & Nissen v. United States*, 336 U.S. 613 (1949) (aiding and abetting) and *Direct Sales Co. v. United States*, 319 U.S. 703 (1943) (conspiracy)). We need not repeat here that discussion, but it is presupposed in these materials. *See infra* note 56 ¶¶ 1–4 for our analysis and discussion of “ratification,” and for our reasons for concluding that the doctrine of “ratification” is of little, if any, relevance to the issue of “true threats.” The panel did not offer a “definition” of “true threat.” Instead, it relied upon the examples of language or conduct found outside of the category in Supreme Court opinions. *See infra* Appendix A (Definition) for an extensive discussion of “definitions,” including “ostensive definitions” (that is, definitions by example rather than by criteria) and our conclusion, contrary to popular wisdom, that the panel’s approach is a proper way to proceed in legal and other endeavors.

12. *See Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002).

13. Reaction was again swift and predictably split. Andrew Burnett, a defendant hit with an \$8 million judgment as part of the verdict, lamented, “If this ruling stands, it will be easy

banc opinion, authored by Judge Pamela Ann Rymer, although excessively lengthy, does not articulate a rationale for its result; it is, in fact, a “holding” without minor premises between its major premises and its conclusions. For example, it sets forth the traditional Ninth Circuit test for “true threats,”<sup>14</sup> discusses the facts of *American Coalition*, but then never applies the test to the facts, even in light of the telling objections contained in the dissents.<sup>15</sup>

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precedent to outlaw any speech that goes contrary to abortionists.” Howard Mintz, *Federal Appeals Court Says Anti-Abortion Activists Intimidate Doctors*, SAN JOSE MERCURY NEWS, May 17, 2002, at 1. Another defendant, Paul deParrie added, “I think this is another stop on the continuing exodus from the 1st Amendment in this nation.” Weinstein, *supra* note 7, at B1. Planned Parenthood personnel disagreed. Their attorney, Maria Vullo, explained, “I think [the ruling] says for the abortion and non-abortion community, if you threaten to kill somebody, the law is not going to protect you.” David Kravets, *Court: Abortion Foes Made Threats*, AP ONLINE, May 17, 2002, 2002 WL 21233878. Dian Harrison, president of the San Francisco-Golden Gate chapter, who commented that “[t]his kind of craziness is not OK,” and said, “[w]hen you start threatening people, you cross the line.” Mintz, *supra*, at 1. Linda Williams, head of the Santa Clara, California chapter, added, “[w]hen free speech is explicitly designed to incite violence or the fear of violence, it is really something quite different.” *Id.* As with the panel decision, abortion proponents focused on the underlying subject matter—abortion—rather than the merits of the case. Vicki Saporta, president of the National Abortion Federation, commented, “I think this decision is important for the continued protection of abortion providers throughout the country.” Weinstein, *supra* note 7, at B1. Again, the media tended to side with the plaintiffs, even though First Amendment issues were raised. *See, e.g.*, Editorial, OMAHA WORLD-HERALD, May 19, 2002, at 10B (noting that the Ninth Circuit called the published materials involved in the *American Coalition* litigation, “which gave names, addresses and personal details about doctors and declared them guilty of crimes against humanity[,] a ‘true threat.’ A reasonable, and obvious, decision. Still, it’s good to have a court say so.”).

In the wake of the ruling, the Web site’s creator vowed not only to keep the site up, but also to “‘add six bloody, baby-butcher judges to the Web site,’ referring to the six judges on the 9th U.S. Circuit Court of Appeals who sided with four doctors and two clinics who sued a dozen abortion foes.” David Kravets, *Anti-Abortion Web Site to Add Judges’ Names*, CONTRA COSTA TIMES, May 18, 2002, at 14.

14. *Am. Coalition*, 290 F.3d at 1074–75.

15. In an analysis of the jurisprudence of “true threats,” preliminarily setting out (without the disruption and burden of the citation to precedent) its basic analytical framework and identifying the key questions is helpful. We deal with several unproblematic paradigms:

- (1) Protected “speech” (any language or expressive conduct, subject to a few narrow exceptions (e.g., “fighting words,” “obscenity,” etc.));
- (2) Unprotected “true threat” (A to B: “I am (or we are) going to harm you.”); and
- (3) Protected “speech” or unprotected “incitement,” if substantial danger of imminent harm is present (A to B: “C ought to be harmed.”).

We deal primarily with alternative problematic paradigms:

- (4) Protected “warning” or unprotected “true threat” (A to B: “You are going to be harmed.”).

The meaning of (4) is not plain. If it is read to be merely a statement of fact, probable or not (e.g., “Continue smoking and you will die of cancer”), neither the majority nor the



minority in *American Coalition*—or any other opinion of which we are aware—would classify it as a “true threat”; it is a protected warning, even if, as intended, it puts the listener in mortal fear.

When the meaning of a statement or expressive conduct is not plain, its interpretation—or disambiguation—is generally a matter of context; the denotation of the language spoken by, or the expressive conduct of, the person may be meaningless in itself, that is, innocent of any express threat. For example, if a person nails two boards together and erects them in another’s front yard, conceivably it could be a Christian symbol, rightly read as, “Repent in light of Christ’s crucifixion.” But tar and burn it, and its symbolism is radically altered: it manifestly carries a racist connotation, stemming from its infamous association with the Ku Klux Klan, and it legitimately engenders in the householder fear for life, limb, and property from whomever erected and torched the cross.

Place, too, may make a difference. Erect the same cross—even burn it—in your own backyard, and while its connotation remains racist, its status as a threat, to a particular person, is removed; it is no different in kind from the burning of an American flag. Each is a form of protected “speech.”

The interpretation or disambiguation of a statement or expressive conduct may also have to be made on another crucial point. If it is to be read as an unprotected “true threat,” and not a protected “warning,” another necessary question arises: “From whom is the harm to come?” If the harm is to come from the speaker, or another for whom he is legally responsible, that is, someone whose conduct is authorized, directed, or ratified by the speaker to engage in the harm, manifestly paradigm (4) is a “true threat.” But if the harm is to come from another, not so connected to the speaker, the statement is a protected warning, not a “true threat.” For example, a law enforcement officer who tells a person that another person is planning to harm him, “warns” him; he does not “threaten,” though the intended effect of the warning may be to put the person in mortal fear.

Legally, interpretation or disambiguation is a process that necessarily relies heavily on evidence of circumstances beyond the speech or expressive conduct of the speaker. Multiple issues are posed. What role should the court play in the process, either in making decisions for itself on interpretation in the First Amendment area or in admitting evidence? Evidence of circumstances is referred to as “evidence of context.” Should evidence of context be limited to the immediate circumstances of the delivery of the speech or expressive conduct of the speaker? May it properly be extended more broadly? How far? Subject to what standards? What standards should limit the role of courts? At the trial court or appellate court level? What role should a jury play? What standards should apply to limit its conduct? Does it make a difference, determinative or otherwise, that the speaker spoke or acted as part of public discourse? That the speaker spoke directly to the person who was the target of the alleged threat? What role, if any, should the state of mind of the speaker or actor play? Should the standard of responsibility be subjective? Intent, knowledge, recklessness? Objective? From whose perspective, the hearer, speaker, or that of a reasonable person? Or should perspective not be taken into consideration? What difference, if any, should the standard make beyond its impact on the formulation of jury instructions? The admission or exclusion of evidence? What difference, if any, does it make that the circumstance from which a danger of harm is to be inferred was of the making of the speaker? Of those for whom he is not legally responsible? Under what standard? What difference, if any, does it make that the circumstances are the beliefs of the speaker, for which no independent claim for relief could be brought because of the First Amendment? Of others for whom he is legally responsible? Of others?

These—and others—are the sorts of questions that arise here. These materials undertake to give answers to them that can be *justified* in light of our history and traditions as a free society that rightly prides itself on its emphasizing individual responsibility. See Wechsler, *supra*

The panel opinion in *American Coalition* is a good template for what we believe to be the correct approach to “true threats”; it went far (although not as far as it should have) toward proscribing “true threats,” while at the same time ensuring protection for the freedom of speech guaranteed in the First Amendment and basic principles of federal criminal law. The en banc opinion, however, bodes ill for that freedom. Its reasoning, a far cry from the impressive and careful analytical work of the panel opinion and the en banc dissents, leaves social and political protesters of all stripes unjustly open to debilitating and uncertain litigation. In fairness, the en banc opinion’s teachings on the general standard for “true threats” are not materially different from those of the other circuit courts of appeal. Nor is its holding that evidence of context is relevant. Evidence of context *is* relevant. The black letter rule, however, is only a general rule; it does not speak to issues of kind, degree, or origin. In fact, the en banc’s upholding on the record before it of the use of evidence of context to interpret one person’s statements in light of another person’s conduct where the other person is legally unrelated to the speaker is especially disturbing. In addition, its upholding of the use of similar evidence of context to show the state of mind of the speaker himself is little short of revolutionary.<sup>16</sup> Indeed, it gives a new meaning to “guilt by association”—where not even association is required to impose guilt vicariously. If this decision is not reversed and is followed in the other circuits, it will put all protestors everywhere in a perilous position. If all Americans

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note 7, at 5, 10–11, 14–15 (“Here as elsewhere a position cannot be divorced from its supporting reasons; the reasons are, indeed, a part and most important part of the position.’ . . . ‘[W]hat, if any, are the standards to be followed in interpretation [?] [What are the] criteria . . . [of] those who undertake to praise or to condemn . . . [that] morally and intellectually [they are] obligated to support?’ . . . [Unlike in politics where principles may be] instrumental in relation to results . . . , the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”). The aim of our approach in these materials is to meet Wechsler’s test. *See also* *Passenger Cases*, 48 U.S. (7 How.) 283, 470 (1849) (Taney, C.J.) (“that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported”). Nevertheless, we recognized, as Lon Fuller so aptly describes it, reason alone cannot be our only guide; fiat (rightly understood, not as arbitrary preference, but as fidelity to established positive law) must also be given its just due. *See* Lon Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376 (1946).

16. *See Am. Coalition*, 290 F.3d at 1079–81.

are to enjoy the benefits of their constitutionally protected right to free speech and basic principles of federal criminal law, that is, a standard of individual responsibility based on personal conduct and subjective state of mind, review by the Supreme Court or, at least, rejection by the other circuits is required.

In these materials, we set out a road map for the task of reforming the jurisprudence of threats and an articulation of its rationale under the First Amendment. In addition, we examine the basic jurisprudence of the federal criminal law, in particular, its traditional roots in notions of individual responsibility based on personal conduct and state of mind. In Part I, we analyze the district court and the Ninth Circuit opinions in the *American Coalition* litigation. In Part II, we trace the traditional theory and practice of free speech under the First Amendment, rooted in the history and various rationales of the First Amendment. We are interested in putting the question “why?” to all black letter rules; for only in light of the answer, or answers, can particular rules and practices be intelligently evaluated. The law must remain a matter of reason, not fiat. In Part III, we examine Supreme Court jurisprudence on “true threats.” We examine each of the major efforts of the Court to grapple with this elusive category. Only then do we make an effort to synthesize the law. In Part IV, we look in detail and in context at the various tests the circuit courts of appeal apply to distinguish “true threats” from “protected speech,” and we analyze how these tests and practices in their case-by-case application fit (comfortably or otherwise) into the Supreme Court’s general free speech teachings and the general jurisprudence of the federal criminal law. Because we argue for a reexamination of the law of each circuit, we examine the law of each circuit separately. We believe that a general survey does not give sufficient data to make an informed judgment about the relevant jurisprudence in particular circuits. In Part V, we examine the basic principles of federal criminal law that focus on individual responsibility in a free society, the necessary background against which the use of the criminal law to control speech or expressive conduct must be intelligently reevaluated. Our particular concern, in opposition to the present jurisprudence of “true threats” in the various circuits, is with the traditional requirements of personal conduct and culpable state of mind. In a free society, forms of strict or vicarious liability should be the exception. That they should be employed in the sensitive area of free speech is an anomaly that

requires a persuasive justification, a justification that does not yet exist in the relevant decisions or legal literature. We believe that it cannot be convincingly written.

In addition, these materials go substantially beyond conventional legal analysis; they include, where relevant, fairly comprehensive historical, social, and philosophical perspectives. These perspectives are principally found in textual footnotes, which we designed to be read independently of the general flow of the textual argument that is in the form of conventional legal analysis.<sup>17</sup> Because the decisions

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17. We go substantially beyond conventional legal analysis in these materials because we believe that it alone cannot offer persuasive answers to the “why” question. In brief, the right interpretation of a constitution, a statute, or a decision is often plainly not one way or another as a matter of legal analysis. *See, e.g.*, Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1239, 1252 (1931):

[T]he line of inquiry . . . has come close to demonstrating that in any case doubtful enough to make litigation respectable the available authoritative premises—*i.e.*, premises legitimate and impeccable under the traditional legal techniques—are at least two, and that the two are mutually contradictory as applied to the case in hand. . . . [T]hen there is a choice in the case; a choice to be justified; a choice which *can* be justified only as a question of policy—for the authoritative tradition speaks with a forked tongue.

*Id.* As Llewellyn observes, the ultimate justification for a legal result must often rest on materials outside of the legal analysis itself. Two of the greatest masters of the common law tradition and the interpretation of statutes, Justice Oliver Wendell Holmes and Judge Learned Hand, each squarely, in the tradition of positivism in the law, voice similar thoughts about the need to go beyond legal analysis. Justice Holmes put it this way:

If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life. It would be equally true of any subject. The only difference is in the ease of seeing the way. To be master of any branch of knowledge, you must master those which lie next to it; and thus to know anything you must know all.

OLIVER WENDELL HOLMES, SPEECHES 23 (1913). Judge Hand observed:

I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with the books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly anything he will. Men do not gather figs of thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.

LEARNED HAND, THE SPIRIT OF LIBERTY 81 (Irving Dillard ed., 3d ed. 1960).

In these materials, we advocate the reform of the jurisprudence of threats in each of the circuits. Our focus is on that jurisprudence in the context of the First Amendment and basic principles of federal criminal law. But that context, too, must be placed in a context, a context that mainly lies outside of the usual legal sources. We attempt that daunting task in these materials in nine textual footnote paragraphs that are, in effect, extensive asides to our legal analysis.

First, we are a nation at war, a war without a visible enemy in a definite geographical area, with no set battles to be fought, and with no conventional way to determine its end in victory for our cause. (Presumably, should we lose, those of us who will be around in the aftermath of the war will know that we were defeated.) As in the case of other wars, this war will inevitably be fought against a backdrop of dissent. That context must be factored into proposals for reform. *See infra* note 53 (recounting the events of September 11, examining the beginning signs of dissent, and comparing a growing ethnic animosity with the sacrosanct character of individual responsibility in the law).

Second, while we believe that individual responsibility must remain sacrosanct, we recognize that individual responsibility properly extends to liability for the actions of others. The legal rules to determine the scope of vicarious liability are fairly routinely applied in criminal and civil law (e.g., aiding and abetting, conspiracy, etc.). Nevertheless, we raise a question about the propriety of the extension of ratification to civil responsibility, where civil responsibility itself is based on criminal standards. *See infra* note 56 (analyzing ratification in the context of federal racketeering legislation).

Third, we believe that the *American Coalition* litigation discussed in these materials is about more than legal remedies, injunctions, or damage; in brief, it is about delegitimation by the use of the labels “murderer” or “racketeer” in the cultural wars roiling this generation of Americans. *See infra* note 130 (recounting sociological aspects of the current cultural war over the contours of American values; the issue of the foundation, if any, of those values, including the Founders’ philosophy; litigation as a means of the delegitimation of your opponent in the social and political arena; and the proper role of the courts in the cultural war that rages before them under the guise of law).

Fourth, the dominant metaphor for free speech under the First Amendment today is “the market place of ideas.” Yet that metaphor formed no part of the Founders’ generation. The dominate intellectual framework of the nation then (and for the generation that followed) was composed of religious and intellectual ideals. Two events impacted decisively on those ideals: the theory of evolution and the Civil War. That impact may be nicely illustrated in the lives of a small handful of prominent personalities in philosophy and law in the period that followed the war. The impact on the philosophy that became dominate after the war (pragmatism or instrumentalism) of the striking events of World War II was also decisive, at least for some. *See infra* note 178 (tracing the origins of the market place metaphor, and the impact of the theory of evolution and the Civil War on pre-war ideals, examining forms of pragmatism or instrumentalism, contrasting the impact of the Civil War and World War II on the philosophies and lives of Justices Holmes and Jackson, and illustrating the practical impact of an instrumental conception of law coupled with a majestic ideal (equality before the law) on a significant area of constitutional law (equal protection)).

Fifth, the central concept of the market place of ideas metaphor and basic principles of federal criminal law is personality, that is, the principal unit of analysis for free speech and responsibility under the federal criminal law is an autonomous individual, capable of acquiring knowledge and freely exercising his or her judgment based on that knowledge. In fact, that concept is rooted in Jewish and Christian scripture and the struggle for religious freedom during Imperial Rome, but those roots are all but unknown to modern and post-modern jurisprudence. They may be profitably recalled and examined. *See infra* note 181 (tracing the

and legal literature of “true threats” repeatedly call for “definition,” and note or complain about its supposed absence,<sup>18</sup> we also include an exhaustive appendix on the philosophical presuppositions of various theories of “definition.” We believe that these calls or complaints may well be unthinking and unjustified, at least for those whose work is the practical articulation of legal principles.

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origins of the Western idea of the autonomous individual (capable of acquiring knowledge and freely acting) and the development of religious freedom in Imperial Rome).

Sixth, privileging reasoning over the affective or emotive aspects of the human personality (a characteristic hubris of the Enlightenment) and of many concepts that are a pivotal aspect of law sadly omits much in the human condition. Art, too, including popular art, reflects insights into that condition and may often be profitably examined in any reflection on it, including ultimately, any reflection on the law. *See infra* note 337 (examining the phrase “silver bullet” in common parlance and the classic horror movie, *The Wolfman* (1941)).

Seventh, affording free speech rights to those with whom we are in agreement costs little. Affording those rights to others is a more difficult task, turning significantly on both the formulation and application of substantive and procedural protections for those rights. *See infra* note 416 (comparing and contrasting recent protest litigation under federal racketeering legislation and the Nuremberg Trials following World War II, instances where the temptation to afford less than full protection to the individuals on trial is or was strong for many of those who sat in judgment on the defendants).

Eighth, individual responsibility presupposes crucial bedrock concepts, including self or identity and its integral aspects, in the heart of which is state of mind. *See infra* note 647 (tracing the origins of the philosophical psychology of the concept of state of mind in the traditional criminal law and in the concept of civil liberties, looking at its status under modern form of empiricism and nominalism (questioning self, freedom, and responsibility and undermining the traditional foundations that justify individual responsibility and civil liberties) and examining the horrific consequences (in theory and in practice) of abandoning these bedrock conceptions of individual responsibility and civil liberties).

Ninth, traditional notions of individual responsibility mirror a concept of character (a person lived a good or evil life, and his or her personality was characterized by virtue or vice); while modern and post-modern notions of individual responsibility remain, they usually lack any articulate justification outside of individually asserted, subjective value preferences. *See infra* note 656 (tracing the origins in religious and philosophical thought of objective notions of moral responsibility and the substitution in modern life for them of subjective value preferences that ultimately lead to a relativism or nihilism that can neither justify individualism, responsibility, nor civil liberties).

We also include two appendices on definition in philosophy and law (reviewing the problematic state of the general discussion of the concept of definition) and natural language as a tool for legal analysis (reviewing the concepts of generality, ambiguity, and vagueness in semantics and law). *See* Appendix A (Definition) and Appendix B (Natural Language: Generality, Ambiguity, and Vagueness).

In the conclusion of these materials, we will attempt to tie these various strands together in the context of our proposals for the reform of the jurisprudence of threats, offering our answers to the “why” question. *See infra* note 773.

18. *See infra* notes 232–33 (discussing “definition”).

We offer these materials because we advocate a fundamental rethinking of the accepted jurisprudence of the circuit courts of appeal in this crucial intersection of freedom of speech and the criminal law. In sharp and unfavorable contrast with the persuasive dissents, the en banc opinion of the Ninth Circuit in *American Coalition* is particularly notable for its wooden and extensive citation of authority from its own circuit and the jurisprudence of others. But the opinion did not go significantly beyond black letter rules to ask probing questions about the supposed rationales for the rules. Nor did it make a sustained effort to essay the practical implication of alternative rules for a free society. If we are to do more than merely offer an academic concurrence to the masterful work of the dissents, we have an obligation to do more than review the same legal and related materials from a different or related perspective.

Finally, in Part VI, we analyze the key components of the Ninth Circuit's panel opinion in *American Coalition* and the en banc dissents to see how they could be refined to conform more closely to the teachings of the Supreme Court in the area of free speech and the jurisprudence of federal criminal law. Needless to say, we reject the en banc majority's fundamental holdings. The principal components of the panel opinion include: (1) whether "true threats" is properly a question of fact for the jury or a question of law for the court; (2) the elements of the standard used to identify "true threats"; and (3) the role of "context" in establishing a "true threat."<sup>19</sup> Based on our analysis, we propose an approach to dealing with "true threats," which is consistent with the Ninth Circuit's panel opinion and the en banc dissents that fairly and sensitively balances the two essential requirements of a free society: (1) the freedom of individuals to protest and to be judged based on personal conduct and state of mind; and (2) the freedom of individuals to not be under the domination of unlawful fear or disruption. We conclude that to protect First Amendment rights in a free society that places, as it ought, an appropriate emphasis on individual responsibility, a court, in distinguishing "speech" from a "true threat," should:

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19. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1015 n.9 (9th Cir. 2001), *aff'd in part, vacated in part, remanded by* 290 F.3d 1058 (9th Cir. 2002) (proper standard); *id.* at 1017 (de novo review proper); *id.* at 1016–20 (role of context).

(1) treat whether speech or expressive conduct constitutes a “true threat” as a threshold question of law;

(2) use a heightened, two-pronged standard, with both an objective, listener-based element and a subjective, speaker-based element, to distinguish “speech” or “expressive conduct” from “true threat”; to wit, speech or expressive conduct constitutes a “true threat” if, and only if

(i) a person speaking or engaging in expressive conduct subjectively intends that the speech or expressive conduct be taken as a threat of unlawful conduct that would serve to place the listener in fear of injury (to his or her person, property, or other protected interest) or would require the listener to take appropriate action to guard against the threat that would substantially disrupt his or her course of conduct—regardless of whether the speaker actually intends to carry out the threat; and

(ii) a reasonable listener would, in context, interpret the speech or expressive conduct as communicating a serious expression of an intent to inflict or to cause serious injury or other disruption to the listener by the speaker or another for whom the speaker is legally responsible; and

(3) in deciding to admit evidence of “context” to prove a “true threat” (where “context” is used to interpret, disambiguate, or substantially color objectively nonthreatening speech or expressive conduct), including the required state of mind of the speaker, independent of other evidentiary requirements, and before admitting such evidence, require clear proof that the speaker is responsible for the “context,” including the violence of others, that is, he authorized it, directed it, or ratified it.

## II. THE *AMERICAN COALITION* LITIGATION

### *A. The District Court Opinion*

By now, those who love the First Amendment are familiar enough with the general outline of the facts from the *American Coalition* litigation. Indeed, in three years, it produced three



published opinions at the trial level alone.<sup>20</sup> Nevertheless, a short summary of the facts of the litigation is required to understand its significance. Plaintiffs, individual doctors and two abortion clinics, brought suit against two anti-abortion protest organizations (American Coalition of Life Activists (“ACLA”) and Advocates for Life Ministries) and various individuals based on the assorted propaganda materials.<sup>21</sup> The plaintiffs alleged that the First Amendment did not protect these materials because the materials constituted “true threats.” The plaintiffs did not argue that the materials were unprotected “incitements.” According to the plaintiffs, the “threats” were actionable under various statutes—including the Racketeer Influenced and Corrupt Organizations Act (“RICO”),<sup>22</sup> the Oregon Racketeer Influenced and Corrupt Organizations Act (“ORICO”),<sup>23</sup> and the Freedom of Access to Clinic Entrances Act (“FACE”).<sup>24</sup>

The materials included two posters, one featuring “THE DEADLY DOZEN”<sup>25</sup> and the other featuring plaintiff Dr. Crist.<sup>26</sup>

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20. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999) (amending order and granting permanent injunction); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 23 F. Supp. 2d 1182 (D. Or. 1998) (granting in part and denying in part motion for summary judgment); *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 945 F. Supp. 1355 (D. Or. 1996) (denying motion to dismiss and granting in part and denying in part motion for judgment on the pleadings).

21. *Am. Coalition*, 23 F. Supp. 2d at 1185.

22. 18 U.S.C. §§ 1961–1968 (1994).

23. OR. REV. STAT. § 166.720 (1997). The plaintiffs abandoned their state law claims before trial; only the RICO and FACE claims reached the jury. *Am. Coalition*, 244 F.3d at 1013 n.3; *see also* *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1063 (9th Cir. 2002).

24. 18 U.S.C. § 248 (1994).

25. The court described the poster:

The poster contains a heading in large, bold print that states: “GUILTY of Crimes Against Humanity.” The document then makes a statement about prosecution of abortion as a “war crime” during the Nuremberg trials in 1945–46. The poster next sets out—under the heading “THE DEADLY DOZEN”—the names, addresses, and telephone numbers of 12 people, including both Newhall plaintiffs and plaintiff Hern. The poster then offers a “\$5,000 REWARD” for “information leading to arrest, conviction and revocation of license to practice medicine,” states in large letters “ABORTIONIST,” and gives the name and address of the ACLA [the American Coalition of Life Activists]. Thus, the statement that stands out because it is emphasized either by the size and/or boldness of print, reads: “GUILTY OF CRIMES AGAINST HUMANITY . . . THE DEADLY DOZEN . . . \$5,000 REWARD . . . ABORTIONIST.”

*Am. Coalition*, 23 F. Supp. 2d at 1186.

They also included an Internet Web site entitled, “The Nuremberg Files,”<sup>27</sup> the stated purpose of which was to “collect[] dossiers on abortionists in anticipation that one day [our society might] be able to hold them on trial for crimes against humanity.”<sup>28</sup> The Internet Web site contained a list of over two hundred people that it termed “ABORTIONISTS,” and a list of over two hundred others that the site alleged supported the abortionists, including law enforcement officers, judges, politicians, abortion clinic workers, and other “MISCELLANEOUS BLOOD FLUNKIES.”<sup>29</sup> A line was drawn through the name of each person killed by those opposed to abortion; in three areas, the site bore drawings of dripping blood.<sup>30</sup>

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26. The court described the poster:

The poster targeting plaintiff Crist bears the initial heading “GUILTY” in very large print, followed by “OF CRIMES AGAINST HUMANITY” in somewhat smaller print. The poster then sets out the same statement about the Nuremberg trials that appears on the Deadly Dozen poster, followed by the statement “Abortionist Robert Crist.” Below that statement is a photograph of Crist, and a listing of his home and work addresses. Directly below the photograph is language, in tiny print, describing Crist as a “notorious Kansas City abortionist [who] travels to St. Louis weekly to kill babies at Reproductive Health Services . . . . He also sometimes kills women.” The poster next recites information about women allegedly injured by Crist, followed by a request (again, in tiny print) to “Please write, leaflet or picket his neighborhood to expose his blood guilt. Ask Crist to turn from killing and injuring women and children, to helping and healing those in need.” In large print directly below the quoted language are the words “\$500 REWARD” followed by (in tiny print) “to any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines.” Finally, like the Deadly Dozen poster, the word “ABORTIONIST” appears in very large print, followed by the ACLA’s name and address. Thus, the emphasized portions of the poster read “GUILTY OF CRIMES AGAINST HUMANITY . . . Abortionist Robert Crist . . . \$500 REWARD . . . ABORTIONIST.”

*Id.* at 1186–87.

27. See generally Rene Sanchez, *Abortion Foes’ Internet Site on Trial*, WASH. POST, Jan. 15, 1999, at A3.

28. *Am. Coalition*, 23 F. Supp. 2d at 1187.

29. *Id.* at 1188 n.9.

30. *Id.* at 1188. The Internet Web site is described in greater detail in Sanchez, *supra* note 27. As a result of the wide-ranging injunction the district court imposed, the site disappeared for several months during the pendency of the appeal. In the wake of the Ninth Circuit’s panel decision, however, the site returned. Even following the en banc court’s opinion, the site is still up—at least for now. See *The Nuremberg Files*, at <http://www.christiangallery.com/atrocity> (last visited May 21, 2002). Indeed, it now features a new introduction directed at the six-member majority in the en banc opinion. See *Changes*, at <http://www.christiangallery.com/changes.html> (last visited May 21, 2002).

Concededly, none of these materials was explicitly threatening.<sup>31</sup> Nevertheless, the plaintiffs argued that the materials constituted “true threats” when viewed in the context of the previous violence that had been directed toward abortion clinics and providers dating back to the 1993 shooting death of Dr. David Gunn. The plaintiffs made these arguments even though none of the defendants engaged in violent conduct (personally or otherwise).<sup>32</sup> No evidence was produced to show that the defendants legally authorized, directed, or ratified the violence. The evidence that was admitted at trial, under the rubric of “context,” contained more than six hundred references by plaintiffs’ counsel and their witnesses “to murders, shootings, bombings, arson, and acts of vandalism committed against abortion providers or facilities by non-parties to the case who were *not* alleged to be conspirators with defendants.”<sup>33</sup>

31. *Am. Coalition*, 23 F. Supp. 2d at 1186.

32. *Id.* at 1185–86. The one exception was Michael Bray. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1138–39 (D. Or. 1999) (individual injunction finding on Michael Bray). While the jury found for plaintiffs on all claims, Bray was excluded on the RICO claim. See *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1066 (9th Cir. 2002); see also *infra* note 56 (no proof in RICO litigation connecting demonstrations with crimes of violence).

33. Brief of Defendants-Appellants at 9, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320) (emphasis added). Some of the “context” evidence admitted included:

141 references to the murder of Dr. David L. Gunn in 1993 by non-party, non-conspirator Michael Griffin.

120 references to non-party, non-conspirator Paul Hill’s murder of Dr. John Bayard Britton and James H. Barrett in 1993 with a shotgun, and his wounding of Barrett’s wife June.

109 references to murder victim Dr. John Bayard Britton.

58 additional references to murderer Michael Griffin.

55 direct references to non-party, non-conspirator Rachelle “Shelley” Shannon in relation to her shooting of Dr. Tiller in the arms in 1993.

42 additional references to gunshot victim Tiller and his shooting.

38 references to John Salvi, who shot clinic workers in Brookline, Mass. in 1994.

35 additional references to murder victims James H. Barrett and/or Mrs. June Barrett, all by plaintiffs.

22 references to abortion doctors, in general, being shot or killed by non-party, non-conspirators.

12 references to non-party, non-conspirator Shelley Shannon’s arson and bombings of abortion clinics.

14 references to arson and bombings of abortion clinics in general.

10 references to the murder victim Dr. George Wayne Patterson, who was slain in Mobile, Alabama in 1993.

12 references to the murder of the Dr. Barnett Slepian by a sniper in Amherst,

Given that “evidence of context,” the plaintiffs testified that they felt “threatened,” though they frankly conceded that “no statement contained in the text of the Deadly Dozen poster, the Crist poster, or the Nuremberg Files [was] explicitly threatening, in the sense that they contain[ed] no ‘quotable quotes’ calling for violence against the targeted providers.”<sup>34</sup> Significantly, the record also included the testimony of federal law enforcement officers stating that they took the posters as threats and that they warned the doctors of possible violence.<sup>35</sup> But equally significant, if not more so, the record contained the closing argument of plaintiffs’ counsel, including an impassioned treatment and condemnation of defendants’ opinions—that however misguided was manifestly protected constitutionally—on the various justifications of killing physicians who engage in abortions.<sup>36</sup> Over the objections of the defendants and the ACLU Foundation of Oregon (“ACLU Foundation”) as amicus curiae, the court found that the defendants’ propaganda materials were speech outside the protection of the First Amendment.<sup>37</sup>

In the course of its opinion, the district court specifically declined to adopt a test for “true threats” that would have provided

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New York, on October 23, 1998, nearly four years after [*American Coalition*]’s posters were issued.

5 references to the sniper shooting of Dr. Garson Romalis on November 8, 1994, including a hearsay account by plaintiff Hern (over vehement defense objections) of how Romalis’s femoral artery was severed by the sniper’s bullet and he almost bled to death on his kitchen floor.

9 references to Brookline, Massachusetts, site of non-party, non-conspirator John Salvi’s fatal shootings of abortion clinic employees Shannon Lowney and Leanne Nichols on December 30, 1994.

4 references to murder victims Shannon Lowney and Leanne Nichols, who were killed by Salvi.

2 references, both by plaintiffs, to Shelley Shannon’s “butyric acid attacks” (i.e., stink bombs) on abortion facilities.

*Id.* at 9–12.

34. *Am. Coalition*, 23 F. Supp. 2d at 1186. The court also so instructed the jury.

35. The testimony is set out in detail in Judge Berzon’s able dissent. *Am. Coalition*, 290 F.3d at 1112–13.

36. *Id.* at 1110–11. The danger of this sort of evidence is that it invites a finding of liability based on belief rather than conduct. *Id.* at 1111 (“One cannot read plaintiffs’ closing argument in this case without fearing that the jury was being encouraged to hold the defendants liable for their abstract advocacy of violence rather than for the alleged coded threats in the posters and Website, the instruction to the jury to the contrary notwithstanding.”).

37. *Id.* at 1086.

far greater protection to speech than the test it eventually used.<sup>38</sup> The ACLU Foundation was ardently opposed to those decisions of the Ninth Circuit that articulated an objective, speaker-based test for the existence of a “true threat,” that is, “whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.”<sup>39</sup> As the ACLU Foundation observed in the amicus curiae brief it filed on appeal:

Civil liberties are indivisible. Free speech rights cannot be granted to some and denied to others. The First Amendment, however, does not protect a speaker who intentionally threatens another with death or serious bodily injury. Although easy to state, this rule is not always easy to apply. Its application is especially difficult where, as in this case, the alleged “threat” is not explicit but may be inferred, if at all, from the surrounding factual circumstances, or “context.”<sup>40</sup>

Instead, the ACLU Foundation urged the district court to adopt a standard with (1) an objective, listener-based component, and (2) a subjective, speaker-based component; it urged that the subjective component was necessary “to insure that there is proof that the speaker actually intended to threaten rather than merely to communicate an idea using protected speech.”<sup>41</sup> As submitted in the brief to the Court, the standard read:

[T]he Free Speech Clause of the First Amendment does not protect statements that are “true threats.” A statement made by a person constitutes a “true threat” when:

First, a person makes a statement that, in context a reasonable listener would interpret as communicating a serious expression

38. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 945 F. Supp. 1355, 1370–73 (D. Or. 1996); 1 STEVEN A. CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 6.01, at 6–7 (2d ed. 1985) (Supp. Jan. 2002) (reviewing of doctrine of binding precedent or judicial hierarchy). The district court acted properly. *See Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting) (“Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant . . .”).

39. *Am. Coalition*, 23 F. Supp. 2d at 1189 (citing *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). For a discussion of this test, see *infra* Part V.A.1.d.

40. Brief of Amicus Curiae ACLU Foundation of Oregon, Inc. at 2, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320).

41. *Am. Coalition*, 23 F. Supp. 2d at 1190.

of an intent to inflict or cause serious harm on or to the listener; and

Second, the speaker intended that the communication be taken as a threat that would serve to place the listener in fear for his or her safety, regardless of whether the speaker actually intended to carry out the threat.<sup>42</sup>

Nonetheless, the Court analyzed the issues, as might properly be expected, solely in terms of the Ninth Circuit's objective, speaker-based standard.<sup>43</sup> Applying that standard, the district court found that only three of the materials could be found, in a trial on the merits, to constitute "true threats" unprotected by the First Amendment.<sup>44</sup> The Court emphasized the importance of viewing the

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42. Brief of Amicus Curiae ACLU Foundation of Oregon, Inc. at 8, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320). While we argue for the adoption of a variation of this standard, we are *not* arguing for the entire "approach" to threats that the ACLU Foundation offered the district court. In the section of its brief to the district court entitled "A Suggested Methodology for Considering True Threats," the ACLU Foundation set forth its test, but then added that

[A] court should also consider other related factors, including: (a) how explicit and unambiguous is the alleged threat; (b) is the alleged threat directed to a specific individual or to specific individuals; (c) was the alleged threat communicated to the listener and, if so, in what manner; (d) does the alleged threat threaten to inflict serious harm. These are not necessarily all of the factors that should be considered, but they appear to this amicus to be among the most important considerations for ensuring that liability is imposed only upon "true threats" and that speech protected under the First Amendment is neither punished nor chilled.

Brief of Amicus Curiae, ACLU Foundation of Oregon Amicus Curiae Introduction at Argument I(D), *Am. Coalition*, 23 F. Supp. 2d 1182 (No. 95-1671-JO). By adding these factors to its "standard," the ACLU Foundation confused the point of adopting the standard in the first place. Accord Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 578-79 (2000) ("Regardless of whether these new factors merely amplify the two main tests, or supplement them, they nevertheless illustrate the primary flaw in the ACLU's approach to the Nuremberg Files litigation. The ACLU essentially proposes that juries be presented with a melange of slippery factors to apply to speech that will often be ambiguous and is . . . so abrasive, offensive, or confrontational that it has made someone angry enough to sue.").

43. *Am. Coalition*, 23 F. Supp. 2d at 1194 ("The ACLU's concern, as well as that of the defendants', is that liability not attach unless the threats are intentionally made, and do not constitute jests or political hyperbole, even extreme political hyperbole. The cases discussed above amply show that the Ninth Circuit shares this concern, and yet repeatedly has confirmed that an objective speaker-based test that considers all the circumstances is sufficient to permit the trier of fact to distinguish between 'true threats' and speech protected by the First Amendment. . . . Accordingly, I decline to depart from established Ninth Circuit law and create a test unique to this case."); see *supra* note 38 (duty to follow precedent in judicial hierarchy).

44. See *Am. Coalition*, 23 F. Supp. 2d at 1194.

posters and the Internet Web site in the “context of violence” asserted by the plaintiffs—even though the defendants did not authorize it, direct it, or ratify it—noting that “the Ninth Circuit holds that whether a threat is a true threat must be determined in light of the context (or circumstances) in which it is made.”<sup>45</sup>

Ultimately, the trial on the merits resulted in a verdict awarding the plaintiffs \$107 million in actual and punitive damages<sup>46</sup> and a broad injunction prohibiting, among other things, the defendants—and others<sup>47</sup>—from:

publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the “Deadly Dozen” Poster . . . or its equivalent, with specific intent to threaten [the plaintiffs] or any of their family members, officers, agents, servants, employees, patients, or attorneys; (c) Publishing, republishing, reproducing and/or distributing anywhere, either directly or indirectly, the Poster of Dr. Robert Crist . . . or its equivalent, with specific intent to threaten [the plaintiffs] or any of their family members, officers, agents, servants, employees, patients or attorneys; [and], (d) Providing additional material concerning [the plaintiffs] or any of their family members, officers, agents, servants, employees, patients, or attorneys, with a specific intent to threaten, to the Nuremberg Files or any mirror Web site that may be created. In addition, defendants are enjoined from publishing, republishing, reproducing and/or distributing in print or electronic form the personally identifying information about plaintiffs contained in [the Nuremberg Files] with a specific intent to threaten.<sup>48</sup>

### *B. The Ninth Circuit Panel Opinion*

Scholarly criticism of the district court’s opinion was widespread and varied in content, with several commentators offering a variety of new approaches to “fix” the district court’s ruling.<sup>49</sup> The panel

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45. *Id.* at 1191.

46. See Sam Howe Verhovek, *Creators of Anti-Abortion Web Site Told to Pay Millions*, N.Y. TIMES, Feb. 3, 1999, at A9.

47. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1155 (D. Or. 1999) (granting injunction against defendants and “all persons in active concert or participation with any of them who receive actual notice”).

48. *Id.* at 1155–56 (footnote omitted).

49. Gey, *supra* note 42, at 541 (arguing that the standards for incitement to violence announced in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), should be applied to true threats); see also Robert Kurman Kelner, Note, *United States v. Jake Baker: Revisiting Threats and the*

opinion of the Ninth Circuit, however, eschewed novelty and reversed the district court, engaging in little more than a standard application of existing precedent. The panel opinion, authored by Judge Alex Kozinski, with the concurrence of Circuit Judge Andrew J. Klenfeld and United States District Judge William W. Schwarzer, sitting by designation, began by explaining that as an appellate tribunal in a First Amendment context, it had the responsibility to “conduct a *de novo* review of both the law and the relevant facts.”<sup>50</sup> “The question . . . is not,” it observed, “whether the facts found below are supported by the record but whether we, looking at the record with fresh eyes, make the same findings. If we disagree with the district court, our findings prevail.”<sup>51</sup> In making its *de novo* examination, the court first observed that “[e]xtreme rhetoric and violent action have marked many political movements in American history,” including the American Revolution and the Abolition, Labor, Antiwar, Animal Rights, and the Environmental movements,<sup>52</sup> and “[a]s a result, much of what was said even by nonviolent participants in these movements acquired a tinge of menace.”<sup>53</sup> But, the court noted, the Supreme Court addressed this

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*First Amendment*, 84 VA. L. REV. 287, 313 (1998) (arguing that courts should “[b]reath[e] new life into the ‘true threats’ doctrine, or alternatively requir[e] a showing of a specific intent to threaten . . .”); Leigh Noffsinger, Note, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Activity*, 74 WASH. L. REV. 1209 (1999) (advocating a four-part definition distinguishing threats from advocacy). But see Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 OHIO ST. L.J. 1175 (2000) (arguing that the *American Coalition* defendants were not entitled to a First Amendment defense).

50. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1017 (9th Cir. 2001) (citing *Lovell v. Powell Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996)).

51. *Id.* (citing *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997)).

52. *Id.* at 1014.

53. ¶1. *Id.*

¶2. *American Coalition* was decided by the panel before September 11, 2001. The en banc decision was rendered after September 11th—in a radically altered landscape. With prescience, the panel realized that the issues before it extended beyond the “anti-abortion activists [who] intimidated abortion providers . . .” *Am. Coalition*, 244 F.3d at 1007. From time immemorial, other “movements [also] acquired a tinge of menace,” including “antiwar.” *Id.* at 1014.

¶3. On September 11, 2001, at 8:45 a.m., a hijacked American Airlines Boeing 757, Flight 11, en route from Boston to Los Angeles, carrying eighty-one passengers and eleven crew members, crashed into the top of the North Tower of the World Trade Center in New York City. At 9:03 a.m., a hijacked United Airlines Boeing 757, Flight 175, en route from Boston to Los Angeles, carrying fifty-six passengers and nine crew members, crashed into the



South Tower of the World Trade Center. At 9:50 a.m., the South Tower collapsed, while at 10:29 a.m., the North Tower imploded, causing even more devastation and blanketing downtown Manhattan in ash and debris. Meanwhile, at 9:38 a.m., a hijacked American Airlines Boeing 757, Flight 77, carrying fifty-eight passengers and six crew members, en route from Dulles to Los Angeles, turned back over Cleveland and flew toward Washington, D.C., and crashed into the Pentagon. Finally, at 10:00 a.m., a hijacked United Airlines Boeing 757, Flight 93, carrying thirty-eight passengers and seven crew members, en route from Newark to San Francisco, crashed near Pittsburgh after passengers fought to regain control of the airplane to prevent its use as yet another devastating terrorist missile. *NEWSWEEK*, Extra Ed., Sept. 2001, at 30–31. Early on, the official count of the dead or missing in New York City was put at 4764, though other counts were as low as 2405. Eric Lipton, *Hard to Figure: A Difference in the Numbers*, N.Y. TIMES, Oct. 25, 2001, at 131. The final figure came in at 3056. Rick Hampson, *WTC Recovery Effort Concludes Without a Word*, USA TODAY, May 31, 2002, at A2 (World Trade Center: 2823; Pentagon: 189; Pennsylvania: 44). The financial impact of the attacks, which rippled out from New York City and Washington, D.C. to include the nation, will probably never be fully known or calculated with precision; it surely will be in the hundreds of billions of dollars. *Compare* N.Y. POST, Jan. 28, 2002, at 2 (reporting that a consulting firm for New York state estimates a cost to the national economy at \$639.3 billion and 2 million jobs), *with* Letter from William J. McDonough, President Federal Reserve Bank of New York, with attachments, to Honorable Carolyn B. Malony, United States House of Representatives (April 18, 2002) (reporting estimates of costs in New York City of building replacement and repair ranging from \$25 billion to \$29 billion with about \$15 billion covered by insurance; loss of income at \$4.5 billion; and displacement of 100,000 city workers, including: hotels, 6000 jobs; air, 11,000 jobs; restaurants, 12,000 jobs; amusement, 3000 jobs; apparel, 3000 jobs; and printing and publishing, 2000 jobs).

¶4. The events of September 11 are unlike any tragedy the United States had experienced in over 200 years. Certainly, many are drawing parallels to the devastating attack on Oahu, Hawaii. On December 7, 1941, at Pearl Harbor, 2300 soldiers and sailors died. On September 11, the dead were ordinary working men and women as well as firefighters and policemen. In 1941, the enemy, dressed in uniform, was the Empire of Japan. This time, the enemy, not dressed in uniform, was Osama bin Laden, his terrorist network, al-Qaeda, and the Taliban Government of Afghanistan that was harboring bin Laden and his network.

¶5. Addressing the Congress and the nation and calling for a vigorous response to the terrorist attacks, President George W. Bush warned that America must prepare for a “lengthy campaign unlike any other we have ever seen”; its objective must be no less than this: to find and defeat “every terrorist group of global reach.” Michael Elliott, *We Will Not Fail*, TIME, Oct. 1, 2001, at 20. The President warned that it will be “a conflict without battlefields or beachheads” and that “the conflict will not be short.” Elaine Sciolino, *The President’s Message: A Different Battle Awaits*, N.Y. TIMES, Sept. 16, 2001, at 5. So far, the President’s prediction is holding true; we are constantly reminded of America’s War on Terror, and public opinion supporting the war runs strong.

¶6. Nevertheless, antiwar marches followed close on the heels of the beginning of the War on Terrorism. Robert Worth, *In Three Languages, Urgently Chanting for Peace*, N.Y. TIMES, Oct. 8, 2001, at B12; Elizabeth Becker, *Marchers Oppose Waging War Against Terrorists*, N.Y. TIMES, Oct. 1, 2001, at 57. Left-wing intellectuals were quick to point the finger of blame at American policies. See Richard Bernstein, *Counterpoint to Unity: Dissent*, N.Y. TIMES, Oct. 6, 2001, at A13. In addition, the nation’s campuses are once again roiled. Anemona Hartocollis, *Campus Culture Wars Flare Anew as Image of the Ugly American Is Raised*, N.Y. TIMES, Sept. 30, 2001, at A24; Francis X. Clines, *At a Waiting College Campus an Echo of the 60’s*, Sept. 28, 2001, at B7. Predictably, with a long and involved war,

demonstrations may well acquire a “tinge of menace.” See Richard Lacayo, *Anti War Movement: Rapid Response*, TIME, Oct. 8, 2001, at 75 (“[A] prolonged and nasty land war, especially one requiring the reestablishment of the draft, would be sure to make more people dovish. If it does, there will be a well-established antiwar movement ready to admit them.”). As two of the dissenting judges on the en banc court in *American Coalition* noted in a different decision, rendered after September 11, the protections of the First Amendment are of crucial importance in times like these. See *LaVine v. Blaine Sch. Dist.*, 279 F.3d 719, 720 (9th Cir. 2002) (Reinhardt, J., dissenting from denial of rehearing en banc) (“[A]t times like those this nation now confronts, it is especially important that the courts remain sensitive to the demands of the First Amendment, a provision that underlies the very existence of our democracy. First Amendment judicial scrutiny should now be at its height, whether the individual before us is a troubled schoolboy, a right-to-life activist, an outraged environmentalist, a Taliban sympathizer, or any other person who disapproves of one or more of our nation’s officials or policies for any reason whatsoever.”) (citation omitted); *id.* at 728 (Kleinfeld, J., dissenting from denial of rehearing en banc) (“Constitutional law ought to be based on neutral principles, and should not easily sway in the winds of popular concerns, for that would make our liberty a weak reed that swayed in the winds.”); see also *Dazo v. Globe Airport Sec. Servs.*, 295 F.3d 934, 943 (9th Cir. 2002) (O’Scannlain, J., dissenting) (“I appreciate the fact that the tragic events of September 11, 2001 have cast this case in a different light from when it was first taken under submission. . . . But this nation’s recent tragedy simply does not bear on the legal question presented in this case. . . . Our judicial charge is to stand above the inflamed passions of the public, however much we may share them; we must apply the law faithfully and evenhandedly.”), *rehearing granted and opinion withdrawn*, 295 F.3d 934 (9th Cir. 2002). But see Dahlia Lithwick, *Poster Children: After 9/11, What Can Abortion Protesters Get Away With?*, at <http://slate.msn.com/?id=2066130> (last visited May 22, 2002) (conceding that Judge Kozinski probably got the right answer in his dissent from the en banc opinion in *American Coalition*, but adding, “even if the [majority] opinion stands on shaky legal ground, it somehow still feels, intuitively, right . . . . In the wake of Sept. 11 and in a week marked by new anthrax threats and terrorist alerts, deciding whether words are just words or thinly veiled calls to action is almost a luxury. Subtleties about whether incendiary messages are incitement or threats or protected political activity do not really matter . . . .”); *id.* (“Imagine a Web site called TheJihadFiles.com, operated out of Michigan. Imagine promises of death to infidels and the celebration of American murders. Imagine lists of all those killed in the attacks on the Twin Towers and the Pentagon with strikes through their names. Imagine your name next to that. Your address. The address of your kids’ schools. Your picture and license plate number. It’s not a threat. Just a roadmap for the next al-Qaida [sic] goon who passes through town.”).

¶7. Osama bin Laden and his followers are not representative of the Muslim world. Karen Armstrong, an astute observer of Islam, notes:

It would be as grave a mistake to see Osama bin Laden as an authentic representative of Islam as it would be to consider James Kopp, the alleged killer of an abortion provider in Buffalo, N.Y., a typical Christian, or Baruch Goldstein, who shot 29 worshipers in the Hebron mosque in 1994 and died in the attack, a true martyr of Israel.

Karen Armstrong, *The True, Peaceful Force of Islam*, TIME, Oct. 1, 2001, at 48 (tracing the history of the rise of “Islam”—an Arabic word related to *shalom* or peace—and the mission of the Prophet Mohammad in the seventh century, a major part of which was to end the vicious cycle of tribal vendetta and counter-vendetta on the Arabian peninsula; explaining that the Quran permits only wars of self defense and exhorts peace and that the primary meaning of “jihad” is not “holy war” but “struggle,” which refers to the difficult effort required personally

problem in *NAACP v. Claiborne Hardware Co.*,<sup>54</sup> where the Court found that the First Amendment fully protected statements by civil rights leader Charles Evers that could be interpreted as “intending to create a fear of violence whether or not [violence] was specifically intended.”<sup>55</sup> The Court found that, unless the speaker “authorized, ratified, or directly threatened” violence, his speech was fully protected.<sup>56</sup> Relying on the example of *Claiborne*, the Ninth Circuit

to put God’s will into practice). See generally KAREN ARMSTRONG, ISLAM: A SHORT HISTORY (2000); YOSSEF BODANSKY, BIN LADEN (2001); AHMED RASHID, TALIBAN (2001).

¶8. Rightly, Congress, in enacting the USA Patriot Act found:

(a) FINDINGS—Congress makes the following findings:

- (1) Arab Americans, Muslim Americans, and Americans from South Asia play a vital role in our Nation and are entitled to nothing less than the full rights of every American.
  - (2) The acts of violence that have been taken against Arab and Muslim Americans since the September 11, 2001 attacks against the United States should be and are condemned by all Americans who value freedom.
  - (3) The concept of individual responsibility for wrongdoing is sacrosanct in American Society, and applies equally to all religious, racial, and ethnic groups.
  - (4) When American citizens commit acts of violence against those who are, or are perceived to be, of Arab or Muslim descent, they should be punished to the full extent of the law.
  - (5) Muslim Americans have become so fearful of harassment that many Muslim women are changing the way they dress to avoid becoming targets.
  - (6) Many Arab Americans and Muslim Americans have acted heroically during the attacks on the United States, including Mohammed Salman Hamdani, a 23-year-old New Yorker of Pakistani descent, who is believed to have gone to the World Trade Center to offer rescue assistance and is now missing.
- (b) SENSE OF CONGRESS. – It is the sense of Congress that—
- (1) the civil rights and civil liberties of all Americans, including Arab-Americans, Muslim-Americans, and Americans from South Asia, must be protected, and that every effort must be taken to preserve their safety;
  - (2) any acts of violence or discrimination against any Americans be condemned; and
  - (3) the Nation is called upon to recognize the patriotism of fellow citizens from all ethnic, racial, and religious backgrounds.

USA Patriot Act of 2001, Pub. L. No. 107-56, §§ 101–102, 115 Stat. 272, 276 (2001).

54. 458 U.S. 886 (1982). For a detailed analysis of this case, see *infra* Part IV.A.

55. *Am. Coalition*, 244 F.3d at 1014. The speech is set out *infra* in Appendix C (Speech of Charles Evers).

56. ¶1. *Claiborne*, 458 U.S. at 929; see *Am. Coalition*, 244 F.3d at 1014. We recognize in our analysis of “true threats” vicarious as well as individual responsibility for the violence of others on the basis of “direction, authorization, or ratification.” We accept ratification as a basis of liability because it is too late to contend otherwise. Substantial qualification, if not objection, however, must be made, if not generally, at least under RICO. Criminal responsibility under RICO is set out in 18 U.S.C. § 1963 (1990) (“Whoever *violates* any provision of Section 1962 . . .”) (emphasis added). Civil responsibility under RICO is set out in 18 U.S.C. § 1964 (1995) (“Any person injured . . . by . . . a *violation* of Section 1962

...”) (emphasis added). “To violate” does not have a different meaning in its verb or noun form. *See* THE OXFORD ENGLISH DICTIONARY 653 (2d ed. 1989). Nor does it under RICO. *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 489 (1985) (“We should not lightly infer that Congress intended [“to violate”] to have wholly different meanings in neighboring [sections].”); *accord* *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943) (Black, J.) (False Claim Act) (“[W]e cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is involved by the informer.”); *N. Sec. Co. v. United States*, 191 U.S. 197, 401 (1904) (Holmes, J., dissenting) (anti-trust) (“The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.”); *see also* *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987) (“a ‘pattern’ for civil purpose is a ‘pattern’ for criminal purposes”) (citations omitted); *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 236 (1989) (“pattern . . . appl[ies] to criminal as well as civil application of [RICO]”); *cf.* *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) (“[I]t seems reasonable to give each use [of ‘to conduct,’ as a verb and a noun,] a similar construction.”). *But see* *Beck v. Prupis*, 529 U.S. 494, 505 (2000) (“to conspire” in 18 U.S.C. § 1962(d) read differently in civil litigation from criminal litigation). Accordingly, if ratification is not a permissible basis for criminal liability, it should not be a permissible basis for civil responsibility, at least under RICO. *Compare* *United States v. Indelicato*, 865 F.2d 1320, 1375–78 (2d Cir. 1989) (en banc), *Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir. 1989) (en banc), *adhered to after remand*, 893 F.2d 1433 (2d Cir. 1989) (“[T]he analysis in *Indelicato* is equally applicable to the present case, for since a RICO violation is an element to be proven in a civil RICO action, the substantive standards as to what must be proven in a criminal RICO prosecution also govern civil RICO actions.”), *and* *United States v. Local 560 of IBT*, 780 F.2d 267, 284 (3d Cir. 1985) (standards of responsibility for aiding and abetting for civil RICO are the same as for criminal RICO), *aff’g*, 581 F. Supp. 279, 330–32 (D.N.J.U. 1984) *with* *Cox v. Admin. U.S. Steel & Carnegie*, 17 F.3d 1386, 1409 (11th Cir. 1994), *rehearing granted on other grounds*, 30 F.3d 1347 (11th Cir. 1994) (failure to repudiate act by union ground to infer ratification of misconduct). *But see* *Rolo v. City Investing Co. Liquidation Trust*, 155 F.3d 644, 656–57 (3d Cir. 1998) (no civil aiding and abetting under RICO) (relying on *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 171–90 (1994) (securities acts)).

¶2. Ratification was not a ground on which to impose criminal as opposed to civil responsibility at common law. *See, e.g.*, *Morse v. State*, 6 Conn. 9 (1825) (finding that although employee gave liquor to minor Yale college student, the employer was not criminally liable despite ratification) (“In the law of contracts, a posterior recognition . . . [may be] equivalent to a precedent command; but it is not so in respect of crimes. . . . [As] to crimes the maxim *omnis ratihabentia retro trahitur et mandato equiparatur*, is inapplicable.”). Nor is it considered an independent basis for criminal responsibility in the leading treatises, which are either silent on the matter or expressly reject it. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW (3d ed. 2000); ROLLINS M. PERKINS ET AL., CRIMINAL LAW (3d ed. 1982). *But see* WILLIAM LAWRENCE CLARK & WILLIAM LAWRENCE MARSHALL, A TREATISE ON THE LAW OF CRIMES 484 (rev. by Melvin F. Wingersky 1958) (rejecting it and citing *Morse v. State*, 6 Conn. 9 (1825)).

¶3. Ratification is, of course, an accepted basis for civil responsibility. *Carbon Fuel Co. v. United Mine Workers of Am.*, 444 U.S. 212, 217–19 (1979); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 739 (1966). Nevertheless, where ratification is recognized as a basis for RICO civil liability, an independent duty to repudiate is present, as in the instance of misconduct by union members. *See, e.g.*, *Cox*, 17 F.3d at 1409; *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 136 (D.C. Cir. 1989),

concluded that “[w]hile Charles Evers and the defendants in our case pursued very different political goals, the two cases have one thing in common: Political activists used words in an effort to bend opponents to their will.”<sup>57</sup> Consequently, the panel concluded that, as a matter of law, “[t]he First Amendment protects ACLA’s statements no less than the statements of the NAACP.”<sup>58</sup>

The question of what role evidence of context plays in determining whether speech or expressive conduct is protected was crucial to the panel’s determination. Like the district court, the Ninth Circuit, in its panel opinion, recognized that none of defendants’ statements were facially threatening; in fact, none explicitly mentioned violence at all.<sup>59</sup> The panel conceded, “the

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*vacated on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (en banc). Generally, in fact, “[r]atification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.” *United States v. Alaska S.S. Co.*, 491 F.2d 1147, 1155 (9th Cir. 1974) (quoting Restatement (Second) of Agency § 82 (1958)). That general rule would not recognize ratification as a basis for liability of the defendants in *American Coalition* for the conduct of those who killed the various doctors; it was not done on their account.

¶4. However problematic under principles of criminal law general ratification is as a basis of criminal responsibility, it is even more problematic for criminal or civil responsibility where First Amendment interests are implicated. As the Court observed in *NAACP v. Claiborne Hardware Co.*:

A legal duty to “repudiate”—to disassociate oneself from acts of another—cannot arise unless, *absent the repudiation*, an individual could be found liable for those acts. As our decision in *Scales*, *Noto*, and *Healy* make clear . . . civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those acts of violence were “agents” or “servants” of those who attended the NAACP meeting; certainly such a relationship cannot be found simply because both shared certain goals.

458 U.S. 886, 925 n.69 (1982) (emphasis added); *see also Am. Coalition*, 244 F.3d at 1015 (“But if their statement *merely encourages unrelated terrorists*, then their words are protected by the First Amendment.”) (emphasis added); *Nat’l Ass’n For Women, Inc. v. Scheidler*, 1997 U.S. Dist. LEXIS 14854, at \*65–68 (N.D. Ill. 1987) (holding on motion under FEDERAL RULES OF CIVIL PROCEDURE Rule 56 that insufficient evidence was introduced to establish a material question of fact on responsibility of demonstrators, even where evidence of illegal purpose was introduced, to connect them with acts by others of murder, kidnapping, and arson) (“In contrast to the overwhelming evidence of [illegal demonstrations], the record fails to support plaintiffs’ allegation that any of the defendants individually or through [others] committed the predicate act of murder [, kidnapping, or arson]. Indeed, plaintiff was noticeably strained in the attempt . . .”).

57. *Am. Coalition*, 244 F.3d at 1014.

58. *Id.*

59. *Id.*

words actually used are not dispositive, because a threat may be inferred from the context in which statements are made.”<sup>60</sup> But, it emphasized that two kinds of ambiguity may be present that context may be used to resolve:

The first deals with statements that call for violence on their face, but are unclear as to *who* is to commit the violent acts—the speaker or a third party. All cases of which we are aware fall into this category: They hold that, where the speaker expressly mentions future violence, context can make it clear that it is the speaker himself who means to carry out the threat.

A more difficult problem arises when the statements, like the ones here, not only fail to threaten violence by the defendants, but fail to mention future violence at all. Can context supply the violent message that language alone leaves out?<sup>61</sup>

The panel expressed doubt on this point, observing that while no case directly answered the question, “important theoretical objections to stretching context so far” are raised by that approach because context, “after all, is often not of the speaker’s making.”<sup>62</sup> If evidence of context made by others could cause facially nonthreatening statements to lose their constitutional protection, “it could have a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause.”<sup>63</sup>

The panel then pointed out that while the district court’s instructions on true threats, which embodied a negligence standard,<sup>64</sup> were consistent with previous threat cases in the circuit,<sup>65</sup>

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60. *Id.* at 1017.

61. *Id.* at 1018.

62. *Id.*

63. *Id.* While the panel did not rule on whether the district court properly admitted the various items of “evidence of context,” it cautioned that nothing in its ruling “should be construed as approving [those] evidentiary rulings.” *Id.* at 1018 n.15.

64. The court instructed the jury as follows: “[A] statement is a ‘true threat’ when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault.” *Id.* at 1016.

On the role of the negligence in setting the civil and criminal liability standard in the First Amendment area, see *infra* note 713.

65. *Id.*

circuit precedents were not themselves consistent.<sup>66</sup> Nevertheless, under the district court's instructions, if

taken literally, the jury could have concluded that ACLA's statements contained "a serious expression of intent to harm," not because they authorized or directly threatened violence, but because they put the doctors in harm's way. However, the First Amendment does not permit the imposition of liability on that basis.<sup>67</sup>

Accordingly, the panel decided that it was material whether an ambiguous jury instruction merited setting aside the district court's verdict, for even if the jury drew only the permissible inference, its verdict could not stand under *Claiborne*; it, therefore, vacated and remanded the decision, with instructions to dissolve the injunction and enter judgment for the defendants on all counts.<sup>68</sup>

### *C. The Ninth Circuit En Banc Opinion*

Scholarly commentary predictably followed the panel's opinion—most of it supportive.<sup>69</sup> Nonetheless, the en banc court reversed

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66. See *id.* at 1015 n.9. The court explained, "[O]ur case law has not been entirely consistent as to whether a speaker may be penalized for negligently uttering a threat or whether he must have specifically intended to threaten." *Id.* While the court stated that it believed "specific intent" was the correct standard, it emphasized that "the result here is the same under either standard." *Id.* at 1016 n.9. For a discussion of the difficulties that the traditional use of "general intent" and "specific intent" present, see *infra* note 513.

67. *Am. Coalition*, 244 F.3d. at 1017.

68. *Id.* at 1019.

69. See, e.g., Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283 (2002); Marc Rohr, *Grand Illusion?*, 38 WILLAMETTE L. REV. 1 (2002). But see Kenneth J. Brown, *Assessing the Legitimacy of Governmental Regulation of Modern Speech Aimed at Social Reform: The Importance of Hindsight and Causation*, 10 WM. & MARY BILL RTS. J. 459, 481 (2002) (arguing that the panel should have analyzed the case as one involving incitement rather than "true threats," but failing to recognize that the panel could not have done so because the case was not argued as an incitement case; see *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 945 F. Supp. 1355, 1371 n.13 (D. Or. 1996) ("Contrary to Defendants' assertions, Plaintiffs are not pursuing an incitement to violence theory . . .")). Commentators who viewed the decision negatively were often influenced less by the merits of the decision and more by its underlying subject matter—abortion. See, e.g., Kari Lou Frank, Note, *Net Effects: How the Internet Has Changed Abortion Law, Policy, and Process*, 8 WM. & MARY J. WOMEN & L. 311, 333 (2002) ("[T]he impact the Internet has on the abortion debate can be as positive as it is negative. If used positively, the Internet could improve the safety of not only the woman seeking an abortion, but also of the abortion provider. Further, it could empower women in their reproductive choices and expand the available means by which women can exercise their rights. On the other hand, if the role of the Internet in the modern abortion climate is ignored, then the same Internet characteristics

course; it concluded that liability could properly be imposed on the defendants because their works constituted “true threats.”<sup>70</sup>

The en banc court began with an extended discussion on the appropriate standard of review.<sup>71</sup> It separated its discussion into two parts: (1) whether the evidence supported the conclusion that a threat was made that came within the underlying statute, FACE, and (2) whether the defendants could be held liable consistent with the First Amendment.<sup>72</sup> On the first issue, the en banc court explained:

[T]he proper definition of a “threat” for purposes of FACE is a question of law that we review *de novo*. If it were clear that neither the Deadly Dozen nor the Crist poster, or the Nuremberg Files, was a threat as properly defined, the case should not have gone to the jury and summary judgment should have been granted in ACLA’s favor. If there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question whether the posters and the Files amount to a “threat of force” for purposes of the statute was for the trier of fact. Assuming that the district court correctly defined “threat” and properly instructed the jury on the elements of liability pursuant to the statute, our review is for substantial evidence supporting the

historical facts (including credibility determinations) and the

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that bring information to the masses may also bring destruction. Without recognition of the impact of the Internet, websites like The Nuremberg Files will only continue to flourish, and remain unfazed by legal or contractual injunctions.”); Prana A. Topper, Note, *The Threatening Internet: Planned Parenthood v. ACLA and a Context-Based Approach to Internet Threats*, 33 COLUM. HUM. RTS. L. REV. 189, 234 (2001) (arguing that the Nuremberg Files Web site “fundamentally affected the doctors, increasing the possibility that they would alter their behavior and cease to provide women with their constitutionally protected right to an abortion. Only an objective, context-based standard can account for the complexities of this reality.”); see Wechsler, *supra* note 7 (calling for a principled and not a result-based jurisprudence).

70. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002).

71. *Id.* at 1066–71.

72. The court also set forth its standard of review with specific respect to the injunctive relief granted. It explained that it would

review the district court’s findings with respect to injunctive relief for clear error and its conclusions of law *de novo*. However, while we normally review the scope of injunctive relief for abuse of discretion, we will scrutinize the relief granted in this case to determine whether the challenged provisions of the injunction burden no more speech than necessary to achieve its goals.

*Id.* at 1070–71.



elements of statutory liability (including intent).<sup>73</sup>

Then, with respect to the First Amendment, the court explained that it had a duty to

review the record independently in order to satisfy ourselves that the posters and the Files constitute a “true threat” such that they lack First Amendment protection. We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact—a true threat—falls within the unprotected category and is narrowly enough bounded as a matter of constitutional law.<sup>74</sup>

Regrettably, after setting forth these two different analyses, the court collapsed them into one. It set out to determine whether the defendants could be held liable consistent with the First Amendment by defining “threat” for purposes of the statute, making sure that the statutory definition “comported” with the First Amendment, that is, a “true threat.”<sup>75</sup> It began by making a vain and dryly literal effort to distinguish *Claiborne*,<sup>76</sup> after summarizing the case, it dismissed it out of hand, reasoning that because it was an “incitement” case, rather than a “threats” case, its teachings were simply not relevant:

*Claiborne*, of course, did not arise under a threats statute. The Court had no need to consider whether Evers’s statements were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused business losses and could not be the basis for liability to white merchants. As the opinion points out, there was no context to give the speeches (including the expression “break your neck”) the implication of authorizing or directly threatening unlawful conduct. To the extent there was any intimidating overtone, Evers’s rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. No specific individuals were targeted. For all that appears, “the break your neck” comments were hyperbolic

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73. *Id.*

74. *Id.*

75. *Id.* at 1071–72.

76. *Id.* at 1072–74.

vernacular. Certainly there was no history that Evers or anyone else associated with the NAACP had broken anyone's neck who did not participate in, or opposed, this boycott or any others. Nor is there any indication that Evers's listeners took his statement that boycott breakers' "necks would be broken" as a serious threat that their necks would be broken; they kept on shopping at boycotted stores.<sup>77</sup>

Accordingly, the en banc court concluded that *Watts v. United States* "was the only Supreme Court case that discussed the First Amendment in relation to true threats before [they] first confronted the issue."<sup>78</sup> It then explained that in *Watts*, "[a]part from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unprotected speech under the First Amendment."<sup>79</sup> To fill that gap, supposedly,<sup>80</sup> the Ninth Circuit in *Roy v. United States*<sup>81</sup> articulated the following test: "Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."<sup>82</sup> It concluded that this test was appropriately applied to FACE.<sup>83</sup>

77. *Id.* at 1073–74 (emphasis added).

78. *Id.* (discussing *Watts v. United States*, 394 U.S. 705 (1969)).

79. *Id.* But see *infra* Appendix A for a discussion of the appropriate use of "ostensive definitions," particularly in legal materials.

80. See *infra* note 81.

81. 416 F.2d 874 (9th Cir. 1969); see *United States v. Patillo*, 438 F.2d 13, 14–15 (4th Cir. 1971) (en banc) (discussing *Roy* and *United States v. Compton*, 428 F.2d 18 (2d Cir. 1970), as a response to the comment in *Watts v. United States*, 394 U.S. 705, 708 (1969), that the court had "grave doubts" on the state of mind standard applied by the District of Columbia Circuit). As we read the *Watts*'s comment, it called for a greater "state of mind" standard in the First Amendment area than negligence; if we are right, *Roy* was an inappropriate response to the court's comment. See *infra* note 713 (discussion of the proper, but severely limited use of the negligence standard) and text accompanying notes 740–44 (discussing *Rogers v. United States*, 422 U.S. 35 (1975) (Marshall, J., concurring)).

82. *Am. Coalition*, 290 F.3d at 1074 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

83. *Id.* at 1077.

The en banc court next set out various general principles that it used in applying this test in the past. A “true threat,” as described by the test, is “unprotected by the [F]irst [A]mendment.”<sup>84</sup> In turn, “a threat is ‘an expression of an intention to inflict evil, injury, or damage on another.’”<sup>85</sup> Such threats, the court continued, “should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners.”<sup>86</sup> “The fact that a threat is subtle does not make it less of a threat.”<sup>87</sup> Nor is it necessary “that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat.”<sup>88</sup>

After indicating that it was going to apply the traditional Ninth Circuit test, the en banc court specifically declined to adopt the subjective intent requirement advanced by the ACLU—i.e., that “the speaker actually intended to induce fear, intimidation, or terror; namely, that the speaker intended to threaten.”<sup>89</sup> The en banc court concluded that this requirement was “subsumed within the statutory standard of FACE itself, which requires that the threat of force be made with the intent to intimidate.”<sup>90</sup> Accordingly, it reasoned,

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84. *Id.* at 1076.

85. *Id.* at 1075 (quoting *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989)).

86. *Id.* (quoting *Orozco-Santillan*, 903 F.2d at 1265).

87. *Id.* (quoting *Orozco-Santillan*, 903 F.2d at 1265).

88. *Id.* at 1075–76 (quoting *Orozco-Santillan*, 903 F.2d at 1266 n.3).

89. *Id.*

90. ¶1. *Id.*; see also *id.* (explaining that “[t]he requirement of intent to intimidate serves to insulate the statute from unconstitutional application to protected speech” (internal quotation marks omitted)).

¶2. This comment can be accepted only if “intent to intimidate” is limited, as is “true threat,” by the qualification that the fear engendered is that of conduct *by the speaker or one for whom he or she is responsible*. “Intimidation,” that is, to inspire fear by “warning” of the conduct of others for whom you are *not* responsible, is hardly conduct that falls within the prohibition of the statute. The court did not give any indication of awareness in its opinion of this crucial distinction, despite the arguments of the dissents on the point. Nor, obviously, did it cite anything in the text of the statute, its legislative history, or in any other decision under the statute to buttress its opinion. Nor does it have the benefit for its opinion of “intent to intimidate” language qualifying the “threat” provision of RICO. See 18 U.S.C. § 1961(1)(A) (1994) (“or threat involving”). Accordingly, the court’s reasoning at this point begs the question before it, that is, it engages in the classic fallacy *petitio principii*. The court did not undertake a comprehensive analysis of either FACE’s or RICO’s language, or, significantly, related statutes, nor can we within the limited confines of these materials. The available sources, however, are not particularly enlightening.

¶3. We begin with the plain meaning of the words used by Congress. *United States v. Turkette*, 452 U.S. 576, 580, 583 n.5 (1981); see also HENRY FRIENDLY, BENCHMARKS 202

(1967) (“(1) Read the statute; (2) read the statute; (3) read the statute!” (quoting Justice Frankfurter)). “To intimidate” is the verb form; “intimidation” is the noun form. Generally, meaning does not change with the form of the word. *Reeves v. Ernst & Young*, 507 U.S. 170, 177 (1993). The word comes from the Medieval Latin. It is typically used in the sense of to inspire with fear, especially in modern usage; to force or to deter from action by threats or violence; or to force or induce, especially by means of menaces. 1 OXFORD ENGLISH DICTIONARY 428 (Compact ed. 1985 & Supp. 1987). “Threaten” is the verb form; “threat” is the noun form. The word comes from the Old English; it is typically used in the sense of to force or induce, especially by means of menaces. 2 *id.* at 352–53. Accordingly, the two words are alternative ways of expressing the same idea, that is, they are synonymous. Unfortunately, standard usage leaves unresolved the ambiguity regarding who is to inflict the harm.

¶4. Neither FACE nor RICO define “threat,” but FACE, and not RICO, offers a statutory definition of “intimidate.” 18 U.S.C. § 248(e)(3) (1994) defines “intimidate” to mean “place a person in reasonable apprehension of bodily harm to him or herself or to another.” The statutory definition is narrower than the common usage. “Apprehension” must be “reasonable” and limited “to bodily harm.” *Id.* As with common usage, the ambiguity “who is to inflict the harm” is left open. *Id.* When FACE provides “by threat of force” intentionally “intimidates,” it is, in fact, using synonyms to perform different grammatical functions in the prohibition. “Threat” and “intimidates” could be transposed in the sentence without loss of meaning. As drafted, the conduct element (verb) is “threaten”; the result element (predicate) is “intimidate.” *Id.* Actual “intimidation” is not required. *Id.* The state of mind element (adverb) for conduct and result is “intentionally.” *Id.* Thus, the plain meaning of the words plus the grammar of the sentence produces the plain meaning or default meaning of the sentence. F.R. PALMER, SEMANTICS 37–41 (2d ed. 1981); see *infra* Appendix B (Natural Language: Generality, Ambiguity, and Vagueness).

¶5. We turn next to context to obtain utterance meaning by examining the context in which the sentence was spoken. PALMER, *supra*, at 37–41. That context is found in FACE’s legislative history; it is instructive on the sense in which “threat” was used in the statute. The most salient features of the legislative history of FACE are H.R. REP. NO. 103-796 (1993); S. REP. NO. 103-117 (1993); and H.R. CONF. REP. NO. 103-488 (1993). See *Garcia v. United States*, 469 U.S. 70, 76 (1984) (“we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill . . .”). Both the House and Senate reports refer favorably to *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989), which interpreted the Fair Housing Act (42 U.S.C. § 3631) (1994) that bans “threats of force” “to intimidate” to require a reasonable speaker based test for “threat.” Similarly, the Conference Report “notes that the Senate language [that was adopted in the final text was] modeled on federal civil rights laws (including 18 U.S.C. § 245(g), 42 U.S.C. § 3631, and 18 U.S.C. § 247).” *Id.* at 457 n.19.

¶6. Nevertheless, the modeling was not precise. At crucial points in the various statutes different words are employed. Whether different meanings were intended cannot not be authoritatively determined from the legislative materials. FACE, in relevant part, provides “by threat . . . *intentionally* . . . intimidates.” 18 U.S.C. § 248(a)(1)–(2) (1994) (emphasis added). 18 U.S.C. § 245(g) (1994), in relevant part, provides “*willfully* intimidates . . .” (emphasis added). 18 U.S.C. § 247(a)(2) (1994), in relevant part, provides “*intentionally* obstructs by . . . threat of force . . .” (emphasis added). 42 U.S.C. § 3631 (1994) provides “by . . . threat of force *willfully* . . . intimidates . . .” (emphasis added). If “intentionally” and “willfully” are read as synonyms, the difference in wording is insignificant. But the words have multiple meaning. See, e.g., *Bryan v. United States*, 524 U.S. 184, 191–92 (1998) (discussing the multiple meanings of “willfully”); see also discussion of “willfulness” *infra* Appendix B ¶ 3 (Natural Language: Generality, Ambiguity, and Vagueness). Thus, at least two alternative

readings of FACE (and the related statutes) are plausible. They may be illustrated with the text of FACE, which prohibits the use of “threat of force” “intentionally” “to intimidate.” 18 U.S.C. § 248(a)(1) (1994). If the language ended at that point, it might well be read as knowingly (“intent” read merely as “conscious awareness”) engaging in conduct (“threat of force”) that a reasonable person would know might engender apprehension of bodily harm (“threat”). 18 U.S.C. § 248(e)(3) (1994). The reading would reflect the basic teaching of *Gilbert* and the text of the statute’s definitions (the conduct itself must be “knowingly,” that is subjective, but the character of the “threat” is assessed from a reasonable person’s perspective, that is, objective). On the other hand, another reading is, in fact, far more plausible. FACE does not prohibit “threats of force” *simpliciter*. The person must possess a reason or motive why he engages in the conduct. Thus, FACE is better paraphrased as knowingly (“conscious awareness”) engaging in conduct that would, from a reasonable person’s perspective (“objective standard”), engender fear of bodily harm with intent (“purpose,” a subjective standard) to achieve a result (interference with “obtaining or providing” “reproductive health services”). The first paraphrase envisions a pure negligence standard (“reasonable person”). In contrast, the second paraphrase envisions both a subjective and an objective standard: the conduct must be knowing (“subjective”); it must be “threatening” (“objective”); and it must be done to achieve a result, that is, “intentionally,” (“purposely,” a subjective standard, to bring about the “result”). The role of lenity, federal-state relations, and First Amendment considerations counsel the adoption of narrow view that requires the subjective state of mind. *Dowling v. United States*, 473 U.S. 207, 216–18 (1984) (rule of lenity) (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76, 95 (1820) (Marshall, C.J.)); *Lewis v. United States*, 401 U.S. 808, 812 (1971) (broad interpretation that alters federal-state relations to be avoided); *DeBartolo v. Fla. Gulf Bldg. Constr. Co.*, 485 U.S. 568, 574–88 (1988) (broad interpretation that impinges on First Amendment to be avoided).

¶7. Sadly, illustrative decisions under the statutes are not consistent and are no more enlightening than the texts or the legislative histories on the key issues: state of mind and from whom the feared harm must come. Unfortunately, until better analytical work is done on these statutes by the courts, the judicial resolution of these issues is not likely to reflect either the values of individual responsibility or First Amendment protections.

¶8. In *United States v. McInnis*, 976 F.2d 1226 (9th Cir. 1992), the court examined a shooting by a rifle by one person, a Caucasian, into the house of an African-American couple. The wife was hit by a bullet. *Id.* McInnis was prosecuted under 42 U.S.C. § 3631(a). *Id.* The court held that the government must prove: (1) the use of force, and (2) an intent to interfere with housing rights on account of race. *Id.* The conduct (shooting) and surrounding circumstances (house occupied by an African-American) were not in issue, but “intent” or state of mind was. *Id.* at 1230. The court held that the government must prove “the specific intent to . . . intimidate . . . the victim because of her race and because of the victim’s occupation of her home.” *Id.* On the elusive distinction between “specific” and “general” intent, see *infra* note 513. Voluntary intoxication was a defense. *McInnis*, 976 F.2d at 1230. Nevertheless, the court held that the evidence (racially derogatory statements by McInnis at the time of the shooting and racially derogatory paraphernalia in McInnis’s house) was sufficient to prove “McInnis acted with the requisite intent, despite his apparent intoxication at the time of the shooting.” *Id.* (“McInnis was aware of his acts and . . . those acts were motivated by racial hatred.”). McInnis sought to exclude some of the paraphernalia under FEDERAL RULES OF EVIDENCE 403. Its admission was reviewed under standards of review of abuse of discretion, harmless error, and plain error. *Id.* at 1231 & n.3. Relying on a prior decision admitting “skinhead” (a neo-Nazi, white power group) evidence in the context of a cross burning in the yard of an African-American (*United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990), *cert. dismissed*, 502 U.S. 922 (1991)), the court upheld the use of the evidence to establish the

“[n]o reason appears to engraft another intent requirement onto the statute, because whether or not the maker of the threat has an actual

racial hatred with which McInnis acted; proof of such hatred satisfied an element of the crime and negated the defense of intoxication. *Id.* at 1233; *see also* United States v. J.H.H., 22 F.3d 821, 826 (8th Cir. 1999) (cross-burning conviction upheld under 42 U.S.C. § 3631(a) (1994)) (“[A]lthough cross-burning can be done with the specific intent to intimidate and to interfere with the exercise of protected rights, in other situations, cross-burning may be done for the sole purpose of making a political statement.”) (internal citation omitted); United States v. Hayward, 6 F.3d 1211, 1250 (7th Cir. 1993) (under 42 U.S.C. § 3631(a), cross-burning may be expressive conduct, but if done to intimidate because of exercised protected rights, it is not protected by First Amendment).

¶9. Pretermittting the terminology (*see infra* note 513 (discussing “general intent” and “specific intent”), *McInnis* is an unproblematic application of § 3631(a). In particular, *McInnis* correctly adopts a construction of § 3631(a) (“willfully . . . intimidates . . . because of . . . roll”) to require “specific intent” and to entertain a defense (intoxication) designed to negate the required state of mind. *See infra* note 513. Since FACE is based on § 3631(a), *American Coalition*’s embodiment of a negligence standard for “threat,” is troublesome, particularly since the court rightly reads FACE itself to embody the subjective “intent to intimidate.” Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1074–75 (9th Cir. 2002) (“a knowingly communicat[ion of] the threat,” and the specific rejection of a requirement of “a subjective intent . . . to induce fear,”). The meaning of the statute and the constitutional limitations on a statute to “true threat” are distinct issues, but the court’s reading of a constitutional limitation as *less* restrictive than a statutory element makes Congress the principal guardian of free speech protections, an anomalous and a counter-intuitive result at best.

¶10. FACE is not universally read in sync with 42 U.S.C. § 3631 (1994), that is, to require a specific intent. In *Greenhut v. Hand*, 996 F. Supp. 372 (D.N.J. 1998), the court examined FACE in the context of threatening calls (“you will be killed”) made to pro-life organizations. *Id.* at 374. Greenhut admitted making the calls, but she defended on the ground that she was so intoxicated that she “could not have ‘intended to intimidate.’” *Id.* at 375. The court rejected the defense, holding that FACE was a “general intent” statute. *Id.* at 377–78. The court reached its conclusion not by analyzing the text of FACE, as above, but by making an analogy to 18 U.S.C. § 871(a) (1994) (threatening President) (citing United States v. Manning, 923 F.2d 83, 85–86 (8th Cir. 1991) (“[I]t is the making of the threat that is prohibited without regard to the maker’s subject intention to carry out the threat.”), *cert. denied*, 501 U.S. 1234 (1991)), and relying on a reading of “threat” evaluated by its impact on recipient, not by the specific intent of maker found as in *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996). *Manning*, at least on the point cited, is irrelevant; “intent to engender fear” is distinguishable from “intent to carry out the threat.” Similarly, while *Dinwiddie*, adopted an objective test for threat, it did *not* reject an additional requirement of “intent to engender fear.” *See infra* text accompanying note 464. The issue was not even raised in Dinwiddie’s appeal. In brief, *Greenhut* was wrongly decided; it is, however, favorably cited on other points. *See, e.g.*, United States v. Greg, 226 F.3d 253, 258 (3d Cir. 2000) (liability under FACE joint and several and sanction based on each violation); Roe v. Aware Woman’s Ctr. For Choice, Inc., 253 F.3d 678, 681 (11th Cir. 2001) (language of FACE read in the same fashion in criminal and civil litigation). Nevertheless, *Greenhut*’s general intent holding is not the law in other circuits. Norton v. Ashcroft, 298 F.3d 547, at 554 (6th Cir. 2002) (“specific intent”); United States v. Mahoney, 247 F.3d 279, 283 (D.C. Cir. 2001) (“specific intent”).

intention to carry it out, an apparently serious threat may cause the mischief or evil toward which the statute was in part directed.”<sup>91</sup> Threats, the en banc court noted:

are outside the First Amendment to “protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). This purpose is not served by hinging constitutionality on the speaker’s subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a “true threat” from speech that is merely frightening.<sup>92</sup>

Nor, the en banc court emphasized, does it matter whether a threat is communicated publicly or privately.<sup>93</sup>

The en banc court next used the traditional definition of threat to analyze whether the facts supported a finding of true threats under the statute—for, as the court explained, “[s]o defined, a threatening statement that violates FACE is unprotected under the First Amendment.”<sup>94</sup> In so doing, it brushed aside various challenges leveled by the defendants. First, the en banc court dismissed the assertion that this case did not involve true threats because “a real threat [made] directly to others,” was not involved but instead involved “political speech”; it also noted that the Ninth Circuit’s test does “not require that the maker of the threat personally cause physical harm to the listener,” but only “the making of the threat with intent to intimidate.”<sup>95</sup>

Next, the en banc court declined to limit the relevant “context” for determining whether statements constitute threats to “the direct circumstances surrounding delivery of the threat, or evidence sufficient to resolve ambiguity in the words of the statement—not two weeks of testimony as occurred . . . in the district court.”<sup>96</sup> Context, the en banc

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91. *Am. Coalition*, 290 F.3d at 1076 (internal quotation marks omitted).

92. *Id.*

93. *Id.*

94. *Id.* at 1077.

95. *Id.* Under the court’s analysis on this point, if Charles Evers’s speech were made today, and it were about abortion, not civil rights, it would arguably fall within the prohibition of the statute, an indefensible result by anyone’s standards.

96. *Id.* at 1078.

court explained, properly includes “the whole factual context and all of the circumstances”; indeed, the court rejoined, “context is critical in a true threats case and history can give meaning to the medium.”<sup>97</sup> “[W]ithout context,” the en banc court noted, “a burning cross or dead rat mean nothing.”<sup>98</sup> Indeed, the en banc court later held that context properly includes evidence bearing on “motive, history of violence including the violent actions of others, and the defendants’ subjective motives . . . .”<sup>99</sup> Accordingly, applying an abuse of discretion standard, it upheld the district court’s opinion permitting:

an FBI agent and two federal marshals to testify that the FBI and the Justice Department considered ACLA’s two posters to be “serious threats”; references to non-party violence; introduction of defendants’ arrests; physicians’ counsel to tell the jury about Bray’s invocations of the Fifth Amendment through a summary of his deposition; references to actions of certain defendants and non-parties on the abortion debate and to such things as the signing of “Defensive Action petitions” by five or six of the individual defendants; an exhibit with Rev. Sullivan’s hearsay opinion that ACLA is a “cancer” which pro-lifers must “cut out immediately” before it “destroys the pro-life movement” to remain in the exhibit books; and by permitting deposition summaries to be introduced.<sup>100</sup>

Turning to the merits, the en banc court reasoned:

Because of context, we conclude that the Crist and Deadly Dozen posters are not just a political statement. Even if the Gunn poster, which was the first “WANTED” poster, was a purely political message when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released. Knowing this, and knowing the fear generated among those in the reproductive health services community who were singled out for identification on a “wanted”-type poster, ACLA deliberately identified Crist on a “GUILTY” poster and intentionally put the names of Hern and the Newhalls on the

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97. *Id.* at 1078–79 (internal quotation marks omitted).

98. *Id.* at 1079.

99. *Id.* at 1080.

100. *Id.* at 1082.



Deadly Dozen “GUILTY” poster to intimidate them. This goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too.<sup>101</sup>

The Nuremberg Files site, the en banc court noted, was “somewhat different” because it named “hundreds of [individuals],” with the avowed intent of “collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity” in “PERFECTLY LEGAL COURTS.”<sup>102</sup> The en banc court hinted that, if the site stopped at this point, it might be protected: “[h]owever offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment.”<sup>103</sup> But, the court continued:

in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize “Abortionists” and list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their activities are lined through in black, while names of those who have been wounded are highlighted in gray. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on both the Nuremberg Files and the GUILTY posters is purely protected, political expression.

Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and Dr. James Newhall in the Nuremberg Files as well as on “wanted”-type posters, constituted true threats was properly for the jury to decide.<sup>104</sup>

Finally, after concluding that the posters and the Internet Web site constituted “true threats” for purposes of FACE (under a definition the en banc opinion attempted to tailor to satisfy First Amendment concerns) the court nonetheless conducted a separate

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101. *Id.* at 1079–80. On other occasions, the Ninth Circuit is not so forgiving. *See, e.g.*, *United States v. Hanna*, 293 F.3d 1080, 1085–87 (9th Cir. 2002) (district court abused its discretion when it permitted law enforcement agents to testify regarding the meaning of the defendant’s communication).

102. *Am. Coalition*, 290 F.3d at 1080.

103. *Id.*

104. *Id.*

analysis of whether “the core constitutional fact—a true threat—exists such that the Crist and Deadly Dozen Posters, and the Nuremberg Files as to Crist, Hen, and the Newhalls, are without First Amendment protection.”<sup>105</sup> Not surprisingly, this analysis essentially amounted to a recapitulation of the earlier analysis of whether the materials constituted threats under FACE. Regarding the posters, the en banc court explained that

The true threats analysis turns on the poster pattern. Neither the Crist poster nor the Deadly Dozen poster contains any language that is overtly threatening. . . . [But] [b]ecause of the pattern, a “wanted”-type poster naming a specific doctor who provides abortions was perceived by physicians, who are providers of reproductive health services, as a serious threat of death or bodily harm. After a “WANTED” poster on Dr. David Gunn appeared, he was shot and killed. After a “WANTED” poster on Dr. George Patterson appeared, he was shot and killed. After a “WANTED” poster on Dr. John Britton appeared, he was shot and killed. None of these “WANTED” posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed “WANTED” posters on Gunn, Patterson and Britton, and knowing that “wanted”-type posters were intimidating and caused fear of serious harm to those named on them, ACLA published a “GUILTY” poster in essentially the same format on Dr. Crist and a Deadly Dozen “GUILTY” poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat. One of the other doctors on the Deadly Dozen poster had in fact been shot before the poster was published. This is not political hyperbole. Nor is it merely vituperative, abusive, and inexact. In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.<sup>106</sup>

The Internet Web site, the en banc opinion stated, reinforced this threatening message. “The communication was not conditional or casual. It was specifically targeted. Crist, Hern, and the Newhalls,

105. *Id.* 1084–85.

106. *Id.* at 1085–86 (citation and internal quotation marks omitted; emphasis added).

who performed abortions, were not amused.”<sup>107</sup> “Violence,” the court explained:

is not a protected value. Nor is a true threat of violence with intent to intimidate. ACLA may have been staking out a position for debate when it merely advocated violence as in Bray’s *A Time to Kill*, or applauded it, as in the Defense Action petitions. Likewise when it created the Nuremberg Files in the abstract, because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or vilification to advocate a political position. But, after being on “wanted”-type posters, Dr. Gunn, Dr. Patterson, and Dr. Britton can no longer participate in the debate. By replicating the poster pattern that preceded the elimination of Gunn, Patterson, and Britton, and by putting Crist, Hern, and the Newhalls in an abortionists’ File that scores fatalities, ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.<sup>108</sup>

Accordingly, the en banc court concluded, in opposition to the panel opinion, that the posters and the Internet Web site were “true threats” and thus, not protected speech.<sup>109</sup> It, therefore, upheld the expansive injunction and affirmed the imposition of liability for monetary damages—although it remanded for reconsideration of punitive damages in light of recent Ninth Circuit and Supreme Court precedent.<sup>110</sup>

Three judges filed dissents from the en banc opinion. Taken together, they form a persuasive and devastating critique of the opinion. Judge Reinhardt, in a short but targeted statement, opined that the majority’s rejection of the “concept that speech made in a political forum on issues of public concern warrants heightened scrutiny, . . . if allowed to stand, would significantly weaken the First Amendment protections we now enjoy.”<sup>111</sup> Judge Kozinski, the author of the panel opinion, justly criticized the en banc opinion as an unpersuasive effort “to justify a crushing monetary judgment and a strict injunction against speech protected by the First

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107. *Id.*

108. *Id.* at 1086.

109. *Id.* at 1088.

110. *Id.* at 1086 (citing, among other decisions, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) and *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001)).

111. *Id.* at 1088 (Reinhardt, J., dissenting).

Amendment.”<sup>112</sup> In addition to reiterating the main points of his panel opinion (public discourse vs. private communication; absence of express threat; limits of the use of evidence of context that a speaker did not authorize, direct, or ratify) and attacking the en banc opinion’s summary rejection of *Claiborne* as controlling,<sup>113</sup> he made the pointed observation that the principal problem with the en banc court’s opinion was that it “recognizes . . . the standard it must apply, yet when it undertakes the critical task of canvassing the record for evidence that defendants made a true threat . . . its opinion fails to come up with any proof that defendants communicated an intent to inflict bodily harm upon plaintiffs” themselves as opposed to a warning of possible actions by others in the future that would be lawful.<sup>114</sup> He also echoed Judge Reinhardt’s

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112. *Id.* at 1089 (Kozinski, J., dissenting).

113. *Id.* at 1090–92 (Kozinski, J., dissenting).

114. *Id.* at 1090 (Kozinski, J., dissenting). Judge Kozinski observed:

Buried deep within the long opinion is a single paragraph that cites evidence supporting the finding that the two wanted posters prepared by defendants constituted a true threat . . . . The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs, nor is there any evidence that defendants took any steps whatsoever to plan or carry out physical violence against anyone. Rather, the majority relies on the fact that “the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released.” But neither Dr. Gunn nor Dr. Patterson was killed by anyone connected with the posters bearing their names.

The record reveals one instance where an individual—Paul Hill, who is not a defendant in this case—participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him. . . . All others who helped to make that poster, as well as those who prepared the other posters, did not resort to violence. . . . There is therefore no pattern showing that people who prepare “wanted”-type posters then engage in physical violence. To the extent the posters indicate a pattern, it is that almost all people engaged in poster-making were non-violent.

*Id.* at 1090–91 (citations omitted). He added:

The majority so much as admits that the Nuremberg Files website does not constitute a threat because of the large number of people listed there. . . . The majority does point out that doctors were listed separately, and . . . that the names of doctors who were killed or wounded were stricken or greyed out, . . . but does not explain how this supports the inference that the posting of the website in any way indicated that *defendants* intended to inflict bodily harm on plaintiffs. At most, the greying and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment.

*Id.* at 1091 n.3 (citing *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973); *Brandenburg v. Ohio*,

point that “statements communicated directly to the target are much more likely to be true threats than those, as here, communicated as part of a public protest.”<sup>115</sup> Finally, he tellingly pointed out that while

[a]n injunction against political speech is bad enough, . . . the liability verdict will have a far more chilling effect. Defendants will be destroyed by a huge debt that is almost certainly not dischargeable in bankruptcy; it will haunt them for the rest of their lives and prevent them from ever again becoming financially self-sufficient. . . . The lesson of what a local jury has done to defendants here will not be lost on others who would engage in heated political rhetoric in a wide variety of causes.<sup>116</sup>

In fact, he insightfully observed:

[A] retrospective liability verdict is far more damaging than an injunction; the latter at least gives notice of what is prohibited and what is not. The fear of liability for damages, and especially punitive

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395 U.S. 444, 447 (1969); *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963)). Judge Kozinski continues:

The majority tries to fill this gaping hole in the record by noting that defendants “knew the fear generated among those in the reproductive health services community who were singled out for identification on a ‘wanted’-type poster.” But a statement does not become a true threat because it instills fear in the listener . . . many statements generate fear in the listener, yet are not true threats and therefore may not be punished or enjoined consistent with the First Amendment. . . . In order for the statement to be a threat, it must send the message that the speakers themselves—or individuals acting in concert with them—will engage in physical violence. The majority’s own definition of true threat makes this clear. Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm.

Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country. For example, plaintiff Dr. Elizabeth Newhall testified, “I feel like my risk comes from being identified as a target. And . . . all the John Salvis in the world know who I am, and that’s my concern.” . . . (“Up until January of ‘95, I felt relatively diluted by the—you know, in the pool of providers of abortion services. I didn’t feel particularly visible to the people who were—you know, to the John Salvis of the world, you know. I sort of felt one of a big, big group.”).

*Id.* at 1091–92 (footnote and citations omitted).

115. *Id.* at 1099 (Kozinski, J., dissenting); *see also id.* (“[I]n deciding whether . . . coercive speech is protected, it makes a big difference whether it is contained in a private communication—a face-to-face confrontation, a telephone call, a dead fish wrapped in a newspaper—or is made during the course of public discourse.” (footnote omitted)).

116. *Id.* at 1100 (Kozinski, J., dissenting).

damages, puts the speaker at risk as to what a jury might later decide is a true threat, and how vindictive it might feel towards the speaker and his cause. In this case, defendants said nothing remotely threatening, yet they find themselves crucified financially. Who knows what other neutral statements a jury might imbue with a menacing meaning based on the activities of unrelated parties. In such circumstances, it is especially important for an appellate court to perform its constitutional function of reviewing the record to ensure that the speech in question clearly falls into one of the narrow categories that is unprotected by the First Amendment. The majority fails to do this.<sup>117</sup>

Judge Kozinski concluded with an ominous warning: “While today it is abortion protesters who are singled out for punitive treatment, the precedent set by this court—the broad and uncritical deference to the judgment of a jury—will haunt dissidents of all political stripes for many years to come.”<sup>118</sup>

In a third masterful and powerful dissent, Judge Berzon aptly summed up the *American Coalition* litigation: “This case is proof positive that hard cases make bad law, and that when the case is very hard—meaning that competing legal and moral imperatives pull with impressive strength in opposite directions—there is the distinct danger of making *very* bad law.”<sup>119</sup> She then went on to propose discarding the Ninth Circuit’s objective, speaker-based test for “true threats” in favor of a new test more faithful to Supreme Court teachings. She echoed many of the points made in the panel opinion; specifically, she called for recognition of the difference between private and public communication of threats<sup>120</sup> and for adoption of the Second Circuit’s test as set forth in *United States v. Kelner*<sup>121</sup>—albeit with “one exception, an addition, and some explication.”<sup>122</sup>

117. *Id.* at 1100–01 (Kozinski, J., dissenting).

118. *Id.* (Kozinski, J., dissenting).

119. *Id.* at 1101 (Berzon, J., dissenting).

120. *Id.* at 1102 (Berzon, J., dissenting).

121. 534 F.2d 1020 (2d Cir. 1976). See *infra* text accompanying note 611 and following notes for a discussion of the Second Circuit’s approach.

122. *Am. Coalition*, 290 F.3d at 1106 (Berzon, J., dissenting). Specifically, Judge Berzon would not include immediacy of the threatened action as a prerequisite to finding a true threat delivered as part of a public speech; she would add a requirement of the defendant’s subjective intent that the victims understand the communication as an unequivocal threat that the speaker or his agents or co-conspirators would physically harm them. *Id.* at 1106–09. She would also require that the threat be unambiguous, given the proper context—that is, objectively threatening, as defined by the Ninth Circuit’s prior case law. *Id.* at 1109–10.

She also advocated more diligent use of *Federal Rule of Evidence* 403 in determining what evidence should properly come in under the rubric of “context.”<sup>123</sup> She concluded with a fateful warning, much like Judge Kozinski’s:

If we are not willing to provide stringent First Amendment protection and a fair trial to those with whom we as a society disagree as well as those with whom we agree—as the Supreme Court did when it struck down the conviction of members of the Ku Klux Klan for their racist, violence—condoning speech in *Brandenburg*—the First Amendment will become a dead letter. Moreover, the next protest group—which may be a new civil rights movement or another group eventually vindicated by acceptance of their goals by society at large—will (unless we cease fulfilling our obligation as judges to be evenhanded) be censored according to the rules applied to the last.<sup>124</sup>

#### D. Analysis

What is crucial about the reinstated judgment in *American Coalition* is not the size of the damage award—though that is far more than the protestors can be reasonably expected to pay, even if the amount is reduced on remand. Nor is it the restrictive nature of the reinstated injunction—though any injunction against speech or expressive conduct goes to the heart of the protections of the First Amendment.<sup>125</sup> Nor is it, as the media suppose, that the people found liable were *anti-abortion* protesters<sup>126</sup>—for the protesters

123. *Id.* at 1112–18 (Berzon, J., dissenting) (focusing, among other things, on the law enforcement testimony and the evidence and argument dealing with defendants’ beliefs).

124. *Id.* at 1120 (Berzon, J., dissenting).

125. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (Pentagon Papers Decision); *Neer v. Minnesota*, 283 U.S. 697, 713 (1931) (“The chief purpose of the guaranty [of free speech is] to prevent previous restraints upon publication.”).

126. As one amicus in the litigation explained, while the views expressed by the protesters may have been “deeply abhorrent to most Americans,” they nevertheless expressed “a view of the type that is protected by the First Amendment.” Brief of Amicus Curiae Thomas Jefferson Center for the Protection of Free Expression at 1, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320); see also Gey, *supra* note 42, at 589.

It is not outlandish to argue that although judgments such as the one in the *Nuremberg Files* case will undoubtedly chill speech, most of the country will be better off when this particular corner of the marketplace of ideas is silenced. However, this argument is a very dangerous one, and one that cuts against the grain of the First Amendment decisions issued by the Supreme Court since 1960.

*Id.*; see *supra* note 53 (discussing antiwar demonstrations).

could just as easily be the advocates of civil rights, labor rights, or any other cause that is, at times, controversial.<sup>127</sup> Rather, it is what it means for freedom of speech in America. If the way the en banc court weighed the issues stands, its doctrine of “true threats”—particularly its purely negligence standard<sup>128</sup> and its unrestrained use of evidence of context beyond that for which the speaker is legally responsible<sup>129</sup>—is a potentially devastating legal sword to draw and

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127. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1014 (9th Cir. 2001), *aff’d in part, vacated in part, remanded by* 290 F.3d 1058 (9th Cir. 2002) (“In more modern times, the labor, anti-war, animal rights and environmental movements all have had their violent fringes.”) As one amicus explained:

For First Amendment purposes, it is irrelevant that the words charged involve abortion, or that they might encourage readers or listeners to thwart a woman’s constitutionally protected right of choice. For if an abhorrent subject matter proved to be disqualifying under the First Amendment, militant advocates of civil rights, or consumer interests, or labor protests might be silenced by similar judgments if a jury found certain extreme and inflammatory statements to be actionable threats.

Brief of Amicus Curiae Thomas Jefferson Center for the Protection of Free Expression at 1–2, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320); see also *id.* at 11 (arguing that “the basic principles of free expression clearly transcend both message and medium”); *id.* at 6 (“Given the intensity of the views that [defendants] harbor about abortion, passionate and inflammatory language (which some persons might well view as ‘threatening’) is hardly surprising. Nor is the situation different in other volatile arenas—civil rights, environmental protection, union organizing, consumer boycotts, etc.—where passionate views often give rise to intemperate, even menacing words.”); Brief of Amicus Curiae ACLU Foundation of Oregon, Inc. at 12, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320) (“[C]are must be taken to ensure that defendants in ‘true threats’ cases are not punished for unpopular but protected activities or expression . . . .”); cf. Murray, *supra* note \*\*, at 738–39 (“Even if some people might be tempted to applaud the judicial morphing of the Hobbs Act’s ‘obtaining’ requirement to sanction anti-abortion protesters, they should pause to consider the implications of this new form of extortion for all social and political protesters. Nothing in the language of the statute limits its applicability to anti-abortion protesters. Rather, anyone who wants to silence *any* social or political protest can draw and wield the RICO/Hobbs Act weapon created by the expansion of Hobbs Act extortion. Two businesses have, in fact, used this weapon to silence protesters who demonstrated against something wholly unrelated to abortion—cruelty to animals.”). Indeed, the high money judgment in the Nuremberg litigation is spawning similar suits involving protests and issues wholly unrelated to abortion. See, e.g., Siobhan Morrissey, *Unsavory Speech: A Pedophile Murder Case Drags the First Amendment Back into Court*, A.B.A. J. 20 (Jan. 2001) (reporting the filing of a wrongful death suit, modeled on the Nuremberg suit, for murder of ten-year-old boy against the North American Man/Boy Love Association based on Web site postings). Other Internet Web site suits are also pending. See, e.g., *Federal Suit Targets Neo-Nazi Web Site-Mom, Daughter Stalked For Year*, THE ARIZ. REPUBLIC, Feb. 13, 2000 (reporting the filing of a suit alleging a violation of the fair-housing law by the Department of Housing and Urban Development against the owner of a neo-Nazi Web site who posted pictures of fair-housing specialists from Pennsylvania, called her a “race traitor,” and showed images of her home exploding).

128. *Am. Coalition*, 290 F.3d at 1088.

129. *Id.* at 1086.



wield for those who seek to silence and delegitimize speech with which they disagree in America's roiling cultural wars.<sup>130</sup>

130. ¶1. Viewing the Ninth Circuit's en banc opinion in isolation from its social and political context would be as myopic as trying to determine the meaning of language without looking at the context within which the speaker spoke. As context must inform language and expressive conduct, so too, it must inform law.

¶2. Today, America is rocked by a "culture war," or as Justice Scalia describes it, taking his term from German history, a "*Kulturkampf*." *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). In *Romer*, the Court held that a constitutional amendment in Colorado that prohibited granting "special rights" to gays and lesbians, adopted by a statewide referendum, was a denial of equal protection under the Fourteenth Amendment. The majority, in an opinion by Justice Kennedy, saw the issue in terms that rejected any legitimate state interest in the classifications. *Id.* at 635–36. The minority, composed of Justices Scalia and Thomas and Chief Justice Rehnquist, saw the issue differently:

The Court has mistaken a *Kulturkampf* for a fit of spite. The constitutional amendment . . . [was] a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. . . . In holding that homosexuality cannot be singled out for disfavorable treatment, the Court . . . places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is *precisely* the cultural debate that gave rise to the Colorado constitutional amendment.

*Id.* at 636 (citation omitted).

¶3. That America is rocked by a "cultural war" is a thesis that was most recently popularized by JAMES DAVIDSON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA—MAKING SENSE OF THE BATTLES OVER THE FAMILY, ART, EDUCATION, LAW, AND POLITICS* (1991). *See also* TOM SINE, *CEASE FIRE: SEARCHING FOR SANITY IN AMERICA'S CULTURE WARS* (1995); THE AMERICAN CULTURE WAR: CURRENT CONTESTS AND FUTURE PROSPECTS (Jame L. Notan, Jr. ed., 1996). The thesis is not without its detractors. *See, e.g.*, CULTURAL WARS IN AMERICAN POLITICS: CRITICAL REVIEWS OF A POPULAR MYTH (Rhys H. Williams ed., 1997). Nevertheless, the phrase is commonly used to describe various social or political disputes. *See, e.g.*, Judith Lyne Hanna, *Wrapping Nudity in a Cloak of Law*, N.Y. TIMES, July 29, 2001, at 14 (describing efforts by local governments to circumscribe "nude erotic dancing" as a "lightning rod for cultural wars").

¶4. Broadly, Hunter argues in *Culture Wars* that most public controversies today, with qualifications, may be lined up with the "orthodox" on one side and the "progressives" on the other. Traditionally, through the nineteenth century and early twentieth century, America's pluralism struggled with a different effort to define social reality. On the one hand, Protestants, and a largely Protestant-based populism, sought to ward off challenges to their view of America by various minority cultures—principally Catholics, Jews, and members of the Church of Jesus Christ of Latter-day Saints—to carve out a space in American life where each could live according to conscience and the obligation of community life without harassment or reprisal. That struggle is largely over. According to Hunter, today's divisions of political consequence are not theological or ecclesiastical, but are the result of differing world views or ideologies. For Hunter, public arguments now—whether over "gay rights" or "family values" or "the right to chose" or "the right to life"—are rooted in "moral authority," that is, "the basis by which people determine whether something is good or bad, right or wrong, acceptable or unacceptable . . ." HUNTER, *supra*, at 42. Old kinds of conflicts—Protestants against Catholics—are "virtually irrelevant." *Id.* Hunter gives "orthodox" and "progressive" special definitions. The key distinction lies in that "orthodoxy" reflects the "*commitment on the part of*

*adherents to an external, definable, and transcendent authority.*" *Id.* at 44. That authority reflects "a consistent, unchangeable measure of value . . . and identity, both personal and collective." *Id.* By contrast, "progressivism" tends to be "defined by the spirit of the modern age, a spirit of rationalism and subjectivism." *Id.* "[T]ruth tends to be viewed as a process, a reality that is ever unfolding." *Id.* Indeed, a radical minority of progressives claim that "there is no meaning to life except that which the individual chooses to bestow upon it, that there is no justice except the justice that exists in the realization of particular individual interests, that virtue is entirely personal and perspectival . . ." *Id.* at 321. Sadly, their radical view is sometimes reflected in modern court opinions. *See, e.g.*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (O'Connor, Kennedy, & Souter, JJ., plurality) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.") If that view was literally obtained, constitutional rights themselves would be without the rational support that the Founders' philosophy accorded them. *See generally* Edward S. Corwin, *The "Higher" Law Background of American Constitution Law, Parts I & II*, 42 HARV. L. REV. 149, 365 (1928–29); DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 92–95, 156–66 (1988) (arguing for the influence of John Locke). WILLIAM BLACKSTONE, *COMMENTARIES* \*42–44, \*121–22, similarly credits Locke's influence. Indeed, that the Founders' philosophy was based on an idea of "natural rights" is today a commonplace that no longer requires the citation to authority. *See, e.g.*, *LEARNED HAND, BILL OF RIGHTS* 1–2 (1958) ("[T]hey were generally regarded as embodying the same political postulates that had been foreshadowed though not fully articulated in the exordium of the Declaration of Independence: 'self-evident' and 'unalienable rights' with which all men are 'endowed by their creator' and among which are 'life, liberty and pursuit of happiness.' . . . The easiest support for this attitude was that the source of 'Natural Law' was the Will of God; so St. Thomas Aquinas conceived it; so does the Church still assert it; and so did the Deists of the eighteenth century."). *See infra* note 181 for a discussion of the historical origin of the idea of liberty in the context of efforts to establish freedom of religion in Imperial Rome. That this background of the law and traditional values is "foundationless" may, of course, be argued, but its consequences ought to be faced with eyes wide open. Rights without rational support are rights on the way to obsolescence. *See infra* note 181 (discussing the lack of support in modern philosophy for a concept of personal identity, the prerequisite for "self" to which to attach "rights," and its tragic consequences for human beings, touching closely on the issues raised in the *American Coalition* litigation). According to Hunter, the growth of science and technology; the industrial revolution; the spread of the Enlightenment faith in reason and the power of independent human rationality, and—ironically—the post-modern despair over that rationality itself; the advent of Darwin and the theory of evolution; break throughs in astronomy, psychology, and sociology; the rise of historicism and higher criticism all were phenomena that originated in Europe, but spread to America and put pressure on traditional forms of culture. In particular, they put pressure on religious belief, giving rise to secular humanism and now its collapse into post-modern criticism, if not nihilism. For a discussion of those turning points in American history and their relation to those who shaped modern law, *see infra* note 178.

¶5. What is most problematic about this new divide is its implication for American democracy: "[O]n political matters one can compromise; on matters of ultimate moral truths, one cannot." HUNTER, *supra*, at 46. "*At the heart of the new cultural realignment are the pragmatic alliances being formed across faith traditions.*" *Id.* at 47. What is at stake in the struggle is the "power to define reality," that is, what "America" means. *Id.* at 52. Unfortunately, in our information society, this struggle is in the hands of the "elites," who alone can operate in various forms of public discourse, including law. *Id.* at 59. "In brief, the media technology that makes public speech possible gives public discourse a life and logic of its

own, or life and logic separated from the intentions of the speaker or the subtleties of arguments they employ.” *Id.* at 34. Tragically, “this dispute is between groups who hold fundamentally different views of the world [and between contenders who] are generally sincere, thoughtful, and well meaning . . . .” *Id.* at 63. But when a battle in the contemporary cultural war becomes a real-life drama of ordinary people opposing each other on an issue, litigation seems inevitable; and indeed, “litigation is pursued as the first step rather than the last resort . . . .” *Id.* at 320. “[P]olarization is virtually guaranteed.” *Id.* at 321. Division and deadlock result. Indeed, the litigation, at bottom, reflects a purpose “to delegitimize [the other side] and its agenda through discrediting labels and commentary[, in particular,] when[, for example,] RICO or federal anti-racketeering laws are applied to certain kinds of political activism . . . .” *Id.* at 250. “As with all other expressions of cultural antagonism, the culture war is ‘about’ the uses of symbols, the uses of language, and the right to impose discrediting labels upon those who would dissent.” *Id.* at 158.

¶6. Hunter’s thesis is aptly illustrated by the litigation discussed in these materials, though the issues raised by these materials go well beyond the abortion debate discussed in them. On one side, the demonstrators seek to label those involved in the provision of abortion services as “murderers,” akin to those who engaged in the Nazi genocide. On the other side, those involved in the clinics and their supporters seek to label the demonstrators as “racketeers.” The litigation is not, therefore, so much about legal remedies—injunctions, damages, or attorney’s fees—as about “labels” or “social stigma.” The war is not fought over “villages,” but over the “hearts and minds” of the “country side.” The reason why is clear. In 1859, John Stuart Mill, in *On Liberty*, in 43 GREAT BOOKS OF THE WESTERN WORLD 282 (Robert Maynard Hutchins et al. eds., 1952) [hereinafter GREAT BOOKS] aptly noted: “[T]he chief mischief of . . . legal penalties is that they strengthen . . . social stigma.” It is “the stigma,” he commented, “which is really effective” in limiting the “open avowal” opinions so labeled. *Id.* The American people are, in fact, sharply divided over abortion. See Gallop Poll Topics: A-Z, *Abortion Issues*, available at, <http://www.gallup.com/poll/indicators/indabortion.asp> (last visited Nov. 29, 2000) (reporting the relative “pro-choice” proportion of the population (48%) and the relative “pro-life” proportion of the population (43%) to be relatively constant between 1988 and 2000; that 48% of the population thinks that abortion is an act of murder, while 45% do not; that in the first three months of pregnancy 65% of the population thinks abortion should be legal, while 31% do not, but in the last three months of pregnancy 86% of the population thinks it should be illegal, while 8% think it should be legal). How these seemingly contradictory positions can be reconciled is seldom articulated by those who voice them. Neither side, therefore, is currently “winning” in the “label” war, that is, a majority is neither “pro-life” nor “pro-choice,” and because each side’s position is in apparent irreconcilable conflict with the other’s position, its supporters must be constantly galvanized to maintain even a minority position. But see Gina Kolata, *As Abortion Rate Decreases, Clinics Compete for Patients*, N.Y. TIMES., Dec. 3, 2000, at A1 (reporting that the number of abortions declined from 1990 to 1997 by 17.4% and that, as a consequence, the same number of clinics must compete for the business of an increasingly smaller number of persons seeking abortion services).

¶7. However, as these wars develop in society, one proposition should not be up for debate: the courts ought to be neutral. Otherwise, the Constitution would become, as Holmes notes, “the partisan of a particular set of ethical or economical opinions . . . .” *Otis v. Parker*, 187 U.S. 606, 609 (1903) (Holmes, J.). Legal processes should not be enlisted to advantage or disadvantage any side. Groups within society should be left to work out their differences among themselves. Judicial thumbs should not be placed on the scales of justice. The First Amendment does not belong to one side or the other, but to both sides together. Justice Holmes put it well in *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J.,

dissenting): “[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.”

¶8. More recently, one Ninth Circuit judge made the point with even greater force in *American Family Ass’n, Inc. v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002). In 1998, the AFA, a Christian group, sponsored an advertising campaign in San Francisco. The campaign featured a newspaper ad proclaiming that while “Christians love homosexuals, ‘God abhors any form of sexual sin,’ whether it is homosexuality, premarital sex, or adultery.” *Id.* at 1119. Certainly, the message was controversial, especially in San Francisco. But rather than allow the various sides to air their views, the City and County of San Francisco quickly passed two resolutions formally condemning the campaign. One of the Resolutions, No. 873-98, denounced the campaign. Another sponsoring organization, with particularly harsh language, declared:

[T]he vast majority of medical, psychological and sociological evidence supports the conclusion that sexual orientation can not be changed” and that ads insinuating as much are “erroneous and full of lies.” The [R]esolution also stated that ads suggesting gays or lesbians are “immoral and undesirable creates an atmosphere which validates oppression of gays and lesbians” and encourages maltreatment of them. The Resolution claimed a “marked increase in anti-gay violence” that coincided with “defamatory and erroneous campaigns” against gays and lesbians. It then urged “local television stations not to broadcast advertising campaigns aimed at ‘converting’ homosexuals.

*Id.* at 1120. The majority upheld the resolutions against both Free Exercise and Establishment Clause challenges. But in a pointed dissent, Judge John Noonan justly excoriated the majority for legitimizing the government’s foray into the culture wars:

This case is a skirmish in the culture wars of the last century. Our culture has been the product, at least in part, of Jewish and Christian religious teaching; and the culture wars have, almost inevitably, brought about challenges to that teaching. The plaintiffs here emphasize the religious roots and religious nature of their message. The defendants focus on secular consequences of a message that they nonetheless maintain comes from a religious group using such a fundamentally religious category as sin.

We are not meant to be soldiers in the skirmish. We are asked, as much as it lies within our capabilities, to put aside our own freight of values and to put on the neutrality that our Constitution guarantees government will have in religious controversy. We are not asked to determine the religious or secular truth of the plaintiffs’ message or the city’s rebuttal. We have no competence to do so.

*Id.* at 1126 (Noonan, J., dissenting).

¶9. For a perceptive and persuasive essay about the cultural wars in the academy, see Eugene Goodheart, *Reflections on the Culture Wars*, 126 J. OF THE AM. ACAD. OF ARTS & SCI. 153, 173–74 (1997) (“The argument in the essay represents an ongoing effort on my part to . . . franchise certain ideas that have become disreputable in the humanities: objectivity, disinterestedness, tradition, and aesthetic appreciation. . . . They are or should be the common possession of scholars of whatever political or cultural persuasion—left, right, or center. . . . To agree on their necessity in intellectual exchange is not to agree about everything, but it may create the possibility of overcoming the current academic Balkanization in which one seeks the comfort zone of the like-minded or prepares to do battle with the enemy.”). See generally CAMPUS WARS: MULTI-CULTURALISM AND THE POLITICS OF DIFFERENCE (John Arthur & Amy Shapiro eds., 1995). For an appropriate application of “true threat” teaching to a campus war, see *Bauer v. Sampson*, No. 99-56964, 2001 U.S. App. LEXIS 22362 (9th Cir. Oct. 15,

Under the en banc court's approach, all that is required for speech to constitute a "true threat" is that a reasonable person in a "context of violence" would foresee that the recipients of the speaker's statement could view the statement as a serious expression of the speaker's intent to harm or assault.<sup>131</sup> This *mere* negligence standard is simply not compatible with a constitutional guarantee as fundamental as free speech. Certainly, few argue that threats of violence should be constitutionally protected; we do not. On the other hand, speech that attempts to persuade by label—or even coerce by social ostracism—is an inviolate part of give and take in a free and pluralistic society.<sup>132</sup> Certainly, a person's right to protected speech cannot be consistent with individual freedom, curtailed by another person's violent conduct, when that conduct is not authorized, directed, or ratified by the speaker. Constitutional rights to free speech are personal; they cannot be vicariously lost.<sup>133</sup> In short, warnings are not threats.

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2001) (granting summary judgment to college professor on professor's First Amendment claim that his speech was protected as against application of campus speech code).

For a short review of the *Kulturkampf* in Bismarckian Germany between the Iron Chancellor and Germany's dissenting Catholic minority, see MICHAEL STURMER, *THE GERMAN EMPIRE: 1870–1918*, 28–41 (2000). Hitler's Germany also had its "church struggle." See IAN KERSHAW, *HITLER 1936–45: NEMESIS* 39–41 (2000). Concern about changes in culture patterns is a part of most historical periods in Western society. See, e.g., OSWALD SPENGLER, *THE DECLINE OF THE WEST* (1932); MAX NORDAU, *DEGENERATION* (1895).

131. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002).

132. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) ("The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment."); cf. Appellants' Reply Brief at 24, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320) (commenting on the power of social disapprobation to effect change, the defendants pointed out that "Plaintiffs find these 'posters' threatening because they became known as the country's foremost providers of abortion services. They became known as, as the Defendants state, 'the deadly dozen.' Anyone—those who disapprove of abortion, the plaintiffs' neighbors, friends, pastors and others with whom they might come into contact—would now be more likely to know them as abortion providers. Plaintiffs have become to the abortion arena what the President is to the political arena. It is this thrust into prominence that the Plaintiffs find threatening.").

133. In our polity, rights—particularly constitutional rights—are *personal* rights. They belong to each individual to exercise or not to exercise, and they are each person's to use or lose. This is current teaching of history and constitutional doctrine. During the conflict over the ratification of the Constitution, the Anti-Federalists argued against ratification on the grounds that it ceded too much power to the federal government. See *generally* THE ANTI-FEDERALISTS PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES (Ralph Ketcham ed., 1986). The Constitution needed, they argued, a bill of rights to protect individuals against the misuse of federal power. See *infra* note 171 (debates in House of Representatives on adoption of bill of rights). Indeed, six of the constitutions adopted by the colonies at the

suggestion of the Continental Congress before 1787 contained full bills of right. ROSCOE POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 82 (1957). The proposed national constitution did not. The absence was telling. Not that the body of the Constitution did not contain protections for civil liberties. It did. U.S. CONST. art. I, § 10 (state denied power to impair obligation of contracts); *id.* art. I, §§ 9–10 (neither federal nor state power extends to ex post facto laws); *id.* art. I, §§ 9–10 (neither federal nor state power extends to bills of attainders). It was a question of degree. Accordingly, a Bill of Rights was adopted in the form of ten amendments to the Constitution of 1789; they were ratified by the states in 1791.

Excluding the Ninth and Tenth Amendments, the first eight amendments protect, in one form or another, individual liberties. *But see* *Griswold v. Connecticut*, 381 U.S. 479, 486–99 (1965) (Goldberg, J. concurring with Warren, C.J., and Brennan, J.) (arguing that the Ninth Amendment protects privacy). The amendments were drafted as limitations on national government. *Bannon v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). After the passage of the Fourteenth Amendment, the Supreme Court began the process of the “selective incorporation” of the Amendments into the Due Process Clause of the Fourteenth Amendment as a limitation on state power. *See* *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968) (tracing the incorporation of various amendments and the test for incorporation). Only the right to bear arms, *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 553 (1876), grand jury indictment, *Hurtado v. California*, 110 U.S. 516, 538 (1884), and civil jury trials, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 216–23 (1916), are expressly not incorporated into the Fourteenth Amendment. No Supreme Court decision touches on the Third Amendment. U.S. CONST. amend. III (quartering soldiers).

Each of these amendments is rooted in particular historical grievances. *See generally* POUND, *supra*, at 82–108 (tracing the origins of each of the provisions in the Bill of Rights). Each represents an instance of perceived overreaching by government that invaded individual rights. *See supra* note 130 ¶ 4 (Founders’ Natural Rights Philosophy); HAND, *supra* note 130, at 1–2 (“[T]hey were generally regarded as embodying the same political postulates that had been foreshadowed though not fully articulated in the exordium of the Declaration of Independence: ‘self-evident’ and ‘unalienable rights’ with which all men ‘are endowed by their Creator’ . . .”).

The individual rights guaranteed by the Constitution are personal rights. The Bill of Rights are, in effect, “bills of liberties.” POUND, *supra*, at 92. “They define circumstances . . . in which politically organized society will keep its hands off and permit free, spontaneous, individual activity . . .” *Id.* The right to be free from unreasonable searches and seizures under the Fourth Amendment, *Wong Sun v. United States*, 371 U.S. 471, 491–92 (1963), not to be witness against oneself under the Fifth Amendment, *Hale v. Henkel*, 201 U.S. 43, 69–70 (1906), and effective assistance of counsel, under the Sixth Amendment, *Massiah v. United States*, 377 U.S. 201, 206–07 (1964), are, for example, personal; they cannot be exercised by another or for another. Even where another may consent to a search, for example, the individual is thought to have clothed the person with the authority, *United States v. Matlock*, 415 U.S. 164, 169–72 (1974), and he retains the right to object to its exercise, *Bumper v. North Carolina*, 391 U.S. 543, 546–50 (1968).

Behind bills of rights are political ideas rooted in religious ideas. Pound observes:

The political ideas [in the Constitution] are largely those of the Puritan Revolution. . . . [They] are those of an era of revolt from authority: of individual interpretation of the Bible and nonconformity in religious organization, and of consociation rather than subordination in government. *They are ideas of the privacy of the individual man as the moral and so the political unit.* . . . [They give rise to the] rights of the individuals subject to the authority of government and

define[] . . . and protect liberties, that is, areas of nonrestraint of men's natural faculties of action.

POUND, *supra*, at 102–04 (emphasis added); see *infra* note 181 ¶¶ 7–8 (religious origin of idea of individual).

Generally, only the individual personally aggrieved by an unconstitutional exercise of governmental power may complain of the infringement. See, e.g., *United States v. Raines*, 362 U.S. 17, 21 (1960) (“one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional”). Exceptions are made in the areas of civil rights and free speech. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 495–507 (1972) (Whites may complain of exclusion of Blacks from petit jury); *Broadrick v. Oklahoma*, 413 U.S. 601, 611–18 (1973) (principles reviewed of permitted facial attacks on statutes on a First Amendment ground by person not aggrieved by statute's application to him); see also *Gilmore v. Utah*, 429 U.S. 1012, 1013–17 (1973) (Burger, C.J., and Powell, J., concurring) (considering and denying the standing of a “next of friend” to raise Eighth Amendment issues in face of knowing and intelligent waiver of rights by condemned convict); *Whitmore v. Arkansas*, 495 U.S. 149, 154–56 (1990) (personal injury of condemned convict prerequisite to assertion of another's rights, even in general administration of death penalty). Nevertheless, the “Justices agree on no specific litmus test that determines when an individual may assert the rights of others not before the Court.” JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 99 (6th ed. 2000) [hereinafter NOWAK & ROTUNDA]. For one description of those considerations, see *Secretary of State v. Joseph H. Wonson Co.*, 467 U.S. 947, 956 (1984) (“Within the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing . . . . Thus, when there is a danger of chilling free speech . . . society's interest [in the exercise of free speech by individuals trumps prudential limitations].”). But our point is that these exceptions are seen as exceptions, and even in their application, the right to object exercised by third parties is not seen as an exercise of the person's or society's right, but the right of the aggrieved individual. Individual rights are, in short, personal rights.

The issue of the power, if at all, of third parties by their own conduct to circumscribe the exercise of the rights of another is worked out by the Supreme Court in the context of the Fighting Words, Incitement, and Hostile Audiences Doctrines. See generally 4 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTION* 240–48 (3d ed. 1999) (analyzing the Fighting Words and Hostile Audience Doctrines) [hereinafter ROTUNDA, *TREATISE*]. In brief, the Fighting Words Doctrine, stemming from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942) (face-to-face confrontation; “G\*\*\*-damned racketeer” and “a damned fascist”; properly prohibited as “fighting words”), permits the government to ban “face-to-face words plainly likely to cause a breach of the peace by the addressee.” *Id.* at 573. Such “epithets [are] likely to provoke the average person to retaliation [and] . . . cause a breach of the peace.” *Id.* at 574. Their “slight social value as a step to the truth” is “clearly outweighed by the social interest in order and morality.” *Id.* at 572; accord ZECHARIAH CHAFEE JR., *FREEDOM OF SPEECH* 170–71 (1990) (Fighting words “do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, . . . offer little opportunity for the usual process of counter-argument[, and] almost immediately [will be followed by] retaliatory violence.”).

Where a person is speaking to a crowd, rather than face to face, the issue is controlled by *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[The government may not] forbid . . . advocacy of . . . force or of law violation except where such advocacy is directed to inciting . . . imminent lawless action and is likely to incite . . . such action.”). There, a Ku Klux Klan leader's conviction was reversed; he was charged for violating Ohio's criminal syndication

statute by advocating political reform through violence and assembling with a group to teach his doctrines. The Court held that no conviction could be obtained consistent with free speech rights unless the government proved (1) subjective intent to incite by the speaker, and (2) the words spoken by the speaker were in context likely to produce imminent lawless action. The requirement that the words objectively encouraged the lawful action was added by *Hess v. Indiana*, 414 U.S. 105, 106–08 (1973) (“We’ll take the f\*\*king street later” or “We’ll take the f\*\*king street again.”) (spoken during antiwar demonstration, but spoken to no one in particular; conviction of disorderly conduct not consistent with free speech rights).

The Hostile Audience Doctrine may be illustrated by *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Feiner v. New York*, 340 U.S. 315 (1951). Terminiello was convicted for a breach of the peace. A howling crowd gathered outside the auditorium where he was speaking. Terminiello’s speech was a denunciation of Jews and Blacks. The police feared violence. When Terminiello did not end his speech, he was arrested in order to keep the peace. Justice Douglas, who wrote for the majority, analyzed the function of free speech; it was, he said, “to invite dispute. . . . Speech is often provocative and challenging. It may . . . have profound unsettling effects as it presses for acceptance of an idea . . . .” *Terminiello*, 337 U.S. at 4. Nevertheless, the conviction was reversed, not because the speech was protected, but because the statute was overbroad. *Terminiello* was followed by *Feiner*, which directly raised the hostile audience issue, since *Feiner* did not challenge the over breadth of the ordinance. *Feiner* spoke for over thirty minutes, in which he made derogatory remarks about the President of the United States and Mayor of Syracuse; he then called on Blacks to “rise up in arms and fight for equal rights.” *Feiner*, 340 U.S. at 333 (Douglas, J., dissenting). The racial remarks stirred “excitement.” *Id.* at 317. “[On]lookers made remarks to the police about their inability to handle the crowd . . . .” *Id.* The police asked *Feiner* to stop; when he refused, he was arrested for disorderly conduct. Chief Justice Vinson justified the arrest, finding that *Feiner* “pass[ed] the bounds of argument or persuasion and under[took] incitement to riot . . . .” *Id.* at 321 (emphasis added). In dissent, Justices Douglas and Black thought that the threat of violence was minimal; they believed that the first duty of the police was to protect the speaker and to control the crowd. Rightly, Rotunda and Nowak distinguish *Terminiello* and *Feiner*, hostile audience decisions, from *Chaplinsky*, a fighting words decision, based on context. NOWAK & ROTUNDA, *supra*, at 1195. *Terminiello* and *Feiner*, he points out, involved speakers delivering speeches heard by an undifferentiated crowds; *Chaplinsky*, on the other hand, involved a face-to-face confrontation between the speaker and a particular person. In brief, speeches are properly afforded free speech protection, but words spit out in face-to-face confrontations are treated, not as speeches, but as actions likely to provoke unthinking reactions. Thus, context is crucial.

While *Feiner* (even though it can be seen as an incitement decision rather than as an incorrectly decided hostile crowd decision) is not yet overruled, but it is repeatedly distinguished. NOWAK & ROTUNDA, *supra*, at 13 (collecting cases). If cases can be said to possess only leases on life, not a fee simple ownership, *Feiner*’s lease long ago ran out, and it is now surely a tenant at sufferance. In brief, convictions of speakers because of hostile audience reactions are no longer affirmed by the modern Court. The government, in short, is “not allowed . . . to prosecute speakers for breach of the peace simply because the speech was before a hostile audience.” *Id.* at 1199. Instead, the Court follows the wise counsel of Zechariah Chafee: no one ought to be made “a criminal simply because his neighbors have no self control and cannot refrain from violence.” CHAFEE, *supra*, at 172

The Hostile Audience Doctrine may also be illustrated by *City of Forsyth v. Nationalist Movement*, 505 U.S. 123 (1992), in which the Court struck down on its face an ordinance that permitted a county administrator to charge no fee or to vary the fee for a demonstration or parade permit based on his estimate of the county’s costs associated with maintaining public



Worse, under the district court's approach, as affirmed by the en banc court, whether speech is protected or unprotected becomes a jury question, subject to a relatively limited constitutional review. Close questions will go to the jury,<sup>134</sup> and they will be affirmed on appeal on the basis of substantial evidence<sup>135</sup> (deferentially reviewed)<sup>136</sup> where the admissibility of evidence is a matter of abuse of discretion.<sup>137</sup> That not only means that the interpretation of the

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order, in effect, letting him gauge public response and shift the cost of a hostile audience reaction to the demonstrator or parade sponsor. In short, the whole Court is in agreement that "heckler's veto" is not constitutionally permissible. *See* 505 U.S. at 139–40 (Rehnquist, C.J., dissenting in which White, Scalia, & Thomas, JJ., concurred).

134. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1070 (9th Cir. 2002).

135. *Id.*

136. *Id.* at 1070–71.

137. ¶1. *Id.* at 1070.

¶2. For the sophisticated legal practitioner at the trial and appellate level, standards of review are passports to understanding and using the law. In fact, the rules of law that define its substance are only one of its aspects; the understanding and use of standards of review by advocates, fact finders, individual judges at trial, or by panels of judges on appeal goes to the heart of the law, not as rule, but as process, and the law as process is often the difference between the law as aspiration and the law as performance. Thus, understanding and using standards of review are crucial to understanding and using the law. Justice Benjamin Cardozo aptly made the point in his classic *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921): "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." (He might well have added that after we get a little older, we must wear glasses to see things at all.) Since few aspects of the law may legally be viewed with our own eyes, standards of review are a key aspect of the legal process. In brief, standards of review are the variously tinted "legal lenses" through which the law requires its participants to view different kinds of legal issues. *See Dickinson v. Zurko*, 527 U.S. 150, 163 (1999) (analyzing proper standard of review for patent matters). For an insightful discussion of the factors (legal, factual, and administrative) that go into the formulation of standards of review on appeal, see the able opinion of Chief Judge Posner in *Thomas v. GMAC Corp.*, 388 F.3d 305, 307–08 (7th Cir. 2002).

¶3. Standards of review are crucial in several general ways, but, most significantly, in framing issues and assigning roles. CHILDRESS & DAVIS, *supra* note 38, at 1–2. "[P]ractice counts more than words." *Id.* Practice gives legal formulation life. But, words, in fact, "frame the practice." *Id.* Justice Felix Frankfurter put it well: "In law . . . the right answer usually depends on putting the right question." *Estate of Roberts v. Commissioner of Internal Revenue Service*, 320 U.S. 410, 413 (1943); *accord* R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 273–75 (rev. ed. 1951) ("Every step . . . depends on asking a question. . . . Descartes, one of the three great masters of the Logic of Questioning (the other two being Socrates and Bacon) insisted upon this as a cardinal point . . ."); KARL LLEWELLYN, *THE BRAMBLE BUSH* 72–73 (1975) ("[E]ven when the evidence has been interpreted as to what it means—in fact—there remains the job of seeing what it means in *law*: of putting [it] into those abstract categories . . . of legal rules . . ."). "[I]ssue framing is the turning point of the decision." CHILDRESS & DAVIS, *supra* note 38, at 1–3. So, too, is the assignment of roles and powers to those who exercise them. *Id.* Power is both granted and withheld by standards of

review. Roles are defined for the participants in the legal process: litigant, advocate, fact finder, trial judge, and appellate judge. Each participant is assigned a role, and each is told how to play it. The participant's role determines the kind and degree of intensity with which matters are viewed. Most significant, the terms for finding error by other participants are set. Judges sit in review of both juries and other judges under specified standards of review. In short, role and power are opposite sides of the legal tender of standards of review.

¶4. We discuss at various points in these materials the relevant standards of review, their impact on litigation raising issues of free speech or expressive conduct, and make appropriate recommendations for reform. *See, e.g., infra* notes 719–20 (pleading standards in civil and criminal litigation). Here, we make only two broad points about standards of review that cut across particular issues: viewed as a whole, standards of review tend to move matters forward—without regard to the underlying issue—to the point where legal and factual disputes are resolved, and once a resolution is made, they tend to protect it from change at later points in the system.

¶5. Moving the process forward and a reluctance to change decisions once made are two tendencies in the law that reflect an unavoidable and uneasy balance between justice on the merits and efficiency of process. On the civil side, for example, the liberal pleading standards of the Federal Rules of Civil Procedure rely, not on pleading, but on discovery and summary judgment to get to “the gravamen of the dispute . . . frankly into the open for the inspection of the court.” *Swierkiewicz v. Sorema*, 122 S. Ct. 992, 998 (2002) (citation omitted). Yet the imposition of various and severe discovery costs on the adversary may, in fact, be a principal objective of the litigation for one side of the controversy. That tactic must be recognized for its transparent character and circumscribed; it can be if courts are attuned to the tactic and willing to intervene. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 597–601 (1998) (procedures to control civil litigation reviewed). Moreover, under FEDERAL RULES OF CIVIL PROCEDURE 56(c) (“no genuine issue as to any material fact”), summary judgment is only proper where a party fails to raise a material issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). The party must be given notice of any challenged issue and an opportunity to respond. *Celotex Corp.*, 477 U.S. at 326. A full opportunity for discovery is required. *Anderson*, 477 U.S. at 257. A dispute is “genuine” when “a reasonable jury could return a verdict for the nonmoving party.” *Id.*, 477 U.S. at 248. The facts and inference are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587. Thus, while summary judgment may curtail litigation without substance, substance may too often be easily put in issue or manufactured, particularly on questions of states of mind. Mental states give meaning to otherwise innocent conduct, but questions dealing with states of mind are for the jury; thus legally requiring proceeding to trial. *See, e.g., Bruner Corp. v. R.A. Bruner Co.*, 133 F.3d 491, 497 (7th Cir. 1998) (knowledge of stolen character of property); *Veten v. Regis B. Lippert Intercat, Inc.*, 985 F.2d 1515, 1522–24 (11th Cir. 1993) (intent to defraud at time of formation of contract). Litigation that implicates free speech or expressive conduct or questions of personal responsibility under basic principles of federal criminal law necessarily implicates mental states, thus requiring trial and imposing potentially crippling discovery costs on the speaker. Moving litigation along without an independent assessment of underlying merits threatens essential values in a free society because the threat of litigation itself, regardless of the likely outcome, chills protected speech.

¶6. Similarly, on the criminal side, alleging an offense is little more than a matter of using the language of the statute. *See infra* note 720 (reviewing standards of civil and criminal pleading). Once the government puts in a reasonable amount of evidence of a “threat,” the question of whether the conduct is a “threat” is usually a question of fact for a duly instructed jury. *See, e.g., United States v. Daughenbaugh*, 49 F.3d 171, 173 (5th Cir. 1995) (upholding

conviction under 18 U.S.C. § 886 for the use of the mail to transmit threat to judge over defense of political speech). Under FEDERAL RULES OF CRIMINAL PROCEDURE 29, the general standard for a judgment of acquittal is whether reasonable minds on the part of the jury might fairly conclude guilt beyond a reasonable doubt. *See, e.g.*, United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972) (Friendly, J.) (higher standard of burden of proof (beyond a reasonable doubt) in criminal cases reflected in review by trial court before submission to jury) (overruling United States v. Feinberg, 140 F.2d 592, 594 (2d Cir. 1944) (Hand, J., collecting and analyzing the decisions) (same standard to be used in civil and criminal cases)). The question for the trial court is not whether it *would* find guilt beyond a reasonable doubt, but whether a reasonable jury *might* find guilt beyond a reasonable doubt. In brief, close questions usually go to the jury. Close questions are typically found where testimony conflicts, credibility is at issue, or different assessments may be made regarding the weight of the evidence. Such questions are not matters of principle to be resolved similarly across cases; for that reason, they are expressly the province of the jury, to be resolved case by case. Such questions, too, are found in most criminal prosecutions, a fact that highlights the central role of the jury in a criminal prosecution.

¶7. Once a jury returns a guilty verdict in a criminal case, and after all post trial motions are denied, as they usually are, attention turns to the appeal, where the court of appeals, facing a challenge to the sufficiency of the evidence, is, like the trial court, not to resolve conflicts in testimony, to pass on the credibility of witnesses, or to assess the weight to be given to testimony. Because the jury verdict removes the presumption of innocence of the defendant, the court of appeals views the evidence in the light most favorable to the government, gives to the government the benefit of all favorable inferences, and, if the verdict is merely sustained by substantial evidence, affirms the verdict. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (rational trier of fact could have found elements of offense beyond a reasonable doubt). Courts of appeal are unusually candid in assessing the practical implication of this standard of review. *See, e.g.*, United States v. Smith, 294 F.3d 473, 477 (3d Cir. 2002) (standard of review for reversal not met unless “prosecution’s failure is clear”); United States v. Cothran, 286 F.3d 173, 175 (3d Cir. 2002) (the standard of review is “particularly deferential”; it imposes a “very heavy burden” on the appellant); United States v. Saunders, 166 F.3d 907, 913 (7th Cir. 1999) (standard of review faces appellant with “an uphill battle”); United States v. Hickok, 77 F.3d 992, 1002, 1006 (7th Cir. 1996) (standard of review imposes on appellant a “heavy burden”; role of appellate court “exceedingly narrow”). Evidentiary issues, too, are reviewed on appeal, not de novo, as matter of law, but on an abuse of discretion standard; that also makes reversal unlikely. *See, e.g.*, United States v. Cueto, 151 F.3d 620, 637 (7th Cir. 1998) (standard of review is abuse of discretion; appellant carries a “heavy burden” because trial court is given “special deference” on evidence issues); *Saunders*, 166 F.3d at 917 (standard of review on admission of evidence is abuse of discretion; reversal only proper if failed to exercise discretion or exercised it in unprincipled fashion); United States v. Hartbarger, 148 F.3d 777, 781, 786 (7th Cir. 1998) (upholding limit on the admission of early childhood experience of defendant and the admission of interracial couple’s reaction to defendant’s conduct, and affirming cross burning conviction under 42 U.S.C. § 3631). Moreover, errors at trial are viewed against the background of FEDERAL RULES OF CRIMINAL PROCEDURE 52 (harmless errors not affecting substantial rights are to be disregarded; only plain error affecting substantial rights may be noticed when not brought to attention of the court). *Katteakos v. United States*, 328 U.S. 750, 764–65 (1946) (conviction will be upheld unless influence of error gives rise to grave doubt of innocence); *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (only exceptional case may be noticed; plain error must substantially affect fair trial); *accord* *Olano v. United States*, 507 U.S. 725, 734 (1993); *see also* *Johnson v. United States*, 520 U.S. 461 (1997) (plain error is assessed at time of appeal, not trial); *Cueto*, 151 F.3d at

metes and bounds of constitutional protection is largely left in the hands of lay persons,<sup>138</sup> but also that, in the majority of cases, defendants will have to undergo—and in civil proceedings pay for the costs of extensive discovery—a full trial on the merits before they can learn whether their speech is, in fact, protected.<sup>139</sup> Given the

637–38 (“substantial and injurious”; “exclusion of evidence had a prejudicial effect upon the jury’s verdict”). Finally, since *Neder v. United States*, 527 U.S. 1, 4–17 (1999), the failure to instruct the jury on an element of offense may itself be harmless error, a result all the more remarkable in light of the defendant’s Sixth Amendment right to a jury trial. In brief, the judicial role of error correction in criminal litigation is generally subordinated to considerations of process. The possibility of criminal prosecution for vicarious speech crimes, where judicial review of a defendant’s First Amendment rights is made only after the defendant is stripped of his presumption of innocence, by a review standard that severely disadvantages him, is inconsistent with fundamental principles of liberty.

¶8. We have no quarrel with the point at which the balance between merits (justice) and process (efficiency) intersects in most civil and criminal litigation. In fact, merits may be difficult to determine in the majority of cases simply because we possess no infallible method to determine with certainty historical facts. Fair, not perfect, process is all that is required. *United States v. Hasting*, 461 U.S. 499, 508–09 (1983) (“no such thing as an error-free, perfect trial, and . . . Constitution does not guarantee such a trial”). Indeed, fair process may be an appropriate surrogate for right merits. Judicial resources are finite. If lavished or squandered on one piece of litigation, they are not available for use on another piece of litigation. Thus, justice rendered in one case is justice denied in the other. Nevertheless, we vigorously argue in these materials that litigation itself is not fungible. Some cases *are* more important than others, not to the litigants, but to the society. Litigation rightly raising free speech or expressive conduct issues *is* more important than other kinds of litigation. See *supra* note 133 (while individual rights are personal, free speech issues warrant special standing rules). Accordingly, we identify in these materials in each particular context where and when the present standards of review for speech or expressed conduct and personal responsibility in the federal criminal law must be more faithfully applied or rethought and reformulated, that is, particularized in light of the importance of these values, which are insistently implicated in this kind of litigation in a free society.

138. See Appellants’ Reply Brief at 9, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (No. 99-35320) (“The jury’s decision below, which imposed a total of \$107 million in damages . . . is a poster-child for just how fact-finders may inhibit free expression.”).

139. See *id.* at 15 (“The mammoth length of First Amendment cases will impose costs on defendants bludgeoning them into submission.”). Moreover, the conduct of such protesters may well be outside of insurance coverage, not only for liability, but also for defense. See, e.g., *State Auto Ins. Cos. v. McClamroch*, 497 S.E.2d 439, 442 (N.C. Ct. App. 1998) (residential picketing against abortion provider that gave rise to tort litigation, including under North Carolina RICO, within policy exclusions as “intentional acts”). Indeed, as Judge Kozinski noted in his en banc dissent, civil judgments imposed on protesters may not even be dischargeable in bankruptcy. See *In re Treshman*, 258 B.R. 613 (Bankr. D. Md. 2001) (finding judgment incurred by a protester in the *American Coalition* trial court decision nondischargeable under the discharge exception for “willful and malicious injury” found in 11 U.S.C. § 523(a)(6) (1993 & Supp. 2000)); see also *In re Michael Bray*, 256 B.R. 708 (Bankr. D. Md. 2000); WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY ¶ 523.12[3] (1996) (analyzing 11 U.S.C. § 532 (1994) (making exceptions to the discharge in bankruptcy)). The

arsenal of statutes proscribing “threats,” this constitutional test will inevitably chill free speech<sup>140</sup>—as the defendants and various amicae<sup>141</sup> in the *American Coalition* litigation so eloquently pointed out. Under this approach, the prospects for freely exercising First

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concern of congressmen over the issue of the discharge of “abortion protesters” is difficult to understand except as symbolic action in the continuing culture wars. *Compare* note 130 (analyzing the current culture wars), with Philip Sheon, *Negotiators Agree on Bill to Rewrite Bankruptcy Laws*, N.Y. TIMES, July 26, 2002 (reporting that “[t]he compromise will restrict the ability of anti-abortion protesters to use the bankruptcy laws to shield themselves”). That means, of course, that such protest activity puts at risk all of the assets the protester has, and all he may ever acquire. Only the very poor or the very rich can afford to protest. *See* Murray, *supra* note \*\*, at 694.

140. As Antonio Califa, Legislative Counsel for the American Civil Liberties Union (“ACLU”), explained:

[T]he harm caused by the chilling of free speech is comparatively greater than the harm resulting from the chilling of other activities. [Therefore,] [t]he logical mandate of the chilling effect doctrine is that legal rules should be formulated to allocate the risk of error away from the preferred value, thereby minimizing the occurrence of the most harmful errors.

Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 833 (1990); *see also* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 688 (1978) (arguing that the doctrine of “chilling effect may be seen not as [a] non-conceptual generalization . . . but rather as a specific substantive doctrine lying at the very heart of the first amendment” (footnote omitted)).

141. For example, the ACLU Foundation observed:

When protected speech is chilled because of uncertainty about the dividing line between protected and unprotected speech, the benefits and protections of the First Amendment are diminished for everyone. On the other hand, “true threats” undeniably have a chilling effect on the exercise of constitutionally-protected activities and have no place in civil society. Reconciling these two principles is one of the most important challenges in this case.

Brief of Amicus Curiae ACLU Foundation of Oregon, Inc. at 3, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320). Likewise, the Thomas Jefferson Center for the Protection of Free Expression commented:

The need for . . . care is especially acute where, as is the case here, the targeted speech [on the basis of which liability is to be imposed] concerns volatile topics of public and political debate.

While certain types of verbal threats may incur legal sanctions, . . . not all words which may seem to convey a threat are unprotected. . . . [T]he task of determining what constitutes a “true threat”—for which the speaker may be liable—is a delicate and painstaking one. That task becomes even more difficult when the alleged threats contain language which, literally construed, do not immediately threaten harm, and which include a view on a volatile political question. In such a case, the potential for chilling protected expression is especially grave.

Brief of Amicus Curiae Thomas Jefferson Center for the Protection of Free Expression at 2, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320) (citations omitted); *see also id.* at 5 (“[T]he facts of the present case illustrate the risk that [an objective] standard—if not applied in the most sensitive way—could gravely chill political expression on issues of public concern.”).

Amendment rights in an increasingly pluralistic society—which can be expected to see more, not less, social and political dissension—are tragically bleak. Is the sun beginning to set on free speech in America? Is it twilight for the First Amendment? These questions are not yet conclusively answered.

In fact, the Founders precisely designed the First Amendment to protect speech so that it could serve as an alternative to violence and as a way to express and to resolve social, political, and even personal disagreements in a free society. To so ill-define the contours of First Amendment protections through substantive standards or trial and appellate practices that the rights guaranteed are difficult to exercise when they are most needed is perverse. The “negligence standard,” which substitutes for a subjective state of mind, and that the district court followed and the en banc court affirmed, is fundamentally at odds with the general theory of the First Amendment and fundamental principles of federal criminal jurisprudence.<sup>142</sup> In addition, its revolutionary view of evidence of context for which a defendant may be held responsible is similarly objectionable. Together, they are inconsistent not only with the fundamental principles of the First Amendment and federal criminal jurisprudence but also with specifically controlling Supreme Court precedent, in particular *Claiborne*. The en banc court’s cursory effort to distinguish *Claiborne* cannot be squared with the duty of lower courts under the doctrine of stare decisis.<sup>143</sup>

The Ninth Circuit’s panel opinion went far toward curing the defects of the district court’s effort. Its approach was far more

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142. See *infra* Part III; *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1015 n.9 (9th Cir. 2001), *aff’d in part, vacated in part, remanded by* 290 F.3d 1058 (9th Cir. 2002) (questioning whether the Ninth Circuit’s standard was an intent or a negligence standard); see also Brief of Amicus Curiae ACLU Foundation of Oregon, Inc. at 5, *Am. Coalition*, 290 F.3d 1058 (No. 99-35320) (“Our worry . . . is that a ‘negligence’ standard will lead to self-censorship by speakers who must necessarily guess about where the constitutional lines will ultimately be drawn. For that reason, the Supreme Court has often imposed a scienter requirement in free speech cases . . .”).

143. Justice Baldwin put it well: “We must respect the solemn decisions of our predecessors and associates, as we may wish that those who succeed us should respect ours; or the supreme law of the land, so far as depends on judicial interpretation, will change with the change of judges.” *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 202–03 (1831) (Baldwin, J., dissenting); see also *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam) (“[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”); *supra* note 38 (duty to follow precedent).

consistent with the Supreme Court's First Amendment jurisprudence than is the en banc court's opinion. First, the panel insisted on making a de novo determination of whether the speech involved was protected and ultimately decided that, as a matter of law, it was.<sup>144</sup> The en banc court correctly determined that de novo review was required, but then failed to perform that review in any meaningful way.<sup>145</sup> Second, the panel rightly realized that it was not free to write on a blank slate: no matter what Ninth Circuit precedent said about the test for a true threat—specific intent or negligence—the Supreme Court provided controlling guidance on the issue in *Claiborne*.<sup>146</sup> The en banc court's flat rejection of *Claiborne* as precedent is unpersuasive and an affront to the doctrine of precedent; even if the case did not involve a statute specifically targeting threats, the rationale of the Court's decision, including its specific reference to *Watts*, spoke volumes about the proper scope of political and social protest under the protections of the First Amendment.<sup>147</sup> Indeed, that the decision would have gone the same way had it involved civil rights, not abortion, is questionable. The en banc majority could not offer this point as a controlling distinction between the two decisions, but it was sadly implicit in all that it said. The media can be forgiven for seeing the case in those stark terms.<sup>148</sup> That a court would share the media's shallow view is indefensible in a free society under the rule of law. Finally, the panel resoundingly affirmed that constitutional rights are personal and cannot be vicariously lost: context neither authorized, directed, nor ratified by the speaker cannot be used to divest his or her speech of constitutional protection.<sup>149</sup> Its opinion stands in sharp and unfavorable contrast with the en banc court's permissive approach to evidence of context.<sup>150</sup>

Still, even under the panel's approach, that the defendants endured discovery, trial, and appeal before finding out that their speech was protected does not bode well for the open and robust

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144. *Am. Coalition*, 244 F.3d at 1019.

145. *Am. Coalition*, 290 F.3d at 1085.

146. *Am. Coalition*, 244 F.3d at 1014.

147. *Am. Coalition*, 290 F.3d at 1071–72.

148. *See supra* notes 7, 13.

149. *Am. Coalition*, 244 F.3d at 1014; *see supra* note 133 (discussing personal character of constitutional rights).

150. *Am. Coalition*, 290 F.3d at 1086–88.

exercise of free speech rights. Moreover, the panel, while recognizing the facts of *Claiborne* as controlling, nevertheless left open the question of whether specific intent or mere negligence is the proper standard to use for state of mind.<sup>151</sup> Thus, while the Ninth Circuit panel opinion is far more protective of free speech than the rulings of the district court or the en banc court, and far more consistent with First Amendment theory and Supreme Court precedent, it does not do all that must be done if free speech is to be protected in America.<sup>152</sup>

### III. THE FIRST AMENDMENT: THEORY AND PRACTICE

To understand the proper application of the First Amendment to cases involving “true threats,” we must do more than simply cite precedents. We must begin at the beginning. Adopted as part of the Bill of Rights in 1791, the First Amendment states, in relevant part, “Congress shall make no law . . . abridging the freedom of speech.”<sup>153</sup> By its terms, the Amendment applies only to the federal government.<sup>154</sup> Nevertheless, it applies to the states through the Due Process Clause of the Fourteenth Amendment.<sup>155</sup> While the language of the Amendment as applied to both the federal and state governments requires that neither Congress nor state legislatures “abridge . . . freedom of speech,” the Amendment neither defines “speech” nor explains what kinds of laws constitute “abridging” freedom of speech.<sup>156</sup> The history of the Amendment is also

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151. *Am. Coalition*, 244 F.3d at 1015 n.9.

152. *See infra* Part VI.

153. U.S. CONST. amend I.

154. *See id.*; *see also* *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (holding that the Bill of Rights applies only to the Federal Government and not to the States).

155. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996) (“Although the text of the First Amendment states that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press,’ the Amendment applies to the States under the Due Process Clause of the Fourteenth Amendment.”). *Gitlow v. New York*, 268 U.S. 652 (1925), was the first Supreme Court decision to apply the freedom of speech provision of the First Amendment to the states through the Fourteenth Amendment. *See id.* at 666 (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

156. *Cf.* KENT GREENAWALT, *FIGHTING WORDS* 13–14 (1995) (“The basic American constitutional standard of ‘abridging the freedom of speech’ seems to call for conceptual categorization to do much of the work of constitutional decision, although courts may need



uninformative.<sup>157</sup> Consequently, courts must resort to “creative interpretation”—looking simultaneously to tradition and to theory—to breathe appropriate life into the Amendment.<sup>158</sup>

### *A. Creative Interpretation: Rationales for the Freedom of Speech*

From time to time, writers advance theories of the proper role of the First Amendment in American society. As they deforest the land in an effort to provide a theoretical framework for the First Amendment, writers advocate one or more of various, but not necessarily mutually exclusive, theories. These theories include: (1) free speech is essential to the search for truth<sup>159</sup>; (2) free speech is essential to intelligent self-government in a democratic system<sup>160</sup>; (3) free speech promotes tolerance and diversity<sup>161</sup>; (4) free speech furthers individual autonomy and self-fulfillment<sup>162</sup>; (5) free speech is a check on tyranny<sup>163</sup>; (6) regulations directed at “harmful” speech

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some explicit balancing to avoid unacceptable results.”); Michael J. Gerhardt, *Liberal Visions of the Freedom of the Press*, 45 VAND. L. REV. 1025, 1040 (1992) (“[T]aking the text at face value when it seemingly speaks in categorical terms might lead to absurd results.”).

157. Even the renowned originalist Robert Bork admits that the First Amendment’s text and legislative history are unhelpful; something more is required, Bork argues, in enforcing the dictates of the First Amendment. See *Ollman v. Evans*, 750 F.2d 970, 995 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (recognizing the need for courts to “continue to develop doctrine to fit [F]irst [A]mendment concerns” and “discern how the [F]ramers’ values, defined in the context of the world they knew, apply to the world we know”); see also Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971) (“The [F]ramers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject.”).

158. See Tona Trollinger, *Reconceptualizing the Free Speech Clause: From a Refuse of Dualism to the Reason of Holism*, 3 GEO. MASON INDEP. L. REV. 137, 147 (1994). Trollinger writes:

Because the text of the First Amendment is not self-defining and its history is uninformative, courts can only deduce the meaning of the Free Speech Clause by creative interpretation. In other words, because the major premise of the jurisprudential free-speech syllogism, the text, is so unenlightening[,] . . . the minor premise, the interpretive schematization, necessarily defines the scope of speech protection.

*Id.* (citing Frederick Schauer, *Philosophy of Language and Legal Interpretation*, 58 S. CAL. L. REV. 399 (1985) and NIMMER ON FREEDOM OF SPEECH § 1.02[G], at 1–3 (1992)).

159. See *infra* notes 192–96 and accompanying text (development of marketplace rationale for free speech).

160. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 109 (1965).

161. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986).

162. See MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984).

163. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B.

will inevitably be abused to constrain worthwhile speech<sup>164</sup>; (7) free speech is important in accommodating the interests of competing groups and achieving social stability<sup>165</sup>; and more recently, (8) free speech protects the essential function of expression of “dissent.”<sup>166</sup> While each of these rationales offers an important insight into the values underlying the First Amendment, none of them by itself proves capable of setting out sufficiently clear principles to explain what “speech” is or when it can be “abridged.”<sup>167</sup> As Professor Greenawalt observes, “What all of these perspectives do provide . . . is a set of considerations, a set of standards for the relation of government to citizens, which help to identify which interferences with expression are most worrisome and which operate as counters, sometimes powerful ones, in favor of freedom.”<sup>168</sup>

In fact, theory alone cannot explain the practical reality of First Amendment protections in modern day America. However compelling, theory must always be tempered with the experience of the everyday—for while in theory, reality may not matter, in reality, theory often does not matter. As Justice Jackson once observed in the context of First Amendment freedoms, “The choice is not between order and liberty. It is between liberty with order and anarchy without either.”<sup>169</sup> Thus, a historical examination of how courts treat the First Amendment is necessary to understand how it reached its present scope.<sup>170</sup>

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FOUND. RES. J. 521.

164. See GREENAWALT, *supra* note 156, at 22.

165. See *id.* at 24.

166. See STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999). See generally the brilliant—and dissenting from the modern liberal position (the right is prior to the good)—treatment of freedom, including, in various contexts, freedom of speech, found in the powerful essay, JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1999). The Garvey approach informs these materials, even when we disagree with him, and even though his text does not directly deal with “true threats.”

167. See GREENAWALT, *supra* note 156, at 34.

168. *Id.*; see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 789 (2d ed. 1988). Professor Tribe maintains:

No satisfactory jurisprudence of free speech can be built upon such partial or compromised notions of the bases for expressional protection or the boundaries of the conduct to be protected . . . . Any adequate conception of freedom of speech must instead draw upon several strands of theory in order to protect a rich variety of expressional modes.

*Id.*

169. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

170. Cf. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897)

This history of the First Amendment from its ratification in 1791 until the early part of the twentieth century is muddled and often inconsistent.<sup>171</sup> From the miasma of doctrine, theory, and result that

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(arguing that understanding history is vital to understanding law). Holmes writes:

At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition. We follow it into the Year Books, and perhaps beyond them to the customs of the Salian Franks, and somewhere in the past, in the German forests, in the needs of Norman kings, in the assumptions of a dominant class, in the absence of generalized ideas, we find out the practical motive for what now best is justified by the mere fact of its acceptance and that men are accustomed to it. The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

*Id.* at 469.

171. See Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 *FORDHAM L. REV.* 263, 331 (1986). After an extended analysis of the cases, Gibson concludes:

Although the freedom of expression doctrines which [sic] the Supreme Court developed between 1791 and 1917 were not as broad or as libertarian as modern doctrines, it would be an exaggeration to say that the Court was thoroughly hostile to freedom of speech . . . . It would be an even greater error to suggest that the Court's decisions during this time should be considered when confronting First Amendment issues today.

The Court's record on speech . . . was, for the most part, mixed.

*Id.* at 331.

The story of the controversies surrounding the adoption of the Constitution is an oft-told tale; it need not be fully canvassed once again here. For a recent treatment of that history, see *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (upholding under 18 U.S.C. § 922(g)(8)(ii) the charge of unlawful possession of firearm by person subject to judicial restraint in domestic relations litigation; holding that Second Amendment affords a private right to bear arms, but that right is subject to reasonable limitations; tracing, in great detail, the history of the adoption of the Bill of Rights, and focusing, in particular, on the right to bear arms). For a general summary of the adoption of the Constitution, see ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS—1776*, at 791 (1955). The classic treatments of that history, including contemporaneous arguments and understandings, may be found in JOSEPH STORY, 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, Ch. XLIV, §§ 1857–1902 (Fred B. Rothman & Co. 1991). Story treats the First Amendment in sections 1864–88. Story's nineteenth century, limited, Blackstonian understanding of the meaning of the Free Speech Clause of the Amendment is, manifestly, considerably more restrictive than that which animates the jurisprudence of the current Supreme Court. In brief, he thought:

[T]he language of [the] amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever,

without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation; and so always, that he does not disturb thereby the public peace, or attempt to subvert the government.

*Id.* § 1874, at 732–33 (footnotes omitted).

A classic treatment, including the adoption of state constitutions, may also be found in THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (DaCapo Press 1972) (1868). James Madison himself alluded to the controversy over the adoption of a Bill of Rights to the Constitution when he rose in the House of Representatives, on June 8, 1789, to offer “amendments” to the Constitution, in what, he said, “may be called a bill of rights.” 1 THE DEBATES AND PROCEEDING IN THE CONGRESS OF THE UNITED STATES 424, 436 (compiled by Gales and Seaton in 1834). Madison observed:

There have been objections of various kinds made against the Constitution. Some were levelled against its structure because the President was without a council; because the Senate, which is a legislative body, had judicial powers in trials on impeachments; and because the powers of that body were compounded in other respects, in a manner that did not correspond with a particular theory; because it grants more power than is supposed to be necessary for every good purpose, and controls the ordinary powers of the State Governments. I know some respectable characters who opposed this Government on these grounds; but I believe that the great mass of the people who opposed it, disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power; nor ought we to consider them safe, while a great number of our fellow-citizens think these securities necessary.

It is a fortunate thing that the objection to the Government has been made on the ground I stated; because it will be practicable, on that ground, to obviate the objection, so far as to satisfy the public mind that their liberties will be perpetual, and this without endangering any part of the Constitution, which is considered as essential to the existence of the Government by those who promoted its adoption.

*Id.* at 433; *see also id.* at 447 (“The ratification of the Constitution in the several States would never have taken place, had they not been assured that the objections [to the lack of a bill of rights] would have been duly attended to by Congress.”). Among the amendments that Madison offered was: “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments.” *Id.* at 434.

Madison, too, was concerned with more than the abuse of governmental power. He observed:

The prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority.

It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention. I am sensible they are not so strong as to satisfy gentlemen of every description who have seen and examined thoroughly the texture of such a defense; yet, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.

decisions in this time period created, the position that Blackstone advocated in his *Commentaries* largely prevailed until the turn of the twentieth century. Blackstone argued that freedom of speech and freedom of the press were limited concepts, protecting an individual only from prior restraint and not from post-publication prosecution.<sup>172</sup> He wrote, “The liberty of the press . . . consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.”<sup>173</sup> *Robertson v. Baldwin*,<sup>174</sup> decided in 1897, confirms that at that time the Supreme Court held this limited view. *Robertson* held that the First Amendment, like other provisions of the Bill of Rights, did not

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*Id.* at 437. He added:

It has been said that it is unnecessary to load the Constitution with this provision, because it was not found effectual in the constitution of the particular States. It is true, there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated; but it does not follow but they may have, to a certain degree, a salutary effect against the abuse of power. *If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.*

*Id.* at 439 (emphasis added). The italicized portion of this speech does much to undermine the thought of those who question the legitimacy of the Supreme Court when it enforces the various provisions of the Bill of Rights. In a justly famous exchange at Harvard in the Holmes lectures of 1958 and 1959, Judge Learned Hand and Professor Herbert Wechsler reflected on the justification for judicial review. Hand supported it only on pragmatic grounds; Wechsler thought it supportable based on text and contemporary understanding. Wechsler cited, among other things, THE FEDERALIST No. 78 (Alexander Hamilton). Hand even questioned that Madison supported judicial review. Compare HAND, *supra* note 130 ¶ 4, at 6 (Madison “doubtful”), 15 (“practical conclusion”) with Wechsler, *supra* note 7, at 3 (citing Hamilton, *supra*). Strangely, neither referred to the congressional debates on the passage of the Bill of Rights nor those at the time of the Civil War Amendments. The congressional debates on the adoption of the Fourteenth Amendment are comprehensively summarized in Bernard H. Siegan, *Separation of Powers & Economic Liberties*, 70 NOTRE DAME L. REV. 415, 443–49 (1995) (“The Framers of and the state conventions that ratified the original constitution may not have comprehended the potential power of the Supreme Court, but the Framers and ratifiers of the Fourteenth Amendment clearly did.”).

172. BLACKSTONE, *supra* note 130, at \*151; accord STORY, *supra* note 171, § 1878.

173. BLACKSTONE, *supra* note 130, at \*151.

174. 165 U.S. 275 (1897). Subsequently, no less a figure than Justice Holmes echoed the point, for the Court, in *Patterson v. Colorado ex rel. the Attorney General*, 205 U.S. 454, 462 (1907) (stating that the “main purpose of [freedom of speech] is ‘to prevent all such previous restraints . . . as had been practiced by other governments,’ and . . . [it does] not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.” (citations omitted)).

create “any novel principles of government,” but instead, simply codified “certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions.”<sup>175</sup>

Beginning in the early part of the 1900s, however, Supreme Court First Amendment doctrine underwent a radical transformation, which eventually led to the present form of its jurisprudence. In fact, most courts and commentators begin their analysis of modern First Amendment doctrine with Justice Holmes’s opinions, beginning in 1919 with the articulation of his “clear and present danger” test in *Schenck v. United States*,<sup>176</sup> and his classic dissent in *Abrams v. United States*,<sup>177</sup> which together form the backdrop for the bulk of the Court’s current work in the area of freedom of speech. In his *Abrams* dissent, Holmes famously advocated his “marketplace of ideas” theory, a tempered version of which still dominates the Court’s First Amendment jurisprudence.<sup>178</sup> That theory, in its moderate form, holds that freedom

175. *Robertson*, 165 U.S. at 281.

176. 249 U.S. 47 (1919).

177. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). Chief Judge Posner suggests that the “common view” is that Holmes’s opinions in *Schenck* and *Abrams* are inconsistent. See RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 66 n.13 (2001) (citing DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 280–82, 324–25, 346–55 (1997)). He disagrees and offers a convincing reconciliation of the two opinions: *Schenck*, in the context of an actual effort to obstruct the draft by mailing leaflets, discussed the costs of free speech, while *Abrams*, in the context of the general circulation of leaflets, discussed the costs of abridging free speech. *Id.* at 66.

178. ¶1. Holmes owes his “marketplace of ideas” theory to Charles Sanders Peirce. David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97, 120 (1982). Indeed, Peirce’s general contribution of American law is tangible, for those who take the trouble to look, though sadly few do. As such, the story of Holmes’s substantial debt to Peirce ought to be more widely known, for it embodies in the life experiences of identifiable individuals important aspects of the American experience, which are relevant to the foundations of American jurisprudence, one focus of these materials.

¶2. In early 1872, several young Cambridge, Massachusetts, intellectuals formed a discussion group which they called “half-ironically, half-defiantly, ‘The Metaphysical Club’—for agnosticism was then riding . . . high . . . and was frowning superbly upon all metaphysics,” LOUIS MENAND, THE METAPHYSICAL CLUB 201 (2001), as remembered by one of its members, Charles Sander Peirce (1839–1914), a prodigy in mathematics, science, and philosophy. Other members of the club, each of whom would become influential, included: William James (1842–1910), then a young doctor, but eventually the world-renowned psychologist and quintessential American philosopher, and Oliver Wendell Holmes, Jr. (1841–1935), a future Justice and Chief Justice of the Massachusetts Supreme Court (1882–1902), a Justice of the United States Supreme Court (1902–32), and widely thought to be one of the giants to sit on the Supreme Court in the twentieth century, though dissent is sharp. See generally G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971);

see also *infra* note 193 (favorable opinion of Holmes by Chief Judge Richard A. Posner). The club lasted for only a few months, but the issues its members discussed—which were to occupy them for the rest of their lives—define, in many ways, modern American life; they are particularly relevant to the issues posed by the *American Coalition* litigation and our proposals for the reform of the jurisprudence of “true threats.” Our intellectual life in law—and outside of law—is the product in many ways of two wars: the Civil War, and the horrors it manifested on the battlefield, and World War II, and the horrors it brought to the attention of the nation in the impact of National Socialism. We turn here to the Civil War and its necessary background for the analysis undertaken in these materials. We also concretely illustrate the commonplace that turns in jurisprudence to produce changes in the law through the actions of particular individuals. For additional treatment of the impact of World War II and National Socialism, see *infra* notes 178, 416.

¶3. According to Menand, for those who came of age in the early 1860s, two events—one intellectual and one traumatic—changed the assumptions with which they viewed their world: The publication in 1859 of Charles Darwin’s *Origin of the Species* and the Civil War. Accord WILLIAM JAMES, A PLURALISTIC UNIVERSE 29–30 (1977) (We “have witnessed in our own persons one of those gradual mutations of intellectual climate [due in part to the] vaster vistas which scientific evolutionism has opened . . .”). A materialistic theory of evolution, rooted in chance, not design, radically undermined belief in the thick legacy of religious and philosophical idealism that preceded the War—a war that swept away not only the civilization of the South, based on slavery and agriculture, and justified theoretically within the Union by state’s rights, but also the entire intellectual culture of the industrial North. “It took nearly half a century for the United States to develop a culture to replace it, to find a set of ideas . . . that would help people cope with the conditions of modern life.” MENAND, *supra* ¶ 2, at x.

¶4. The basic facts of that fratricidal struggle make its sweeping impact wholly understandable. The population of the North was twenty-two million, the South nine million, plus three and one-half million slaves. ALAN BARKER, THE CIVIL WAR IN AMERICA 144 (1961). The North fielded the equivalent of 1,500,000 men, in rolling three year enlistments, totaling approximately 2,900,000, while the South, at any one time, fielded 1,000,000, for an overall total of 1,300,000, though “because of inadequate records nobody will ever get an exact count.” BRUCE CATTON, THE CIVIL WAR 162 (1960). “The struggle of [General Ulysses S.] Grant and [General Robert E.] Lee was an epic drama: modern total war faced the traditional conception of war as a contest of skill, finesse and chivalry.” BARKER, *supra* at 126. The North suffered 111,000 deaths in battle, the South 94,000, and “more than double this number on each side from disease and wounds.” *Id.* at 112. A people that suffers carnage of that magnitude will inevitably be revolutionized in a wide variety of ways. In fact, the Civil War “mark[s] the great divide in American history.” *Id.* at 164. Little remained as it was—down to the details of grammar. Symbolically, people now wrote, “The United States *is*, not the United States *are*.” A union of states was preserved in form, but changed in substance. “Succession allowed the North, for four years, to set the terms for national expansion without interference from the South.” MENAND, *supra* ¶ 2, at ix. The military defeat of the South made the Republican Party the controlling force in national politics after 1865. Considerations of states’ rights were put aside. “For more than thirty years, a strong central government practiced and promoted the ascendance of industrial capitalism and the way of life associated with it—the way of life we call ‘modern.’” *Id.* at x.

¶5. The broad name for the set of ideas that emerged to replace the pre-War, traditional intellectual order is “pragmatism.” Borrowing it from Immanuel Kant, *Critique of Pure Reason*, in 42 GREAT BOOKS, *supra* note 130, at 241 (contingent belief “forming the ground of actual use of means for the attainment of certain ends . . . [is] *pragmatical* belief”), Peirce introduced “pragmatism” to the Metaphysical Club in 1872. MENAND, *supra* ¶ 2, at 227.

When James publicly “invented” it years later, he expressly credited the name to Peirce. WILLIAM JAMES, *PRAGMATISM AND OTHER WRITINGS* 25 (Guiles B. Gunn ed., 2000) [hereinafter JAMES, *PRAGMATISM*]. Peirce, James, and Holmes were hardly of a single mind. Nevertheless, certain doctrines are associated with American pragmatism (of which they are thought to be exemplars) and give an indication of the diversity of thought masked behind the label: that beliefs are hypotheses and ideas are plans of actions (a theory of mind); that ideas can be clarified by showing their relation to action (an account of meaning); and that beliefs are true when they are successful guides for prediction and action (a theory of truth). See Robert G. Meyers, *The Beginnings of Pragmatism: Peirce, Wright, James, Royce*, in COLUMBIA HISTORY OF WESTERN PHILOSOPHY 592 (Richard H. Popkin ed., 1999). Each of these doctrines was formulated, elaborated, and modified, at least by Peirce during his career. See *id.* See generally CHARLES SANDERS PEIRCE, *PRAGMATISM AS A PRINCIPLE AND METHOD OF RIGHT THINKING* (Patricia Ann Turrissi ed., 1999). Peirce, however, was a different kind of pragmatist from James or Holmes; he resolutely resisted nominalism and individualism. For Peirce, while thinking is done in generalizations, the universe contained things “to which our generalizations correspond[ed].” MENAND, *supra* ¶ 2, at 228. Each sees with his own eyes, but the aggregate of what we all see individually is real. “The opinion which is fated to be ultimately agreed to by all who investigate is what [I] mean by the truth.” *Id.* at 229 (quoting Peirce). As in evolution, bad ideas are weeded out, leaving the good; we are, as Menand summarizes Peirce believing and “evolving, as a species, toward a complete epistemological rapport with reality.” *Id.* at 367. Accordingly, all opinion “must converge.” *Id.* at 369; see also Aristotle, *Metaphysics*, I.I. 992a, in 8 GREAT BOOKS, *supra* note 130, at 911 (“no one is able to attain the truth adequately, while collectively we do not fail . . . and . . . by the union of all a considerable amount is amassed”).

¶6. James, on the other hand, possessed no such grand scheme, and he was not only an empiricist, but a nominalist and an individualist. For him, the “true” was nothing more than “what works well, even though the qualification ‘on the whole’ may always have to be added.” WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 357 (1997). Put in other words, “‘the true’ . . . is only the expedient in the way of our thinking, just as ‘the right’ is only the expedient in our way of behaving.” JAMES, *PRAGMATISM*, *supra*, at 97–98. In short, the “real” was only “anything . . . of which we find ourselves obligated to take account . . . .” WILLIAM JAMES, *SOME PROBLEMS OF PHILOSOPHY* 101 (1996). See *infra* note 647 ¶ 28 for the views of a more modern pragmatist (Richard Rorty) and for an analysis of the possible consequences of such views if the history of the rise of National Socialism can be used to draw lessons from history, though some of those points are made here. See also *infra* note 793 for the notion that lessons may be or are drawn from history.

¶7. Peirce and James were philosophers, spokesmen for the new view of things. Holmes, on the other hand, was a jurist and in no sense a systematic thinker. Jurisprudential theories are often classified by which elements of the law they find essential. See MENAND, *supra* ¶ 2, at 339. For example, “[a] legal theory that stresses . . . logical consistency of judicial opinions is called formalist; a theory that emphasizes their social consequences is called utilitarian; a theory that regards them as reflections of the circumstances in which they were written is called historicist.” *Id.* In contrast, Holmes acted on the belief that the law had “no essential aspect.” *Id.* In fact, “[o]nce at war,” Holmes “found that life resisted a neat intellectual ordering and that the rightness or wrongness of belief was largely irrelevant.” G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION PROFILES OF AMERICAN JUDGES* 157 (1978). “[N]o generalization was worth a damn; fighting for ideals was heroic, but ideals were meaningless in themselves.” *Id.* “The easy solution was to acknowledge ‘ultimate facts’—power, force and change—and let the ‘goodness or badness of laws’ turn on ‘what the crowd wants,’ even though the crowd, ‘if it knew,’ would not want what it did.” *Id.* at 160 (citations omitted); see



Oliver Wendell Holmes, *Natural Law*, in COLLECTED LEGAL PAPERS 31 (1920) ("Men . . . believe what they want . . . . I see . . . no basis . . . that tells us what we should want . . . ."). Admittedly, aspects of Holmes's thought are in tension and require, for some, a reconciliation. These aspects include his good reputation in modern times and his bad philosophy, that is, bad from the traditional religious or natural rights perspective of the Founders. See Harold R. McKinnon, *The Secret of Mr. Justice Holmes: An Analysis*, 36 A.B.A. J. 261 (1950); see also *supra* note 133 (material on natural rights background of the Constitution). Holmes's philosophy was "agnostic, materialistic, hopeless of the attainment of any ultimate truth, meaning or standard of value." McKinnon, *supra*, at 261. Accordingly, his philosophy is "indistinguishable from the amoral realism of those regimes of force and power that are the scandal of the century." *Id.* Compare Robert H. Jackson, *The Rule of Law Among Nations*, A.B.A. J. 290, 293 (1945) ("It is a popular current philosophy, with adherents and practitioners in this country, that law is anything that can muster the votes to be put in legislation, or directive, or decision and backed with a policeman's club. Law to those of this school has no foundation in nature, no necessary harmony with higher principles of right and wrong. They hold that authority is all that makes law, and power is all that is necessary to authority. It is charitable to assume that such advocates of power as the sole source of law do not recognize the identity of their incipient authoritarianism with that which has reached its awful climax in Europe."), with McKinnon, *supra*, at 262 (quoting Holmes: "When the Germans [in World War I] disregarded what we called the rules of the game, I don't see there was anything to be said except: we don't like it and shall kill you if we can."). In brief, Holmes's thinking is characterized by "nihilism" and "Darwinian evolutionism in place of a personal destiny." McKinnon, *supra*, at 344. While his reputation is good and his philosophy was bad, the tension is only apparent, for Holmes was "an agnostic prophet to an agnostic age. His bottomless relativism fails to create a reaction [today] because in an age that denies the validity of any form of knowledge but the tentative findings of the positive sciences that relativism possesses the glamour of a war cry." *Id.* at 345.

¶8. The contrast between Jackson's ideals and Holmes's nihilism is also reflected in their public lives. Holmes fought heroically as a soldier, but lost his ideals. At the conclusion of another war, Jackson fought heroically as a United States Prosecutor in the Nuremberg Trial to see American ideals translated into international law. The trial and the ideal of personal responsibility is discussed *infra* note 416. President Harry S. Truman appointed Jackson the United States Prosecutor for the Nuremberg Trial of the major Nazi leaders. Jackson is generally credited with being the moving force behind the successful effort of the trials to establish principles of international law holding that individuals in governments are personally responsible for their conduct in conspiring to and engaging in aggressive war, committing war crimes, and committing crimes against humanity. Following the trial, the newly established United Nations ratified the Nuremberg principles. A popular account of the trial is JOSEPH E. PERSICO, *NUREMBERG: INFAMY ON TRIAL* (1995). A more scholarly treatment is ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1986). For the single best, thoughtful essay on the "meaning" of the trial, see David Luban, *The Legacies of Nuremberg*, in *LEGAL MODERNISM* 335-78 (1994) ("The ambiguous legacies of Nuremberg linger at the margins of our unreliable moral memories; they inspire but also burden the conscience of our politics."). The principles established by Jackson's efforts at Nuremberg are vital today. See, e.g., Suzanne Daley, *A Full Charge of Genocide for Milosevic: Indictment Portrays an Architect of War*, N.Y. TIMES, Nov. 24, 2001, at A8 (reporting that the United Nations war crimes tribunal in the Hague issued a sweeping new indictment of the former Yugoslav president, Slobodan Milosevic, charging him with genocide, crimes against humanity, and grave breaches of the Geneva Convention and with participating "in a joint criminal enterprise, the purpose of which" was genocide). Holmes's legacy is more ambivalent.

¶9. American ideals, joined with pragmatism, also produced profound change in American law. Ideas, whenever they are adopted, inevitably produce consequences, as Holmes himself was fully aware. See Holmes, *supra* note 170, at 478 (“[R]ead the works of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte.”). The Civil War ended slavery; pragmatism contributed to the end of legal segregation. For James, theories were “instruments not answers to enigmas.” JAMES, PRAGMATISM, *supra*, at 28; see MENAND, *supra*, at xi (arguing that while different, Peirce, James, and Holmes “had in common . . . , not a group of ideas, but a simple idea—an idea about ideas. They all believed that ideas are not ‘out there’ waiting to be discovered, but are tools . . . to cope with the world . . .”). James’s thought had a major influence on Roscoe Pound (1870–1964). See DAVID WIGDOR, ROSCOE POUND 183–204 (1974). Pound himself acknowledged the influence. See 3 ROSCOE POUND, JURISPRUDENCE 16, 31 (1959). From 1910 to 1936, Pound was the Dean of the Harvard Law School. In turn, Pound greatly influenced one of his students, Charles Hamilton Houston (1895–1950), one of the few blacks at the law school in the early 1900s, and the first to edit the *Harvard Law Review*. See JUAN WILLIAMS, THURGOOD MARSHALL 55 (1998). Pound and Houston were close. *Id.* Houston took Pound’s instrumentalism with him to the Howard Law School, where he taught and became vice-dean, and where one of his protégées was Thurgood Marshall. *Id.* Together, harnessing Pound’s instrumentalism to the ideal of equality, they formulated and executed, through the NAACP, its project of *using* the law to end the legal separation of the races, which is memorialized in such decisions as *Brown v. Board of Education*, 347 U.S. 483 (1954), and, significantly for these materials, in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). See generally WILLIAMS, *supra*, at 57–63, 93–100, 174–227 (tracing the relation between Houston and Marshall and the litigation that culminated in *Brown*).

¶10. In 1872, “pragmatism” was only an idea. Today, pragmatism is dominant in the American law. In fact, Robert Summers argues persuasively that “pragmatic instrumentalism” is *the* American jurisprudential philosophy. See ROBERT SAMUEL SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982). But see GEORGE SANTAYANA, THE LIFE OF REASON 214, 218–19 (2d ed. 1924) (“[B]ut thought is in no way instrumental or servile; it is an experience realized, not a force to be used. . . . In so far as thought is instrumental it is not worth having . . . it must terminate in something truly profitable and ultimate which, being saved in itself, may lend value to all that led up to it. . . . a word, the value of thought is ideal.”). For a classic treatment of the impact of ideas—over a longer period of time—that essays more generally the thesis that ideas influence history, see RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (Midway reprint 1976) (arguing that much of the “disintegration” of modern culture may be attributed to a “first cause,” that is, the decline in social standards that we see today may be, in fact, intellectually traced to the fourteenth century when the belief in the reality of transcendentals was first seriously challenged). Weaver observes the following:

[M]odernism encourages . . . rebelliousness; and rebellion, as the legend of the Fall tells us, comes from pride. Pride and impatience, these are the ingredients of that contumely which denies substance because substance stands in the way. Hence the war against nature, against other men, against the past. For modern man there is no providence, because it would imply a wisdom superior to his and a relationship of means to ends which he cannot find out. . . . The physical world is a complex of imposed conditions; when these thwart immediate expression of his will, he becomes angry and asserts that there should be no obstruction of his wishes. In effect this becomes a deification of his own will; man is not making himself like a god but is taking himself as he is and putting himself in the place of God. . . . Now that we have unchained forces of unpredictable magnitude, all that keeps the world

of speech is a necessary element of the process of searching for truth,<sup>179</sup> emphasizing “that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems.”<sup>180</sup>

While most trace the roots of the “marketplace of ideas” theory to English philosophers John Milton or John Stuart Mill, its roots actually extend further back—all the way to the time of the Roman Emperor Constantine, to Lucius Caecilius Firmianus Lactantius. In his day Lactantius, a tutor to the Emperor’s eldest son, Crispus, was “[t]he leading contemporary exponent of Latin letters.”<sup>181</sup> Charles

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from chaos are certain patterns, ill understood and surviving through force of inertia. Once these disappear, and we lack even an adventitious basis for unity, nothing separates us from the fifth century A.D.

*Id.* at 182–85. Menand’s *The Metaphysical Club* is favorably reviewed in Jean Strouse, Book Review, *Where They Got Their Ideas*, N.Y. TIMES, June 10, 2001, at 10; it is, in fact, one excellent place to start in any review of the intellectual history of the early twentieth century—in law and in related fields.

179. See TRIBE, *supra* note 168, at 785.

180. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3.

181. ¶1. CHARLES NORRIS COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* 191 (1944).

¶2. Its modern relevance is seldom alluded to by anyone—except in histories of the period—but religious liberty first appeared in Western jurisprudence during the period of the Roman Empire through the Edict of Milan, jointly issued in 313 A.D., by Constantine (274–337 A.D.), the ruler of the Empire in the West, and Licinius (308–324 A.D.), the ruler of the Empire in the East. The Edict of Milan was, however, not wholly an innovation. The old pagan Empire was slowly moving for some time toward an accommodation with a spreading Christianity. For a history of that process based on contemporary records, see RAMSAY MACMULLEN, *CHRISTIANIZING THE ROMAN EMPIRE (A.D. 100–400)*, at 102 (1984) (arguing from a secular, practical perspective that nothing counts for more than the year 312, which brought Constantine’s conversion, or 313, with the Edict of Milan; also arguing that prior to those dates, conversion was accomplished mainly by apparent supernatural cures and the expulsion of supernatural beings from people and places, rather than particular teachings, but then after those dates, material and other advantages stemming from Imperial sponsorship may well be said to have played the major role in conversion). For a review of that period based on the insight of modern sociology, see RODNEY STARK, *THE RISE OF CHRISTIANITY* (1996) (arguing, among other things, that the growth of Christianity was slow, not massive; its growth was consistent with the growth of modern religions; it spread through religiously dispirited Greeks and Jews and among the pagan upper classes, not the poor; it spread due to the depopulation of the Empire through plagues that Christians disproportionately survived, since they cared for the sick, as pagans did not; and it offered superior ideas, including the higher status accorded women, and form of organization). In April of 311, Galerius, Emperor in the West, recanted the traditional, though not always enforced, policy of the persecutions of those who would not recognize the cult of the emperor. The text of his Edict is set out in EUSEBIUS, *THE HISTORY OF THE CHURCH FROM CHRIST TO CONSTANTINE* 353–54 (1965) (extending clemency to Christians so long as “they do nothing contrary to public order”). So, too, during this period, Maximin, the Emperor in the East, who first persecuted Christians,

wrote to governors under him, “the first missive on behalf of the Christians . . .” *Id.* at 371–73. It provided, in relevant part, that “if some [Christians] choose to follow their own worship, you will please leave them free to do so . . . [for] it is by persuasion and coaxing . . . [through which people] can more appropriately be recalled to the worship of the gods.” *Id.* at 372–73; *see also id.* at 376 (“[E]veryone who chooses to follow . . . [Christianity] may, in accordance with this our indulgence and in fulfillment of his own choice and desire, participate in such acts of worship as he was accustomed . . .”)

¶3. Constantine only came to the precedent-establishing Milan meeting after having first defeated in the West Maxentius at the Milvian Bridge in 312 A.D., where “as later legend has it . . . Constantine experienced his famous vision.” JOHN JULIUS NORWICH, *A SHORT HISTORY OF BYZANTIUM* 5 (1997). According to the legend, Constantine saw in the heavens a cross of light bearing the inscription *Hoc Vince*, or “Conquer by this Sign.” Comparable to that experienced by St. Paul on the road to Damascus, Constantine’s vision marked a watershed of world history. The story of the vision itself may be largely written off as a pious legend, though surely “before the battle the Emperor underwent some profound spiritual experience.” *See id.* at 41. When the triumphant Constantine met Licinius at Milan in 313 A.D., one of the issues that was before them was “the question of religious toleration and, in particular, the future status of Christians.” *Id.* at 44. After other matters were taken care of, the two Emperors “agreed on the final text of [an] . . . edict, confirming that of Galerius and granting Christianity full legal recognition throughout the Empire.” *Id.* at 45. The text of the Edict is set out in Latin and English in LACTANTIUS, *DE MORTIBUS PERSECUTORUM* 71–73 (J.L. Creed ed. and trans., 1984). In relevant part, the Edict provided:

When I, Constantine Augustus, and I, Licinius Augustus happily met at Milan . . . we thought that . . . the arrangements which above all needed to be made were those which ensured reverence for the Divinity, so that we might grant both to Christian and to all men freedom to follow whatever religion each one wished . . . so that the supreme Divinity, whose religion we obey with free minds, may be able to show in all matters. His accustomed favour and benevolence toward us . . . This we have done to ensure that no cult or religion may seem to have been impaired by us.

*Id.* at 71.

¶4. The relations between the two Emperors did not remain amicable. Eventually, Constantine vanquished Licinius. At first, on the plea of Licinius’s wife, Constantia, Constantine’s sister, Constantine merely exiled Licinius. But a few months later, Constantine summarily put him to death. *See NORWICH, supra* ¶ 3, at 45–50. Constantine was then in sole control of the Empire, East and West. Constantine continued the policy of toleration begun in the Edict of Milan. In fact, reflecting his policy of toleration, he prepared and circulated throughout the Empire a prayer. In relevant part, it provided:

Let those, therefore, who are still blinded by error be made welcome to the some degree of peace and tranquility which they have who believe [in Christianity] . . . .  
Let no man molest another in this matter, but let everyone be free to follow the bias of his own mind. . . . For it is one thing voluntarily to undertake the struggle for immortality, another to compel other to do likewise from fear of punishment.

*Id.* at 52.

¶5. ELIZABETH D. DIGISER, *THE MAKING OF A CHRISTIAN EMPIRE: LACTANTIUS AT ROME* (2000), contains a masterful retelling of the story, in which she develops fully, from an intellectual perspective, the contrasting ideas that stood on each side of the enormous historical divide represented by the Edict of Milan. In particular, Digiser carefully traces the influence of Lactantius on Constantine, whose court Lactantius joined in 310. Digiser credibly argues that Lactantius made a major contribution to Constantine’s policy of religious tolerance. *See id.* at 13 (Constantine used Lactantius’s “*Divine Institutes* as a sort of touchstone in order to

establish a government under which all his subjects could fully exercise their obligation as citizens” consistent with the religious pluralism of the Empire.).

[Lactantius] declares that it is inappropriate to use threats of force or penalties to defend any sort of religious worship . . . . To support his claim he draws upon Cicero’s ideal constitution in *On the Laws*. For Cicero, the gods should be approached chastely, “by people offering piety [*pietas*] and laying aside wealth”; God would “punish the one who does differently” . . . . Lactantius interprets this passage to mean that a true deity would reject human coercion to obtain worship . . . . On the contrary, he argues, force opposes the spirit of religion; it pollutes and violates religion with bloodshed . . . . Moreover, those who strive to defend religion with force make a deity appear weak . . . . Lactantius precludes the practice on the part of either side. The use of force against Christians merely exhibits the bankruptcy of the traditional religions and the philosophers’ arguments; the use of force by Christians opposes their deepest religious convictions, a fact that he makes explicit: “We put up with practices that should be prohibited. We do not resist even verbally, but concede revenge to God” . . . .

Lactantius also develops Cicero’s assertion that “purity of mind” is more important than ritual . . . . Here he takes Cicero to mean that a deity wants devotion, faith, and love, sentiments that do not arise in response to force . . . : “Why should a god love a person who does not feel love in return?” Consequently, “nothing requires free will as much as religion [*nihil est enim tam voluntarium quam religio*],” because religion is absent where an observance is forced . . . . This argument too applies to both sides: lack of feeling for a god violates both the quid pro quo of the traditional religions and the interior quality of philosophical piety. Nor can Christians retain people “against their will [*invitus*],” because the person who lacks the requisite inner conviction is “useless to God [*inutilis est . . . deo*]” . . . .

*Id.* at 109 (citations omitted).

¶6. Lactantius, a Christian, drew on Cicero, a Roman orator, to make his arguments more persuasive to the educated Roman. Nevertheless, “religious freedom” (*libertas religionis*) was first proposed by another Christian writer, Tertullian (160–220), who first coined the phrase. Compare *id.* at 112, with TERTULLIAN, APOLOGY XXIV 6 at 133 (1931) (“Look to it, whether this also may form part of the accusation of irreligion—to do away with *freedom of religion*, to forbid a man choice of deity, so that I may not worship whom I would, but am forced to worship whom I would not. No one, not even a man, will wish to receive reluctant worship.” (emphasis added)). In turn, Tertullian only developed the thought of other early Christians. Building on the *Genesis* 1:26 account of creation, where God made man in his own image and likeness, they developed, against the Roman ideal, that a man’s worth related to his family and society, the idea of “the intrinsic worth of every human being . . .” ELAINE PAGELS, ADAM, EVE, AND THE SERPENT XIX–XX (1988) (exploring how early Christians used in the first four centuries the *Genesis* account of creation in Jewish scriptures to develop ideas of human worth, equality, and freedom); see, in particular, *id.* at 32–56 (Chapter 2: Christians Against the Roman Order); accord ROBERT L. WILKEN, THE CHRISTIANS AS THE ROMANS SAW THEM 205 (1984) (“Christianity became the kind of religion it did because it had [pagan] critics . . . . They helped Christians to find their authentic voice . . . . Christians encountered the traditions of the ancient world, not simply as an intellectual legacy from the past . . . , but as part of a vital interaction through the vigorous criticism of pagan intellectuals.”). Pagels observes:

Most Roman citizens would probably have agreed with Aristotle that . . . the

Cochrane writes:

measure of one's worth was what are contributed to the . . . business of the state . . . . Anyone who chose . . . to go a solitary way risked extreme ostracism: in Greek, the term "idiot" literally referred to a person concerned solely with personal or private matters . . . instead of the public life and social life of the larger community.

PAGELS, *supra*, at 80.

¶7. In fact, in the Roman polity, the unit of analysis of the law was not "person," as we know it, a human being, but the family, which was identified with the father. BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 65 (1975) ("In the early law, and to a considerable extent throughout Roman history, the family is the legal unit. Its head, the *pater familias*, is the only full person known to the law.").

¶8. Significantly, Pagels elaborates:

[Christians] originated . . . the idea that developed much later in the West as the "absolute value of the individual." The idea that each individual has intrinsic, God-given value and is of infinite worth quite apart from any social contribution—an idea most pagans would have rejected as absurd—persists today as the ethical basis of western law and politics. Our secularized western idea of democratic society owes much to that early Christian vision of a new society—a society no longer formed by the natural bonds of family, tribe, or nation but by the voluntary choice of its members.

PAGELS, *supra* ¶ 6, at 81.

¶9. Unfortunately, the policy of religious toleration lasted only sixty-seven years. Theodosius the Great (379–395 A.D.) faced a number of problems during his sixteen-year reign. The effects of some of his policies can still be seen. Theodosius was the last Emperor to rule over a united Roman Empire before the final collapse of the West from barbarian incursions. See NORWICH, *supra* ¶ 3, at 109–19. To stave off the tribes, he created "federalism" to permit them to settle within the Empire. But his policy on religion is what interests us. At Thessalonica in 380 A.D., Theodosius issued a fateful decree:

We desire that all peoples who fall beneath the sway of our imperial clemency should profess the faith which we believe to have been communicated by the Apostle Peter to the Romans . . . . And we require that those who follow this rule of faith should embrace the name of Catholic Christians, adjudging all others madmen and ordering them to be designated as heretics . . . .

COCHRANE, *supra* ¶ 1, at 327.

¶10. The old classical idea of a commonwealth held together by the cult of the emperor thus gave way in the Edict of Milan to the notion of two more or less distinct orders, one political, the other ecclesiastical, a beginning of the idea of the separation of church and state. As the Edict of Milan inaugurated the New Republic, the Edict of Thessalonica broke with that new notion, and it returned to the older idea of unity; it inaugurated the Orthodox Empire, a Catholic State. *Id.* at 328. In fact, the administration of Theodosius embarked upon a systematic effort to abolish the surviving forms of paganism. See *id.* at 328–32. Freedom of religion was at an end. The old Greco-Roman religion fell victim to the weapons that it had earlier employed against Christianity. The famous statue of Victory in the Senate House was, for example, removed. Ironically, as foretold by ancient legend that the removal of the symbol of Rome might be presaged, Alaric and his Gothic host marched triumphantly through the streets of the sacred capital in 410 A.D.; the event shook the Roman world to its foundations. See *id.* at 332–51. "The sack of the capital revealed as nothing else could have done, the grim truth that *Romanitas* had reached the end of the road." *Id.* at 351–52.

Lactantius deserves, in much more than a purely verbal sense, to be called “the Christian Cicero.” And, in his *Divine Institutes*, his object was precisely analogous to that of Cicero in his generation [for the Old Republic of Rome]; the work was intended to serve as a *De Officiis* for the New Republic [of Constantine]. From this standpoint, it merits the close attention of those who desire a clue to the spirit of the Constantinian age.<sup>182</sup>

The concept of a marketplace of ideas, while not so denominated, served as one of the core postulates for Lactantius’s vision of society. Lactantius was a devout Christian. Nevertheless, he realized that “by its very nature religion is something which cannot be imposed upon the mind by force.”<sup>183</sup> Consequently, although he insisted that “[i]n the New Republic the primary object will be to secure, to all alike, liberty to profess Christianity and to live the Christian life” and recognized that this “postulates freedom for the Church,” he emphasized that under his vision of society, this “freedom . . . w[ould also] be extended to non-believers.”<sup>184</sup> Convinced that Christians had the truth, he reasoned that if pagans and Christians were permitted to write and discuss freely, the truth would prevail without coercion. Apparently, but unknowingly, later thinkers such as Milton and Mill<sup>185</sup> would echo Lactantius.<sup>186</sup>

182. COCHRANE, *supra* note 181, at 191.

183. *Id.*

184. *Id.*

185. John Stuart Mill (1806–73) is usually given unalloyed credit for *On Liberty*. In fact, he himself tells us that it was a collaborative work between him and Harriet Taylor, whom Mill met in 1831, but only subsequently married after the death of her husband. Mill called Taylor “the most admirable person I had ever known.” JOHN STUART MILL, AUTOBIOGRAPHY 111 (Jack Stillinger ed., 1957). Mill commented that Taylor was “shut out by the social disabilities of women from any adequate exercise of her highest faculties in action on the world without.” *Id.* at 112. “Alike in the highest regions of speculation and in the smallest practical concerns of daily life,” he said, “her mind was the same perfect instrument, piercing to the very heart and marrow of the matter; always seizing the essential idea or principle.” *Id.* In fact, Mill and Taylor wrote *On Liberty* together, “reading, weighing and criticizing every sentence.” *Id.* at 144. If it is truly a joint work, however, we wonder why it was not published under their joint names. No evidence appears in Mill’s autobiography that he read or was aware of the idea of Lactantius, though he was given a classical education. *See id.* at 5–6. But he was also aware of the issue of religious liberty under Roman rule. *See* John Stuart Mill, *On Liberty*, in 43 GREAT BOOKS, *supra* note 130, at 267–79 [hereinafter Mill, *Liberty*]. That Lactantius and Mill (and Taylor) came to similar conclusions, though for different reasons, was apparently a product of independent invention.

186. Lactantius was among those that the Second Vatican Council credited, in its declaration on Religious Liberty, with helping to formulate the position of the Catholic Church, which “became more fully known to human reason through centuries of experience,”

Lactantius's reasoning resurfaced during the Protestant Reformation when John Milton, whose views were a powerful blend of Christian humanism and Puritanism, argued for it in defense of free speech in England. In a speech before Parliament in 1644, Milton argued that allowing all perspectives on a given issue to be heard would not prevent the truth from coming out. Indeed, in his words, "Though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to worse in a free and open encounter."<sup>187</sup> For Milton, reason was "choosing." Man must, therefore, be left free to choose between good and evil; prescriptive morality prevented the understanding of truth known and the discovery of truth unknown.

John Stuart Mill, for his part, refined the concept of freedom, pointing out the potentially catastrophic results of allowing anything short of free and vigorous expression of all sides of an issue. For Mill, the argument for the right of free speech—and its vigorous exercise—could be summed up in four points:

First, if any opinion is compelled to silence, that opinion may, for naught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of the truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

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that is, "man's response to God by faith ought to be free, and that therefore nobody is to be forced to embrace the faith against his will . . . [ , as t]he act of faith is of its very nature a free act . . . that [must be] reasonable and free." VATICAN COUNCIL II, THE CONCILIAR AND POST CONCILIAR DOCUMENTS 806–07 & n.7 (Austin Flannery ed., 1987) (comparing with Lactantius, *Divinarum Institutionum*). Pope John Paul II continues to affirm that "even in the context of a soundly secular State . . . each citizen, without distinction of sex, race and nationality, [must be guaranteed] the fundamental right to freedom of conscience . . . ." John Paul II, Address to Astana, Kazakhstan, Sept. 24, 2001, at [http://www.vatican.va/holy\\_father/john\\_p\\_010924\\_Kazakhstan-astana-culture\\_en.html](http://www.vatican.va/holy_father/john_p_010924_Kazakhstan-astana-culture_en.html).

187. JOHN MILTON, AREOPAGITICA (1644), reprinted in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 717, 746 (1957). See generally A.S.P. Woodhouse, *Milton, Puritanism, and Liberty*, 4 U. TORONTO Q. 483 (1934–35) (comparing Milton and Roger Williams in light of Pauline theology as formulated by Martin Luther and John Calvin).



Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled . . . .<sup>188</sup>

Moreover, Mill observed, suppressing an idea harms all of humanity by robbing the truth-finding process of that idea:

[T]he peculiar evil of silencing the expression of an opinion is that it is, robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>189</sup>

Thus, three philosophers—classic and modern, Catholic and Protestant—concluded that freedom of speech is essential because, in the end, truth is more likely to emerge from a debate in which many differing views are voiced than from government suppression of what the government deems false. The history of freedom of religion teaches us, too, that “freedom” itself began as “freedom of religion,” that is, a right against the state to chart a course of our own choosing. Over time, that “freedom” of “persons,” made in the image and likeness of God,<sup>190</sup> grew to the full panoply of “freedoms,” which are now legally secured in the Bill of Rights. As history teaches that “virtue” for the person is indivisible,<sup>191</sup> she also teaches that freedom for all of us is indivisible: when an attack is made on one freedom, an attack is made on all freedoms.

In time, the marketplace rationale crossed the Atlantic and found its way into the American First Amendment jurisprudence of Holmes’s now famous *Abrams* dissent. There, Holmes observed that while

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188. Mill, *Liberty*, *supra* note 185, at 292.

189. *Id.* at 275.

190. See *supra* note 181 (discussing history of “religious liberty”); see *infra* note 647 (discussing the history of “personal responsibility”).

191. See *infra* note 656 (discussing “character,” “vice,” and “virtue”).

“[p]ersecution for the expression of opinions seems to me perfectly logical . . . [i]f you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition,” such persecution is not ultimately the wisest course.<sup>192</sup> Instead, he opined as follows:

192. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¶1. We cite to Justice Holmes in support of many of the propositions we advance on free speech in these materials. This is not the place, of course, for an in-depth analysis of Holmes’s free speech jurisprudence; it is ably done elsewhere. *See, e.g.*, G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391 (1992); *see also id.* at 393 nn.10–12 (collecting articles). Nor do we express any opinion on the internal coherency of Holmes’s free speech jurisprudence—though various commentators observe that Holmes was not always a free speech defender, as most remember him. *See, e.g., id.* at 462 (“Holmes’s consciousness about the free speech dimensions of cases in 1929 was light-years away from that in the 1890s, when he decided the *McAuliffe v. Mayor and Bd. of Aldermen*, 29 N.E. 517 (Mass. 1892)] and [*Commonwealth v. Davis*], 39 N.E. 113 (Mass. 1895)] cases, or that in 1915, when he decided *Fox v. Washington*, [236 U.S. 273 (1915)], or even that in the spring of 1919, when *Schenck* and the other Espionage Act cases were decided. By the time he was deciding the *Gitlow* and *Schwimmer* cases, Holmes’s consciousness had shifted from that of a judge for whom speech issues seemed incidental, or trivial, or merely subsumed in other common-law issues, to one for whom speech issues were of central constitutional importance.”). Rather, we point to Holmes because most recognize him—and justly so—as among the founders of current, free speech-protective First Amendment doctrine. *See id.* at 392 (discussing Holmes’s “identification as the modern founder of an approach toward freedom of expression that treats the First Amendment as a source of significant limitations on legislative sovereignty”). *But cf.* Yosaf Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1406 (1984) (describing how, for Holmes, deciding a case was merely a matter of “doing sums” to arrive at the answer required by “duty and reason”: “Justice Holmes did his ‘sums’ elegantly. That elegance was put to good use by [Zechariah] Chafee and others whose dedication to a liberal conception of free speech is clear.”).

¶2. We do not mean to suggest that Holmes might adopt our approach to “true threats” in its entirety—or in part. Indeed, he probably would not adopt our approach. Holmes is best remembered for his “clear and present danger” test; simply put, Holmes believed that speech could be suppressed where “the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.” *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.). The idea of “clear and present danger” justifying suppression of speech was ultimately given its enduring content by then Chief Judge of the Second Circuit, Learned Hand: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff’d*, 341 U.S. 494 (1951). Under this test, speech is suppressible not because of any evil that the speech as speech might cause, but because of some criminal activity that it might bring about, such as violence. That is, speech is proscribable when it approaches an “attempt” to commit some substantive crime. *See, e.g., Schenck*, 249 U.S. at 52 (Holmes, J.) (“It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced . . . . If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the

same, we perceive no ground for saying that success alone warrants making the act a crime.”); *Debs v. United States*, 249 U.S. 211, 215 (1919) (Holmes, J.) (arguing that if the “natural and intended effect” of a speech was to obstruct recruiting, “and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief”); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) (“I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”); *id.* at 628 (“Publishing . . . opinions for the very purpose of obstructing [government aims,] however, might indicate a greater danger and at any rate would have the quality of an attempt . . . . An actual intent . . . is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime . . . . It is necessary where the success of the attempt depends upon others because if that intent is not present the actor’s aim may be accomplished without bringing about the evils sought to be checked.”); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (“If the publication of this document has been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.”); *see also Dennis*, 341 U.S. at 506–07 (synthesizing Holmes and Brandeis on freedom of speech: “[In their dissent in *Gitlow*,] Justices Holmes and Brandeis . . . made no distinction between a federal statute which made certain acts unlawful, the evidence to support the conviction being speech, and a statute which made speech itself a crime. This approach was emphasized in *Whitney v. California*, 274 U.S. 357 (1927), where the Court was confronted with a conviction under the California Criminal Syndicalist statute . . . . In their concurrence[, Justices Holmes and Brandeis] repeated that even though the legislature had designated certain speech as criminal, this could not prevent the defendant from showing that there was no danger that the substantive evil would be brought about.”).

¶3. Indeed, various commentators recognize that Holmes’s free speech jurisprudence was largely shaped by his experience with the law of criminal attempts. *See Rogat & O’Fallon, supra*, at 1361; White, *supra*, at 395. We, on the other hand, argue strenuously that threats should *not* be viewed as inchoate offenses—indeed, viewing threats as “attempts” fundamentally distorts federal criminal jurisprudence. Thus, while Holmes’s understanding of the free speech is inconsistent with our proposal, his approach—like that of Professor Gey, *see supra* note 42—is misguided as applied to “true threats” because it justifies proscribing speech because of substantive criminal offenses it might bring about, offenses which other statutes already proscribe, rather than because of the evils that the threats themselves, in fact, cause, i.e., fear and disruption. *See infra* note 729–33 and accompanying text (discussing interests implicated by threat jurisprudence).

¶4. Two logical corollaries of Holmes’s “clear and present danger” approach also put him at odds with our approach. First, for Holmes, the state of mind required for a speaker to lose First Amendment protection is the intent to bring about some substantive harm—e.g., violence. *See, e.g., Debs*, 249 U.S. at 215 (Holmes, J.) (arguing that if the “natural and intended effect” of a speech was to obstruct recruiting, “and if, in all the circumstances, that would be its probable effect, it would not be protected [by the First Amendment against a law proscribing obstructing recruiting] . . . .”); *Schenck*, 249 U.S. at 52 (Holmes, J.) (“If the act, [speaking, or circulating a paper,] its tendency and the intent with which it is done are the

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon

same, we perceive no ground for saying that success alone warrants making the act a crime.”); *Abrams*, 250 U.S. at 627 (Holmes, J., dissenting) (“[T]he United States constitutionally may punish speech that produces *or is intended to produce* a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.” (emphasis added)); *id.* (explaining that in this context, “intent” reflects a special meaning: “[A] deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.”). This makes sense: if the purpose of proscribing speech is to prevent a substantive crime that it might bring about, then the proposition has its greatest effect in those situations in which the speaker, in fact, intends to bring about the crime. For us, though, threats are proscribable because of the precise evils that the threats themselves, as speech, bring about—fear and disruption. For us, therefore, the required state of mind is that the speaker intends to threaten. See *infra* text accompanying note 747 (discussing proposed “intent” state of mind).

¶5. Second, for Holmes, context can limit one’s right to speak—whether or not the speaker authorizes, directs, or ratifies the context. See, e.g., *Schenck*, 249 U.S. at 52 (Holmes, J.) (“We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.”); *Abrams*, 250 U.S. at 627–28 (Holmes, J., dissenting) (“The power [of the United States to punish speech] is greater in time of war than in time of peace because war opens dangers that do not exist at other times.”). Again, this makes sense if the purpose of proscribing speech or expressive conduct is to prevent substantive crimes that it might bring about, and they might well be brought about by others or at least made more likely by circumstances outside of a speaker’s control; as such, limiting a speaker’s freedom to speak or engage in expressive conduct under those circumstances is arguably reasonable at least where some form of excitement is present. See *infra* text accompanying note 727 (discussing interest protected by threat jurisprudence). But again, we sharply disagree with Holmes. For, as we see it, threats are proscribable because of the fear and disruption they, the threats themselves, engender. Other bodies of law, including that of excitement, are sufficient to protect against those offenses in themselves. See, e.g., *supra* note 730 and accompanying text (discussion of murder and wrongful death). Thus, as we see it, context is relevant only in determining whether a reasonable listener might deem given speech or expressive conduct “threatening” (and thus, whether the speech or expressive conduct might reasonably engender fear and disruption). But we perceive substantial constitutional problems with making one’s right to speak or act expressively dependent on the actions of others, or on circumstances outside of a speaker’s control. See *supra* note 133 (analyzing the personal character of constitutional rights). Accordingly, although we agree with much of Holmes’s work in the area of free speech, we disagree with his overall approach—at least as applied to “true threats.”

which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>193</sup>

193. *Abrams*, 250 U.S. at 630. Holmes's concepts of "fighting faiths" and "marketplace of ideas" are, in many ways, close to the concepts of Mill. See Mill, *Liberty*, *supra* note 185, at 275-76 ("[E]very age [has] held many opinions which subsequent ages have deemed not only false but absurd . . ."; "[c]omplete Liberty of contracting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action . . ."). Nevertheless, while Mill believed in truth, he did not believe that "truth always triumphs over persecution." *Id.* at 280. He termed that thought "one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes." *Id.* Instead, he believed: "Wrong opinions and practices gradually yield to fact and argument; [but] facts and arguments, to produce any effect on the mind, must be brought before it." *Id.* at 276. At the same time, he thought:

The real advantage which truth has consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favorable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.

*Id.* at 280.

Like Mill, Holmes did not credit his view to any source. But he was, as it is now generally conceded, "notorious for not giving credit to his intellectual forebears and for being petty in his insistence on the primacy of his own contributions." Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 687 (1982). Touster is a disapproving Holmes critic; his view, however is shared by others more sympathetic to Holmes's project. See, e.g., G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 113 (1993) ("Holmes was loath to acknowledge influences on and antecedents of his work."). Chief Judge Richard Posner calls Holmes "the greatest figure in American law—perhaps our greatest judge, probably our most seminal legal thinker . . . [but] ungenerous to his intellectual predecessors and . . . contemporaries . . ." Richard A. Posner, *Bookshelf: Star of the Legal Stage*, WALL ST. J., Aug. 9, 1989, at A9 (reviewing SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989)).

Holmes's "bad man theory" of the law, for example, famously advanced in *The Path of the Law*, *supra* note 170, was, in all likelihood, taken from Rudolf von Jhering, a German jurisprudential writer. See RUDOLF VON JHERING, LAW AS A MEANS TO AN END 33 (Isaac Husik trans., 1913). That he did not acknowledge von Jhering is hardly to Holmes's credit. Indeed, Holmes acknowledged reading German jurists and recommended them to those who would "command ideas." Holmes, *supra* note 170, at 478. Holmes, in fact, read *The Spirit of the Roman Law* before he wrote *The Path of the Law*. See MARK DEWOLFE HOWE II, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882, at 152 (1963) (noting that Holmes read *The Spirit of the Roman Law* in 1879 in a French translation). See generally Mathias W. Reiman, *Holmes' Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES JR. 72, 101-05 (Robert W. Gordon ed., 1992). His debt to von Jhering is more extensive. Compare OLIVER WENDELL HOLMES, COMMON LAW 1 (Mark DeWolfe Howe ed. 1963) [hereinafter HOLMES, COMMON LAW] ("The life of the law has been not logic: it has been experience."), with Konrad Zweigert & Kurt Siehr, *Jhering's Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 225-26 (1971) (drawing a "precise parallel" to Jhering in *The Spirit of the Roman Law*: "Life is not

Holmes thus argued, as did Lactantius, Milton, and Mill, though with a skeptical twist,<sup>194</sup> that insistence on free trade in ideas is ultimately more important than pressing any individual cause. In a regime where any idea can be suppressed, today's victors may well be tomorrow's silenced voices, when some view or philosophy other than their own becomes ascendant.

While Holmes wrote in dissent when he first introduced the concept into Supreme Court jurisprudence, the marketplace rationale gradually took root and flourished. Justice Brandeis picked up the idea eight years later and cast it in its more moderate and enduring form. He did not skeptically argue that whatever the marketplace *produces* must be the truth, as Holmes had. Rather, he argued that a free marketplace of ideas is necessary to the *search* for truth. He wrote:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized . . . that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.<sup>195</sup>

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here to be a servant of concepts, but concepts are here to serve life.” (citation omitted)). Holmes, too, did cite von Jhering on other points. HOLMES, COMMON LAW, *supra*, at 208 (theory of possession).

194. A profound difference, of course, distinguishes the confident but untested view that truth will always win out over any untruth, and the skeptical view that whatever is wins out is the truth. See Letter from Oliver Wendell Holmes to Harold Laski (June 1, 1927), in 2 HOLMES-LASKI LETTERS 948 (Mark DeWolfe Howe ed., 1953) (“I do accept ‘a rough equation between isness and oughtness. . . .’”).

195. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring). The

Thus, Brandeis emphasized that the best cure for bad ideas is more ideas, rather than immediate government suppression. Only by being able to consider all sides of an issue can people eventually come to see the truth, or at least have a fair chance to come to it.

From Lactantius to the present day, the marketplace theory is impressive in its ability to withstand aggressive attack<sup>196</sup> and remain a viable theory in scholarly debate.<sup>197</sup> Moreover, and more important, it finds favor with an enduring majority on the Supreme Court. The marketplace concept appears consistently throughout the Court's controlling opinions over the last forty years.<sup>198</sup> In an effort to

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Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), termed Brandeis's formulation of the principle behind the First Amendment "classic."

196. For a harsh critique of this theory, see Ingber, *supra* note 180, at 5 (arguing that in the marketplace of ideas—as in the economic marketplace—"real world conditions . . . interfere with the effective operation of the marketplace of ideas," and that government regulation may be required to correct "communicative market failures"). Various other lines of criticism are also leveled at the theory. See also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 978 (1978) (arguing that the hope that the marketplace of ideas leads to truth is implausible, and that such a marketplace "appears improperly biased in favor of presently dominant groups").

197. For a compelling reply to criticisms of the truth finding function of free speech, see KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 16–24 (1989) (responding to the major criticisms of the truth finding function of free speech, and finding that this rationale is "at a minimum . . . neither incoherent nor evidently fallacious," and thus "warrant[s] continued reliance on it in our culture"). But see *id.* at 34 (emphasizing that the value of the truth finding function should neither be conflated with the idea that whatever the marketplace produces must be truth because "what emerges from the marketplace of ideas simply counts as the truth under a liberal government," which does not yield distinctive support for a free speech principle, nor with the idea that "there are things that count independently as the truth and that the chances of those being accepted by people are enhanced by a marketplace of ideas"—which makes "whether free speech contributes to truth . . . a factual question, however hard to answer").

198. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 885 (1997); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 464–65 (1995); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *Texas v. Johnson*, 491 U.S. 397, 418 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986); *Regan v. Time, Inc.*, 468 U.S. 641, 696 (1984); *Fed. Communications Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364, 377–78 (1984); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983); *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–67 (1982); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537, 538 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 760 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *Miami Herald Publ'g Co. v.*

promote a free marketplace of ideas, the Court is extremely hesitant to allow the government to proscribe speech or expressive conduct based on its content.

*B. The First Amendment, the Marketplace, and Content Discrimination*

In the early 1970s, the Court began to prohibit *simpliciter* the suppression of speech or expressive conduct on the basis of its content.<sup>199</sup> In its seminal decision in *Police Department of Chicago v. Mosley*,<sup>200</sup> the Court announced that the prohibition on content-based proscription was a “central principle” of the First Amendment. Tapping into the marketplace rationale, the Court explained that because “[t]here is an ‘equality of status in the field of ideas,’ government must afford all points of view an equal opportunity to be heard.”<sup>201</sup> Because the First Amendment embodies a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”<sup>202</sup> the Court declared in sweeping terms that, “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.”<sup>203</sup> Thus, the First Amendment generally prohibits

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Tornillo, 418 U.S. 241, 248 (1974); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969); *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967).

199. See Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 66 (1994) (arguing that “[a]lthough its doctrinal roots can be traced to the 1930s and 1940s,” the principle that speech cannot be regulated because of its content “did not emerge as an organizing methodology in First Amendment jurisprudence until the early 1970s”).

200. 408 U.S. 92 (1972).

201. *Id.* at 96 (citations omitted); see also *Leathers v. Medlock*, 499 U.S. 439, 448 (1991) (noting that the risk posed by content-based regulation is that “[i]t will distort the market for ideas”); *Cohen v. California*, 403 U.S. 15, 24 (1971). As the Court said in *Cohen*:

The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

*Id.*

202. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (barring suits by public figures for defamation absent a showing of actual malice).

203. *Mosley*, 408 U.S. at 95 (1972) (citing *Cohen*, 403 U.S. at 24 (upholding a defendant’s right to wear inside a courthouse a jacket that had printed on its back, “F\*\*k the draft”)).



government from proscribing speech<sup>204</sup> or even expressive conduct<sup>205</sup>—including such activities as demonstrating,<sup>206</sup> picketing,<sup>207</sup> and even burning the American flag<sup>208</sup>—because it does not approve of the idea expressed. The government cannot prohibit public discussion of a given topic nor can it restrict speech or expressive conduct that reflects a particular viewpoint.<sup>209</sup> “Content-based regulations are presumptively invalid,”<sup>210</sup> as are “viewpoint-based” restrictions.<sup>211</sup> Such regulations can be sustained only if they survive strict scrutiny; “[t]he [government] must show that the ‘regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.’”<sup>212</sup> As the Court has noted,

204. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 309–11 (1940)).

205. See *id.* (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989)).

206. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (striking down an ordinance governing the issuance of parade permits because it gave public officials too much discretion in determining who could demonstrate).

207. See, e.g., *Carey v. Brown*, 447 U.S. 455, 459–60 (1980) (striking down a statute that prohibited the picketing of residences or dwellings except when the dwelling was a place of business, a place of employment involved in a labor dispute, or the place of holding a meeting on premises commonly used to discuss subjects of general interest); *Mosley*, 408 U.S. at 94 (striking down an ordinance that banned all picketing within 150 feet of a school building while classes were in session and one half-hour before and afterwards, excepting the peaceful picketing of any school involved in a labor dispute).

208. See *Johnson*, 491 U.S. at 420.

209. See *Burson v. Freeman*, 504 U.S. 191, 197 (1992) (plurality opinion).

210. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (citing, among other things, *Mosley*, 408 U.S. at 95); see also *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *id.* at 124 (Kennedy, J., concurring in judgment); *Consol. Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 536 (1980).

211. See *R.A.V.*, 505 U.S. at 383–90.

212. *Burson*, 504 U.S. at 198 (plurality opinion) (citations omitted); see also *R.A.V.*, 505 U.S. at 394 n.7 (stating that while a prohibition of hate speech was “narrowly tailored,” and the interest to be protected “compelling,” the availability of alternative means of enforcement of the interest rendered it “unnecessary” and inconsistent with the First Amendment). But see *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring in judgment) (arguing that “strict scrutiny” balancing has no place in content-based regulation of First Amendment-protected speech, tracing the history of “strict scrutiny” in the Court’s First Amendment jurisprudence to its origin as an Equal Protection doctrine, and arguing that “[b]orrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so”). None of the other members of the Court was inclined to Justice Kennedy’s approach. See *id.* at 118 (majority opinion) (noting that a content-based proscription can be sustained if it passes “strict scrutiny”).

“[I]t is the rare case in which we have held that a law survives strict scrutiny.”<sup>213</sup>

Evidently, as those who reflect on jurisprudence observe, general rules always undergo subtle (sometimes not so subtle) transformations, and develop, with experience, exceptions.<sup>214</sup> Despite its general prohibition of content-based speech regulation, the Court recognizes that certain categories of speech may be regulated precisely on the basis of their content.<sup>215</sup> In *Chaplinsky v. New*

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The requirements for content-based speech regulation are far more exacting than those for content-neutral regulations of speech, which draw only “intermediate scrutiny.” Under this standard, the Court upholds time, place, and manner restrictions of content-neutral speech using one or the other of two tests. In some cases, the Court holds that “content-neutral” regulations are constitutional when they are “narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.” *United States v. Grace*, 461 U.S. 171, 177 (1983). In others, the Court acknowledges that such a restriction is acceptable “if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *United States v. O’Brien*, 391 U.S. 367, 377 (1968). The Court treats these two tests as essentially equivalent. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 244 (1990) (White, J., concurring in part and dissenting in part).

213. *See Burson*, 504 U.S. at 211; *accord* *TRIBE*, *supra* note 168, at 836 (arguing that the “autonomy of the individual . . . from government’s content-based restrictions” is “nearly absolute”).

214. *See, e.g., HOLMES, COMMON LAW*, *supra* note 193, at 32:

Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.

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What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates, or fall into the humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

*Id.*

215. *See R.A.V.*, 505 U.S. at 383 (observing that a “categorical [exception] approach has remained an important part of our First Amendment jurisprudence”).

*Hampshire*,<sup>216</sup> the Court acknowledged the existence of “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>217</sup> The Court listed the categories that can be regulated *qua* categories as including “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . .”<sup>218</sup> These categories of speech may be regulated, the Court explained, because they “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>219</sup> Under this approach, if a particular speech regulation targets one of these specific categories, the government may constitutionally regulate or prohibit speech entirely.

Despite *Chaplinsky’s* broad language, its scope was considerably curtailed in the ensuing years. To be sure, obscenity, defamation, and fighting words may still be regulated on the basis of content,<sup>220</sup> and the category has been expanded: child pornography<sup>221</sup> is now among the list of exceptions.<sup>222</sup> Nevertheless, each of these categories

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216. 315 U.S. 568 (1942).

217. *Id.* at 571–72. Various authors agree that *Chaplinsky* marked the beginning of the Court’s “categorization” approach. *See, e.g.*, TRIBE, *supra* note 168, at 837; Werhan, *supra* note 199, at 54. *But see* *R.A.V.*, 505 U.S. at 382–83 (“From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas . . .”).

218. *Chaplinsky*, 315 U.S. at 572.

219. *Id.*; *see also* TRIBE, *supra* note 168, at 837 (arguing that “[t]he premise that speech has special value only in the context of dialogue underlies the dictum” in *Chaplinsky*).

220. *See R.A.V.*, 505 U.S. at 383.

221. *See* *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that the “category of child pornography . . . , like obscenity, is unprotected by the First Amendment”).

222. Commercial speech was once thought to be a categorical exception; it is no longer. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Nevertheless, it does not receive full protection. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562–63 (1980) (adopting a four-part test when the government can abridge commercial speech; “The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”); *accord* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553 (2001) (applying *Hudson* to strike down, under the First Amendment, Massachusetts regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars: “For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment . . . . Instead, the Court has afforded commercial speech a measure of First Amendment protection ‘commensurate’ with its position in relation to other constitutionally guaranteed expression.”); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (applying *Hudson* to strike down, under the First Amendment, mandatory advertising assessments

is considerably more narrow than when it was first introduced.<sup>223</sup>

Moreover, in *R.A.V. v. City of St. Paul*, the Court held that even the excepted categories are protected against viewpoint discrimination, that is, content-based discrimination “unrelated to their distinctively proscribable content.”<sup>224</sup> Invalidating a St. Paul ordinance proscribing hate speech that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,”<sup>225</sup> the Court explained:

We have sometimes said that [the excepted] categories of expression are “not within the area of constitutionally protected speech,” . . . or that the “protection of the First Amendment does not extend” to them . . . . Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can . . . be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution.<sup>226</sup>

It is not that the categories “have at most a ‘*de minimis*’ expressive content . . . or that their content is *in all respects* ‘worthless and undeserving of constitutional protection . . . .’”<sup>227</sup> “We have not said that [the excepted categories] constitute ‘no part of the expression of ideas,’ but only that they constitute ‘no *essential*

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imposed on mushroom procedures and handlers, since they were not part of a broad regulatory scheme); *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999) (applying *Hudson* to strike down 18 U.S.C. § 1304 (prohibiting the interstate transmission of gambling information) and implementing FCC regulation as applied to the commercial advertising of lawful casinos between states in which casinos are lawful).

223. See *R.A.V.*, 505 U.S. at 383 (“Our decisions since the 1960’s have narrowed the scope of the traditional categorical exceptions . . . .”). On the narrowing of “obscenity,” see *Miller v. California*, 413 U.S. 15 (1973). On the narrowing of “defamation,” see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See generally *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13–17 (1990). On the narrowing of the “fighting words” doctrine, see *Gooding v. Wilson*, 405 U.S. 518 (1972), *Lewis v. New Orleans*, 415 U.S. 130 (1974), *Cohen v. California*, 403 U.S. 15 (1971), and *TRIBE, supra* note 168, at 929 (“The fighting words doctrine itself has been narrowly construed.”).

224. *R.A.V.*, 505 U.S. at 384.

225. ST. PAUL, MINN., BIAS-MOTIVATED CRIME ORDINANCE, LEGIS. CODE § 292.02 (1990).

226. *R.A.V.*, 505 U.S. at 383 (citations omitted).

227. *Id.* at 385.

part of any exposition of ideas.”<sup>228</sup> Consequently, the Court held that, even when regulating speech falling within a categorical exception, “[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”<sup>229</sup>

To summarize: the Supreme Court, in giving substance to the First Amendment’s undefined language, holds that government—whether state or federal—generally may not regulate speech based on its content. The exceptions to this blanket rule are few in number and limited in scope. Moreover, the government may not regulate even such “excepted” speech based on approval or disapproval of its message. While the Supreme Court’s decisions following *Chaplinsky* leave a role for categorical exceptions, they “demonstrate the Court’s . . . determination not to allow the methodology to defeat First Amendment claims.”<sup>230</sup> Balancing the interests involved with strict scrutiny on a case-by-case basis, rather than finding speech unprotected by squeezing it into a pre-ordained box, is the preferred basis for adjudicating content-based free speech regulations.<sup>231</sup>

228. *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

229. *Id.* at 386. In one of the more memorable lines from the case, Justice Scalia observed, “St. Paul has no . . . authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.* at 392.

230. Werhan, *supra* note 199, at 66; *cf.* TRIBE, *supra* note 168, at 929 (arguing that Court decisions since *Chaplinsky* narrowing the excluded categories have “called into question the whole structure of [F]irst [A]mendment rights erected on the *Chaplinsky* foundation”). For a recent argument that a First Amendment jurisprudence that relies solely on the content-neutral/content-based distinction to determine whether speech is protected—with no balancing of interests in individual cases—is incoherent, see SHIFFRIN, *supra* note 166, at 8–10 (arguing that categorical exceptions must be chosen by reference to some set of standards, and thus can never be truly content-neutral).

231. The Court’s movement away from large categories towards adjudication based on individual cases may be characterized as a move from “rules” to “standards.” On the merits of each, see generally Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995); TRIBE, *supra* note 168, at 793–94; and CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICTS* 106–08, 110–15, 130–35 (1993). The classic examination of the issues remains Roscoe Pound, *Hierarchy of Sources and Forms in Different Systems of Law*, 7 TUL. L. REV. 475, 482–83, 485–86 (1933).

One of the most well-documented debates concerning whether rules or standards should be preferred in the area of the First Amendment was that between Justices Black (advocating rules) and Frankfurter (advocating standards). *Compare* *Dennis v. United States*, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring):

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the

## IV. "TRUE THREATS" AND THE SUPREME COURT

Given the Court's reluctance to shoehorn speech or expressive conduct proscriptions into ever-narrowing categorical exceptions to find them constitutional or unconstitutional and its preference to weigh the constitutionality of the proscriptions case by case, the Court's retention of the "true threats" categorical exception without more than an ostensive definition, that is, a definition by illustration, need not be seen as objectionable.<sup>232</sup> Ostensive definitions are, in fact, definitions,<sup>233</sup> and they can give crucial guidance, as *American*

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judicial process, than by announcing dogmas too inflexible for the nonEuclidian problems to be solved.

(footnote omitted), *with* *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 61 (1961) (Black, J., dissenting):

As I have indicated many times before, I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field. The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence.

(footnote omitted).

Which opinion should be the preferred approach for First Amendment issues is a question not easily resolved. We do not attempt it. We highlight the change, however, to underscore the analogous constitutional ground on which the doctrine of "true threats" now finds itself, that is, lagging behind in this progression.

232. Compare Gey, *supra* note 42, at 543 & n.11 ("True threats' is merely the term courts apply to threatening language that is not constitutionally protected. The Supreme Court has not provided a definitive interpretation of the term, and the lower courts have been unable to agree on the components of a true threat."), *with* *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1071 (9th Cir. 2002) ("The Supreme Court has provided benchmarks, but no definition"), and *id.* at 1074 (the Supreme Court in *Watts* "set out no standard for determining when a statement is a 'true threat'"). But see John L. Gordon, *First Amendment Protection of Free Speech May Not Be Enlarged to Protect Threats Made by Minors, in a Public School Environment, Where the State Constitution's Protection of Free Speech Reaches Beyond That Guaranteed by the Federal Constitution*: *Lovell v. Poway Unified School District*, 18 J. JUV. L. 246, 249 (1997) (arguing that the Supreme Court has defined "true threat" and that "California is in agreement with the Supreme Court on First Amendment protection for threats and has relied upon the Supreme Court's definition of a true threat").

233. See Gey, *supra* note 42, at 545 ("Although the Supreme Court has not explicitly defined the standard for assessing whether speech containing threatening language is protected by the First Amendment, the Court's incitement decisions and the references to threats that occasionally appear in those decisions actually leave far less room to maneuver than lower courts have typically assumed.").

Legal literature generally is replete with calls for a “definition,” or at least a better “definition,” of various concepts. Compare Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 46 (2000) (“little agreement even on a definition of organized crime”), with G. Robert Blakey, *Definition of Organized Crime in Statutes and Law Enforcement Administration*, in PRESIDENT’S COMM’N ON ORGANIZED CRIME: REPORT TO PRESIDENT, THE IMPACT: ORGANIZED CRIME TODAY 511 (1986) (“Different definitions . . . usually depend[] on the purpose of the . . . use of the concept.”). Often implicit in efforts to provide such a “definition” is the assumption that the concept of “definition” itself is wholly unproblematic. In fact, “paradoxically, no problem . . . [in philosophy or logic is] less settled than . . . [that] of definition . . . .” Raziel Abelson, *Definition*, in 1 & 2 THE ENCYCLOPEDIA OF PHILOSOPHY 314 (1966). As Abelson aptly states:

Definitions play a crucial role in every field of inquiry, yet there are few if any philosophical questions about definition (what sort of thing it is, what standards it should satisfy, what kind of knowledge, if any, it conveys) on which logicians and philosophers agree.

*Id.*

Indeed, anyone trying to clarify the concept of “definition” quickly runs into other, equally vexing problems: epistemology (the theory of knowledge, SIMON BLACKBURN, THE OXFORD DICTIONARY OF PHILOSOPHY 123 (1996) and metaphysics (the theory of what things, if any, exist beyond the empirical. *Id.* at 240)). Finally, the concept of theory itself implicates a theory of language, the means by which we think and share our thoughts about things. Abelson, *supra*, at 211. The concept of “definition,” particularly seeking its “essence,” is problematic. Nevertheless the various problems are largely ignored in the existing literature. See *infra* Appendix A (Definition) for a survey of the literature.

Because we believe that the quest for an “essentialist” definition of “threat” or “true threat” is Quixotic, we do not undertake it. What is needed, we believe, is an identification of the interests involved and a careful balancing of them. We know, more or less, the interests behind “free speech.” *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) articulates for us the three major policy considerations underlying why “true threats” are proscribable *qua* threats: to “protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.” *Id.* at 388. The First Amendment must also play its crucial role that much of the en banc majority in *American Coalition* recognizes. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002) (quoting *R.A.V.*, 505 U.S. 377). We go further. We believe that the jurisprudence of the federal criminal law must also play its appointed role: individual responsibility, based on personal conduct and a state of mind, must remain sacrosanct. See, particularly, *infra* text accompanying note 647 (analyzing basic principles of federal criminal law). But once *all* of these policy considerations are recognized, the rest is a question of “means.” POSNER, *supra* note 177, at 63 (“It is so much easier to reason about means to given ends than about the ends themselves.”).

For us, as for any lawyer, the rest is purely practical. Adopt *any* definition that is “no more complicated or elaborate than necessary.” REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 100 (1965). For lawyers—if not philosophers or logicians—definition follows, or ought to follow, purpose (or purposes). But achieving purpose (or purposes) is necessarily circumscribed by the various linguistic techniques of definition and the inherent limitations of language itself (generality, vagueness, ambiguity, etc.). In brief, the project is purposeful (human purpose) and pragmatic (how does it work) given the substantial limits placed on the achievement of human purpose by fallible human understanding, real world constraints of language, and the character of things themselves; it is not “essentialist,” in the

*Coalition* shows. That guidance is principally contained in four decisions.

#### *A. The Decisions*

*Watts v. United States*,<sup>234</sup> a short *per curiam* opinion, marked the Court's first foray into "true threats," and it is the Court's only decision on the merits applying the "true threats" doctrine. Decided against the backdrop of national upheaval over the Vietnam War and the draft, the case involved a person who allegedly "threatened" President Lyndon Baines Johnson at a rally on the Washington Monument grounds in Washington, D.C.<sup>235</sup> Robert Watts was speaking about police brutality with a group of young men and women, most of whom were in their teens or early twenties.<sup>236</sup> When one member of the group suggested that those present should "get more education before expressing their views," Watts responded angrily:

They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.<sup>237</sup>

Based on this statement, Watts was convicted of knowingly and willfully threatening the President under 18 U.S.C. § 871, a federal felony.<sup>238</sup> Watts moved for a judgment of acquittal, arguing that the prosecution introduced insufficient evidence on which a jury could find he had, in fact, threatened the President; he emphasized that he made his statement "during a political debate," that he made it "conditional upon an event—induction into the Armed Forces—which [he] vowed would never occur," that "both [he] and the

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classic sense, nor is it purely "prescriptive" or "linguistic." See *infra* Appendix A (Definition) (discussing essentialist, prescriptive, linguistic, and pragmatic).

Hand put it well: "[There is] no escape in each situation from balancing the conflicting interests at stake with as detached a temper as we can achieve." HAND, *supra* note 17, at 179. Hand echoes Pound. See ROSCOE POUND, CRIMINAL JUSTICE IN THE AMERICAN CITY 18 (1922) ("[T]he problem is one of compromise; of balancing conflicting interests . . .").

234. 394 U.S. 705 (1969).

235. *Id.* at 706.

236. *Id.*

237. *Id.*

238. *Id.*



crowd laughed after the statement was made,” and that at worst, “what happened . . . was a kind of very crude offensive method of stating a political opposition to the President.”<sup>239</sup> The district court denied his motion, and the District of Columbia Circuit Court of Appeals affirmed.<sup>240</sup>

The Supreme Court, however, reversed the conviction in an unsigned opinion. The Court recognized that the presidential threat statute was constitutional on its face.<sup>241</sup> Nevertheless, it stressed that because the provision criminalized “pure speech,” it was to be “interpreted with the commands of the First Amendment clearly in mind.”<sup>242</sup> Statutory language, it explained, must be interpreted “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”<sup>243</sup> Consequently, the Court concluded that “[w]hat is a threat must be distinguished from what is constitutionally protected speech,”<sup>244</sup> and that the statute in issue “initially requires the Government to prove a true ‘threat.’”<sup>245</sup> In determining whether Watts’s speech constituted a “true threat,” the Court focused on the conditional nature of the statement, the reaction of the listeners, and on the context in which the statement was made.<sup>246</sup> Based on these factors, the Court concluded that the speech was not a “true threat,” but was “political hyperbole.”<sup>247</sup> The Court recognized that “[t]he language of the political arena, like the language used in labor disputes, . . . is often vituperative, abusive, and inexact”; it agreed, therefore, “with [Watts] that his only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’”<sup>248</sup>

The Court later clarified—at least in our judgment, if not that of the en banc majority in *American Coalition*—its *Watts* opinion in

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239. *Id.* at 706–07.

240. *Id.* at 706.

241. *Id.* at 707.

242. *Id.*

243. *Id.* at 708 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

244. *Id.* at 707.

245. *Id.* at 708.

246. *Id.* at 708.

247. *Id.*

248. *Id.*

*NAACP v. Claiborne Hardware Co.*,<sup>249</sup> a suit by seventeen white merchants, which stemmed from a boycott of their stores, located in Port Gibson, in Claiborne County, Mississippi. The purpose of the boycott was to secure equality and racial justice.<sup>250</sup> The boycott was well-organized and well-executed; it began at the First Baptist Church, after repeated calls for action by members of the black community—including a petition presented to the public officials of Port Gibson and Claiborne County—went unheeded.<sup>251</sup> A meeting was held at the First Baptist Church, which “[s]everal hundred [B]lack people” attended<sup>252</sup> and at which several people spoke. Charles Evers, the Field Secretary of the NAACP in Mississippi, was among the speakers. Evers told the assembled people that “any ‘uncle toms’ who broke the boycott would ‘have their necks broken’ by their own people.”<sup>253</sup> After Evers’s speech, the group voted, and it agreed unanimously to place a boycott on the white merchants of Port Gibson and Claiborne County.<sup>254</sup>

During the boycott, Evers delivered a number of other speeches to various crowds of African-Americans.<sup>255</sup> In one, he stated that boycott violators would be “disciplined” by their own people, and he warned that the “Sheriff could not sleep with boycott violators at night.”<sup>256</sup> In another, he warned, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”<sup>257</sup> Evers’s powerful language was enhanced by the posting of observers (“enforcers,” “deacons,” or “black hats”) in the vicinity of white-owned businesses,<sup>258</sup> who noted who went into the stores. The names of persons who violated the boycott were then read at meetings of the Claiborne County NAACP, and they “were branded

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249. 458 U.S. 886 (1982).

250. *Id.* at 889–90, 899–900.

251. *Id.* at 889, 898–900.

252. *Id.* at 900.

253. *Id.* at 900 n.28. According to Sheriff Dan McKay, who was present during the speech, “Evers’s remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP.” *Id.*

254. *Id.*

255. The content of one of Evers’s speeches—which the Court found fully protected—warrants, for that reason, close attention; it is set out, here, as it was to the Court’s opinion, in full in an appendix to these materials. *See infra* Appendix C (The Speech of Charles Evers).

256. *Claiborne*, 458 U.S. at 902.

257. *Id.*

258. *Id.* at 894.

as traitors to the [B]lack cause, called demeaning names, and socially ostracized for merely trading with whites.”<sup>259</sup> Nevertheless, the boycott was, for the most part, peaceful;<sup>260</sup> it was, however, marred, according to the record, by at least some instances of violence: shots were fired into at least two boycott violators’ homes, a brick was thrown through a third violator’s windshield, and a fourth violator sustained damage to his flower garden.<sup>261</sup>

Angered by the boycott, several merchants sued two corporations, the NAACP and Mississippi Action for Progress (MAP),<sup>262</sup> and 146 individuals—including Evers.<sup>263</sup> At trial, the Chancellor found 130 of the defendants jointly and severally liable on three different conspiracy theories.<sup>264</sup> He then held them liable

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259. *Id.* at 904.

260. *Id.* at 903.

261. *Id.* at 904. Since violence was not an element of any of the claims for relief brought by the merchants, they were, of course, not required to show it. Accordingly, the trial proceedings are not necessarily a reliable record of the extent of the violence, if any, that occurred or its sources. *See infra* note 264. Nevertheless, the merchants possessed an adequate incentive to show violence for the practical purpose of making their presentation more persuasive, and to the degree that the record contained only isolated instances of violence, and none of it was connected to the defendants, we may infer that the merchants lacked evidence of it and that the boycott was essentially nonviolent.

262. *Claiborne*, 458 U.S. at 889–90. MAP was a Mississippi corporation; it implemented the federal “Head Start” program. *Id.* at 889.

263. *Id.* at 890.

264. According to the Supreme Court, the lower court considered three theories of liability:

First, the court held that the defendants were liable for the tort of malicious interference with the plaintiffs’ businesses, which did not necessarily require the presence of a conspiracy. Second, the chancellor found a violation of a state statutory prohibition against secondary boycotts, on the theory that the defendants’ primary dispute was with the governing authorities of Port Gibson and Claiborne County and not with the white merchants at whom the boycott was directed. Third, the court found a violation of Mississippi’s antitrust statute, on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County and thus had unreasonably limited competition between black and white merchants that had traditionally existed.

*Id.* at 890–92.

An examination of the lower court opinion shows that, while the plaintiffs did not need to prove violence to win on the antitrust claim, proof of violence played a key (if not strictly necessary) role in their victory on the secondary boycott claim. The malicious interference claim was upheld primarily based on the defendants’ coercive (but not actually violent) acts. In fact, the Mississippi court only considered violence broadly rather than specifically, and it recounted just two instances of actual violence, while it made no effort (beyond mere association) to link the violence to the particular defendants in the litigation. *NAACP v.*

for *all* of the plaintiffs' lost earnings during the seven-year period of the boycott,<sup>265</sup> specifically rejecting the defendants' claims that the First Amendment protected their conduct.<sup>266</sup> On appeal, the Mississippi Supreme Court reversed the defendants' liability on two of the theories but upheld their liability under a third—although it held that the plaintiffs failed to establish their case with respect to

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*Claiborne Hardware Co.*, 393 So. 2d 1290, 1297–99 (Miss. 1980).

In upholding liability for instituting an illegal secondary boycott, the Mississippi Supreme Court held that “[i]f any . . . force, violence, or threats is [sic] present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other.” *Id.* at 1301. Thus, while violence is not an element of an illegal secondary boycott, the court’s finding that boycotters committed actual violence in the boycott was sufficient to render it illegal. To support this holding, the court cited *Smith v. Grady*, 411 F.2d 181, 187 (5th Cir. 1969): “Any kind of boycott is unlawful if executed with force or violence or threats . . .” The court did not find, however, that the defendants, as opposed to other boycotters, committed violent acts, nor did it hold that such a finding was necessary to impose liability.

To uphold the judgment under the malicious interference statute, the plaintiffs were required to prove coercive behavior by defendants. The statute read: “If any person shall . . . threaten with bodily harm, intimidate or coerce another person to prevent said person from lawfully trading or carrying on business, including buying or selling, he shall be guilty of a misdemeanor.” MISS. CODE. ANN. § 93-23-83 (1966). Here, again, the court found that boycotters (but not the defendants) went beyond merely coercive conduct and engaged in actual violence. *See Claiborne*, 393 So. 2d at 1300 (“In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers.”). Nevertheless, the finding was not essential to the holding, which was mainly based on forms of coercion by the defendants. *See id.* The court found: “Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards . . . in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear . . .” *Id.*

The Court’s holding that the malicious interference was part of a conspiracy did not rely on a finding of actual violence. The statute, in relevant part, defines “conspiracy” as the conduct of “two (2) or more persons [who] conspire . . . [t]o prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation . . .” MISS. CODE. ANN. § 97-1-1 (1942). The court, in short, held: “The *agreed use* of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy.” *Claiborne*, 393 So. 2d at 1301 (emphasis added). Thus, the defendants’ agreement to use violence or threats of violence, not actual violence, was the element that the court relied upon to impose liability.

The Mississippi Supreme Court’s reference to actual violence by the boycotters, on the other hand, indicated its belief that such violence was, if not required, at least relevant to the defendants’ liability. *See id.* at 1298 (“The thread of fear and violence is woven throughout this case.”).

265. *Claiborne*, 458 U.S. at 898.

266. *Id.* at 892.

MAP and thirty-seven of the individual defendants.<sup>267</sup> The defendants' general First Amendment defense was flatly rejected; the court quoted a trial court finding that:

[i]n carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results.<sup>268</sup>

It then observed:

We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime.<sup>269</sup>

The Supreme Court reversed, making two crucial points. First, the Court recognized that the defendants sought to "persuade others to join the boycott through social pressure and the 'threat' of social ostracism."<sup>270</sup> Nevertheless, it held: "Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."<sup>271</sup> Quoting Justice Rutledge, the Court continued: "[The First Amendment] extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts."<sup>272</sup> Moreover, the Court explained, "[t]he claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the First Amendment." The Court added:

Petitioners were engaged openly and vigorously in making the public aware of respondent's . . . practices. Those practices were offensive to them, as the views and practices of petitioners are no

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267. *Id.* at 894, 896.

268. *Id.* at 894 (quoting *Claiborne*, 393 So. 2d at 1300).

269. *Id.* at 895 (quoting *Claiborne*, 393 So. 2d at 1301).

270. *Id.* at 909–10.

271. *Id.* at 910.

272. *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 537 (1965) (Rutledge, J.)).

doubt offensive to others. But so long as the means are peaceful, the communication need not meet the standards of acceptability.<sup>273</sup>

The Court did recognize, however, that “[t]he First Amendment does not protect violence,”<sup>274</sup> and—in a passage squarely overlooked by the en banc majority in *American Coalition*—that “[n]o federal rule of law restricts a State from imposing . . . liability for . . . losses that are caused by . . . violence and by *threats of violence*.”<sup>275</sup> Nevertheless, it concluded that “[t]he record in this case demonstrates that all of [the plaintiffs’] losses were not proximately caused by violence or threats of violence,”<sup>276</sup> and that “[t]o the extent that the court’s judgment rests on the ground that ‘many’ black citizens were ‘intimidated’ by ‘threats’ of ‘social ostracism, vilification, and traduction,’ it is flatly inconsistent with the First Amendment.”<sup>277</sup> How the en banc majority could ignore the import of this language in a controlling Supreme Court opinion boggles even the legal imagination.

Second, the Court emphasized the importance of assessing individual responsibility only for individual conduct in the sensitive area of First Amendment speech—precisely the point we argue so vigorously for here and which the en banc majority distorted, if it did not simply ignore. Liability simply cannot be imposed vicariously in the First Amendment area without substantial qualification. When violence or threats of violence “occur . . . in the context of constitutionally protected activity, . . . ‘precision of regulation’ is demanded.”<sup>278</sup> Specifically, liability may be imposed only for the “direct consequences of . . . [violent] conduct, and does not include consequences resulting from associated peaceful . . . activity,”<sup>279</sup> that is, “[o]nly those losses proximately caused by unlawful conduct may be recovered.”<sup>280</sup> Individual liability must, in short, be based on individual conduct, not on mere association with an unpopular group—absent a showing that the “group itself possessed unlawful goals and that the individual held a specific intent to further those

273. *Id.* at 911 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

274. *Id.* at 916.

275. *Id.* (emphasis added).

276. *Id.* at 922.

277. *Id.* at 921.

278. *Id.* at 916 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

279. *Id.* at 918 (quoting *Mine Workers v. Gibbs*, 383 U.S. 715, 730 (1966)).

280. *Id.* at 918.

illegal aims.”<sup>281</sup> The en banc majority, in contrast, imposed such liability without even an association. For it, “context” is a magic formula that removes all constitutional restraints. As in *Ali Baba and the Forty Thieves*, all that a court need say is, “Context” or “Open Sesame.”<sup>282</sup> Then, it will be admitted to a cave where the First Amendment and requirements of individual responsibility are inapplicable.

Under this framework, the Court addressed Evers’s liability based on his speeches:

While many of the comments in Evers’ speeches might have contemplated “discipline” in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as . . . intending to create a fear of violence whether or not improper discipline was specifically intended.<sup>283</sup>

Nevertheless, the Court found that “Evers’ addresses did not exceed the bounds of protected speech.”<sup>284</sup> Although the Court principally analyzed the speeches under the “fighting words” exception, it did, significantly, recount the facts and the holding of *Watts* concerning “true threats.”<sup>285</sup> Refusing to uphold Evers’s liability, the Court, in a crucial passage, added, “there is no evidence—apart from the speeches themselves—that Evers . . . directly threatened acts of violence.”<sup>286</sup> This point, too, was ignored or missed by the en banc majority in *American Coalition*. The Supreme Court then reversed and remanded *Claiborne*.<sup>287</sup>

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281. *Id.* at 920.

282. “Open Sesame” is how most people remember the phrase from Arthur Lubin’s *ALI BABA AND THE FORTY THIEVES* (1943), which starred Maria Montez and Jon Hall. That is how the phrase is also recounted in children’s books. See, e.g., MARION N. FRENCH, *MYTHS AND LEGENDS OF THE AGES* 228 (1956). More authoritative translations of the original Arabic read: “Open, O Simsim.” 1 *THE ARABIAN NIGHTS ENTERTAINMENTS* 150 (Burton trans., 1955).

283. *Claiborne*, 458 U.S. at 927.

284. *Id.* at 929.

285. *Id.* at 928 n.71.

286. *Id.* at 929.

287. *Id.* at 934.

The approach to “true threats” established in *Watts*—and elaborated in *Claiborne*—stands unaltered to this day. Considering the doctrine’s long standing dominance, that it was ignored or misread by the en banc majority in *American Coalition* is that much more remarkable. In fact, the two most recent cases from the court concerning threats, *Madsen v. Women’s Health Center, Inc.*<sup>288</sup> and *R.A.V. v. City of St. Paul*,<sup>289</sup> simply confirm that while “true threats” may be proscribed under the First Amendment, “true threats” is a narrow category. When such threats are subject to proscription, they may be proscribed only to the extent that other categorical exceptions—such as obscenity, defamation, and fighting words—may be proscribed.

In *Madsen v. Women’s Health Center*,<sup>290</sup> a case dealing with an injunction issued against a group of anti-abortion protesters, the Court indicated in two places that “true threats” were outside of First Amendment protection. First, in dealing with the portion of the injunction that banned the anti-abortion protesters from displaying images that people inside a particular clinic could observe, the Court observed that “threats to patients or their families, however communicated, are proscribable under the First Amendment.”<sup>291</sup> The Court avoided deciding the issue of whether the posters were “true threats,” though, noting instead that patients and their families could avoid the images if the clinic were simply “to pull its curtains.”<sup>292</sup> It struck down that provision of the injunction because it extended to all “images observable” rather than to those “signs that could be interpreted as threats or veiled threats.”<sup>293</sup> Accordingly, the injunction failed to survive the level of First Amendment scrutiny applicable to a “content-neutral injunction”<sup>294</sup>—dubbed by some “intermediate-intermediate scrutiny.”<sup>295</sup>

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288. 512 U.S. 753 (1994).

289. 505 U.S. 377 (1992).

290. 512 U.S. 753 (1994).

291. *Id.* at 773.

292. *Id.*

293. *Id.*

294. *See id.* at 765 (“[W]hen evaluating a content-neutral injunction, we . . . must ask . . . whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”).

295. *See generally id.* at 791 (Scalia, J., concurring in part and dissenting in part). For a critique by one of our number of the majority opinion in *Madsen*, see Murray, *supra* note \*\*, at 754–57.



Second, the Court struck down a provision of the injunction that barred protesters from speaking to any person seeking the services of a clinic within 300 feet of the clinic as violative of the First Amendment, holding that “[a]bsent evidence that the protesters’ speech is independently proscribable (i.e., ‘fighting words’ or threats), . . . this provision cannot stand.”<sup>296</sup>

Similarly, in *R.A.V. v. City of St. Paul*,<sup>297</sup> which dealt not with threats or expressive conduct but with “hate speech,” the Court confirmed that “threats of violence are outside the First Amendment.”<sup>298</sup> Nevertheless, the Court added that even categorical exceptions like “true threats” must be proscribed in a way that is viewpoint-neutral. Citing *Watts*, the Court explained that

the Federal Government can [for example] criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.<sup>299</sup>

But, the Court cautioned, “the Federal Government may not criminalize . . . threats against the President that [merely] mention his policy on aid to inner cities.”<sup>300</sup>

### *B. Analysis*

The Court’s teachings on “true threats” may be quickly summarized. *Watts* lays the foundation on which the Court builds its understanding of how to distinguish protected speech or expressive conduct from unprotected threats. The decision identifies the “true threat” categorical exception to First Amendment protections. “True threats” must be, however, distinguished from “political hyperbole.”<sup>301</sup> Debate about ideas is a crucial aspect of the freedoms

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296. *Madsen*, 512 U.S. at 774.

297. 505 U.S. 377 (1992).

298. *Id.* at 388.

299. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)).

300. *Id.*

301. *See Watts*, 394 U.S. at 708.

protected by the First Amendment,<sup>302</sup> and the language of the public arena is often “vituperative, abusive, and inexact.”<sup>303</sup>

*Watts* provides two important guideposts on how the Court reached its conclusion. First, regarding the standard for determining whether the speech is protected speech or expressive conduct or is an unprotected threat, the Court emphasized the factors that it considered to determine whether Watts’s speech was protected: (1) whether the threat was conditional, (2) the reaction of the listeners, and (3) the context in which the statement was made.<sup>304</sup> What the Court did not say is equally important: it did not say that the list was exhaustive, that any one of the factors was determinative, that each must be examined, or that any one of the factors was more important than another. Nor did it say that any of the factors (e.g. “context”) was legitimately open to manipulation that might constrict the breathing room of the First Amendment to the point of suffocation.<sup>305</sup>

Second, the Court adopted a methodology of enforcing its approach for separating “true threats” from protected speech: instead of remanding for a new trial with different instructions, it remanded with an instruction to dismiss the case. The Court thus followed a long line of decisions, holding:

[T]he question is one of alleged trespass across “the line between speech unconditionally guaranteed and speech which may legitimately be regulated.” . . . [T]he rule is that we “examine for ourselves the statements in issue and the circumstances under which they were made . . .” We must “make an independent examination of the whole record,” . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.<sup>306</sup>

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302. See *supra* note 192 (discussing Holmes’s free speech jurisprudence).

303. *Watts*, 394 U.S. at 708.

304. *Id.*

305. Compare *Watts* with the en banc opinion in *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1086 (9th Cir. 2002).

306. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (citations omitted); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567–68 (1995) (explaining that the “constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court” rests upon the Supreme Court “simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the

The question whether speech constitutes a “true threat” is, therefore, a *question of law* to be decided by a court independent of the jury’s finding of fact.<sup>307</sup>

*Claiborne* confirms that not all threats or expressive conduct are proscribable simply because they are threats. While consistently referring to “threats of violence” as outside the First Amendment, the Court in *Claiborne* emphasized that “‘threats’ of ‘social ostracism, vilification, and traduction’”<sup>308</sup> are fully within the Amendment’s protection. In addition, in *Claiborne*, the Court intimated that “true threats” is a narrow category. Evers repeatedly addressed crowds of black citizens, telling them that boycott violators would have their “necks broken” and that the “Sheriff could not sleep with boycott violators at night.” In a highly charged climate or context, in which violence actually was visited upon several boycott violators—shots were fired through houses, bricks were thrown through windshields—the Court still refused to uphold liability.<sup>309</sup> Because Evers himself had not authorized or ratified violence, the First Amendment protected his speeches.<sup>310</sup> Without evidence of personal involvement in the violence, Evers’s speeches were protected: “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.”<sup>311</sup>

Two other points stand out. Where protected speech is intermixed with unprotected speech, individual liability must be based on individual conduct.<sup>312</sup> Only those losses proximately caused by the unprotected conduct can be the basis for liability. Individual

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near or far side of the line of constitutional protection”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933–34 (1982); *Greenbelt Coop. Publ’g Ass’n. v. Bresler*, 398 U.S. 6, 11 (1970); *St. Amant v. Thompson*, 390 U.S. 727, 732–33 (1968).

307. See also *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984), in which the Court unanimously observed: “[T]he rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact-finding function be performed in the particular case by a jury or by a trial judge.” *But see* CHILDRESS & DAVIS, *supra* note 38, § 3.12 (“[I]t remains to be seen whether the court’s de novo review in defamation cases [on malice] will apply broadly to First Amendment actions.”)

308. *Claiborne*, 458 U.S. at 921.

309. *Id.* at 904.

310. *Id.* at 921.

311. *Id.* at 910; *see also id.* at 911 (“The claim that the expressions were intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment.”).

312. *See id.* at 918.

liability may not be imposed without individual conduct, so losses resulting from *protected* conduct are not cognizable.<sup>313</sup> Thus, the Court required “precision of regulation,” that is, independent judicial review of fact finding, focused pleadings, limited arguments of counsel, narrowly tailored jury instructions, clarifying special verdicts, and a heightened burden of proof (“clear”).<sup>314</sup> Each of

313. *See id.*

314. Strangely, most comment on the Court’s opinion in *Claiborne* is fixed on its substantive teaching about the First Amendment. Far less attention is paid to the *techniques* through which those First Amendment teachings are to be exercised, including procedural and evidentiary limitations. Six elements of the Court’s opinion stand out:

*First*, the Court’s opinion mandates an independent standard of review by any reviewing court of the application of its First Amendment standards. *Id.* at 916 n.50 (“We must make an independent examination of the whole record.” (citations omitted)). We argue that an independent review *by the trial court* before a matter is submitted to a jury is necessarily included within that mandate. *See infra* Part VII.A.

*Second*, the Court focused on *pleadings* as a means to define issues. *Claiborne*, 458 U.S. at 917–18 (citing labor law limitations as “no less applicable . . . to the important First Amendment interests at issue in this case”). We argue that First Amendment litigation is a constitutional exception to general notice pleading. *See infra* Part VII.D.

*Third*, the Court focused on *arguments of counsel* as a means to define issues. *Claiborne*, 458 U.S. at 917–18. Arguments of counsel will be appropriately limited if the substantive standard for “true threats” is rightly set out and the admissibility of evidence is rigorously policed. *See infra* Part VII.D.

*Fourth*, the Court focused on *jury instructions* as a means to define issues. *Claiborne*, 458 U.S. at 917–18. Jury instructions, too, will be appropriately limited if the substantive standard for “true threats” is rightly set out and the admissibility of evidence is rigorously policed. *See infra* Part VII.D.

*Fifth*, considering that the Court requires that a distinction be made between damages that flow from protected conduct and damages that flow from unprotected conduct, we do not see how this distinction can be drawn—and reviewed—except by detailed and carefully drafted *special verdicts that disclose evidentiary bases*. *Claiborne*, 458 U.S. at 918 (“Only those losses proximately covered by unlawful conduct may be recovered.”). “[A]mbiguous findings . . . are inadequate to assure the ‘precision of regulation’ demanded by [the First Amendment].” *Id.* at 921. “[N]o constitutional freedom . . . [may] be defeated by insubstantial findings of fact . . .” *Id.* at 924 (citation omitted). Conclusions of fact “must be supported by findings that adequately disclose the *evidentiary basis* for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct . . .” *Id.* at 933–34 (emphasis added). We argue, therefore, that special verdicts are required in First Amendment litigation. *See infra* note 416.

*Sixth*, “clear proof” is required of what must be shown, that is, association and specific intent when an individual joins an organization or group that reflects dual goals: lawful and unlawful. *Claiborne*, 458 U.S. at 919 (“[T]here must be ‘clear proof that a defendant ‘specifically intend[s] to accomplish [the aims of the organization] by resort to violence.’” (citations omitted)). We read this passage to prohibit the use of the usual civil standard of preponderance of the evidence. *See infra* note 768 (discussing various burdens of proof). Collective responsibility is, in short, beyond the pale. *Claiborne*, 458 U.S. at 920 n.55. “Civil liability may not be imposed merely because an individual belonged to a group, some members

these devices must be used to ensure the maximum possible safeguards for speech by segregating protected speech or expressive conduct, otherwise not actionable, from unprotected speech when it is uttered in the context of unprotected speech or violent conduct.

*Madsen* and *R.A.V.* fill out some of the interstices of the *Watts/Claiborne* framework. While the Court does not squarely hold that “true threats” is a categorical exception,<sup>315</sup> *Madsen*, in fact, treats them as “independently proscribable” as well as, and, in the same breath as “fighting words,” indicating that the Court conceives of “true threats” like obscenity, defamation, and fighting words.<sup>316</sup> *R.A.V.* confirms this view, and it underlines that, like other categorical exceptions, “true threats” may not be proscribed based on a viewpoint criterion. Significantly, too, *R.A.V.* articulates the three major policy considerations underlying why “true threats” are proscribable *qua* threats: to “protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”<sup>317</sup> Finally, *R.A.V.*’s reference to “threats of violence” rather than just to “true threats” as proscribable confirms *Claiborne*’s holding that other kinds of threats (e.g., at least those of ostracism, vilification, and traduction) are not within the categorical exception of “true threats.”

Despite the Court’s guidance, the circuit courts of appeal continue to formulate their own discrete approaches to the issue of “true threats.” The approaches of most circuits—including the en

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of which committed acts of violence.” *Id.* at 920. “[I]t is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.” *Id.*

Each of the techniques must be employed with care to assure that judgments of individual responsibility in these sensitive areas are consistent with the promise of the First Amendment and, at the same time, with basic principles of criminal jurisprudence. That the courts presently do so is hardly the case. *See infra* note 416 (discussing the *Scheidler* decision).

315. *Accord* James R. Bussian, Comment, *Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations*, 36 S. TEX. L. REV. 153, 175 (1995) (observing that the Supreme Court has “never expressly h[eld] that a threat of violence is a categorical exception to the First Amendment”); Kristine L. Sendek, Comment, “FACE”-ing the Constitution: The Battle over the Freedom of Access to Clinic Entrances Shifts from Reproductive Health Facilities to the Federal Courts, 46 CATH. U. L. REV. 165, 213 (1996) (“Although not specifically referred to as a categorical exception to the First Amendment’s protection of speech, threats of force are not considered protected speech by the Supreme Court.”).

316. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 774 (1994).

317. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

banc opinion in *American Coalition*—reflect little of what the Court teaches. Indeed, too often the teaching is flatly misread or simply ignored altogether. The result is a myriad of approaches, tests, and holdings that significantly (and impermissibly) broaden the scope of “threats,” correspondingly (and impermissibly) decrease First Amendment freedoms, and distort fundamental principles of federal criminal jurisprudence. A careful examination of each of the circuit’s major decisions is required to demonstrate the scope and depth of the required reform. Much must be done.

#### V. THE CIRCUITS ON “TRUE THREATS”

Despite the relevant decisions of the Supreme Court on “true threats,” the circuit courts of appeal are using a lot of time—and pages of the Federal Reporters—as if they were largely free to think about the problem for themselves. Nevertheless, as Judge Avern Cohn aptly observes, the results are far from “uniform.”<sup>318</sup> The circuit courts generally agree that, as appellate tribunals, they must scrutinize independently whether speech is protected. But after that, unanimity splinters. The lack of uniformity may be traced in large part to the conflation of the question of whether a statement is a “true threat” for the purposes of (1) the requisite state of mind under the particular statute at issue and (2) for the scope of the First Amendment. The confusion results from “too loose a use of the phrase true threat.”<sup>319</sup> The confusion may be demonstrated in the two major approaches to “true threats.”

Under the majority approach, courts treat the First Amendment as intermingled with the statutory construction. In doing so, the courts find that the statute itself requires a showing of a constitutional “true threat,”<sup>320</sup> they define “true threat” for both constitutional and statutory purposes, and they conclude that any speech that falls within the statute, as so construed, is unprotected.<sup>321</sup>

318. See *United States v. Baker*, 890 F. Supp. 1375, 1381 (E.D. Mich. 1995), *aff’d sub nom.*, *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

319. *Id.* at 1381.

320. See, e.g., *United States v. Brock*, 863 F. Supp. 851, 857 n.7 (E.D. Wis. 1994) (“Congress need not explicitly limit FACE to ‘true threats’ to comply with the First Amendment; as with other statutes criminalizing threats, the courts will infer such a limitation.”) (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)), *aff’d sub nom.*, *United States v. Soderna*, 82 F.3d 1370 (7th Cir. 1996).

321. See *infra* Part VII.A.

Significantly, the question of whether particular speech falls within the statute is, as a rule, left to a duly instructed jury, and courts note that as with any other statute, a jury finding can be set aside on a showing that no reasonable jury could find that, the speech constituted a “true threat.”<sup>322</sup> The legal standard used to instruct the jury is an “objective” test,<sup>323</sup> but it comes, nevertheless, in three main verbal varieties, although the exact word formulation varies by circuit, and significantly, the various verbal formulations hardly produce differing results: (1) an objective, speaker-based approach,<sup>324</sup> (2) an objective, hearer-based approach,<sup>325</sup> and (3) an objective, viewpoint-neutral approach.<sup>326</sup> At a minimum, the different formulations should affect the character of jury instructions; they could, but do not, affect the admission of evidence, that is, speaker-based tests might cue the district court to admit less evidence of

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322. See, e.g., *United States v. Orozco-Santillan*, 903 F.2d 1262, 1264 (9th Cir. 1990) (reviewing a conviction challenged on First Amendment grounds, and stating that, in so doing, it “examines the sufficiency of the evidence to support a conviction and the denial of a motion for acquittal by reviewing the evidence ‘in the light most favorable to the prosecution,’ determining whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt’”) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973) (“When a motion for a directed verdict of acquittal is made in a criminal case, the sole duty of the trial judge is to determine whether there is substantial evidence which, taken in the light most favorable to the [prosecution], tends to show that the defendant is guilty beyond a reasonable doubt . . . .” Even when the defense is based on a claim of [F]irst [A]mendment rights, [this] rule . . . contains the proper standard for determining whether a case should be submitted to the jury.”) (quoting *Bell v. United States*, 185 F.2d 302, 310 (4th Cir. 1950)); see also *United States v. Kosma*, 951 F.2d 549, 555 (3d Cir. 1991) (“A few cases may be so clear [in favor of acquittal] that they can be resolved as a matter of law, but most cases arising under [18 U.S.C. § 871] present widely varying fact patterns that should be left to the trier of fact.” (citations omitted)).

323. On this point within the circuits, decisions are not entirely uniform. See, e.g., *United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988) (stating that “the showing of an intent to threaten, required by § 875(c) . . . is a showing of specific intent”); *United States v. Frederickson*, 601 F.2d 1358, 1363 (8th Cir. 1979) (applying, as the law of the case, a specific intent standard requiring proof “that the defendant appreciated the threatening nature of his statement and intended at least to convey the impression that the threat was a serious one” (citing *Rogers v. United States*, 422 U.S. 35, 46 (1975) (Marshall, J., concurring))); *United States v. Patillo*, 431 F.2d 293, 297–98 (4th Cir. 1970) (“We hold that where, as in Patillo’s case, a true threat against the person of the President is uttered without communication to the President intended, the threat can form a basis for conviction under the terms of Section 871(a) only if made with a present intention to do injury to the President.”), *panel opinion adhered to*, 438 F.2d 13 (4th Cir. 1971).

324. See *infra* Part V.A.1.

325. See *infra* Part V.A.2.

326. See *infra* Part V.A.3.

hearer reaction while hearer-based tests might cue district courts to admit more evidence of hearer reaction. Nevertheless, the administration of the various tests reflects little variation.<sup>327</sup> Within each circuit, additional factors may also be considered and various subsidiary rules may be followed. In addition, each circuit tends to use the same definition or test for all statutes dealing with “threats.”

The minority approach—which only the Second Circuit follows, although the Sixth Circuit may be moving to do so—is markedly different. In the Second Circuit, whether speech is protected by the First Amendment is a separate inquiry from whether it is a “threat” for purposes of a particular statute. In fact, in the Second Circuit (and perhaps the Sixth), the focus significantly shifts from a duly instructed jury to the trial court itself. Before examining any particular statute, the trial court itself must first apply a threshold test to ensure that, consistent with the First Amendment, the speech at issue constitutionally constitutes a “true threat.” In all of these circuits, appellate courts purport to scrutinize independently whether speech is protected. In the Second Circuit, the legal standard is also objective; it is, however—at least in theory—a higher standard than that followed by other circuits.<sup>328</sup>

These approaches—and the variations among them—constitute the “true threats” jurisprudence of the federal circuit courts. Regrettably, none of the circuits adequately safeguards freedom of speech, nor do any of the circuits even afford that degree of protection guaranteed by current Supreme Court jurisprudence,

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327. Here, we agree with the judgment of the en banc opinion in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1074–75, 1075 n.7 (9th Cir. 2002) (“The difference does not appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener.”).

328. The Second Circuit asserts that this higher objective standard “works ultimately to much the same purpose and effect as would a requirement of proof of specific intent to execute the threat . . . .” *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976). In fact, the Second Circuit observes, the “qualities of unequivocal immediacy and express intention,” which its standard requires for proof that a given communication is a threat unprotected by the First Amendment, “are the most, perhaps, that even [a] . . . requirement of specific intent could demand in any event since such an intent may be proved circumstantially; the jury under that test would have the almost impossible task of evaluating (a defendant’s) subjective mental processes in relation to executing his apparent intent as that intent was manifested by his words and gestures in context.” *Id.* While these arguments are telling, they do not change the objective character of the standard, which looks to what a reasonable person would think, rather than to what the speaker intended. Nor does this standard focus the jury’s attention on its duty to find, in fact, that the defendant subjectively intends “to threaten” a particular person.



much less give due recognition to basic principles of federal criminal law. An analysis of illustrative decisions from each circuit demonstrates the substantial shortcomings of the various approaches. It also establishes how thorough the required reform must be.

*A. Construing Around the First Amendment:  
The Predominant Approach*

*1. The objective, speaker-based test*

*a. The First Circuit.* Two cases, both decided in 1997, reflect the First Circuit's teachings on "true threats." The first, *United States v. Fulmer*,<sup>329</sup> involved the prosecution of Kevan Fulmer for threatening a federal agent in violation of 18 U.S.C. § 115(a)(1)(B). Convinced that his brother and father-in-law committed pension fraud and income tax fraud by failing to disclose assets in bankruptcy, Fulmer complained to the Office of the United States Trustee—which, in turn, referred the matter to Richard Egan, an FBI agent.<sup>330</sup> Egan met with Fulmer in August or September of 1994, and in that meeting, Fulmer described his brother and former father-in-law<sup>331</sup> as "vicious" people who "used the courts to keep him away from his family."<sup>332</sup> Egan described Fulmer's demeanor as "polite, articulate," but "tense."<sup>333</sup> Fulmer remained in constant contact with Egan for approximately three months following the meeting, stopping by to inquire about the case, sending Egan letters and faxes, and calling him on the telephone. Egan investigated the case and consulted with an Assistant United States Attorney,<sup>334</sup> who advised him that he would not prosecute the case. In turn, Egan informed Fulmer that the case did not merit prosecution. Fulmer "protested the decision, but said 'good-bye' and hung up after Egan told him there was nothing further to discuss."<sup>335</sup>

Subsequently, Fulmer left Egan the following voicemail message:

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329. 108 F.3d 1486 (1st Cir. 1997).

330. *Id.* at 1489.

331. By the time of the meeting, Fulmer was divorced. *See id.*

332. *Id.*

333. *Id.*

334. *See id.*

335. *Id.* at 1490.

Hi Dick, Kevan Fulmer. Hope things are well, hope you had an enjoyable Easter and all the other holidays since I've last spoken with you last. I want you to look something up. It's known as a misprision. Just think of it in terms of a misprision of a felony. Hope all is well. The *silver bullets* are coming. I'll talk to you. Enjoy the intriguing unraveling of what I said to you. Talk to you, Dick. It's been a pleasure. Take care.<sup>336</sup>

At trial, Egan testified that the message "shocked" him; he found it, "chilling" and "scary." He testified that the phrase "silver bullets" was unknown to him, and he thought that it indicated a threat.<sup>337</sup>

336. *Id.* (emphasis added).

337. ¶1. *Id.*

¶2. The members of the court, the Assistant United States Attorney, and Special Agent Egan, were apparently raised in a rarefied milieu divorced from the ubiquitous icons of popular culture. In fact, the phrase "silver bullet" is a well-known and often-used cliché. A search of Lexis for the period from August 18, 2001, to October 18, 2001, for example, finds the phrase used by the general media 721 times in reference to a wide-ranging melange of subjects, including airbags, John M. Broder, *How We Drive*, N.Y. TIMES, Oct. 10, 2001, at 10, col. 1.; terrorism, Amity Shlaes, *America Must Fight Against Terrorism at Home*, FIN. TIMES, Oct. 8, 2000, at 25; and gasoline additives, Seema Mehta, *MTBE Cleanup Cost Put at 29 Billion*, L.A. TIMES, Oct. 14, 2001, pt. 2, at 6. The use continues. See, e.g., Louis Vehitelle, *Consumer Confidence Index Goes from a Aha to a Hmm*, N.Y. TIMES, June 8, 2002, at 1 (New York University economist quoted: "No index or statistic is the silver bullet that anticipates consumption."). While the phrase does not appear in the OXFORD ENGLISH DICTIONARY, its meaning is commonplace, at least to aficionados of popular film, in particular the horror movie.

¶3. For many, however, films are little more than an opportunity for entertainment, a harmless diversion, and a "good scare." For others, their meaning as art is deeply psychological or profoundly religious or is a socio-economic commentary. See, e.g., STUART M. KAMINSKY, *AMERICA FILM GENRES* 130–54 (1974); Judith Hess Wright, *Genre Films and the Status Quo*, in *FILM GENRE READER* 41 (Barny Keith Grant ed., 1986); R.H.W. Dillard, *The Pageantry of Death*, in *FOCUS ON THE HORROR FILM* 36 (Roy Huss & T.J. Ross eds., 1972). They provide a sharp counterpoint to the optimistic rationalism of the Enlightenment, which was often, though not always, antireligious—that is, rejecting that which could not be touched or measured, as matter of faith or belief. Mary Shelly's *Frankenstein* (1818)—one novel and motion picture character known to all—is a classic in the genre, a powerful romantic reaction to the hubris of reason. Law, of course, privileges reason, but it must still keep an eye on what the other facilities of the human person know in their own ways. Lawyers must study and learn from art as well as philosophy or science. In fact, from the interpretation of art, we can learn much about the human condition, which must be taken into account in any formulation of a legal rule, including the jurisprudence of "true threats." Various views provide not confusion but perspective.

¶4. For Kaminsky, for example, horror films—from a Jungian perspective—are modern shared dreams, a contemporary form of myth or folktale. Previously, myths possessed religious meanings. For example, a universal fear, like death, that could not be handled in any other way, was turned into allegory. In modern society, horror films deal with not only fear of death but also a loss of individuality and the presence of social isolation. Immortality, a frequent

theme, is seen not as a boon but as a bane, a curse from which a tormented creature seeks release, a creature who is "acutely aware of this aloneness, . . . pained because he constantly finds love but, knows that he is doomed to destroy or outlive the love object." KAMINSKY, *supra*, at 101. Often, the uncontrolled beast that lurks within each of us, once out, must "destroy others to continue living." *Id.* at 102. As in the biblical conflict between Cain and Abel, life is seen as a struggle between good and evil, not only external, "but something monstrous within ourselves." *Id.* at 104. "Graves and crypts [are] constantly . . . defiled . . . [and] a corpse . . . [found] missing [is a fact viewed not as] resurrection [but] as a horror [instead of] a Christ-like miracle." *Id.* at 106. Modern science is of no avail in mitigating or destroying the evil; the monster can only be exorcized by the supernatural. For a similar, but Freudian, interpretation, see RANDY LOREN RASMUSSEN, *CHILDREN OF THE NIGHT* 222-38 (1998).

¶5. For Wright, "genre films," on the other hand, "produce satisfaction rather than action [and] pity and fear rather than revolt" against oppressive "social and political conflicts." Wright, *supra* at 41. They serve the interest of the ruling classes since "oppressed groups [all too often] . . . accept the genre film's absurd solutions to economic and social conflicts." *Id.* In particular, the "horror film attempts to resolve the disparities between two contradictory ways of problem solving—one based on rationality, the other based on faith, an irrational commitment to certain traditional beliefs." *Id.* at 42. "Horror films present human beings as fallen, prey to uncontrollable evil impulses." *Id.* at 43. "The message is clear: science must not be allowed to replace traditional values and beliefs. Otherwise, chaos will result, as humans cannot control their own evil tendencies or those of the people around them without supernatural help." *Id.* at 46. "The social order out of which these monsters spring," however, "is . . . good [and] it must remain unchanged." *Id.* "[T]he existing class structure [properly] prevents chaos." *Id.* "Like the German expressionist horror films that preceded them, American horror films . . . may be seen as a reaction to . . . economic and social upheaval . . ." *Id.* It is, in effect, "a plea to go back to older methods of coping." *Id.*

¶6. For Dillard, however, "all significant Western Art, at least since the medieval period, has been directly concerned with the original fall of man and the consequent introduction of sin and death into the world." Dillard, *supra* at 36. The horror film is

[a]t its best, as thoroughly and richly involved with the dark truths of sin and death as any art form has ever been, but its approach is that of parable and metaphor—an approach which enables it on occasion to achieve a metaphysical grandeur, but which also may explain why its failures are so very awful . . .

*Id.*

¶7. Like the morality play of the middle ages, "the horror film deals with the central issue of Christian life—the struggle between the spirits of good and evil . . ." *Id.* at 36. It "teaches an acceptance of the natural order of things . . . [and that] death . . . is also the natural and peaceful end to the turmoil and terror of life in a fallen world." *Id.* at 37.

¶8. "The werewolf story is perhaps the clearest example of [the] . . . ambiguity of death in the horror film." *Id.* at 38. The central figure is both hero and villain. Through no action of his own, like each of us, possessing a fallen nature, the evil within the protagonist is released by happenstance, the bite of a werewolf; he, too, becomes a beast of the full moon, a creature of blind evil but still a man, tortured as if damned. An individual in a business suit by day and is a beast at night, cursed by immorality, he "can only die . . . by a wound from a silver weapon (a knife, a bullet, the head of a cane) . . ." *Id.* at 39. "Reason . . . is ineffectual, because it denies the existence of any evil that does not fit the immutable laws of a logical and orderly universe." *Id.* at 40. "Death . . . [is] the instrument of the hero's salvation. . . . a paradox worthy of the highest art." *Id.* at 39. The horror film, therefore, "is a morality play for our times." *Id.* at 41. It is "religious . . . as all art finally proves to be . . . [affirming] humanity in the very face of honor." *Id.*

¶9. George Wagner's *The Wolf Man* (Universal Pictures 1941), a classic, tragic horror film, is illustrative of the genre and warrants, for that reason, further treatment. It presents a view of the human being as not different in kind from a beast, and it provides an artistic counterpoint to simplistic concepts of individual responsibility sometimes found in the criminal law and at issue in these materials. As developed by Curt Siodmak's excellent screenplay based on lycanthropic folklore, Larry Talbot, the protagonist, is played by Lon Chaney, Jr., son of the silent film star. For more on lycanthropy, see *A LYCANTHROPY READER* (Charlotte Otten ed., 1986) (indicating, generally, that Siodmak's screenplay is more imaginative than true to historical myth). Chaney's definitive portrayal of the monster, using a rubber snout, long claws, and yak hair, catapulted the junior Channey to horror film stardom, rivaling that of his father.

¶10. Cast as a young Welsh heir, Chaney returns from an American education ("pragmatism") to the mansion of his father, Sir John Talbot ("enlightened reason") played by Claude Rains, who does typically fine work in a role well beneath his considerable talent. While working on his father's telescope, Cheney sees the beautiful young Gwen Conliffe, played by Evelyn Ankers, in the second floor of her father's antique shop; he goes there, asking to see the pair of earrings that she was wearing when he saw her through the window. Gwen tells him they are not for sale; instead, he buys an old walking cane with a silver handle, formed in the shape of a wolf's head with a pentagram engraved on it. Gwen tells Larry about the werewolf legend, including that the pentagram was its sign, but Larry laughs it off as a silly superstition, asks Gwen for a date (the real purpose of his visit to the shop), and suggests that she join him to get their futures told at a local gypsy camp. Gwen agrees, though she is engaged (a traditional bond) to Frank Andrew (played by Patric Knowles), the Talbot's game-keeper. But to assuage her "guilt" of cheating (unknown to Larry) on Frank (a violation of a bond, for which tradition will inevitably impose a sanction), she brings her friend, Jenny Williams (played by Fay Helm), as a chaperone.

¶11. At the camp, the trio meets the gypsy fortune teller, Bela, played by Bela Lugosi, whose intense talent is largely wasted in a minor role, and his mother, Queen Maleva ("the voice of the supernatural" marvelously played with great restraint by Maria Ouspenskaya). Jenny has her fortune read by Bela. As Larry and Gwen walk off into the fog-shrouded moor, deepening their illicit relationship and her guilt, Bela sees a pentagram in Jenny's hand, a sign that she will be killed by a werewolf; she quickly ends the session. While Larry and Gwen are walking on the moor, they hear a bone-chilling wolf's howl and a young woman's screams; Larry rushes toward the sounds, and he is attacked by a hairy beast; during the struggle he manages to beat the animal to death with the head of his cane but is bitten on his chest by the animal and faints from the pain. When he comes to, the dead bodies of Jenny and Bela are found—Jenny's throat ripped out and Bela's head beaten in. Captain Paul Montford, played by Ralph Bellamy ("the voice of the law") without particular distinction, comes upon the scene and of course, doubts Larry's story since it is not supported by "evidence" (his alleged wound has disappeared). Similarly, Doctor Lloyd ("the voice of science"), played by Warren Williams, does not believe Larry after examining only what he can see, Jenny's and Bela's bodies.

¶12. Seeking answers beyond the accepted methods of reason or science, Larry goes to the crypt where Bela is resting. There, he sees Maleva but does not then talk to her. Later, Larry goes to a gypsy carnival, held to commemorate Bela's death. This time, he does seek out Maleva and she tells him that her son was a werewolf and since he was bitten, he too will become a wild beast when the moon is full, the victim of a capricious fate. She tells him that, like her poor son, he will kill despite himself, that nothing can help him, and that he can only be killed by a silver object—a bullet, a knife, or—ominously—a cane. See *DRAKE DOUGLAS, HORRORS! 97* (1989) ("A silver bullet entering the werewolf's body . . . will bring instant death . . . [, but an] ordinary bullet will not harm a werewolf, even though he be in human form.").

¶13. As the plot develops, Larry, in fact, turns into a werewolf at the next full moon and viciously kills a grave digger—in, of course, a foggy cemetery—fulfilling Maleva's dire prediction. Tormented by what he did, Larry tries to convince Gwen that he is a werewolf; though she knows well the myth, she refuses to believe him, and Larry—horrified—sees the portentous sign of the pentagram in Gwen's palm, as Bela saw it in Jenny's. Larry then seeks Sir John's aid, but Sir John also refuses to believe his son's fantastic story because it does not fit into his "enlightened" view of the world. Like Doctor Lloyd, he "explains" Larry's fears as possibly a form of schizophrenia, an answer of science. But Sir John eventually agrees to tie Larry up while he goes out onto the moor—fatefully carrying, at Larry's suggestion, his wolf's head cane—with Capt. Montford ("the law"), Dr. Lloyd ("science"), and Frank Andres ("traditional man") the game keeper. They futilely use man-made traps, unknowingly seeking a supernatural wild beast of the night that is terrorizing the village community; the techniques of the modern man will never "catch" the truth of the supernatural. The full moon rises, and Larry turns into a werewolf, easily breaking free of the restraints (representing enlightened reason), which Sir John placed on him.

¶14. Gwen—unbelievably—is on the moor, and Larry finds and attacks her. Sir John, separated from the hunting party, hears her screams, rushes to the sound, and like Larry with Bela, beats the beast to death with Larry's silver cane—a result that Larry transparently envisioned when he importuned his father to take the cane (to go beyond enlightened reason). Sir John, who scoffed at his son's supernatural tale, now sees with his own eyes the beast laying on the moor slowly turning from a monster into his own son: an empirical verification of the supernatural. The separated hunting party now appears and assumes that Larry died trying to save Gwen. Sir John does not disabuse them of their too hasty assumption, a characteristic of modern man. Maleva also appears and says a prayer, embodying the "real" truth, over Larry's lifeless body: "[t]he way you walked was thorny, though no fault of your own. But as the rain enters the soil, the river enters the sea, so tears run to a predestined end. Your suffering is over. Now you will find peace for eternity."

¶15. Released only two days after Pearl Harbor, *The Wolfman* was an unanticipated financial smash hit for Universal. Despite bad reviews, *see, e.g.*, N.Y. TIMES, Dec. 22, 1941, at 24 ("[N]obody is going to go on believing in werewolves or Santa Clauses if the custodians of these legends don't tell them with a more convincing imaginative touch."), the picture did extremely well at the box office, touching something deep in the popular imagination, which popular education did not encompass. *See, e.g.*, VARIETY, Dec. 24, 1941 (reporting double house averages, big engagements, and hold overs at the theaters). In the following years, Chaney reprised the werewolf role six times, giving further currency to the legend and its "silver bullet" myth, as the only means to kill a monster. Nevertheless, the "sequels were clearly hurry-up jobs played for the thrills and scares . . ." JAMES B. TWITCHELL, DREADFUL PLEASURES 226 (1985).

¶16. Though the sequels hardly graced the genre, the original rightly made Chaney a star; it also made the phrase "silver bullet" part of the daily vocabulary of at least the American theater-going public, if not law enforcement or the judiciary. *See also* William Safire, *On Language—Drug War Lingo*, N.Y. TIMES, Sept. 24, 1989, § 6, at 20 (tracing the origins of "magic bullet" (in German *Zauberkegel*) to bacteriologist Paul Ehrlich who shared the Nobel Prize in 1908 and coined the term to describe the ideal therapeutic agent that destroys unhealthy cells but spares healthy tissue. The phrase was also related to "silver bullet" thought to be effective with werewolves). Apparently, only those involved in the administration of justice—a process of enlightened reason, like that of Sir John or Captain Monford—are ignorant of the popular meaning of "silver bullet"—that which unfailingly achieves its objective.

For his part, Fulmer called two witnesses who testified to the meaning of the phrase “silver bullets.” The first testified that the phrase meant “a clear-cut simple violation of law” and that Fulmer used it to “describe specific evidence, including an \$8,200 check from a bankruptcy estate that never reached its intended recipient.”<sup>338</sup> The second testified that Fulmer used the term to mean “information that he was going to provide to banks proving the illegality of some of [his brother’s] transactions.”<sup>339</sup> Fulmer was convicted, and he appealed. He argued, among other things, that the prosecution violated his First Amendment rights as outlined in *Watts*.

The court began its opinion by examining the “threat” requirement of the statute. After noting that the First Circuit was not on record “on the appropriate standard regarding the nature of a ‘true threat,’” it reviewed the work of its sister circuits in developing a “true threat” standard under the statute “and other federal threat statutes.”<sup>340</sup> The court refused to adopt an actual intent standard for the making of a true threat, which the defendant actually intended to threaten. Rather, it adopted an objective test. It concluded:

[T]he appropriate standard under which a defendant may be convicted for making a threat is whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made. This standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the “reasonable-recipient standard,” namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we to apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.<sup>341</sup>

It then dismissed Fulmer’s argument that “the statement was at most ambiguous and could not have been a ‘true threat,’” stating that after “[r]eviewing . . . [the] . . . facts, and drawing all inferences in favor of the verdict,” it could not “say that no rational jury could

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338. *United States v. Fulmer*, 108 F.3d 1486, 1490 (1st Cir. 1997).

339. *Id.*

340. *Id.* at 1491.

341. *Id.*

have found beyond a reasonable doubt that Fulmer's statement was a threat."<sup>342</sup> The court emphasized that "[w]hether a given [statement] constitutes a threat is an issue of fact for the trial jury."<sup>343</sup> Moreover, it held, "[t]he use of ambiguous language does not preclude a statement from being a threat."<sup>344</sup> It explained:

[w]hile the statement on its face may be susceptible to more than one interpretation, some factors not discernible from the record, such as the tone of the defendant's voice or the credibility of the government's and Fulmer's witnesses, may legitimately lead a rational jury to find that his statement was a threat.<sup>345</sup>

Nevertheless, the court later inconsistently noted that, when examining context, "evidence of the recipient's reactions" to an alleged "true threat" as well as his "interpretation" of it is "relevant to the inquiry."<sup>346</sup>

Only at this point did the court address Fulmer's First Amendment argument, which it then dismissed in a single paragraph. The court observed that *Watts* "involved a statement made against the president in the context of a political rally against a war"; Fulmer's statement, in contrast, was not "one criticizing either Egan or any other government figure."<sup>347</sup> "Moreover," the court added, "a true threat is unprotected by the First Amendment. . . . Thus, a conviction under this statute, based on a finding that the statement was a true threat, would not violate Fulmer's constitutionally protected right to speech."<sup>348</sup> In sum, the court defined the "threat" element of 18 U.S.C. § 115(a)(1)(B) to require a "true threat," applied an objective, speaker-based test to determine

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342. *Id.* at 1492.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.* at 1499. Here, the court gave away the benefit of a reasonable speaker test. Nevertheless, while the court inconsistently upheld the admission of most of Egan's testimony, it ultimately found that admission of one of Egan's statements—that he brought home extra ammunition on the night he received the threat—constituted an abuse of discretion since it was unduly prejudicial under FEDERAL RULE OF EVIDENCE 403. *See id.* at 1500. That the court adopted a general policy of admitting this kind of evidence, subject to Rule 403 objections, is paradoxical in light of its expressed concern that a defendant might be found guilty "for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant." *Id.* at 1491.

347. *Id.* at 1492.

348. *Id.* at 1492–93.

whether a “true threat,” existed, and held that the threat was unprotected, even though it only met the First Circuit’s test for “true threat” rather than the Supreme Court’s test.

In *United States v. Whiffen*,<sup>349</sup> decided five months after *Fulmer*, the First Circuit reaffirmed its approach to true threats. Kevin Whiffen was convicted under 18 U.S.C. § 875(c) for repeatedly threatening workers at a collection agency who were pursuing a debt he owed. On several occasions, he told the workers that their building “will go boom,” that “buildings go boom boom,” and the like.<sup>350</sup> Upholding the conviction over a First Amendment challenge, the court first held that 18 U.S.C. § 875(c) required the government to prove a “true threat.”<sup>351</sup> Then, declining to adopt an actual intent standard, it reiterated the *Fulmer* objective, speaker-based standard. It emphasized:

This test takes into consideration the context in which the remark was made and avoids the risk that an otherwise innocuous statement might become a threat if directed at an unusually sensitive listener. This approach also protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten, or, as would be more common, the government is unable to prove such specific intent which, by its nature, is difficult to demonstrate.<sup>352</sup>

The court then summarily dismissed Whiffen’s First Amendment challenge in much the same fashion as the *Fulmer* court dismissed Fulmer’s claim. It simply stated that Whiffen did “not claim that his statements were a form of political speech,” and that, “[i]n any event, a true threat is not protected by the First Amendment. . . . For this reason, a conviction upon a finding that the statements were true threats would not violate Whiffen’s constitutionally protected right to speech.”<sup>353</sup>

These two cases illustrate several problems with the First Circuit’s approach. First, by making the issue—as a rule—a question for the jury, the First Circuit necessarily subjects defendants, in close

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349. 121 F.3d 18 (1st Cir. 1997).

350. *Id.* at 20.

351. *Id.* at 21.

352. *Id.*

353. *Id.* at 22. The court did eventually reverse the conviction on evidentiary issues. See *infra* note 774.



cases, to a full jury trial and all the expense and delay that go along with it.<sup>354</sup> Second, close cases are submitted to a jury, which usually results in the case being affirmed on appeal after a conviction since the appellate standard is not easily overcome.<sup>355</sup> These results are not consistent with the protection of minority rights under the First Amendment. Close cases should go to the defendant, not to the jury.

Moreover, *Fulmer* is not consistent with either *Watts* or *Claiborne*. In *Fulmer*, the court affirmed a conviction for a “true threat” based on a facially nonthreatening statement to an FBI agent—an employee of the government—albeit directed to him personally.<sup>356</sup> In *Watts*, the Supreme Court reversed a conviction where a statement that *was* facially threatening was made against another government employee—the President—albeit during a public debate.<sup>357</sup> In *Claiborne*, the Court also overturned a judgment based on facially threatening statements against regular citizens—albeit during a public debate.<sup>358</sup> If neither the First Amendment nor the Supreme Court differentiates between political speech and other forms of protest or expressive conduct in the context of “true threats,” the First Circuit cannot justify drawing that line. Putting to one side the failure of the trial court to make an independent assessment of the character of Fulmer’s speech, that the remarks were directed to the agent personally—standing alone—ought not tip the scale against the defendant.

Finally, *Whiffen*’s argument for an objective standard on the ground that it “protects listeners from statements that are reasonably interpreted as threats, even if . . . the government is unable to prove such specific intent which, by its nature, is difficult to

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354. See *infra* Part VII.A.

355. See *supra* note 137 (discussing standards of review).

356. *United States v. Fulmer*, 108 F.3d 1486, 1490 (1st Cir. 1997); cf. *United States v. Poocha*, 259 F.3d 1077 (9th Cir. 2001) (concluding that a defendant’s speech was constitutionally protected, even though the defendant “clench[ed] his fists, st[u]ck out his chest, and yell[ed] ‘f\*\*k you’” at a park ranger, who was standing approximately five feet away, after the ranger ordered the defendant to move on); *id.* at 1080 n.1 (Defendant’s “words, even when viewed in the light of his conduct, do not suggest that his speech was a threat of violence unprotected by the First Amendment. Under the circumstances [the statements could reasonably be seen as an] expression of criticism from an onlooker.”).

357. See *supra* Part IV.A.

358. See *supra* Part IV.A.

demonstrate”<sup>359</sup> is hardly tenable. In a nation that values its commitment to robust, wide-open debate, risk of loss *must* fall on the government in prosecutions involving arguably protected speech. That convictions are difficult to obtain is not objectionable if free speech is to be given breathing room. That objection proves too much, so it proves nothing. The promise of freedom always makes the government’s job harder. That is its function.

*b. The Third Circuit.* The Third Circuit’s definitive pronouncement on “true threats” came in *United States v. Kosma*,<sup>360</sup> where Louis Kosma sent a series of threatening letters to the President; he was indicted on two counts of violating 18 U.S.C. § 871(a). A postcard written on March 2, 1988, addressed to President Reagan, “C/O Ye Ol Whitehouse,” read:

Mr. Reagan: You are hereby invited to PHILADELPHIA. We are going to give you a 21 Gun-Salute.

21 guns are going to put bullets thru your heart & brains. You are a Disgrace to the Air-Force. You are a Disgrace to Teddy Roosevelt. You are a Disgrace to John F. Kennedy. You are a Disgrace to Nancy Reagan. You have insulted her intelligence, and dignity, and honor, and integrity, and I resent this very much!! You are In Contempt of EVERYTHING that I represent, and standby, and believe. Officially: an Act of Contempt of Court. Your name is going to be removed from ALL documents, and books. OFFICIALLY: you were NEVER the “president” of anything!<sup>361</sup>

A document dated April 20, and sent to the U.S. Marshall’s office in Baltimore, was headed, “IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA” and purported to be an “Official Court Order,” “Official Proclamation,” and “Motion to Proceed in Forma.”<sup>362</sup> The letter stated:

359. *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997). The Supreme Court specifically rejects this rationale for not adopting an appropriate state of mind requirement. *See infra* note 644 ¶ 13 (detailed discussion and analysis of *Morissette v. United States*, 342 U.S. 246 (1952)).

360. 951 F.2d 549 (3d Cir. 1991).

361. *Id.* at 550.

362. *Id.* at 551.

To: Wilson Goode.

Ronald Reagan.

WHEREBY; You criminals have caused many Crimes against Humanity, and it would be Futile for you to seek Justice. YOU CAN ONLY SEEK MERCY!! "Give me Liberty or give me Death." WE can NOT give you Liberty, but we can give you Death, to end your Mental Anguish!! You are hereby ORDERED to Philadelphia, Penna. We are going to give you a 21 Gun-Salute. *Twenty-one guns are going to put bullets thru your heart & brains.* Place: FEDERAL COURTHOUSE. 601 Market street. Time: 6:O'clock am. Date: June 14th. 1988. Flag Day.<sup>363</sup>

The document claimed to be from the "Senior Commander. REGIONAL TASK FORCE" and the "U.S. MARINES" but was signed by the defendant.<sup>364</sup> Kosma was convicted on both counts; he appealed, claiming a violation of his First Amendment rights;<sup>365</sup> his conviction was affirmed.<sup>366</sup>

The Third Circuit began its opinion by recognizing that because the appeal "involve[d] the interpretation of a statute and its application to the facts of this case, our review is plenary."<sup>367</sup> Then, it recognized that "[i]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"<sup>368</sup> The court observed that while it was "mindful of the potential difficulties in distinguishing between constitutionally protected political speech and unprotected threats against the President" and despite its "solicitude for the First Amendment," it believed that the case was "not a difficult one."<sup>369</sup>

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363. *Id.*

364. *Id.*

365. *Id.* at 553.

366. *Id.* at 559.

367. *Id.* at 553.

368. *Id.* (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)).

369. *Id.*

Kosma argued that *Watts* controlled; the court, however, held that his reliance on *Watts* was misplaced.<sup>370</sup> It noted that in *Watts*, the court held that the “appropriateness of . . . statements about the President must be viewed ‘in context,’” with consideration given to “the expressly conditional nature of the statement and the reaction of the listeners.”<sup>371</sup> By contrast, in Kosma’s case, none of these factors was present. First, “there was no overtly political context for Kosma’s letters.”<sup>372</sup> Second, “Kosma’s threats, though ostensibly phrased as ‘invitations,’ were not as conditional as those in *Watts*, which were dependent on the defendant’s induction into the armed forces—a condition which the defendant stated would never happen.”<sup>373</sup> Third, Kosma did not direct his “remarks at a group attending a W.E.B. DuBois Club rally,” with the result of “th[e] group laugh[ing],” as *Watts* did; instead, Kosma “sent his letters directly to the President,” making “the only audience for them . . . the Secret Service and the staff of the White House mailroom, and it is doubtful that they were laughing.”<sup>374</sup> Moreover, the court found it “significant” that Kosma’s letters implied that Kosma himself would kill the President.<sup>375</sup> The court then observed that while “[a] few cases may be so clear [in favor of acquittal] that they can be resolved as a matter of law, . . . most cases arising under [§ 871] present widely varying fact patterns that should be left to the trier of fact.”<sup>376</sup> It concluded, “[i]n sum, we find that Kosma’s letters to the President clearly constituted ‘true threats’ and were not protected expression.”<sup>377</sup>

Finally, the court analyzed an additional aspect of a “true threat”: “the appropriate intent standard for judging a ‘true threat’ against the President.”<sup>378</sup> The court declined to adopt a subjective intent standard for two reasons: (1) such a test “makes it considerably more difficult for the government to prosecute threats against the President,” which is inconsistent with “the compelling,

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370. *Id.* at 554.

371. *Id.* at 553–54.

372. *Id.* at 554.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 555 (citation omitted).

377. *Id.*

378. *Id.*

and indeed paramount, interest in safeguarding the President”;<sup>379</sup> and (2) such a test “defies the purposes behind the Congressional enactment of section 871,” which was not only “meant to protect the President’s life” but also “to prevent the disruptions and inconveniences which result from the threat itself, regardless of whether there is any intention to execute the threat.”<sup>380</sup> Thus, the court adopted an “objective, reasonable speaker standard.” Viewed from the standpoint of the speaker:

the defendant [had to] intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President . . . .<sup>381</sup>

Under that test, the court concluded, “the evidence presented at trial was more than sufficient to convict Kosma.”<sup>382</sup>

The court in *Kosma* correctly stated its appellate responsibility in a case involving the First Amendment, that is, to examine the record independently. But that special responsibility at the appellate level will often come too far down the road.<sup>383</sup> If a defendant is entitled to have a judge, who is more neutral and sensitized to First Amendment concerns and the protection of minority views than a jury, *review* his conviction, then he is entitled to have a judge decide *in the first instance* whether conviction would be appropriate, consistent with the First Amendment. Sending most prosecutions to the jury in “widely varying fact patterns,” as the *Kosma* Court expressly envisioned, and giving a deferential review to jury findings—albeit within a *de novo* framework—hardly squares with First Amendment concerns. In a country that values free speech, a defendant should not have to suffer trial, conviction, and appeal *before* he receives careful judicial review.

Further, *Kosma* itself cannot be squared with *Watts*. Admittedly, that Kosma’s letters were private—rather than part of a public debate—and were directed personally to the President distinguishes

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379. *Id.* at 556.

380. *Id.*

381. *Id.* at 557 (citing *Roy v. United States*, 416 F.2d 874, 877–78 (9th Cir. 1969)).

382. *Id.*

383. *See infra* Part VII.A.

this case, at least somewhat, from *Watts*. But the court's other attempts at distinguishing *Watts* are unconvincing. Indeed, on the whole, it is fair to say that *Watts* controls; in the end, *Kosma's* letters are, like *Watts's* rant—statements vituperative of a matter of public concern. First, saying that no “overly political” context was present for the letters ignores the obvious—the letters were written to President Reagan to criticize the job he was doing.<sup>384</sup> Second, *Kosma's* “threats” were conditional; they were conditioned on President Reagan accepting his “invitation.”<sup>385</sup> Nothing indicated Reagan ever intended to visit Philadelphia—let alone on June 14, 1988. Third, that *Kosma* directed his letters to the President, the “threatened person,” does not remove them from First Amendment protection. Charles Evers, the defendant in *Claiborne*, directed his speeches at the persons allegedly threatened, the black citizens of Claiborne County, Alabama.<sup>386</sup> Nevertheless, the court found those threats fully protected.<sup>387</sup> Fourth, that the crowd in *Watts* laughed, while the Secret Service agents did not, is ambiguous.<sup>388</sup> The crowd in *Watts* may have laughed because they thought *Watts* amusing (i.e., not threatening), but equally possibly, they may have snickered at the prospect of the President's death, a more sobering possibility. That the Secret Service agents did not laugh at *Kosma's* letters (at least the court assumes they did not) cannot be enough to distinguish *Kosma* from *Watts*. To be sure, the agents appropriately took the statement seriously, but that alone hardly takes it out of the protection of the First Amendment. Agents have to take *all* statements about shooting the President seriously. That fact goes to the reasonableness of the agents' response, not to the character of the statement to which they may be reacting.<sup>389</sup> The functions of the Secret Service ought not define the limits of freedom; they ought not be permitted to define the constitutionally protected character of the statement.

Moreover, that *Kosma* himself would kill the President is hardly a reason to affirm. After all, *Watts* himself said *he* wanted to get

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384. *Kosma*, 951 F.2d at 550, 554.

385. *Id.*

386. *See supra* note 255.

387. *See supra* note 255.

388. For more about “ambiguity,” see *infra* note 459 and Appendix B ¶¶ 2–5 (Natural Language: Generality, Ambiguity, and Vagueness).

389. *See infra* Part VII.B.2.

L.B.J. in *his* sights.<sup>390</sup> Finally, that it will be difficult for the government to obtain convictions is surely no reason to adopt a lax standard for “true threats.”<sup>391</sup> It would be “easy” to forego trials altogether, but that is not the test. Thus, the Third Circuit’s approach to “true threats” flatly fails to conform to the high level of First Amendment protection mandated by the Supreme Court or by basic principles of the federal criminal law.

*c. The Seventh Circuit.* The Seventh Circuit also follows an objective, speaker-based test for true threats.<sup>392</sup> In *United States v.*

390. See *supra* text accompanying note 237.

391. See *infra* Part VII.C. The Supreme Court specifically rejects this rationale for determining the appropriate state of mind. See *infra* note 644 ¶ 13 (detailed discussion and analysis of *Morissette v. United States*, 342 U.S. 246 (1951)).

392. This objective speaker-based test controls in the Seventh Circuit in spite of one opinion, written by Chief Judge Posner, in which the court employed an objective hearer-based test. See *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990) (“The test for whether a statement *is* a threat is an objective one; it is not what the defendant intended but whether the recipient could reasonably have regarded the defendant’s statement as a threat. *United States v. Prochaska*, 222 F.2d 1, 2 (7th Cir. 1955). We have found no recent cases on the point, but it seems clearly correct to us as a matter of principle.”). This statement ignores the existence of *United States v. Khorrami*, 895 F.2d 1186, 1192 (7th Cir. 1990) (citing *United States v. Hoffman*, 806 F.2d 703, 707 (7th Cir. 1986)), which followed the objective speaker-based standard.

The Seventh Circuit in *United States v. Pacione*, 950 F.2d 1348 (7th Cir. 1991), noted this contradiction; the defendant was convicted on one count of making threats under 18 U.S.C. § 155(a)(1)(B) (1994) and appealed. At trial, he requested—and was denied—an instruction on what is required to prove a true threat under *Khorrami*. The Seventh Circuit explained that *Khorrami*, *Hoffman*, and *Watts* focused on whether a “reasonable person would foresee that the hearer would take the statement seriously.” *Pacione*, 950 F.2d at 1355. The court then “note[d] that a recent case in this circuit where the alleged threat was deemed ambiguous, focuses on whether the recipient could reasonably have regarded the statement as a threat.” *Id.* (citing *Schneider*, 910 F.2d at 1570). The court, however, did not attempt to explain, or even harmonize *Schneider*; it simply noted and then ignored it. Two sentences later, it concluded

that a defendant charged with making a threat is entitled to [a *Khorrami*] instruction where the evidence permits a reasonable doubt whether the alleged threat meets the *Khorrami* test. Because of the difficulty of drawing the reasonable doubt line in many circumstances, it would be prudent to give the instruction, if requested.

*Id.*

If *Schneider* is, in fact, an anomaly, the Seventh Circuit follows a speaker-based rather than a hearer-based approach to “true threats.” See also *United States v. Saunders*, 166 F.3d 907, 912, 914 n.7 (7th Cir. 1999) (applying the *Khorrami* test to an allegation under 18 U.S.C. § 115(a)(1)(B) (1994) and noting that *Schneider* represented a departure from Seventh Circuit practice); *United States v. Hartbarger*, 148 F.3d 777, 782–83 (7th Cir. 1998) (adopting the *Khorrami* test for an allegation under 18 U.S.C. § 241 (1994)).

*Hoffman*,<sup>393</sup> the Seventh Circuit reviewed David Hoffman's conviction for threatening the life of the President. Hoffman sent a letter to the White House that read, "Ronnie, Listen Chump! Resign or You'll Get Your Brains Blown Out."<sup>394</sup> "[At the end of the unsigned letter] was a crude drawing of a pistol with a bullet emerging from the barrel."<sup>395</sup> Addressing Hoffman's appeal, the court began by noting that in *Watts* the Supreme Court

cautioned that because the statute "makes criminal a form of pure speech, [it] must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech" . . . .

To protect these First Amendment values, the Court held that "the statute initially requires the government to prove a true 'threat.'"<sup>396</sup>

After considering the "purposes of the statute," namely, "to prohibit any statement that would disrupt the activities and movements of the president," the court concluded that an objective, speaker-based test for a true threat would satisfy those purposes.<sup>397</sup> It held that:

[I]n order for the government to establish a "true threat" it must demonstrate that the defendant made a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President."<sup>398</sup>

The court then explained that this standard does not require "that the defendant actually intended to carry out the threat" as "it is the utterance which the statute makes criminal, not the specific intent to carry out the threat . . . ."<sup>399</sup> The court noted that its task on the review of a jury verdict was to determine "not whether [it]

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393. 806 F.2d 703 (7th Cir. 1986).

394. *Id.* at 704.

395. *Id.*

396. *Id.* at 706.

397. *Id.*

398. *Id.* at 707 (quoting *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969)). *Roy* is an unpersuasive precedent. See *supra* note 81 (discussing *Roy* as an inappropriate response to the Supreme Court's concern with the state of mind requirement of the District of Columbia Circuit in *Watts v. United States*, 394 U.S. 705, 798 (1969)).

399. *Id.* (citing *United States v. Kelner*, 534 F.2d 1020, 1025 (2nd Cir. 1976)).



would have convicted the defendant,” but rather to determine “whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’”<sup>400</sup> Finding this standard met, it affirmed the conviction.<sup>401</sup>

The Seventh Circuit confirmed its approach four years later. In *United States v. Khorrami*,<sup>402</sup> Mohammed Farhad Khorrami made a series of harassing phone calls and sent a harassing letter to the New York headquarters of the Jewish National Fund (JNF).<sup>403</sup> At trial, Khorrami was convicted on one count of violating 18 U.S.C. § 876.<sup>404</sup> The conviction stemmed from a “wanted poster” he sent the JNF.<sup>405</sup> The letter, which Khorrami sent to the JNF in one of the Fund’s business reply envelopes, consisted of

a poster-like paper that stated at its top “Wanted for crimes against humanity and Palestinians for fifty years.” Under this heading the paper contained pictures that had been taken from materials that the Jewish National Fund published. The pictures were of Israeli officials including Yitzhak Shamir, Israeli Prime Minister, Shimon Peres, Israeli Foreign Minister, Chaim Herzog, Israeli President, Teddy Kollek, Mayor of Jerusalem and Shlomo Lahat, Mayor of Tel Aviv. Also included on the paper were pictures of Thomas Pickering, former United States Ambassador to Israel as well as of individuals who were the President, Executive Vice-President and Director of Communications for the Jewish National Fund. Swastikas and epithets were drawn over the pictures together with “mustaches” and other disfigurements. Next to the names Yitzhak Shamir and Shimon Peres were, respectively, the words “Execute now!” and “His blood need.” Next to the pictures of both Teddy Kollek and Shlomo Lahat were the statements “Must be killed.” On the left side of the picture was a map of Israel on which was written “Long live Palestine,” and a small disfigured picture of an individual appearing to be Senator Edward Kennedy with an arrow pointing to an accompanying statement “Long live Sarhan Sarhan.” [sic].<sup>406</sup>

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400. *Id.* at 708.

401. *Id.* at 714.

402. 895 F.2d 1186 (7th Cir. 1990).

403. *Id.* at 1188.

404. *Id.* at 1190.

405. *Id.* at 1189.

406. *Id.*

On appeal, Khorrami unsuccessfully argued that the evidence at trial was insufficient to support his conviction. Analyzing the elements of the statute and finding that Khorrami's authorship of the letter was essentially undisputed, the court found that "the only question presented is whether the government produced evidence sufficient to support the jury's verdict that Khorrami's letter constituted a 'true threat.'"<sup>407</sup> The "necessity to resolve the question of whether Khorrami's letter constituted a 'true threat,'" the court explained, "stem[med] from the protections our Constitution accords free speech."<sup>408</sup> Given the holdings in *Watts* and *Hoffman*, the court concluded that in order "[t]o protect . . . First Amendment values" the government must "prove a true 'threat,'" that is, a threat under the objective, speaker-based test laid out in *Hoffman*.<sup>409</sup> It continued, "[t]he question of whether the language constitutes a threat is an issue of fact for the jury."<sup>410</sup> The court, therefore, affirmed the conviction, dismissing Khorrami's arguments that his poster was merely "political hyperbole":

Khorrami sent the "wanted poster" to the Jewish National Fund following a six-month campaign of profane, vulgar and vicious telephone calls to the Fund's toll-free number. He sent the poster at the same time that he also sent another threatening letter to the Fund. Khorrami drafted all of his threatening correspondence from Jewish National Fund materials, demonstrating to the Fund employees that they were dealing with an individual who had previous contact with the Fund, and he included threats against Fund officers on the same poster that contained threats to Shimon Peres and Yitzhak Shamir. Later, Jaime Negroni, a Fund employee, reasoned that it was likely that the letters and the harassing telephone calls were coming from the same individual. In the context of Khorrami's personal vendetta campaign of telephonic and postal harassment waged against the Jewish National Fund, a reasonable jury could conclude that the recipients of Khorrami's "wanted" poster would interpret this poster as a serious threat to inflict bodily harm upon another rather than as mere "political hyperbole." Since there was more than sufficient evidence to support the jury's conclusion that Khorrami's "wanted" poster

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407. *Id.* at 1192.

408. *Id.*

409. *Id.*

410. *Id.* (quotation marks omitted).

constituted a “true threat,” Khorrami’s conviction must be upheld.<sup>411</sup>

These two appeals aptly demonstrate the substantial shortcomings of the Seventh Circuit’s current approach. First, the question of whether speech constitutes a “true threat” should not, at least in the first instance, be left to a jury. The trial court should review the government’s evidence against the First Amendment and make an independent judgment on the constitutional issue of “true threat” before it gives the case, if at all, to the jury. Second, in *Hoffman*, as in *Watts*, the defendant criticized the President.<sup>412</sup> The *Hoffman* Court, however, missed the point when it emphasized that a “true threat” does not require an intent to carry it out. As the Court recognized in *R.A.V.*, of the three main purposes behind why threats are proscribable, two have nothing to do with the danger that the threats might lead to violence, that is, protecting hearers from fear and preventing the disruption that threats may cause.<sup>413</sup> The court should have spent its time focusing on whether *Hoffman* differed in any relevant way from *Watts*. It did not. The results should, therefore, have been the same: Hoffman’s conviction should have been reversed.

*Khorrami* is even less tenable. Under *Watts* and *Claiborne*, the poster would have been protected had it contained just faces and language like “Wanted for Crimes Against Humanity.” To be sure, the addition of the phrases “must be killed,” “execute now,” and “his blood need” added a menacing dimension to the poster. But given that the poster itself was a tool of social protest and that the statements were made on the poster in the context of social protest, they cannot be punished consistent with *Claiborne*. In *Claiborne*, Evers made remarks that were just as threatening in the context of his social protest.<sup>414</sup> In fact, his remarks were directed to the people “threatened,” where Khorrami, in fact, did not send his poster to Yitzhak Shamir, Shimon Peres, Teddy Kollek, or Shlomo Lahat. Thus, the poster, while hardly in “good taste,” or within the bounds of social acceptability—on that we can all agree—squarely falls well within protected political or social protest. We may also agree with

411. *Id.* at 1193.

412. *See supra* note 234 (discussion of *Watts v. United States*, 394 U.S. 705 (1969)).

413. *See supra* note 234 and accompanying text (quoting *Watts*, 394 U.S. at 707).

414. *See infra* Appendix C (Speech of Charles Evers).

Evers and disagree with the view point of Khorrami, but that sort of content discrimination<sup>415</sup> is precisely what the First Amendment prohibits. Free speech is for friend and foe alike.<sup>416</sup>

415. See *supra* text accompanying note 303 (quoting *Watts*, 394 U.S. at 708).

416. ¶1. *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (“not free thought for those who agree with us but freedom for the thought that we hate”).

¶2. The Seventh Circuit’s recent decision in *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002) (petition limited to scope of extortion and private equity under RICO), requires extended comment. While the court’s opinion on RICO law is unexceptionable, its treatment of the First Amendment is seriously flawed and in sharp and unfavorable contrast to the workman-like opinion of the Second Circuit in *New York v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001), which is analyzed *infra* note 623. Candor also requires that we disclose that one of our number, Blakey, represented Scheidler in a previous Supreme Court appearance. *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994). The Seventh Circuit’s decision in *Scheidler* is the appeal from the trial court’s ruling on remand of the Supreme Court’s first *Scheidler* opinion.

¶3. First, the court holds, inconsistently with the Ninth Circuit’s decision in *Religious Technology Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), that equity relief is properly available to private parties under RICO. We have no quarrel with the court’s holding. See G. Robert Blakey & Scott Cessar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 528 (1987) (“*Wollersheim*’s reasoning is fatally flawed, since it is inconsistent with the text, legislative history, and purpose of RICO, and it cannot be easily squared with the teaching of the Supreme Court on how to read statutes in general or RICO in particular.”). The conflict in the circuits will now apparently be resolved by the Supreme Court.

¶4. After its statutory analysis on the equity relief issue, the court turned to the defendant’s First Amendment arguments. *Nat’l Org. for Women*, 267 F.3d at 700. “All parties acknowledge,” the court observed, “that the defendants engaged in a substantial amount of protected speech . . .” *Id.* The court then, unsurprisingly, held that “liability cannot constitutionally be imposed on them for this portion of their conduct.” *Id.* Nevertheless, the court, mistakenly, concluded that the jury instructions and verdict forms contained the necessary constitutional protections. See *supra* note 314 (discussing the *Claiborne* requirement of special verdicts and carefully tailored jury instructions). First, the court expressed doubt about the scope of its power to review the record. *Nat’l Org. for Women*, 267 F.3d 700. In light of *Claiborne*, however, it should not have. See *supra* note 314 (discussing the proper role of an appellate court in First Amendment litigation). Despite the doubts, the court applied the standard most favorable to the defendants and still upheld the verdict. *Nat’l Org. for Women*, 267 F.3d at 700.

¶5. The court applied an incorrect test—that “the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN [the umbrella organization that loosely coordinated the demonstrations] engaged in illegal conduct . . .” *Id.* at 702. On the contrary, the focus must be not on the plaintiff’s evidence, but on the instructions and the verdicts and they hardly met the strict *Claiborne* standards. See *supra* note 314 (discussion of *Claiborne*). No one who sees, as we have, the instructions or verdict forms will reasonably conclude otherwise. The Special Interrogatories and Verdict Form are set out in *National Organization for Women*, 267 F.3d at 702 (see docket Nos. 97-3076, 99-3336, 99-3891, 99-

3897 and 01-2050). *Id.* Petition for Rehearing and Rehearing en banc of Defendant-Appellants Scheidler, Scholberg, Murphy & Pro Life Action League, Inc., *Nat'l Org. for Women*, apps. B-C (setting out relevant instructions); *see also id.* App. D (setting out the injunction). As it had to, the court acknowledged the applicability of *Claiborne*, but it did not follow it. *Nat'l Org. for Women*, 267 F.3d at 702.

¶6. First, it focused on the record, which is only part of its constitutional task; it then turned to the instructions and the jury verdict. Despite the court's holding to the contrary, the interrogatory answers and verdict forms do not adequately disclose the *evidentiary basis* for concluding that *specific parties* agreed to the unlawful purposes and conduct and "that carefully identify the impact of such unlawful conduct . . ." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933-34 (1982). Nor do they carefully require and demonstrate that the necessary distinction was made between the consequences of the protected and unprotected conduct of the defendants—or persons for whose individual conduct they may be constitutionally held responsible. *Id.*

¶7. The instructions, which permitted liability to be predicated on "overt acts" as well as "predicate acts," also violated *Beck v. Prupis*, 594 U.S. 494 (2000) (holding that mere overt acts are not cognizable). *See Nat'l Org. for Women*, 267 F.3d at app. C (especially Instruction No. 28 and Question No. 9). Moreover, the court failed to require a unanimous verdict on *each* predicate act that was alleged. *Cf.* Richardson v. United States, 526 U.S. 813 (1999) (holding that under the Continuing Criminal Enterprise Statute, 21 U.S.C. § 848, which was modeled after RICO, a unanimous verdict is required). The use of the generic state law extortion instruction (No. 26) by the district court was also hardly harmless, particularly in a First Amendment litigation, as the Court of Appeals held. *Nat'l Org. for Women*, 267 F.3d at 702-03; *see, e.g.,* N.Y. Times v. Sullivan, 376 U.S. 254, 284 (1964) (reviewing court *must* overturn verdict that *may* rest on an unlawful or unconstitutional theory); *cf.* Isaacs v. Sprint Corp., 261 F.3d 679, 682 (7th Cir. 2001) (variations in state law militate against class certification). In fact, the verdicts are, in substance, *general and not specific* as *Claiborne* manifestly requires. *See supra* note 314 (discussion of *Claiborne*). In addition, despite *Claiborne*, the *Scheidler* court found that its duty to review the instruction was "deferential." *Nat'l Org. for Women*, 267 F.3d at 704; *see supra* note 314 (discussion of *Claiborne*).

¶8. When the *Scheidler* Court finally turned to the injunctions themselves, it upheld them; it concluded that they were drawn as "precise[ly] as possible." *Nat'l Org. for Women*, 267 F.3d at 706. We have little quarrel with the court's judgment here, especially since it substantially narrows the text of the injunction by adding gloss that will well serve those who might be otherwise unconstitutionally affected by it. *See id.* (focusing on (1) the express exclusion for peaceful picketing, etc., (2) the provision for limiting the responsibility of the defendants for conduct by others not "actively [in] concert" with them, and (3) the pointed advice to the lower court to take "care in enforcing the injunction"). *But see id.* at 706-07 (Others acting in concert with the defendants or PLAN, which was not a party, without inducement or direction from the defendants, may be held in violation of the injunction, despite the general rule that the "only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden . . . , but what it has power to forbid, an act of a party." (quoting *Alemite Mfg. Corp. v. Stoff*, 42 F.2d 832, 833 (2d Cir. 1930) (Hand, J.))).

¶9. The Seventh Circuit next cursorily turned to what it dismissively termed "a hodgepodge of other challenges to the judgment, none of which need detain us long." *Nat'l Org. for Women*, 267 F.3d at 707. One issue, at least, merited considerably more attention than the court gave it: "obtaining" under the Hobbs Act, 18 U.S.C. § 1951(b) (2000). Rightly, the defendants contended that they did not "obtain" any of the plaintiff's "property." *Id.* at 709. Mistakenly, the court asserted that "a long line of precedent in this circuit hold[s]

that . . . ‘an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to . . . the victim is all that is required.’” *Id.* at 51 (citation omitted). In fact, the Seventh Circuit never so held; the language cited for the proposition, found in *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995), is plainly dicta. In fact, the defendants sought to obtain property for themselves. The matter is considered, in depth, by one of our number. Murray, *supra* note \*\*, at 718–19 & n.124 (tracing “extortion” from its common law roots into the Hobbs Act and concluding not only that the Seventh Circuit had not previously decided the issue by a square holding but also that “obtaining” under “extortion” requires more than the victim “giv[ing] up” the “property”; it also requires, as a property law offense like “larceny” and “robbery,” that the perpetrator or a third party must “get” the “property”); *accord* *United States v. Panaro*, 266 F.2d 939, 943 (9th Cir. 2001) (citing Murray, *supra* note \*\*). *But see* *United States v. Arena*, 180 F.3d 380, 393–94 (2d Cir. 2000) (reaching its contrary judgment by use of a 1976 dictionary without consideration of the common law background of extortion or the required rules for construction of a federal statute, including lenity, federal-state relations, etc.); see Murray, *supra* note \*\*, at 732–36, for a discussion and evaluation of *Arena*. The Supreme Court will now apparently resolve that issue.

¶10. Remarkably, another tribunal—in another time and place—treated the issues of culpable state of mind and individual responsibility in the context of action by an organization with the due attention it deserves in a free society, a central theme of these materials: the International Military Tribunal in Nuremberg, Germany, in 1945–46. Because those proceedings stand in sharp and unfavorable contrast with the jurisprudence of “true threats” in the circuits, they warrant close attention; they also involved people (Justice Robert Jackson and others) who would subsequently play a major role in the development of federal, state-of-mind jurisprudence. Indeed, those debates—and the judgment of the tribunal—are highly enlightening today, particularly in light of the Court’s decision in *Morrisette v. United States*, 342 U.S. 246 (1952), in which the Court’s opinion was authored by Justice Robert H. Jackson; it is a ringing affirmation of the central role that state of mind plays in federal criminal jurisprudence. See *infra* note 644 (analysis of opinion in *Morrisette* and its significance for state of mind in federal criminal jurisprudence).

¶11. The debates and the judgment also deserve to be more widely known in the context of modern RICO prosecutions, which, like the Nuremberg prosecution in Germany and in the United States in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), feature “enterprise criminality.” See *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (“finding that enterprise criminality” consists of “all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors” (quoting G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013–14 (1980))).

¶12. In due course, the twenty-four leaders of the National Socialist German Workers’ Party (N.S.D.A.P. or “Nazi”), the armed forces, the government, and banking industry in Nazi Germany were indicted. Along with the individuals, seven organizations were brought before the tribunal; they were the organizations through which the Nazis acquired and maintained power and conducted a world war, which ultimately took lives of anywhere from thirty-five to sixty million people and cost \$14 trillion. 29 NEW ENCYCLOPEDIA BRITANNICA 1022–23 (1992). They were also the instruments through which a policy was implemented for eliminating *lebensunwerten Leben* or *unnutze Esser* (“life unworthy of life” or “useless eater”). DEREK HUMPHRY & ANN WICKETT, *THE RIGHT TO DIE: UNDERSTANDING EUTHANASIA* 22 (1986). Those included in the “elimination project” were the handicapped, Gypsies, homosexuals, and six million Jews.

¶13. The charges at Nuremberg were as follows: (1) conspiracy to wage aggressive war, (2) waging aggressive war, (3) war crimes, and (4) crimes against humanity. The organizations, however, were not on trial in their corporate capacity; the trial focused on them to establish an element in the major offenders' trials that would be foreclosed in subsequent prosecutions of minor offenders. Under its charter, the prosecution had the right to secure, in effect, a declaratory judgment of the criminal character of organizations that would be binding in subsequent trials of individuals. General notice was given of the proceedings, and individuals were given the right to be heard at the discretion of the tribunal, in person or by affidavit. The charged organizations were the Reich Cabinet, the Leadership Corp of the Nazi Party, the S.S. (*Schutzstaffeln der N.S.D.A.P.*), the S.D. (*Sicherheitsdienst des Reichführers S.S.*), the S.A. (*Sturmabteilung der N.S.D.A.P.*), the Gestapo (*Geheime Staatspolizei*), and the General Staff and High Command of the German Armed Forces ("High Command").

¶14. One of the defendants was incompetent to stand trial; two committed suicide; six were sentenced to terms of imprisonment; twelve were hanged; and three were acquitted. (The three acquitted were subsequently tried and found guilty under German law.) Three organizations were not found criminal under the charter: the S.A., the Reich Cabinet, and the High Command. The trial lasted 166 days and heard 133 witnesses, including nineteen of the defendants; the basic defense of the individuals was "I didn't know." Understandably, the tribunal was unpersuaded by that particular defense plea.

¶15. Significantly, one week after the American prosecution concluded its case on the accused organizations, the tribunal submitted to the prosecution four questions designed, the tribunal said, to define—using language remarkably like *Claiborne*—"with more precision" the charges against the organizations found in the indictment: (1) What test of criminality should be applied in light of claims of conscription and ignorance of criminal purposes?; (2) When did an organization become criminal?; (3) Should any class of persons within an organization be excluded?; and (4) How should the elements of criminality be defined for the organizations? 5 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 228–29 (1946–49).

¶16. Arguments on these questions took three days. Justice Robert H. Jackson, the Chief American Prosecutor, was the first to speak; he began his argument by saying that the United States did "not seek to convict the whole German people of crime." *Id.* at 356. "But [this] trial should not," he said, "absolve the whole German people except the 21 men in the dock." *Id.* "The success of their design," he argued, "was made possible because great numbers of Germans organized themselves . . . [so that] the power of their leaders was extended and magnified." *Id.* Individuals must be held accountable for their conduct. Nevertheless, everyone who was responsible could not be tried in one trial. "[T]he number of individual defendants that fairly can be tried in a simple proceeding probably does not greatly exceed the number now in your dock." *Id.* at 357. Individual conduct must be the focus of the trial.

¶17. To be criminal, membership in an organization had to be "intentional and voluntary." *Id.* at 360. But a member was, Jackson argued, "chargeable not only with what he knew but with all of which he was reasonably put on notice." *Id.* Yet solely looking at individuals was insufficient. "Not even the most tolerant of governments permit an accumulation of private power in organizations to a point where it rivals, obstructs, or dominates the government itself. To do so would be to grant designing men a liberty to destroy liberty." *Id.* at 361. "Protection of the citizen's liberty . . . requir[es] even free governments to enact laws making criminal those aggregations of power which threaten to impose their will on unwilling citizens." *Id.* Justice Jackson then reviewed the basic principles of conspiracy law in the United States; he concluded with the observation that "organizational

affiliation is a quick and simple, but at the same time a fairly accurate way of speaking about “what . . . [an] organization actually” does. *Id.*

¶18. Jackson then offered to the tribunal four basic principles of organizational liability: “[1] the organization or group . . . must be some aggregation of persons associated in [an] identifiable relationship with a . . . general purpose, (2) membership must be voluntary, (3) the aims of the organization must be criminal, [and] (4) the aims must be of a such a character that membership may properly be charged with knowledge, [that is,] its purpose or methods . . . [must have been] open or notorious.”

*Id.* 367–68. The test, he argued, “would be not what . . . [a person] actually knew, but what . . . a person of common understanding . . . should have known.” *Id.* at 369. “Group or organization should be given no artificial or sophisticated meaning. The word ‘group’ . . . [is] a broad term, implying a loose and less formal structure or relationship than is implied in the term ‘organization.’” *Id.*

¶19. Not every person in an organization was necessarily worthy of prosecution. Jackson would, he said, exclude in the Gestapo, for example, “persons employed in a purely clerical, stenographic, janitorial or similar unofficial routine tasks.” *Id.* at 371. Sir David Maxwell-Fye, the Chief British Prosecutor, concurred in Justice Jackson’s principles. *Id.* at 378. In particular, he supported Jackson’s “constructive knowledge” test. *Id.* (“Of such a character” that he “ought to have known.”). So, too, did the French Prosecutor. *Id.* at 384. He only clarified one element: the distinction between a “legal entity” and a “de facto group.” *Id.* at 385–86. Both should, he argued, come within the prohibition of the charter. When pressed by the tribunal on the point of “should have known,” Justice Jackson would only concede that lack of knowledge, if argued by the defense, should go solely to mitigation, not to exculpation. *Id.* at 444, 448–49 (“We do not want to set up a trap for innocent people . . . but there can be no doubt that every person affiliated with this movement [knew of its illicit aims.] . . . [A] court . . . [could] take judicial notice (of what) must have been known in Germany . . .”).

¶20. Maxwell-Fye supported Jackson’s position. *Id.* at 458 (“[T]he Prosecution’s test is constructive knowledge . . . [it was] only too true that . . . a large number of people [in Germany] made a habit of sticking their heads in the sand . . .”). Strikingly, only General R. A. Rudenko, the Chief Soviet Prosecutor, demurred. When pressed by the tribunal, Rudenko squarely affirmed the “principle of individual guilt,” and he readily concluded that somewhere an individual might “have been unaware of [the organization’s] criminal purpose.” *Id.* at 471. That would be, he recognized, a “question of individual responsibility” on which a “defense” could be “submitted.” *Id.* at 471–72 (“stating that the strength of the defense depends upon the extent of his information, the reasons for his entering, and the reasons for his leaving”). No one who reads the record at Nuremberg, as we have, could avoid being struck by the striking irony that neither the American nor the British prosecutor stood squarely behind individual responsibility based on personal conduct and state of mind. In fact, only the Soviet prosecutor (who knew from *personal* experience under a different system what neither the American nor the Englishman could know from his *personal* experience) recognized that respect for the freedom of the individual in free society requires individual responsibility based on personal conduct and state of mind.

¶21. On October 1, 1946, the tribunal handed down its judgments. Judicial Decisions, *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172 (1947) [hereinafter *International Military Tribunal (Nuremberg)*]. Significantly, for the purposes of these materials, the tribunal flatly rejected the arguments of the American and British advocates and squarely established, consistent with the advocacy of the Soviet prosecutor, a standard of individual responsibility based on individual conduct and state of mind:



A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups . . . fix[es] the criminality of its members . . . [it] exclude[s] persons who had no *knowledge* of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were *personally* implicated in the commission of acts declared criminality by . . . the Charter as members of the organization. *Membership alone is not enough* . . .

*Id.* at 251 (emphasis added); cf. Blakey & Roddy, *supra* note 11, at 1617–26, 1634–56 (Appendix D (state of mind) and Appendix G (association in fact)).

¶22. After finding that certain of the organizations existed as alleged during the period of the indictment, and that they had either criminal purposes or engaged in criminal methods, the tribunal turned to the S.A., the Reich Cabinet, and the High Command. The tribunal first examined the S.A. After the purge of June 30, 1934, the S.A. was, the tribunal found, reduced “to the status of a group of unimportant Nazi hangers-on.” *International Military Tribunal (Nuremberg)*, *supra* ¶ 21, at 268. It was not shown, as required by the charter, that the atrocities that the S.A. committed before 1934 were part of a “specific plan to wage aggressive war.” *Id.* While in specific instances units of the S.A. subsequently engaged in war crimes and crimes against humanity, “it cannot be said that its members generally participated in or even knew of the criminal acts.” *Id.* For these reasons, the tribunal did “not declare the SA to be a criminal organization” under the charter. *Id.*

¶23. The tribunal then turned to the Reich Cabinet and declined to declare it a criminal organization since it never “really acted as an organization.” *Id.* Indeed, after 1937, it held no meetings; its members “were undoubtedly involved in the conspiracy to make aggressive war,” but they were “involved as individuals.” *Id.* At best, it was “merely an aggregation of administrative officers subject to the absolute control of Hitler.” *Id.* It was not, the tribunal found, a functioning organization. Similarly, the tribunal declined to declare the High Command a criminal organization, since it was neither “an ‘organization’ nor a ‘group’ within . . . the Charter.” *Id.* at 270. Undoubtedly, high ranking officers (the indictment did not charge middle or lower level officers) “coordinated and directed the three services” but to “derive from this pattern of their activities the existence of an association or group” did not, it held, follow. *Id.* The officers were instead “an aggregation of military men . . . who happen at a given period of time to hold the high-ranking military positions.” *Id.* at 271. Nevertheless, while “they actively participated in . . . crimes, or sat silent as acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world had ever had the misfortune to know,” they acted as individuals, not as an organization or group. *Id.* They should, the tribunal found, “[w]here the facts warrant it . . . be brought to trial” as individuals. *Id.* The principles applied at Nuremberg are now a settled part of international law; they were used, for example, as precedent in the trial of Adolf Eichmann for his part in the “Final Solution” (*Endlosung*). See Cr.A. (Jm.), Attorney Gen. of the Gov’t of Isr. v. Eichmann, 36 I.L.R. 5 (1961), *aff’d*, Cr.A. (Jm.), 36 I.L.R. 277 (1962).

¶24. The most succinct, yet comprehensive summary of the trial of the major war criminals is DREXEL P. SPRECHER, 2 *INSIDE THE NUREMBERG TRIAL* (1999); it also contains an excellent chronology and an extensive bibliography. *Id.* at 1537–44, 1549–57. The best historical account of the process through which the United States was drawn into the trials, based on a thorough analysis of the documentary record, is BRADLEY SMITH, *THE ROAD TO NUREMBERG* (1981); the best account of the process by which the tribunal itself reached its verdict is BRADLEY SMITH, *REACHING JUDGMENT AT NUREMBERG* (1977).

¶25. Judge John J. Parker, an alternate member of the tribunal, returned to the United States where he served on the Fourth Circuit. Parker wrote *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940), which held that “knowledge” is the proper standard for aiding and abetting within 18 U.S.C. § 2; he also wrote *Scales v. United States*, 227 F.2d 581, 587 (4th Cir. 1955), *aff’d on other grounds*, 367 U.S. 203 (1961), which held that knowledge is the proper standard for conspiracy with 18 U.S.C. § 371. Professor Herbert Wechsler, a former Assistant Attorney General for the Criminal Division in the U.S. Department of Justice and an aid to Judge Francis Biddle, who was a former Attorney General of the United States as well as a member of the tribunal, returned to the United States, where he became one of the reporters for the Model Penal Code that adopted “purpose” as the standard for complicity and conspiracy. See MODEL PENAL CODE §§ 2.06, 5.03 (1961).

¶26. When Justice Jackson returned to the United States he wrote the opinion for a unanimous Supreme Court in *Morissette v. United States*, 342 U.S. 246, 250–76 (1952), which established a general presumption of state of mind (*scienter*) for federal criminal statutes. For a detailed analysis of a watershed decision in the development of federal criminal jurisprudence, whose importance for the jurisprudence of the federal criminal law can hardly be over-emphasized, see *infra* note 644. The significance of *Morissette* for the central argument of these materials on state of mind need only be pointed out here. See generally Blakey & Roddy, *supra* note 11, at 1345–90 (required state of mind in 18 U.S.C. § 2 (aiding and abetting) is “intent or purpose”); *id.* at 1430–38 (required state of mind in 18 U.S.C. § 371 (conspiracy) is “intent or purpose”); *id.* at 1617–26 (history of state of mind in criminal jurisprudence); *id.* at 1646–56 (containing analysis of the association-in-fact enterprise under RICO: concept, composition, and proof (separateness, structure, common purpose, and continuity)). See also Alexander D. Tripp, Comment, *Margins of the Mob: A Comparison of Reves v. Ernst & Young with Criminal Association Laws in Italy and France*, 20 FORDHAM INT’L. L.J. 263 (1996).

¶27. RICO was a claim for relief submitted to the jury in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), but it played a small role in the decision of the en banc opinion. Nevertheless, since it was used in both *American Coalition* and *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), against protests that implicated First Amendment concerns and basic principles of the federal criminal law, a more detailed treatment of its central concepts is relevant. Consistent with the central holding of the Nuremberg Trial, RICO does not prohibit “membership” in an organization; it focuses on a person’s “participation,” through “racketeering activity” in the “affairs of an enterprise.” 18 U.S.C. § 1962(c) (1994). The shift in the drafting of the key pieces of legislation from “membership” to “participation” is traced in detail in Blakey & Roddy, *supra* note 11, at 1666–71. Broadly, the original draft of the bill that developed into RICO, introduced by Senator John L. McClellan, prohibited knowingly “becom[ing] a member of (1) the Mafia or (2) another organization having . . . [as] its purposes” engaging in specified crimes. S. Res. 2187, 89th Cong. § 2(a) (1965). The bill was subjected to trenchant criticism by the Department of Justice on constitutional grounds in light of earlier questionable efforts to deal with membership in the Community Party in the Smith Act; it was redrafted and merged with another bill, originally drafted by Senator Roman Hruska, which outlawed “investing unreported income” in “any business enterprise” and using that “income to establish or operate . . . such . . . business enterprise.” S. Res. 2204, 90th Cong. (1967). Senate Resolution 2204 became Senate Resolution 1861 in the Ninety-first Congress (1969), which, in turn, became Title IX (“RICO”) of the Organized Crime Control Act.

¶28. This crucial beginning of the legislative history of Senate Bill 2187 was entirely missed by Professor, now Judge, Gerald E. Lynch in his otherwise thoughtful work on RICO, despite specific reference to it in Blakey & Gettings, *supra* ¶ 11 (citing Cressey, *The Functions*

*d. The Ninth Circuit.* Prior to the panel opinion in *American Coalition*,<sup>417</sup> the Ninth Circuit was an “objective, speaker-based” jurisdiction. The leading case was *United States v. Orozco-Santillan*,<sup>418</sup> which the panel opinion in *American Coalition* did not question. Orozco-Santillan was convicted on three counts of threatening a federal law enforcement officer in violation of 18 U.S.C. § 115(a)(1)(B). Count III stemmed from his arrest, which occurred during a routine INS stop in a park in Los Angeles. Daniel Vela, an INS agent, questioned Orozco-Santillan as he was handcuffed and kneeling on the ground. When Vela asked him to stand, Orozco-Santillan replied, “take these handcuffs off and I’ll

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*and Structure of Criminal Syndicates*, in TASK FORCE REPORT: ORGANIZED CRIME, PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 960 (1967) (analyzing S. 2187)). Compare Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerald E. Lynch*, 88 COLUM. L. REV. 774 (1988), with Gerald E. Lynch, *A Reply to Michael Goldsmith*, 88 COLUM. L. REV. 802 (1988), and Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987). Professor Lynch’s factual mistake distorts his legal analysis and tends to undermine much of his otherwise thoughtful pieces on RICO. RICO does not, in short, prohibit “being a criminal,” as Lynch suggests by the title to his article, but does prohibit “participating” in the “affairs” of an “enterprise” by a “pattern of criminal activities.” 18 U.S.C. § 1962(c). Accordingly, it adroitly sidesteps the constitutional problem of criminalizing “membership” in associations that may have multiple goals, not all of which may be criminal. Plainly, RICO does not focus on what you *think* or whom you *associate* with but on what you *do, intend, and know*—and its criminality under specified state and federal offenses. See, e.g., *United States v. Elliot*, 571 F.2d 880, 906–07 (5th Cir. 1978) (without knowledge of RICO aspects of conspiracy, RICO conviction reversed), *cert. denied*, 439 U.S. 953 (1978). It fully reflects, therefore, the central legal lessons of Nuremberg on the requirements of personal conduct and state of mind to establish individual responsibility. Compare *United States v. Beasley*, 72 F.3d 1518, 1527 (11th Cir. 1996) (finding a RICO prosecution consistent with the First Amendment even though individuals used religious organization as an “enterprise” through which they engaged in a pattern of criminal activity), and *United States v. Dickens*, 695 F.2d 765, 772–76 (3d Cir. 1982) (findings similar to *Beasley*), with *Dennis v. United States*, 341 U.S. 494, 502 (1951) (finding that Smith Act prosecutions for conspiracy to advocate the overthrow of the government by force or violence are constitutional), and *Yates v. United States*, 354 U.S. 298, 318 (1957) (finding that the Smith Act is limited to advocacy of concrete violent action, not abstract principles of advocacy), *overruled in part on other grounds*, *Burks v. United States*, 437 U.S. 1, 7 (1978).

¶29. Civil RICO litigation, like *American Coalition* or *National Organization of Women*, that proceeds without concern for the teaching of *Claiborne*, threatens to undermine these careful drafting efforts by Congress as well as the First Amendment. In particular, if a free society can give the leaders of National Socialism due process, that is, a standard of individual responsibility including personal conduct and knowledge as the proper state of mind, we ought to be able to do as much for demonstrators in the United States, no matter what they demonstrate for or against.

417. For a detailed description, see *supra* Part II.B.

418. 903 F.2d 1262 (9th Cir. 1990).

kick your f\*\*king a\*\*.”<sup>419</sup> The agents took him to jail and booked him on immigration charges; there, he repeated his threat that “he would ‘kick [Vela’s] a\*\*’ if Vela removed his handcuffs.”<sup>420</sup>

Count II was based on statements Orozco-Santillan made during a phone call to Vela while out on bail, approximately two months after his arrest. “Orozco-Santillan said he was back on the street and could obtain information about Vela from another INS agent . . . .”<sup>421</sup> He also said, “‘you motherf\*\*ker, lo vas a pagar,’ which Vela translated as ‘you will pay for this.’”<sup>422</sup> Count I was based on a second phone call, made two days after the first and the day after Vela arrested Orozco-Santillan’s neighbor. Orozco-Santillan said, “[Vela], this is Orozco. Somebody is going to die.”<sup>423</sup> He also said, “‘you ain’t s\*\*\*, Vela. You’re just a punk. You better let [the neighbor] go. You had no right arresting him. You can’t f\*\*k with me Vela, cause I’m out on bail! You’re going to get you’re a\*\* kicked, punk.’”<sup>424</sup> The court found that the statements, “made in a loud and angry manner, frightened Vela, and he understood [Orozco] was ‘out to kill him.’”<sup>425</sup> When Orozco-Santillan was arrested, five days after the second phone call, he said, “You can’t f\*\*k with me, Vela, just because I called.”<sup>426</sup>

Orozco-Santillan was convicted on all three counts; he unsuccessfully appealed. First, the court examined whether his statements constituted threats. The court began by borrowing its approach from other statutes; it then defined a “threat” as “‘an expression of an intention to inflict evil, injury, or damage on another.’”<sup>427</sup> Beyond its definition, the court required that “[a]lleged threats . . . be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. . . .

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419. *Id.* at 1264 (alteration added).

420. *Id.* (alteration added).

421. *Id.*

422. *Id.* (alteration added).

423. *Id.*

424. *Id.* (alteration added).

425. *Id.*

426. *Id.* (alteration added).

427. *Id.* at 1265 (quoting *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989) (quoting WEBSTER’S THIRD INTERNATIONAL DICTIONARY 2382 (1993))).

[T]hat a threat is subtle does not make it less of a threat.”<sup>428</sup> The court explained:

Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.<sup>429</sup>

Regarding the First Amendment, the court continued:

Although a threat must be “distinguished from what is constitutionally protected speech,” this is not a case involving statements with a political message. A “true” threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the [F]irst [A]mendment.<sup>430</sup>

The court found sufficient evidence on all three counts.<sup>431</sup>

Regrettably, *Orozco-Santillan* cannot be squared with the process required by Supreme Court First Amendment jurisprudence, though its result, at least in part, is fair enough. First, on count II, Vela was a government employee like the President in *Watts*.<sup>432</sup> The defendant was upset with the way Vela was doing his job, much like Watts was upset with how the President was doing his.<sup>433</sup> If this were all that the case involved, *Watts* would end the matter. Nevertheless,

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428. *Id.* (quoting *Gilbert*, 884 F.2d at 457). Later, the Ninth Circuit would carefully and correctly point out that it did

not mean to suggest that [the person to whom the threat was made] need only assert that he or she felt threatened by another’s conduct in order to justify overriding that person’s right to free expression. While courts may consider the effect on the listener when determining whether a statement constitutes a true threat, the final result turns upon whether a reasonable person in these circumstances should have foreseen that his or her words would have this effect.

*Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996).

429. *Orozco-Santillan*, 903 F.2d at 1265. The court clarified that under its objective standard, no subjective proof was required in order to show that a defendant intended to threaten. As the court explained, “The only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat.” *Id.* at 1265 n.3.

430. *Id.* at 1265–66 (citation omitted) (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)).

431. *Id.* at 1266; *cf.* *United States v. Poocha*, 259 F.3d 1077, 1079–85, 1081 n.1 (9th Cir. 2001) (discussed *supra* note 356).

432. *See supra* text accompanying notes 234–48.

433. *See supra* Part IV.A.

Orozco-Santillan's threats, like Watts's, were also conditional. *Watts* teaches, too, that protest is not always channeled into dulcet phrases.<sup>434</sup> That the speech was vituperative, therefore, does not remove it from the First Amendment.<sup>435</sup> Nevertheless, what distinguishes Orozco-Santillan's threats from Watts's threats is that they were not made in public or on a matter of public concern; they were not just criticisms of a governmental official but instead were apparently serious statements of an intent to inflict harm on the officials and personally directed to that official. Had the district court made an independent judgment on the constitutional issue and not paid deference to the jury and had the standard adopted required an inference of subjective intent, as well as an objective showing of the threatening character of the language, Orozco-Santillan's conviction would have been proper.

Count III, on the other hand, which was based on the defendant's "threats" to inflict violence on Vela if Vela released him from his handcuffs, cannot constitute a "true threat." As in *Watts*, the threat was conditional.<sup>436</sup> Threats are proscribable, *R.A.V.* teaches,<sup>437</sup> because they may cause fear and disruption, but here the "threat" could not reasonably cause Vela fear or bring about disruption—Orozco-Santillan could not hurt Vela unless Vela released the handcuffs. Finally, Count I is arguably contrary to *Watts*. Criticism of a government employee—even the President—is protected, even where the criticism is less than civil.<sup>438</sup> While Watts did not utter a face-to-face threat, as was the threat to Vela, that Vela was a law enforcement officer must be counted in the balance. Vituperative language is routine in street confrontations; it ought not be routinely construed as independently criminal, even though it is hostile. Multiplying crimes will not create civility in police/offender encounters. Going down that route merely compounds hostility. The category of merely verbal crimes ought to be narrowly, not expansively, construed.

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434. *Watts*, 394 U.S. at 706.

435. *Id.*

436. *Id.*

437. See *supra* note 234 (discussing *Watts*, 394 U.S. 705).

438. See, e.g., *Watts*, 394 U.S. at 708 ("We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.'").

The panel opinion in *American Coalition* assumes the validity of *Orozco-Santillan*, but the panel's First Amendment analysis is manifestly more rigorous than that of the en banc opinion.<sup>439</sup> Following the Supreme Court's teachings in *Claiborne* and *Watts*, the panel makes several important distinctions, which were largely ignored by the en banc majority. Nevertheless, they merit repetition. First, public speech ought to be distinguished from speech privately addressed to another; private speech is less likely to be protected as a general matter—though of course, this is not dispositive.<sup>440</sup> Second, speech that is not explicitly threatening ought to be distinguished from explicitly threatened speech, where harm is threatened either by the speaker or someone connected with him.<sup>441</sup>

Finally, while context can render ambiguous language a “true threat,” that context ought to be derived from the speaker; context that a speaker does not authorize, direct, or ratify ought not limit the speaker's First Amendment freedoms.<sup>442</sup> The panel opinion in *American Coalition* does not, however, indicate *when* a trial court should address the question of whether speech is protected. Although it points to *Claiborne* for its “threat” standard, it expressly avoids the question whether a person must intend to threaten or whether mere negligence (of the objective, speaker-based kind used in *Orozco-Santillan*) suffices to render a threat unprotected by the First Amendment. Those issues, too, must be rigorously examined.<sup>443</sup>

## 2. The objective, hearer-based test

a. *The Fourth Circuit.* The Fourth Circuit first touched on “true threats” in *United States v. Patillo*,<sup>444</sup> where it reasoned that the Supreme Court in *Watts* required a “true threat” as an element of 18 U.S.C. § 871(a). With little discussion, it quickly concluded in *Patillo* that a “true threat” was shown.<sup>445</sup> In *United States v.*

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439. See, e.g., *id.*

440. See *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1018–19 (9th Cir. 2001), *reh'g en banc granted*, 268 F.3d 908, (9th Cir. 2001), *rev'd*, 290 F.3d 1058 (9th Cir. 2002).

441. *Id.* at 1018.

442. *Id.*

443. See *infra* Part VII.B.1.

444. 431 F.2d 293 (4th Cir. 1970), *panel opinion adhered to*, 438 F.2d 13 (4th Cir. 1971) (en banc).

445. *Id.* at 295.

*Maisonet*,<sup>446</sup> on the other hand, the court offered a slightly more elaborate discussion of “true threats.”

Maisonet was convicted of violating 18 U.S.C. § 876. At first, Maisonet was convicted of another crime and sentenced in the Superior Court of the District of Columbia. While incarcerated, he sent a personal letter to the judge who sentenced him, mailed to the judge’s home in Virginia, accusing him of prejudice against Puerto Ricans and declaring his sentence illegal. The letter continued: “I may have to do all my ten (10) years, but if I ever get out of here and nothing happen [sic] to me while I am in here, you will never be able to be prejudice [sic] and racist against another Puerto Rican like me.”<sup>447</sup> Maisonet addressed the letter to the judge at his home “so that it would receive the judge’s personal attention.”<sup>448</sup>

Maisonet unsuccessfully appealed his threat conviction, asserting that he expressed his intent to seek the judge’s removal from office and offering a First Amendment defense. The court began its analysis by holding that “[e]ven when [a] defense is based on a claim of [F]irst [A]mendment rights” the case should be submitted to the jury because

[w]hen a motion for a directed verdict of acquittal is made in a criminal case, the sole duty of the trial judge is to determine whether there is substantial evidence which, taken in the light most favorable to the [prosecution], tends to show that the defendant is guilty beyond a reasonable doubt.<sup>449</sup>

The court continued, “whether a letter that is susceptible of more than one meaning—one of which is a threat of physical injury—constitutes a threat must be determined in the light of the context in which it was written.”<sup>450</sup> The court then proceeded to state a test: “If there is substantial evidence that tends to show beyond a reasonable doubt that an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury, the court should submit the case to the jury.”<sup>451</sup>

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446. 484 F.2d 1356 (4th Cir. 1973).

447. *Id.* at 1357.

448. *Id.*

449. *Id.* at 1358 (citation omitted).

450. *Id.*

451. *Id.*



The court found ample evidence of a true threat. It observed:

Maisonet had been sentenced to prison by the judge to whom he addressed the letter; he considered the sentence to be illegal; he charged that the judge was motivated by prejudice and racism; he addressed the letter to the judge's home; and he said nothing in the letter about having the judge investigated or about seeking his removal.<sup>452</sup>

Consequently, the court affirmed Maisonet's conviction.<sup>453</sup>

The reasoning of *Maisonet*—if not its result—amply demonstrates that the Fourth Circuit does not adequately protect First Amendment freedoms in the context of “true threats.” Maisonet—like Watts—was upset with a government officer: a judge in *Maisonet* and the President in *Watts*.<sup>454</sup> The crucial difference is that Watts's threat was made in a public place in the context of a public debate on a subject of public concern while Maisonet made his threat to the judge personally and mailed to his home.<sup>455</sup> Moreover, the court's analysis in *Maisonet* gives unwarranted deference to the jury. Apart from the issue of the subjective intent, the principal vice of the decision—not its result—is its use of the jury, where the usual standards of review are deferential to the jury.<sup>456</sup> The court in the first instance, as a matter of law, ought to distinguish between protected and unprotected speech or expressive conduct.<sup>457</sup> Maisonet was convicted—fair enough on the facts—but the process was not consistent with the proper protection of free speech. First Amendment freedoms, in short, require a more discriminating process.

*b. The Eighth Circuit.* The Eighth Circuit's most comprehensive decision on “true threats” is *United States v. Dinwiddie*,<sup>458</sup> in which the government civilly sued Regina Dinwiddie, an anti-abortion protestor. The government alleged that she violated the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248(a)(1), and it sought an injunction barring further violations. At trial, the district

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452. *Id.*

453. *Id.* at 1359.

454. *See Watts v. United States*, 394 U.S. 705, 706–07 (1969).

455. *See supra* Part IV.A.2.a.

456. *See supra* note 137 (analysis of standards of review).

457. *See infra* Part VII.A.

458. 76 F.3d 913 (8th Cir. 1996).

court found that Dinwiddie violated FACE by unambiguously threatening to use physical force against Planned Parenthood's staff. The court found that

Mrs. Dinwiddie directed particularly pointed threats at Dr. Robert Crist, a physician who is the Medical Director of Planned Parenthood. Over a six- to eight-month period beginning in mid-1994, the defendant made approximately 50 comments to Dr. Crist, often through a bullhorn, warning "Robert, remember Dr. Gunn [a physician who was killed in 1993 by an opponent of abortion]. . . . This could happen to you. . . . He is not in the world anymore. . . . Whoever sheds man's blood, by man his blood shall be shed."<sup>459</sup>

Similarly, she told Patricia Brous, the Executive Director of Planned Parenthood, "Patty, you have not seen violence yet until you see what we do to you."<sup>460</sup>

459. *Id.* at 917. The court did not consider alternative interpretations of the arguably "ambiguous statements." Here, as in *American Coalition*, the statements were, in fact, ambiguous. *See supra* note 59 and accompanying text. The text admits of another reading, which is hardly implausible. The statement could just as easily be read as a warning, *not* a threat, of what "might happen," not necessarily what Dinwiddie herself, or another connected to her, would do. *See supra* note 15 (analysis of difference between "warning" and "threat"); *see infra* Appendix B (Natural language: Generality, Ambiguity, and Vagueness) ¶¶ 3–5. In other circuits, ambiguity does *not* generally preclude sending the case to the jury. *See, e.g.*, *United States v. Fulmer*, 108 F.3d 1486, 1491 (1st Cir. 1997); *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990) ("The threat in this case was ambiguous, but the task of interpretation was for the jury."); *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990) ("The fact that a threat is subtle does not make it less of a threat." (citation and quotation marks omitted)); *United States v. Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973).

The Eighth Circuit, however, in *United States v. Barclay*, 452 F.2d 930 (8th Cir. 1971), held that "[w]here a communication contains language which is equally susceptible of two interpretations, one threatening, and the other nonthreatening, the government carries the burden of presenting evidence serving to remove that ambiguity. Absent such proof, the trial court must direct a verdict of acquittal." *Id.* at 933. That proof was not offered here by the government. Under the Eighth Circuit's own jurisprudence, therefore, the matter could not have been submitted to a jury; accordingly, the district court should not have found the facts against Dinwiddie.

460. *Dinwiddie*, 76 F.3d at 917. That Dinwiddie supposedly threatened the persons directly was important under Eighth Circuit precedent, although the court did not so observe. *See, e.g.*, *United States v. Bellrichard*, 994 F.2d 1318, 1321–22 (8th Cir. 1993) (dealing with letters rather than oral communications and noting that "[a]s a general proposition, . . . [communication] delivered to a person at home or at work is somewhat more likely to be taken by the recipient as a threat than is an oral statement made at a public gathering, which was the situation in *Watts*" and that "[a]lthough the government agreed to save time at trial by not presenting evidence of the recipients' reactions to the letters, we suspect that, unlike the

Dinwiddie challenged the injunction on appeal, arguing that her “threats” were actually First Amendment protected speech. The Eighth Circuit disagreed, noting Brous’s testimony that “the words that have been thrown, through the bullhorn or otherwise, at staff and patients have become much more violent. There is a higher level of stress. We have had to have counselors deal with stress among the staff.”<sup>461</sup> The court also observed:

Dr. Crist, Ms. Brous, and other members of Planned Parenthood’s staff testified that Mrs. Dinwiddie’s conduct . . . caused them to fear for their personal safety. Dr. Crist stated that because of his fear of the defendant, he now wears a bullet-proof vest. Planned Parenthood has responded to Mrs. Dinwiddie by placing an armed guard at its front door.<sup>462</sup>

Nevertheless, the court recognized:

[a]lthough the government may outlaw threats, . . . the First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive. What is offensive to some is passionate to others. The First Amendment, therefore, requires a court (or a jury) that is applying [a statute]’s prohibition on using “threats of force” to differentiate between ‘true threat[s]’ and protected speech.<sup>463</sup>

The court then explained that an alleged threat must be analyzed “‘in the light of [its] entire factual context,’ and [the factfinder must decide] whether the recipient of the alleged threat could reasonably conclude that it expresses ‘a determination or intent to injure presently or in the future.’”<sup>464</sup> The court, in short, adopted an objective, hearer-based standard. The court further offered a list of factors that were considered in past Eighth Circuit cases. They included:

the reaction of the recipient of the threat and of other listeners; . . . whether the threat was conditional; . . . whether the threat was

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crowd at the anti-war rally in *Watts*, the recipients did not laugh when they read [the defendant’s] messages”).

461. *Dinwiddie*, 76 F.3d at 917.

462. *Id.* at 918.

463. *Id.* at 925; *accord* United States v. McDermott, 822 F. Supp. 582, 592 (N.D. Iowa 1993) (stating that, in the Eighth Circuit, “[t]he question of whether language constitutes a threat is a question for the jury” (citation omitted)).

464. *Dinwiddie*, 76 F.3d at 925 (citing *Martin v. United States*, 691 F.2d 1235, 1240 (8th Cir. 1982)).

communicated directly to its victim; . . . whether the maker of the threat had made similar statements to the victim in the past; . . . and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.<sup>465</sup>

Though Mrs. Dinwiddie did not specifically say to Dr. Crist, “I am going to kill you,” the court concluded that “the manner in which Mrs. Dinwiddie made her statements, the context in which they were made, and Dr. Crist’s reaction to them all supported the conclusion that the statements were ‘threats of force’ that ‘intimidated’ Dr. Crist.”<sup>466</sup> Consequently, it affirmed the lower court’s finding that Mrs. Dinwiddie’s comments were “true threats” and not protected speech.<sup>467</sup>

The *Dinwiddie* approach was also followed in *United States v. Hart*,<sup>468</sup> where Fred J. Hart rented two Ryder trucks and parked them in the driveways of two Little Rock, Arkansas abortion

465. *Id.* The court gave no guidance on the appropriate weight to give each factor; indeed, it hedged, pointing out that the “list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.” *Id.*

466. *Id.* The court added, in a footnote, that “the fact that Mrs. Dinwiddie did not specifically say to Dr. Crist that she would injure him does not mean that Mrs. Dinwiddie’s comments were not ‘threats of force.’” *Id.* at 925 n.9.

467. *Id.* at 926.

468. 212 F.3d 1067 (8th Cir. 2000). Similarly, the circuit court purported to apply *Dinwiddie* in *Doe v. Pulaski County Special School District*, 263 F.3d 833 (8th Cir. 2001), *vacated by* No. 01-1048, 2001 U.S. App. LEXIS 23877 (8th Cir. Nov. 5, 2001). There, an eighth-grade student accused of threatening a classmate successfully challenged his expulsion. The school district argued that the expulsion was proper since a true threat was made. While the circuit court analyzed the *Dinwiddie* factors, it obfuscated the circuit’s approach by quoting approvingly from Second, Sixth, and Ninth Circuit opinions, where markedly different approaches are followed. Amazingly, the court claimed that it was “integrating” these various approaches with its own and then—nakedly—concluded that the proper test was to “ask whether a reasonable person would foresee that . . . [another’s communication] could be interpreted by [the recipient] as a serious expression of intent to harm . . . .” *Id.* at 837. That the test leaves much to be desired may be seen from the ease in which the majority and dissenting opinions reach opposite conclusions based on the same set of facts. *Compare id.* at 837–38 (majority), *with id.* at 838–39 (dissent). A more nuanced approach is required.

After the editorial process for these materials was substantially completed, the Eighth Circuit granted en banc rehearing in *Doe* and reversed (6-4) the panel opinion. *See Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (2002) (reaffirming *Dinwiddie*, rejecting *Fulmer*’s criticism (undue danger of giving too much attention to the too-sensitive hearer), and holding that an intent to communicate must be found (not an intent to carry out the threat or a capacity to engage in the threatened conduct), that speaker reaction is relevant, and that the full context must be examined, including the speaker’s self-created image as a violent person.

clinics.<sup>469</sup> When the employees arrived at the clinics that morning, they “were alarmed” as the trucks reminded them “of the catastrophic 1995 bombing of a federal office building in Oklahoma City, Oklahoma, involving a Ryder truck . . . . They immediately left the buildings and notified the police.”<sup>470</sup> When the bomb squad investigated, no explosive materials were found.<sup>471</sup>

At a trial for violating FACE,<sup>472</sup> the government offered testimony from employees who said that they feared that the trucks contained bombs. Police officers also testified that they believed that the trucks posed a threat. In addition, the government introduced stipulated testimony from Hart’s father, who said that “Hart acted with the intent that ‘if people believed that there was a bomb on one or more of those Ryder trucks, that it would have been worth it in order to save at least the life of one baby.’”<sup>473</sup> For his part, Hart offered the testimony of Carrie Land, a Special Agent for the FBI. Land testified that shortly after Hart’s indictment, she noticed several Ryder trucks parked outside the FBI’s offices in Little Rock, but she did not find them threatening “because she knew that the other occupants of the building were in the process of moving.”<sup>474</sup>

Hart was convicted; he unsuccessfully appealed his conviction. The court began its opinion by noting that Hart had to show “that the evidence presented by the government was not sufficient to permit a reasonable jury to find him guilty beyond a reasonable doubt.”<sup>475</sup> Following *Dinwiddie*, the court observed that “conduct constitutes a ‘threat of force’ in violation of the FACE Act only if it constitutes a ‘true threat.’”<sup>476</sup> That reflects, the court said, an objective, hearer-based standard, which must be applied in light of

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469. *Hart*, 212 F.3d at 1069–70.

470. *Id.*

471. *Id.*

472. 18 U.S.C. § 248 (2001). While *Dinwiddie* and *Hart* construe FACE, the circuit’s threat jurisprudence cuts across statutes. *See, e.g.*, *United States v. Bellichard*, 994 F.2d 1318, 1323–24 (8th Cir. 1993) (stating that “we have adopted an objective standard for analyzing threats under 18 U.S.C. § 876 and we have stated, ‘If a reasonable recipient, familiar with the context of the communication, would interpret it as a threat, the issue should go to the jury’” and observing that “[s]ections 871 and 876 ‘recognize in their terminology that it is the making of the threat that is prohibited without regard to the maker’s subjective intention to carry out the threat’” (citations omitted)).

473. *Hart*, 212 F.3d at 1070.

474. *Id.*

475. *Id.* at 1070–71.

476. *Id.*

the *Dinwiddie* factors.<sup>477</sup> Based on that approach, the court concluded, “[g]iven the context and manner in which Hart placed the Ryder trucks and the reaction of clinic staff and patients and others, . . . it was reasonable for the jury to find that Hart’s conduct constituted a ‘true threat’ of force.”<sup>478</sup>

The Eighth Circuit’s approach produces results inconsistent with the implications of Supreme Court “true threats” jurisprudence. First, the trial court does not analyze whether the speech at issue is protected speech as a matter of law. Second, while the “factors” the circuit identified may be relevant, the pure negligence standard adopted—unless it were modified to contain an element of subjective responsibility—does not sufficiently protect freedom of speech consistent with basic principles of federal criminal jurisprudence. Worse, in *Dinwiddie*, the district court admitted voluminous evidence regarding how the clinic workers, in fact, reacted, including their subjective fear and the safety precautions they took, thus undermining the supposed objective character of the test.<sup>479</sup>

Affirming *Dinwiddie*’s conviction, the Eighth Circuit found Dr. Crist’s reaction to the statements crucial.<sup>480</sup> But this analysis distorts the test. Whether Dr. Crist was, in fact, afraid is not the Eighth Circuit’s test for whether the speech constitutes a “true threat.” According to the circuit’s own decisions, what matters is whether a *reasonable* person in Crist’s shoes would deem the speech to be threatening harm from the speaker.<sup>481</sup> In fact, *Dinwiddie* engaged in little more than classic “fire and brimstone”—highly vivid, passionate, and animated preaching—in her comments to Dr. Crist; her *direct* comments to Brous, of course, stand on a different footing. The job of the court was to distinguish “protected preaching” from “unprotected personal threats.” Instead, the court

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477. *Id.* at 1072.

478. *Id.* Previously, the court clarified in *United States v. J.H.H.*, 22 F.3d 821 (8th Cir. 1994), that “[e]vidence showing the reaction of the victim of a threat is admissible as proof that a threat was made” but that such evidence must be evaluated by asking “whether an objectively reasonable recipient would view the message as a threat.” *Id.* at 827–28.

479. The district court—upon proper objection by the defendant—should have excluded the evidence of the clinic workers’ wearing bullet-proof vests and the clinic hiring a security guard. That evidence, though arguably probative of whether a reasonable person would have deemed *Dinwiddie*’s speech threatening, is too prejudicial under FEDERAL RULE OF EVIDENCE 403. *See infra* note 774 (discussion of admission of prejudicial evidence).

480. *Hart*, 212 F.3d at 1072.

481. *See, e.g., id.*

simply concluded that the context in which the “preaching” *and* the personal threats were made, *including Crist’s reaction to them*, was sufficient to support the verdict. That analysis cannot stand consistent with the First Amendment and basic principles of federal criminal jurisprudence.

These criticisms apply, though less sharply, to *Hart*. First, the court upheld the jury’s verdict largely based on the clinic workers’ *subjective reaction* to the Ryder trucks.<sup>482</sup> Accordingly, the court did not strictly adhere even to the *objective negligence* standard it adopted. Second, given the evidence from his father concerning Hart’s intent, the jury was entitled to find that Hart *intended* to exploit the Oklahoma City bombing.<sup>483</sup> Nevertheless, absent that testimony, the evidence that the workers associated the trucks with Oklahoma City and felt threatened was nicely counter-balanced by the FBI agent’s testimony that she did not find Ryder trucks parked outside a building threatening, particularly as it was not a government building. Since the court did not focus its analysis on Hart’s state of mind in using the Ryder trucks, the *Hart* opinion is troubling—not for its result, which is appropriate enough on the facts—but for its analysis, which bodes ill for the First Amendment and basic principles of federal criminal jurisprudence.

To summarize, the approach of the Eighth Circuit is mixed. Its position on ambiguity (before speech is termed threatening the government must produce evidence to disambiguate utterances) should be the majority view; unfortunately, it is not.<sup>484</sup> Neither judges nor juries should be able to take a speaker’s speech one way rather than another and turn it into a crime without solid evidence that the speaker himself or herself intended to cross the line.<sup>485</sup> When the circuit adopted an objective, hearer-based test, but sadly let it turn on subjective reactions of the hearer, it substantially undermined its own test. When it makes the speaker’s rights turn on the persuasive character of the complaining witness’s testimony, moreover, it impermissibly legitimates a “heckler’s veto.”<sup>486</sup>

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482. *Id.*

483. *Id.*

484. *See supra* note 459.

485. *See infra* Part VII.B.1.

486. *MacDonald v. City of Chi.*, 243 F.3d 1021, 1033 (7th Cir. 2001) (“Because the City *must* authorize the parade or other event, hecklers cannot veto unpopular speech ‘by threatening to show up in large numbers and create traffic hazards of their own.’” (emphasis

*c. The Tenth Circuit.* The Tenth Circuit's principal foray into an analysis of "true threats" is *United States v. Viefhaus*.<sup>487</sup> There, Viefhaus and his fiancée were the leaders of a white supremacy organization in Tulsa, Oklahoma. The organization maintained a telephone hotline to disseminate its message under the listing "Aryan Intelligence Network."<sup>488</sup> Callers to the hotline heard taped messages from Viefhaus outlining the organization's views. One of these messages formed the basis for Viefhaus's prosecution:

It is time for all white people to realize that the current system of government is beyond repair. Our revolution is not about fixing this system, but to absolutely destroy it, by any means necessary. Only then can we build an Aryan society for our children and grandchildren. The first major step in solidifying the revolutionary mentality is to understand that there are only two classes in life, those who support our cause and the enemy. As is the case of the bombing of the Murrah Federal Building, the revolutionary understands and accepts no matter how painful that innocent people must be considered expendable if necessary, in order to successfully complete any action. . . . This is a war . . . racial . . . holy war. As an added ultimatum to those of you who are still unwilling to pick up a sword, a letter from a high ranking revolutionary commander has been written and received demanding that action be taken against the government by all white warriors by December 15th and if this action is not taken, bombs will be activated in 15 pre-selected major U.S. cities. That means December 15, 1996, one week from today. In other words, this war is going to start with or without you. For all of you out there that have been bragging about being ready and willing to jump in when the time comes, well you better lace up your jump boots.<sup>489</sup>

Viefhaus was convicted on three separate counts, including one of violating 18 U.S.C. § 844(c) by using a telephone to transmit a bomb threat.<sup>490</sup> He appealed that conviction, arguing that his speech did not constitute a "true threat" and that it was, at worst, "vulgar

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added) (citation omitted)); see *supra* note 133 (analysis of the personal character of constitutional rights).

487. 168 F.3d 392 (10th Cir. 1999).

488. *Id.* at 394.

489. *Id.* (emphasis omitted) (citing Appellant's Brief at 5, *Viefhaus* (No. 97-5207)).

490. *Id.* at 395.



political speech' within the context of a 'political agenda,'" relying primarily on *Watts*.<sup>491</sup> The Tenth Circuit, however, affirmed the conviction. First, it explained that "[a] 'true threat' means 'a serious threat as distinguished from words as mere political argument, idle talk or jest.'"<sup>492</sup> It then defined a true threat as "a declaration of intention, purpose, design, goal, or determination to inflict punishment, loss, or pain on another, or to injure another or his property by the commission of some unlawful act."<sup>493</sup> The court continued:

It is not necessary to show that defendant intended to carry out the threat, nor is it necessary to prove he had the apparent ability to carry out the threat. The question is whether those who hear or read the threat reasonably consider that an actual threat has been made. It is the making of the threat and not the intention to carry out the threat out that violates the law.<sup>494</sup>

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491. *Id.* (citing Appellant's Brief at 22, *Viefhaus* (No. 97-5207)).

492. *Id.* (citing *United States v. Leaverton*, 835 F.2d 254, 257 (10th Cir. 1987)).

493. *Id.* (citing BLACK'S LAW DICTIONARY 1480 (6th ed. 1990) and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged) 1176 (1993)).

494. *Id.* at 395-96 (emphasis omitted) (citation omitted). The Tenth Circuit also approved of this objective, hearer-based approach when it was given as a jury instruction in a prosecution under 18 U.S.C. § 871 (1994) in *United States v. Dysart*, 705 F.2d 1247, 1256 (10th Cir. 1983); it reiterated its approval in a second prosecution under § 871 in *United States v. Welch*, 745 F.2d 614, 618 (10th Cir. 1984). Nevertheless, in *Welch*, the court applied a speaker-based standard:

In *United States v. Hart*, 457 F.2d 1087, 1090 [(10th Cir. 1972)], . . . we approved an instruction stating that before a defendant can be convicted under this statute the jury "must be convinced beyond a reasonable doubt that the defendant intentionally made a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing or reading it as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States . . . ."

Applying this construction of § 871, we conclude that the evidence was sufficient here for the jury to find that a reasonable person would foresee that the statement would be interpreted by persons hearing it "as a serious expression of an intention to inflict bodily harm upon or to take the life of the President of the United States."

*Welch*, 745 F.2d at 619-20 (emphasis omitted).

This contradiction is troubling, especially since the court in *Viefhaus* adverted to it at one point in its analysis. See *Viefhaus*, 168 F.3d at 396 ("In determining the existence of a threat under similar statutes, we have adopted an objective test focusing on how a 'reasonable person would foresee . . . the statement being interpreted by persons hearing or reading it.'" (citing *Welch*, 745 F.2d at 619-20)). Such unexplained jumping from test to test makes determining the position of the Tenth Circuit difficult; it indicates at the least that the court may be confused or is unable to distinguish between the different tests. Indeed, in another

The Tenth Circuit concluded that “Viefhaus crossed the threshold from political rhetoric to criminal threat when he stated unequivocally that fifteen cities would be bombed.”<sup>495</sup> “The fact that a specific threat accompanies pure political speech,” the court continued, “does not shield a defendant from culpability.”<sup>496</sup> For the court, “Viefhaus’ statement regarding the imminent bombing of fifteen cities reasonably may be construed as a ‘true threat.’” Therefore, Viefhaus’ prosecution and conviction did not violate his First Amendment rights.<sup>497</sup>

Viefhaus also argued that “the district court should have resolved his First Amendment defense as a matter of law rather than submit the matter to the jury.”<sup>498</sup> The Tenth Circuit demurred:

We consistently have held that whether a defendant’s statement is a true threat or mere political speech is a question for the jury . . . . If there is no question that a defendant’s speech is protected by the First Amendment, the court may dismiss the charge as a matter of law. . . . Such a scenario, however, is not present here.<sup>499</sup>

Thus, it affirmed the conviction.<sup>500</sup>

Regrettably, the Tenth Circuit in *Viefhaus* failed to give proper effect to the Supreme Court’s First Amendment teachings or basic principles of federal criminal law. First, the district court should have analyzed initially, as a matter of law, whether the message was unprotected speech.<sup>501</sup> The Tenth Circuit, too, should have enforced

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opinion on “true threats,” the Tenth Circuit avoided the issue entirely, simply describing its test as “an objective test, focusing on whether a reasonable person would find that a threat existed.” *United States v. Magleby*, 241 F.3d 1306, 1311 (10th Cir. 2001) (citing *Viefhaus*, 168 F.3d at 396). The court later adverted that its test was hearer-based but did not specifically so state. *See id.* (discussing other circuits that have a “reasonable recipient test”).

495. *Viefhaus*, 168 F.3d at 396.

496. *Id.* (citations omitted).

497. *Id.* The court dismissed three other arguments that the message was outside the prohibitions of § 844(e) and therefore not punishable: “(1) [the defendant] did not directly communicate with anyone; (2) the warning in the message was conditional in that no bombing would commence if action was ‘taken against the government by all white warriors’; and (3) the message merely related a threat leveled by a third party.” *Id.* The court held that “a ‘statement may constitute a threat even though it is subject to a possible contingency in the maker’s control,’” and that “a defendant who repeats a third party’s threat may be subjected to criminal liability.” *Id.* (citing *Leaverton*, 835 F.2d at 256).

498. *Id.*

499. *Id.* at 397.

500. *Id.* at 398.

501. *See infra* Part VII.A.

that approach. To say, as the circuit did, that political speech accompanying a threat does not shield the defendant from culpability begs the question.<sup>502</sup> Under Supreme Court jurisprudence, that a threat was present here is hardly self-evident. Certainly, the statement about bombing fifteen cities was unequivocal. But Evers's threat in *Claiborne* to break boycott violators' necks was equally unequivocal.<sup>503</sup>

Moreover, in *Claiborne* the defendant's speeches were directed at those "threatened."<sup>504</sup> Here, people had to call a voice mail recording to hear the threat. Thus, *Viefhaus* looks more like *Madsen*. In *Madsen*, the Court held that the proper solution was for the clinic to shut its curtains.<sup>505</sup> The same rationale applies here. No one needed to call the voicemail message in the first place. The language about bombing the cities, uttered in the context of albeit a distasteful message of social protest, was not a threat at all but mere political hyperbole. Thus, as in *Madsen*, the problem was best solved by ignoring it.

### 3. *The objective, viewpoint-neutral approach*

*a. The Fifth Circuit.* The Fifth Circuit's most comprehensive treatment of the First Amendment and threat statutes is in *United States v. Morales*,<sup>506</sup> which involved the prosecution of Eduardo Morales, an eighteen-year-old high school student from Houston, Texas. Morales entered into an Internet chatroom and engaged in a

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502. *Viefhaus*, 168 F.3d at 396 (citations omitted).

503. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982).

504. *Id.* at 900 n.28.

505. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 773 (1994).

506. 272 F.3d 284 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2624 (2002). While the Fifth Circuit's teachings on threats and the First Amendment are relatively new, the court's recognition of the distinction between "true threats" and "incitement" under *Brandenburg* is not of recent vintage. In *United States v. Howell*, 719 F.2d 1258 (5th Cir. 1983), the court refused to apply the *Brandenburg* test to determine whether the First Amendment protected threats that Howell made against the President. The court explained:

While Howell's statements may have been unlikely to incite or produce imminent lawless action, the *Brandenburg* test applies by its terms to advocacy, not to threats such as those made by Howell. The line between the two forms of speech may be difficult to draw in some instances, but this is not one of them. Far from attempting to influence others, Howell was merely stating his own unambiguous and apparently quite serious intention to take the life of the President.

*Id.* at 1260-61 (footnote omitted). For a discussion of *Brandenburg*, see *infra* text accompanying notes 751-53 (comparison of *Brandenburg* and *Watts*).

829]

*Threats, Free Speech, and Jurisprudence*

virtual conversation with a stranger, Crystal Lees, who lived in Puyallup, Washington. The two exchanged the following series of instant messages:

Morales: I will kill

Lees: huh?—me You will kill what—me

Morales: TEACHERS AND STUDENTS AT MILBY

Lees: Why do you want to do that Where is Milby?

Morales: CAUSE AM TIRED. . . . HOUSTON

Lees: are you really going to go and kill people Who has made you mad r u ok do you want to talk to me

Morales: YES F NE ONE STANDS N MY WAY WILL SHOT

Lees: r u ok

Morales: I HATE LIVE

Lees: I am here

Morales: YES MY NAME S ED HARRIS SEE U N A COUPLE OF MONTHS<sup>507</sup>

Concerned for the safety of Milby High School students and teachers, Lees alerted the police. The high school principal was informed and increased security measures were implemented at the school.<sup>508</sup> Within hours the police traced the Internet conversation to Morales who admitted that he was the individual who talked back and forth with Lees in the chatroom, but he insisted that he was only joking. He explained that “he was trying to joke that he was the ghost of Ed Harris, whom he mistakenly thought was the assailant at Columbine High School, who in fact was Eric Harris.”<sup>509</sup>

The police were not amused; Morales was arrested and convicted of one count of transmitting, in interstate commerce, a threat to injure another, in violation of 18 U.S.C. § 875(c). On appeal, he

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507. *Morales*, 272 F.3d at 286.

508. *Id.*

509. *Id.*

raised three principal challenges to his conviction: (1) the communication was not a “true threat,” given the context in which it was delivered; (2) the statements were not cognizable under § 875(c) because they were communicated to a third party, rather than to the persons threatened; and (3) the district court erred by failing to require the jury to find that Morales possessed the subjective intent to threaten.<sup>510</sup>

The court began by addressing whether Morales’s statements were “true threats.” The court explained that in the Fifth Circuit “a communication is a threat under § 875(c) if ‘in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor.’”<sup>511</sup> This standard also “requires proof that the threat was made knowingly and intentionally.”<sup>512</sup> Nevertheless, the court noted, the statute requires only “general intent.”<sup>513</sup> Thus, the

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510. *Id.*

511. *Id.* at 287 (quoting *United States v. Myers*, 104 F.3d 76, 79 (5th Cir. 1997)).

512. *Id.*

513. No one who teaches criminal law for any length of time, as one of our number has for more than thirty-five years, ever fails to fall into despair at having students “get it right” when teaching “general” and “specific” intent. What Judge Learned Hand says about “willfulness” is apt for “general” and “specific intent.” See *infra* note 686 (“awful word” that ought to be “purged”). The ambiguities of the terms are set out in detail (and need not be discussed here) in LAFAVE, *supra* note 56, at 239 (concluding that “greater clarity could be accomplished by abandoning the . . . terminology”). In fact, the Model Penal Code is drafted, and well drafted, without using the distinctions. See MODEL PENAL CODE AND COMMENTARIES § 2.02, at 231 n.2 (1985) (stating that this step taken because “the concept of ‘general intent’ has been an abiding source of confusion and ambiguity in the penal law”). The Supreme Court itself indicated its dissatisfaction with the terminology in *United States v. Bailey*, 444 U.S. 394, 402–06 (1980) (“Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime. . . . At common law, crimes generally were classified as requiring either ‘general intent’ or ‘specific intent.’ This venerable distinction, however, has been the source of a good deal of confusion. . . . This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*.”; see also *Liparota v. United States*, 471 U.S. 419, 423 n.5 (1985) (“We have also recognized that the mental elements in criminal law encompasses more than the two possibilities of ‘specific’ and ‘general’ intent”). Nevertheless, any expectation is idle that the courts will move away from their use and engage in an analysis of the real issues at stake. Maitland used to say, “Law schools make tough law.” FREDERICK MAITLAND, ENGLISH LAW AND THE RENAISSANCE 25 (1901). Sadly, judges still remember what they “learned” in the first semester of law school. That they will move away from it and on to something new, different—and demonstratively—better is the hope of reformers, not practical people.

*Morales* is a case study in why the distinctions should be abandoned. If the statute requires a showing of “intentional” conduct, as the court says, the court does not explain how liability could be established on a showing of only “knowledge.” Apparently, the court is unaware of the significant differences between the two states of mind. “Intent,” for example, is required for conspiracy and aiding and abetting; “knowledge” alone is insufficient. See *supra*

twofold state of mind requirement (“knowingly and willfully”) of the statute is met where

[1] [a] threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and [2] a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat.<sup>514</sup>

The court next noted the Supreme Court’s admonition that statutes that criminalize a form of pure speech “must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.”<sup>515</sup> Accordingly, the court explained, “statutes prohibiting threats initially require the Government to prove a true threat.”<sup>516</sup> Such threats, the court continued, are to be distinguished from “political hyperbole” and examined “‘in context’ to determine whether they are true threats punishable by law.”<sup>517</sup> To effectuate these principles, the court explained, in the Fifth Circuit, “a fact finder must determine that the recipient of the in-context threat reasonably feared it would be carried out.”<sup>518</sup>

Applying this test to Morales, the court had little trouble affirming his conviction. Morales admitted making the statements, and he admitted that he did it to see how Lees would react. He also admitted that he was aware of a prior incident in which a Milby student made threats over the Internet, and he knew that his conduct was unlawful. The court easily concluded that these facts were sufficient to support Morales’s conviction under § 875(c), which it read as requiring only a “general intent.” In addition, the court agreed with the jury that the communication “in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor.”<sup>519</sup> The jury, after all, heard

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note 11. Accordingly, the analysis here is as muddled as the terminology it uses. More need not be said.

514. *Morales*, 272 F.3d at 287 (quoting *United States v. Pilkington*, 583 F.2d 746, 747 (5th Cir. 1978)).

515. *Id.* (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969)).

516. *Id.* (internal quotation marks and alteration omitted) (quoting *Watts*, 394 U.S. at 708).

517. *Id.*

518. *Id.* (quoting *United States v. Myers*, 104 F.3d 76, 80 (5th Cir. 1997)).

519. *Id.* at 288 (quoting *Myers*, 104 F.3d at 79).

evidence that Lees felt apprehension that the threat would be acted upon, that Morales repeated his threats to kill several times, and that he gave no indication in remarks that he was joking. Morales, too, admitted that he attempted to refer to Eric Harris, one of the perpetrators of the Columbine killings—and “[t]hus, his statement in context cannot be divorced from the reality of that tragedy.”<sup>520</sup> Finally, the court decided that Morales’s statements were easily distinguished from those in *Watts*: “[u]nlike Watts, Morales was not engaged in political speech as part of a public debate, in which the listeners laughed in response to Watts’s comments.”<sup>521</sup>

After this cursory analysis, the court made equally short work of Morales’s remaining arguments. The court decided that it made no difference that the threats were made to a “random third party who had no connection with Milby High School”;<sup>522</sup> it refused to draw a distinction between threats communicated to third parties and threats communicated directly to their targets. Instead, it held that “this character and context of the threat . . . is the relevant test.”<sup>523</sup> The court spent even less time rejecting Morales’s contention that the jury instructions should have required proof that he “specifically intended” to threaten.<sup>524</sup> It reiterated its earlier statement that “the government was not required to prove that the defendant intended the statements to be threats” because “§ 875(c) contains nothing suggesting a specific intent requirement.”<sup>525</sup> Accordingly, it affirmed Morales’s conviction.

That Morales was convicted is fair enough on the facts, though it is troubling that a mere high school student can be federally convicted of a felony on the basis of random remarks made in an

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520. *Id.*

521. *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)).

522. *Id.*

523. *Id.*

524. In relevant part, the jury instructions stated:

The Government does not have to prove that the defendant subjectively intended for the recipient to understand the communication as a threat. The Government also does not have to prove that the defendant actually intended to carry out the threat.

*Id.* at 288–89. Morales, however, sought an instruction that the jury must find that he “understood and meant [his] words as a threat” and that he “sent the words knowingly and willfully, that is, intending them to be taken seriously.” *Id.* at 289.

525. *Id.* at 289 (internal quotation marks omitted).

Internet chatroom to an anonymous person located states away. That having been said, Morales's statements contain nothing even arguably approaching social or political commentary. In fact, he baldly made repeated threats to kill students and faculty at Milby, and he gave no hint that he was anything other than serious.<sup>526</sup> The Columbine allusion cannot be easily ignored. Indeed, Morales himself admitted that he intended to capitalize on the "context" of Columbine, and he hoped to use it to give his statements a tinge of menace. In addition, he candidly admitted that he "did it to see how [the recipient of the threats] would react," and that he "could see why [she] 'would get scared or why she reacted the way she did.'"<sup>527</sup> In short, Morales intended to cause fear and disruption, an intent that worked out precisely as he had hoped, apart from his troubles with the law. Accordingly, his conviction, on the facts, is unexceptional.

Regrettably, however, whether or not the result of *Morales* is "right," the standards enunciated by the Fifth Circuit for dealing with "true threats" under the First Amendment are, at best, muddled. Like many other circuits, the Fifth Circuit appears to espouse an objective standard for determining whether a communication is a threat—at least under § 875(c). But the language of the opinion in *Morales* is opaque on the perspective from which the communication should be viewed. The court holds that a statement constitutes a threat only when two different criteria are satisfied: (1) "in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor"<sup>528</sup>—here the perspective is, fairly enough, that of a viewpoint-neutral reasonable person—and (2) "the recipient of the in-context threat reasonably feared it would be carried out"<sup>529</sup>—here the perspective is, inconsistently, that of a reasonable listener. Thus, while we characterize the Fifth Circuit as an objective, hearer-based jurisdiction, the standard is, in fact, unique to the circuit. Nevertheless, all of the objections we raise to the other circuit courts' jurisprudence apply here. The trial court does not make an independent review of the application of the First Amendment.<sup>530</sup> A

526. *Id.* at 286.

527. *Id.* at 287.

528. *Id.* (quoting *United States v. Myers*, 104 F.3d 76, 79 (5th Cir. 1997)).

529. *Id.* (quoting *Myers*, 104 F.3d at 80).

530. *See infra* Part VII.A.



culpable state of mind (intent or purpose to make a threat) is not required; in fact, it is specifically rejected.<sup>531</sup> Evidence of context is admissible without adequate guidance.<sup>532</sup> Indeed, by emphasizing its requirement that the recipient of the “in-context threat reasonably feared that it would be carried out,” the court invites the introduction of highly prejudicial evidence. To let in myriad evidence about the “context” of the recipient and the recipient’s reaction to the alleged threat and to leave it to the jury to decide whether the reaction of a scared recipient is “reasonable” is hardly a strategy sensitive to the basic principles of federal criminal law and the First Amendment’s demands for breathing room. Guilt ought to be personal.<sup>533</sup> Nor should these sensitive issues be thrown to a jury to sort out without careful pre-submission guidance.<sup>534</sup> A trial-by-hindsight, with only the possibility of deferential appellate review,<sup>535</sup> bodes ill for the freedom of speech and individual responsibility.

*Morales* also squarely holds that neither the First Amendment nor basic principles of federal criminal jurisprudence *require* a finding that a person convicted of a “true threat” subjectively intended to threaten.<sup>536</sup> Strangely, given the force of the court’s holding, this conclusion represents a change of course in the circuit’s teachings. In *Shackelford v. Shirley*,<sup>537</sup> the court upheld Shackelford’s conviction under a Mississippi telephone harassment statute, which made it “unlawful for any person or persons . . . to make a telephone call, with intent to terrify, intimidate, or harass, and threaten to inflict injury or physical harm to any person at the called number or to his property.”<sup>538</sup> Shackelford “admitted to placing a telephone call to Otha Richardson, his former supervisor, and stating that the next time Richardson came by Shackelford’s car lot he would be ‘toting an a\*\* whipping.’”<sup>539</sup> Shackelford argued that this statement was protected by the First Amendment. The Fifth Circuit, however, disagreed: “As speech strays further from the values of persuasion,

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531. *See infra* Part VII.B.1.

532. *See infra* Part VII.B.1.

533. *See supra* note 133 (discussing the personal character of constitutional rights).

534. *See infra* Part VII.D.

535. *See supra* note 137 (analyzing standards of review).

536. *See supra* text accompanying notes 528–29.

537. 948 F.2d 935 (5th Cir. 1991).

538. *Id.* at 937.

539. *Id.* (alteration added).

dialogue and free exchange of ideas the first amendment was designed to protect, and moves toward threats made with specific intent to perform illegal acts, the state has greater latitude to enact statutes that effectively neutralize verbal expression.”<sup>540</sup> After discussing *Watts*’s “true threat doctrine,” the court emphasized that because the Mississippi statute contained a “specific intent” requirement, the court felt confident that it prescribed for punishment “only a class of ‘true threats,’ and not social or political advocacy” threats, that would be outside the reach of First Amendment protection.<sup>541</sup> Consequently, the district court instructed the jury “that they should convict only if they found that Shackelford ‘ma[d]e a telephone call to Otha Richardson with the intent to terrify, intimidate or harass, and threaten[ed] to inflict injury and physical harm to the said Otha Richardson.’”<sup>542</sup> The court, without difficulty, held that “the jury’s verdict represents a finding that Shackelford engaged in unprotected, threatening speech.”<sup>543</sup>

The *Shackelford* court, then, thought it crucial for First Amendment purposes that the threat statute under which the defendant was convicted require proof that the defendant subjectively intended to threaten. Strangely, the *Morales* court did not discuss (much less cite) *Shackelford* before holding that a conviction under § 875(c) did not require that a defendant subjectively intend to threaten but was, nevertheless, acceptable under the First Amendment. Instead, the court relied on its prior decision in *Myers*, which discussed the state of mind required to sustain a conviction under § 875(c) but did not discuss the implications of the First Amendment on culpable state of mind or the basic principles of federal criminal jurisprudence on the statute.<sup>544</sup> Like the other circuits, the Fifth Circuit manifestly needs to reexamine all aspects of its “true threat” jurisprudence, including the care with which it drafts its opinions.

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540. *Id.* at 938.

541. *Id.* at 940.

542. *Id.* at 940 n.3.

543. *Id.*

544. *See infra* Part VII.B.1. The *Myers* court understandably did not discuss free speech implications, as the opinion gives no indication that they were argued before the court.

*b. The Eleventh Circuit.* The Eleventh Circuit's limited teachings on "true threats" are well-summarized in *United States v. Callahan*.<sup>545</sup> There, Donald Callahan was convicted of mailing a letter threatening the lives of the President-elect and Vice-President-elect in violation of 18 U.S.C. § 871(a). The letter Callahan sent was addressed to H.S. Knight, Director of the Secret Service and read:

Dear Mr. Knight:

It is essential that Reagan and Bush are assassinated on Inauguration Day in front of the television cameras.

If you can arrange for me to get into the act, I will be willing to accept the responsibility.

I don't want anymore Protestant Scum in the White House. The separation of Church and State is a sacrosanct privilege to me and all Christians.

The fate of the Christian West hangs in the balance. The forces of the Reformation must be destroyed before there is any possibility of dissolving the threat posed by Jewish Fascism and Communism.

You know where I live. Just call, I will be in Washington in a few hours.<sup>546</sup>

Callahan was convicted; he appealed and the Eleventh Circuit affirmed. First, the circuit observed that "[v]iewing the evidence in the light most favorable to the jury's verdict, . . . there was substantial evidence to support the jury verdict under the objective standard utilized in this circuit."<sup>547</sup> It then dismissed the defendant's arguments that "his letter constituted a conditional statement that was nothing more than political hyperbole," an argument that was buttressed by "the fact that the Secret Service did not respond immediately to the letter."<sup>548</sup> The Eleventh Circuit replied:

The defendant's argument misses the mark. The question is whether there was sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under

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545. 702 F.2d 964 (11th Cir. 1983).

546. *Id.* at 965.

547. *Id.*

548. *Id.*

such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm upon or to take the life of the persons named . . . . The government is not required to prove an actual intent to carry out the threat.<sup>549</sup>

The circuit then concluded that the letter met this test:

That the letter contains certain political and religious statements does not serve to remove it from the prohibition of the statute. In *Watts*[,] . . . where the Court determined that the statements involved were expressions of political opposition rather than a true threat, the statements were made during a political debate, were expressly conditioned on the occurrence of an event, and both the maker and the crowd he addressed laughed at the statement.<sup>550</sup>

Thus, the Eleventh Circuit affirmed Callahan's conviction. While the court did not address the First Amendment issues or the basic principles of federal criminal jurisprudence that surrounded Callahan's prosecution, it did indicate that as long as a communication was a "true threat"—under the statute involved—its prosecution would not impinge upon constitutional rights.<sup>551</sup>

This approach was also confirmed in an initial district court opinion from Alabama, *Lucero v. Trosch*,<sup>552</sup> though the defendant was ultimately held not responsible in a subsequent opinion; both opinions merit, for that reason, careful analysis. In its first opinion, the district court, on a motion to dismiss a civil action under the Freedom of Access to Clinic Entrances Act (FACE) and specifically under 18 U.S.C. § 248(a)(1), discussed the requirement of a "threat of force" under that statute.<sup>553</sup> Father David Trosch appeared on *The Geraldo Show*, which was filmed in New York City. This colloquy took place when the show's host questioned the defendant about his abortion beliefs:

Q: Father David Trosch would you murder an abortion doctor if you had the gun in your hand?

A: No, I would not murder him, but I would kill him, there's a difference.

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549. *Id.* (citation omitted).

550. *Id.* at 966.

551. *Id.* at 965.

552. 904 F. Supp. 1336 (S.D. Ala. 1995).

553. *Id.* at 1340.

. . . .

Q: Sitting along side you, Dr. Bruce Lucero, a doctor who admits to performing abortions . . .

A: . . . he is a mass murderer . . .

Q: . . . would you kill him?

A: He is a mass murderer and should be dead. Absolutely.

Q: He should be dead?

A: Should be dead.

. . . .

Q: Father Trosch, do you have the courage to say that you would kill him?

A: He deserves to be dead, [a]bsolutely.<sup>554</sup>

The district court also noted that “[t]he exchanges cited herein contain the only responses in which Trosch directly referred to Lucero. The transcripts indicate, however, that Trosch made many other comments containing his views that all physicians who perform abortions, as well as their ‘accomplices,’ should be killed in defense of innocent human life.”<sup>555</sup> Two months earlier, Trosch appeared on *The Shelly Stewart Show*. There, he expressed the same views: that abortion providers should be killed in defense of innocent human life. He did not make any specific reference to Lucero.<sup>556</sup>

The district court refused to dismiss the FACE complaint against Trosch. First, it examined the “threat of force” requirement of the statute, and it followed the objective standard announced in *Callahan*.<sup>557</sup> The district court was, therefore, “unwilling to conclude as a matter of law that Trosch’s statements . . . [did] not

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554. *Id.* at 1338–39.

555. *Id.* at 1339 n.2.

556. *Id.* at 1339.

557. *Id.* at 1340.

constitute threats of force.”<sup>558</sup> Addressing Trosch’s First Amendment argument, the district court continued:

The defendant’s argument that his comments on *Geraldo* are expressive conduct protected by the First Amendment represents the flipside of his contention that the statements were not threats of force. If Trosch’s remarks . . . were threats of force, then they cannot receive First Amendment protection. Given the court’s conclusion that the Access Act claim may not be dismissed on the ground that Trosch’s statements did not constitute threats of force, logic compels the court not to dismiss the claim on the ground that Trosch’s statements were expressive conduct protected by the First Amendment . . . .<sup>559</sup>

Thus, the district court squarely determined that at least the First Amendment considerations were fully protected if the statute required a “true threat,” as defined by the Eleventh Circuit’s objective standard.

While the district court refused to dismiss the FACE complaint on First Amendment grounds, it held after a bench trial that Lucero failed to prove by a preponderance of the evidence that the statements constituted, under the relevant circumstances, a “true threat” against him.<sup>560</sup> Citing *Cheffer v. Reno*,<sup>561</sup> the *Lucero* Court held that the test for “threat” under FACE was whether the statement would place a person “in reasonable apprehension of bodily harm.”<sup>562</sup> Citing *United States v. Dinwiddie*,<sup>563</sup> the court held that the statement had to be “gauged in light of the entire factual context in which it was made.”<sup>564</sup> The court then adopted the *Dinwiddie* factors, supposedly reflecting a hearer-based test, to evaluate the context.<sup>565</sup> Accordingly, the court found it significant for

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558. *Id.*

559. *Id.* at 1341.

560. *Lucero v. Trosch*, 928 F. Supp. 1124, 1130 (S.D. Ala. 1996). The court limited its consideration to the statements made on *The Geraldo Show*; it held that, as a matter of law, the statements made on *The Shelly Stewart Show* were not directed at Lucero and that they could only be used for context. *Id.* at 1129 n.10.

561. 55 F.3d 1517 (11th Cir. 1995) (citations omitted).

562. *Lucero*, 928 F. Supp. at 1129 (quoting *Cheffer*, 55 F.3d at 1521).

563. 76 F.3d 913 (8th Cir. 1996) (citations omitted). The court also cited *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994), and *United States v. Gilbert*, 884 F.2d 454, 457 (9th Cir. 1989).

564. *Lucero*, 928 F. Supp. at 1129.

565. *Id.* (quoting *Dinwiddie*, 76 F.3d at 925).

its decision against Lucero's claim for relief that the comments were made on a daytime talk show that "explores and exploits" subjects and guests "to boost its ratings"; that the host "prodded" and "forced" guests to answer "complex, [and] loaded" questions in "sound-byte" form; that guests were not permitted to explain themselves; that Lucero and Trosch were intentionally seated next to each other in an attempt "to elicit negative interaction"; and that Lucero was "fully aware" of Trosch's beliefs before he agreed to come on the show.<sup>566</sup> The court specifically declined to credit Lucero's testimony that he was "frightened and intimidated" by Trosch's statements.<sup>567</sup> Lucero himself also conceded that he had no contact with Trosch before or after the show and had not seen him at his home or clinic.<sup>568</sup> Finally, Trosch's statements, though extreme, were qualified, and he expressly presented them as a philosophical discussion of the doctrine of "justifiable homicide,"<sup>569</sup> in which his role was that of a "teacher," not a doer.<sup>570</sup>

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566. *Id.*

567. *Id.* at 1130. Significantly, the court also rejected the expert testimony of Dr. Dallas Blanchard, a sociologist. The court observed:

Dr. Blanchard testified generally that abortion providers find themselves in a dangerous climate today, and that they should be fearful for their safety. He also asserted that the pronouncements of Fr. Trosch and other anti-abortion leaders have the effect of *stigmatizing* Dr. Lucero and rendering him a target. However, Dr. Blanchard's testimony focused on the evil effects of the "justifiable homicide doctrine" itself, and largely ignored the specific threatening quality (if any) of Fr. Trosch's statements to Dr. Lucero on *Geraldo*. In fact, Dr. Blanchard's testimony apparently was that Dr. Lucero's appearance on the *Geraldo Show*, in and of itself, caused Dr. Lucero to be more of a target, irrespective of any particular statements made by Fr. Trosch to Dr. Lucero. Therefore, Dr. Blanchard appeared to be of the opinion that the threat to Dr. Lucero stems from the general climate, and is heightened by Fr. Trosch's pronouncements of the "justifiable homicide doctrine." Though Dr. Blanchard's testimony may well be accurate from a sociology standpoint, the court cannot hold Fr. Trosch liable under FACE either for the dangerous atmosphere facing abortion providers today or for his impassioned advocacy of the "doctrine of justifiable homicide," in the absence of a threat of force directed at Dr. Lucero.

*Id.* at 1131 n.12 (emphasis added); *see supra* note 130 (discussion of stigma in the context of culture wars).

568. *Lucero*, 928 F. Supp. at 1130.

569. *Id.* at 1130. The single best text treating the morality of homicide is PHILIP E. DEVINE, *ETHICS OF HOMICIDE* (Notre Dame 1990).

570. *Lucero*, 928 F. Supp. at 1130 n.11.

While the district court adopted the factors of *Dinwiddie*, it distinguished its result.<sup>571</sup> Dinwiddie's conduct extended over a six-month period; her statements were accompanied by a physical assault of a staff member and a physical obstruction of the clinic.<sup>572</sup> Accordingly, the vastly different context distinguished the two situations, but the court did not give Trosch blanket permission to speak his mind in the future without regard to the context. Ominously, it observed:

The Court having found that Fr. Trosch's statements on the *Geraldo Show* were not threats of force, the defendant cannot be held liable under FACE for having made those statements. However, the fact that Fr. Trosch has prevailed in this lawsuit does not mean that he may continue to make statements similar to those he articulated on *Geraldo* with impunity. The Court is not holding that statements such as those made by Fr. Trosch on *Geraldo* could *never* violate FACE. On the contrary, the Court's decision is heavily influenced by the specific circumstances surrounding Fr. Trosch's remarks. More to the point, this Court is of the opinion that Fr. Trosch's comments could, in fact, have constituted a violation of FACE had the context in which they were made been different. Certainly, Fr. Trosch remains free to express his philosophical views to the full limits authorized by the First Amendment, recognizing that the First Amendment does not offer refuge to true threats of force. If Fr. Trosch chooses to articulate his rhetoric in a manner which could reasonably be construed by its recipients as a serious expression of an intent to inflict bodily harm, he does so at the risk of incurring criminal and civil penalties under FACE.<sup>573</sup>

*Trosch* demonstrates how troubling the Eleventh Circuit's approach is from a First Amendment perspective and the perspective of basic principles of federal criminal jurisprudence. First, the district court treated the issue of whether the speech was a "true threat" as a fact question, rather than adjudicating it as a question of law.<sup>574</sup> The holdings in the *Trosch* litigation simply cannot be justified as consistent with *Watts* and *Claiborne*. *Thinking* that abortion providers should be killed is not a crime, as it is not criminal treason

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571. *Id.* at 1131.

572. *Id.*

573. *Id.* at 1131–32.

574. *See infra* Part VII.B.1.



to imagine the death of the President.<sup>575</sup> Making thoughts punishable is a doctrine against which the Constitution turns its face.<sup>576</sup> Watts made his statements at a W.E.B. DuBois club rally, an event held in a public place, in a vigorous effort to express his views on the Vietnam War.<sup>577</sup> Similarly, Trosch made his remarks on a nationally televised program, in a vigorous effort to express his views on abortion.<sup>578</sup> In *Watts* and in *Trosch*, the statements were conditional, that is, “I *would* kill him” and “he *should* be dead,” rather than “I *will* kill him.”<sup>579</sup> *Claiborne* did not draw a distinction between social rather than political issues.

The district court’s initial decision and the Eleventh Circuit’s general approach are hardly consistent, therefore, with either basic First Amendment jurisprudence or basic principles of federal criminal jurisprudence, particularly on the requirement of a culpable state of mind.<sup>580</sup> Nor can the district court’s own “threat” to Trosch (after it found that his conduct was not a “true threat”) that he faced *future* criminal and civil penalties under FACE when and if, he “crosses the line,” be fairly described as anything other than a highly improper judicial effort to chill Trosch’s rights under the First Amendment. We do not share, as we suppose most Americans do not, Father Trosch’s particular beliefs about the doctrine of “justifiable homicide.” They are bad law<sup>581</sup> and misguided moral philosophies.<sup>582</sup>

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575. Treason is expressly defined by U.S. CONSTITUTION Article I, Section 9 (“Treason against the United States shall consist *only* in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” (emphasis added)). See *generally* *Cramer v. United States*, 325 U.S. 1, 12–29 (1945) (reversing conviction of treason for aiding German saboteurs landed from enemy submarines; detailing history of treason clause, finding that aid and comfort requires more than mental activity and that more than an intentional act is required—in fact, the defendant must “intend to betray his country by means of the act”).

576. Under the Treason Act, 25 Edw. 3, c. 2, Stat. 5, (1351) (Eng.), high treason was “imagin[ing] the death of our Lord the King.” 4 BLACKSTONE, *supra* note 130 ¶ 4, at \*76–81, discusses the doctrine at length; it need not detain us here. See also *Dennis v. United States*, 341 U.S. 494, 583 (1951) (Douglas, J., dissenting) (“There was a time in England when the concept of constructive treason flourished. Men were punished not for raising a hand against the king but thinking murderous thoughts about him. The Framers of the Constitution were alive to that abuse and took steps to see that the practice would not flourish here.”).

577. See *Watts v. United States*, 394 U.S. 705, 706 (1969).

578. See *Lucero*, 928 F. Supp. at 1338.

579. See *Watts*, 394 U.S. at 706.

580. See *infra* Part VII.B.1.

581. See, e.g., *Commonwealth v. Markum*, 541 A.2d 347 (Pa. Super. Ct. 1988) (finding that anti-abortion demonstrators who destroyed medical equipment are not entitled to assert defense of justification); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972) (determining

But we—and the First Amendment—do share Voltaire’s attitude toward someone like Trosch: “[We] disapprove of what you say, but . . . [we] will defend to the death your right to say it.”<sup>583</sup> The district court steps outside its proper judicial role of neutrality when it threatens or warns either side in a contentious public debate to watch its tongue in the future. Carefully framed injunctions, maybe, but judicial threats, never!

*c. The District of Columbia Circuit.* The District of Columbia Circuit Court’s decisions do not reflect an articulate standard for judging “true threats.” In *Alexander v. United States*,<sup>584</sup> the only

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that political protesters demonstrating against Vietnam War are not, in prosecution for destruction of government property, entitled to assert defense of justification); *State v. Warsaw*, 410 A.2d 1000 (Vt. 1979) (finding that environmentalists demonstrating against nuclear power are not entitled, in prosecution for trespass, to assert defense of justification). *Markum*’s holding in the abortion context is not an isolated decision. See, e.g., *State v. O’Brien*, 784 S.W.2d 187 (Mo. Ct. App. 1989). But see *People v. Archer*, 537 N.Y.S.2d 726 (City Ct. 1988) (holding that, except for constitutionally protected first-trimester abortions, under N.Y. Penal Law § 35.05, the choice of evils provision, juries may assess choice under “ordinary standards of intelligence and morality”). *Archer* was found unpersuasive in *City of Wichita v. Tilson*, 855 P.2d 911, 916 (Kan. 1993). See generally James O. Pearson, Jr., Annotation, “Choice of Evils,” *Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R.5th 521 (2001); James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351 (1993).

582. Our review of the literature of moral philosophy, surprisingly, found a paucity of material that takes up the specific question of justifiable force in the context of the provision of abortion services. Nothing was found that argued that deadly force was morally permissible. In fact, those articles that considered the issue argued otherwise. See, e.g., Christopher Tollefsen, *Donagan, Rebellion, and Civil Rebellion*, 11 PUB. AFF. Q. 303 (1997) (using ALAN DONAGAN, *THE THEORY OF MORALITY* (1977) as a base point and, after a review of a variety of sources, concluding that “most reflective proponents” of the tradition that hold abortion to be immoral, nevertheless, are properly unwilling to approve the use of force in defense of the potentially aborted fetus, since it would be a form of unjustified revolutionary violence). In addition, Father Trosch himself was appropriately suspended from official church duties for, in public appearances, calling bloodshed justifiable to protect the unborn. See Gustav Niebuhr, *To Church’s Dismay, Priest Talks of ‘Justifiable Homicide’ of Abortion Doctors*, N.Y. TIMES, Aug. 24, 1994, at A12 (reporting that the archdiocese at Mobile, Alabama, stripped Father Trosch of his church position and barred him from saying mass in public because of his public position that slaying abortion providers is morally justifiable).

583. S.G. TALLENTYRE, *THE FRIENDS OF VOLTAIRE* 199 (1907). In fact, Voltaire did not speak the quote in the text, though that is how it appears in most dictionaries of quotations. See FAMILIAR QUOTATIONS 307 (16th ed. 1992). E. Beatrice Hall, “a woman biographer[,] said it for him.” JACQUES BARZUN, *FROM DAWN TO DECADENCE* 361 (2000) (noting that Hall wrote *The Friends of Voltaire* using the pseudonym S.G. Tallentyre (1906) and phrased the quote). Hall offered the quote as an “attitude,” not a “quotation.” History remembers it otherwise.

584. 418 F.2d 1203 (D.C. Cir. 1969).

appeal dealing with “true threats,” the circuit reversed the conviction of Eugene Alexander who, while inebriated, made several harassing phone calls to the White House.<sup>585</sup> “The calls, excluding interruptions, consumed a total of about 50 minutes, and were interspersed profusely with discussions of ‘the War in Viet Nam [sic],’ the ‘Russians,’ and other topics of a controversial political nature.”<sup>586</sup> Based on the phone calls, Alexander was convicted on two counts of threatening the life of the President in violation of 18 U.S.C. § 871. The circuit court postponed the disposition of the appeal pending *Watts*. After the decision, the circuit court remanded the appeal for a new trial,<sup>587</sup> observing that the jury was improperly instructed under *Watts*: “Neither ‘idle talk’ nor mere ‘jest’ is a ‘true threat’ . . . .”<sup>588</sup> Accordingly, under *Watts*, the defendant “was entitled to have the issue as to whether his statements constituted a ‘threat’ properly submitted to a jury.”<sup>589</sup>

A more recent district court decision, however, sheds light on what the circuit court might do if faced with the issue of “true threats” today. In a memorandum decision denying Donald Adams’s motion to dismiss in *United States v. Adams*,<sup>590</sup> the district court adopted an objective, viewpoint-neutral standard for determining whether a communication constitutes a “true threat.”

On June 10, 1999, Adams “approached one of the gates of the White House and told one of the uniformed Secret Service officers: ‘I want to kill the President.’ At the officer’s request, he repeated this intention, stating again ‘I want to kill the President.’”<sup>591</sup> Denying a motion to dismiss, the district court observed, “The courts have universally held . . . that the defendant’s intention or ability to carry out the threat he utters is irrelevant. The statute is violated so long as a reasonable person, hearing the threat, would consider it a serious expression of an intent to kill the President.”<sup>592</sup>

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585. *Id.* at 1204–05.

586. *Id.* at 1204.

587. *Id.* at 1205.

588. *Id.* at 1206.

589. *Id.*

590. 73 F. Supp. 2d 2 (D.D.C. 1999).

591. *Id.* at 3.

592. *Id.* If it followed the district court’s apparent approach, the circuit court would be adopting a viewpoint-neutral approach. The district court’s opinion, however, is misleading; it cited three cases. The first two were from the Sixth and Second Circuits. The Second Circuit follows a two-step approach for dealing with “true threats.” The Sixth Circuit’s approach is in

The court added, “Moreover, the defendant’s utterance was not made in the context of a political statement meaning that the First Amendment considerations animating the decision in *Watts* . . . are not present here. Prosecution of the defendant does not threaten in any way the nation’s interest in robust debate of political issues.”<sup>593</sup>

The district court then concluded, “[a]bsent such considerations, the government’s limited burden at this stage of the proceedings was easily satisfied by testimony that a man arrived at the White House and expressed what certainly appeared to be a serious desire to kill its occupant.”<sup>594</sup> To the extent that *Adams* represents the District of Columbia Circuit’s approach to true threats, it bodes ill for freedom of speech and basic principles of federal criminal jurisprudence. That *Adams* had a serious intent to kill the President—if indeed he did—is irrelevant to his prosecution for making a threat. *Watts* might well have entertained a serious intention to kill the President—if the government made him carry a rifle.<sup>595</sup> *Evers* might well have entertained a serious intent to break boycott violators’ “damn necks”—if they broke the boycott.<sup>596</sup> Nevertheless, the intent *to carry out* a threat is *not* the appropriate culpable state of mind for a “threat.” The requisite state of mind for “threat” is intent to make a “threat,” that is, to utter the language with the intent or purpose that the person hearing it will either be put in fear or his affairs will be disrupted, or both.<sup>597</sup> A “threat” becomes a “true threat” if, but only if, it is *not* privileged under the circumstances, in light of *Adams*’s First Amendment right to speak his mind, and the prosecution is otherwise consistent with basic principles of federal criminal jurisprudence.

Requiring an intent to carry out the threat confuses “threat,” as a completed offense, with “threat” as an attempt. “Threat” is, in fact, a completed crime; it is not like an attempt to commit a battery; it

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flux. The court did not expressly indicate that it was adopting that approach; it merely dismissed First Amendment concerns, noting that the defendant’s “utterance was not made in the context of a political statement . . . .” *Id.* The third case was from the Tenth Circuit which follows an objective, viewpoint-neutral approach. *See supra* Part V.A.2.c. This approach is fully consistent with what the court did. Which approach the district court, in fact, adopted cannot be determined with great confidence from its brief opinion.

593. *Adams*, 73 F. Supp. 2d at 3.

594. *Id.*

595. *See supra* Part IV.A.

596. *See supra* Part IV.A.

597. *See infra* Part VII.B.1.

ought not, therefore, include an intent to achieve the objective of battery (physical injury). Nor should it require conduct going beyond mere preparation and commencing the consummation.<sup>598</sup> The courts are simply conflating basic principles of federal criminal jurisprudence. In short, a “threat” is not only “speech” but also “conduct,” the *actus reus*, of a crime. Accordingly, the *mens rea* of “true threat” ought to be the intent or purpose to threaten; that is, by speech alone to bring about those harms that the jurisprudence of threats and free speech recognizes as legally cognizable, or reasonable fear or reasonable disruption in another’s life, where that fear and disruption may not be squared with the right to engage in free speech in a free society. Indeed, “I want to kill the President” is a far cry from “I’m going to kill the President.” That this kind of speech which is probably little more than a caustic attack on the President’s performance of his duties is a “true threat” under District of Columbia jurisprudence bodes ill for the First Amendment in the District of Columbia; it also is a sad commentary on the court’s grasp of basic principles of federal criminal jurisprudence. Much remains to be done.

*d. The Federal Circuit.* The Federal Circuit’s jurisprudence does not explicitly reflect how it would resolve clashes between “true threats” and protected “speech.” In *Metz v. Department of the Treasury, Federal Law Enforcement Training Center*,<sup>599</sup> the court reviewed a decision of the Merit Systems Protection Board upholding the Department of the Treasury’s decision to remove Metz from his position as an instructor at the Federal Law Enforcement Training Center. Metz’s dismissal stemmed from his threat “to harm himself and others” after he was given a performance rating of “excellent” rather than “outstanding.”<sup>600</sup>

The circuit court reviewed the Board’s decision “for errors of law” to decide “whether the board applied the proper legal test to

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598. To the degree that the jurisprudence of threats is thought to protect against the possibility of the threatened conduct occurring, it does, of course, play the role of an inchoate offense. Some criminals feel a need to tell their victims what they intend to do, adding psychological terror to physical or other injury. Where the circumstances warrant, the law rightly intervenes after terror and before injury. But emphasis on this secondary role in the formulation of the definition of “true threat” distorts its proper articulation and undermines its primary functions, protection from fear and disruption. See *infra* text accompanying note 667 (discussion of law of attempt).

599. 780 F.2d 1001 (Fed. Cir. 1986).

600. *Id.* at 1002.

determine if Metz *actually threatened* his superiors.”<sup>601</sup> Explaining that “[t]he United States Supreme Court provided the basis for these standards by writing ‘the statute initially requires the Government to prove a true threat’” and—without citing to any precedent—that “[t]his standard applies to Government agency regulations as well as the statute construed in *Watts*,” the court indicated that it would apply an objective test.<sup>602</sup> Specifically, it indicated that it would look to “the connotation which a reasonable person would give to the words” in order to determine if the words constituted a threat.”<sup>603</sup> The court continued:

In order to apply the reasonable person standard, however, the board must weigh the evidence. We direct the board to consider the following evidentiary factors in deciding whether an employee threatened his supervisors or co-workers:

- (1) The listener’s reactions;
- (2) The listener’s apprehension of harm;
- (3) The speaker’s intent;
- (4) Any conditional nature of the statements; and
- (5) The attendant circumstances.<sup>604</sup>

Given the dictates of *Watts*, it added that the Board should not “disregard subjective evidence of fear or intent,” but it should “give objective evidence heavy weight.”<sup>605</sup> Using this test, the court found that out of the five men whose testimony was used to sustain Metz’s removal, two did not perceive the statements as threats, two others did not expect Metz to harm his superiors—nor did they consider the statements serious enough to warrant reporting—and the final person’s testimony was discredited by the presiding official. Therefore, the court concluded that the Board’s decision was “not

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601. *Id.* (emphasis added).

602. *Id.* at 1002–03 (internal quotation marks omitted).

603. *Id.* at 1002 (citing *Meechan v. United States Postal Serv.*, 718 F.2d 1069, 1075 (Fed. Cir. 1983)).

604. *Id.*

605. *Id.* at 1003.

supported by substantial evidence.”<sup>606</sup> Thus, the Circuit Court reversed the Board’s decision.<sup>607</sup>

The teaching of *Metz* is, however, opaque. At a minimum, it shows that the Federal Circuit follows a practice adopted by the other circuits of choosing one standard for what constitutes a “true threat” and applying it to *all* statutes that require a showing of a “true threat.” While the court did not specifically refer to the First Amendment, it did discuss *Watts*’s “true threat” requirement. Read broadly, the decision might indicate that the Federal Circuit follows an objective test that both construes the “true threat” requirement around First Amendment concerns and then decides that speech or expressive conduct constitutes a “true threat” not protected “speech.”

Nevertheless, *Metz* is not a correct application of the teachings of First Amendment or basic principles of federal criminal law. Each of the objections we raised against the teachings of the other circuits equally applies to the Federal Circuit’s holdings. An individual culpable state of mind was not required, as mandated by both the First Amendment and federal criminal jurisprudence.<sup>608</sup> To say, too, that evidence of the subjective reaction of others may be, without qualification, considered in determining whether a communication constituted a “true threat” is to make one person’s constitutional rights dependant on another’s sensitivities, giving others a kind of “heckler’s veto.”<sup>609</sup> Constitutional rights are personal; they cannot be lost merely because of another’s subjective feelings.<sup>610</sup> Indeed, the approach of the Federal Circuit on this score is the least protective of any of the circuits, and it is squarely inconsistent with the guarantees of the First Amendment. Here, too, much remains to be done.

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606. *Id.* at 1004.

607. *Id.*

608. *See infra* Part VII.B.1.

609. *See supra* note 133 (discussing the personal character of constitutional rights, including “the heckler’s veto”).

610. *See id.*

*B. An Independent First Amendment Standard for Threats: The Second Circuit (and the Sixth?)*

*1. The Second Circuit*

In *United States v. Francis*,<sup>611</sup> the Second Circuit adopted an approach to “true threats” that differs markedly from the objective tests of the other circuits, in which the court first construes the statute around First Amendment concerns and then simply applies the statute. In *Francis*, the circuit faced an appeal by the government of a dismissal of an indictment under 18 U.S.C. § 875(c), charging Michael Francis “with interstate transmission of threats to ‘blow the victim’s head off, cut the victim up into a thousand tiny pieces, slit the victim’s throat, and kill the victim.’”<sup>612</sup> The district court dismissed the indictment because “the government failed to charge that Francis subjectively knew or intended his communication to be threatening.”<sup>613</sup>

The Second Circuit reinstated the indictment, and it articulated a procedure for district courts to follow when facing “true threat” issues. To prosecute a defendant for a threatening communication, the government must demonstrate that the communication constituted a “true threat” within the meaning of the statute.<sup>614</sup> The Second Circuit explained:

We have routinely used the term “true threat” in setting forth the second element of [a violation of § 875(c)]. While we continue to do so, we note that the question of whether a defendant’s communication is a true threat rather than speech protected by the First Amendment—a *threshold question of law for the court* . . . —is different from the question of whether a reasonable person would interpret the communication as a true threat—a question for the jury at trial . . . .<sup>615</sup>

The circuit then held, “[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a

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611. 164 F.3d 120 (2d Cir. 1999).

612. *Id.* at 121.

613. *Id.* (quoting *United States v. Francis*, 975 F. Supp. 288, 296 (S.D.N.Y. 1997)).

614. *Id.* at 123 n.4.

615. *Id.* (emphasis added).



gravity of purpose and imminent prospect of execution, the statute may properly be applied.”<sup>616</sup> “Once a statement meets this test,” the court observed, “it is no longer protected speech because it is so intertwined with violent action that it has essentially become conduct rather than speech.”<sup>617</sup>

The court explained that after answering the First Amendment issue, a district court should then look to the statute and determine whether the communication constituted a “true threat” within its meaning. According to the court, the second question is objective. The court explained:

[U]nder Section 875(c), the government need prove only that the defendant intentionally transmitted a communication in interstate commerce and that the circumstances were such that an ordinary, reasonable recipient familiar with the context of the communication would interpret it as a true threat of injury.<sup>618</sup>

Consequently, the Second Circuit concluded, “Because the

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616. *Id.* at 123 (citing *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)); *see also* *People v. Benitz*, 105 Cal. Rptr. 2d 242, 251 (Cal. Ct. App. 2001) (analyzing attempt and “true threat” under the California Penal Code section 422; reversing conviction, since jury instruction was not specific enough to protect free speech), *review granted*, 25 P.3d 1080 (Cal. 2001), *dismissed*, 45 P.3d 1169 (Cal. 2002). California Penal Code section 422 prohibits “terrorist threats,” which, in brief, contain four elements: (1) willful threat of death or great bodily injury; (2) the intent that the threat be taken as threat; (3) threat on face or under circumstances, is unequivocal, unconditional, immediate and specific; and (4) threat caused other person reasonable fear. The original text of section 422 was found unconstitutionally vague in *People v. Mirmirani*, 636 P.2d 1130 (Cal. 1981). In redrafting section 422, the legislature, in part, followed *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976) (requiring unequivocal, unconditional, immediate, and specific threat). Wisely, it went beyond the law of the Second Circuit when it imposed the intent requirement. Nevertheless, *People v. Bolin*, 956 P.2d 374, 403 (Cal. 1998) read *Kelner* and section 422’s third element of “unconditional” as a word of illustration not a word of limitation. The requirement is, *Bolin* held, designed to assure that the threat is a “true threat” under *Watts*. Similarly, *In re M.S.*, 896 P.2d 1365, 1372 (Cal. 1995) read “imminent” as a word of illustration, not limitation.

617. *Francis*, 164 F.3d at 123.

618. *Id.* (citing *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (construing 18 U.S.C. § 875(c)) (citing *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994) (construing 18 U.S.C. § 876))). The test for whether a communication constitutes a “true threat” within the meaning of a particular statute was not always objective in the Second Circuit. *See, e.g.*, *United States v. Carrier*, 708 F.2d 77, 79 (2d Cir. 1983) (applying a test under 18 U.S.C. § 871 requiring that “the statute . . . be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President”). Given *Francis*’s blunt rejection of an intent standard for § 875(c) and the age of the *Carrier* decision, whether the Second Circuit would apply its “specific intent” test to a present-day § 871 prosecution is problematic.

government need not prove that a defendant intended his communication to be threatening, it follows that the indictment is adequate.<sup>619</sup>

The Second Circuit's approach to "true threats" is unique. The Second Circuit appropriately holds that the determination of whether speech is protected or an unprotected "true threat" is a question of law that a district court must resolve for itself rather than a question of fact for the jury. This approach is a necessary implication of *Watts* and *Claiborne*.<sup>620</sup> Just as important, First Amendment freedoms are ensured by providing that a judge, who by the character of his or her position should be sensitized to First Amendment concerns and the protection of the rights of the holders of minority viewpoints, will screen out matters that should not get as far as the jury. Nevertheless, the Second Circuit standard, while more stringent than those of the other circuits, is still solely an objective standard; it impermissibly allows conviction solely based on what others think of speech or expressive conduct, rather than by what the defendant intended to speak or act. Such an approach is, therefore, inconsistent with the more recent teachings of the Supreme Court on state of mind in criminal jurisprudence, which generally requires a minimum showing of knowledge.<sup>621</sup> Both the First Amendment and basic principles of federal criminal jurisprudence mandate a culpable state of mind.<sup>622</sup> In short, even *Francis* cannot be squared with Supreme Court jurisprudence.<sup>623</sup>

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619. *Francis*, 164 F.3d at 123. *Francis's* promise of greater protection for First Amendment value may not be fully redeemed in the district courts. See *United States v. Anderson*, No. 00-CR-15, 2000 WL 362024, at \*4 (N.D.N.Y. March 30, 2000) (applying *Francis* but noting, in answering the threshold law question of whether the First Amendment protected speech in a prosecution under 18 U.S.C. § 876, that "[d]efendant concedes that First Amendment limitations imposed on prosecutions for threatening communications apply in only the rarest cases"); see also *id.* (concluding that the "defendant's communication is not protected speech" and adding that its "conclusion is buttressed by defendant's inability to cite any cases other than *Watts* to this Court where the threatening communication was protected by the First Amendment, and the person uttering it was protected from prosecution").

620. See *supra* Part IV.B.

621. See Blakey & Roddy, *supra* note 11, at 1622 ("The general rule is that knowledge is required on conduct, as well as factual, and, in appropriate circumstances, legal, surrounding circumstances of a liability character. Result, too, is knowledge." (citations omitted)); see *infra* Part VI.

622. See *infra* Part VII.B.2.

623. The Second Circuit, in *New York v. Operation Rescue National*, 273 F.3d 184 (2d Cir. 2001), undertook a careful and detailed analysis of FACE—particularly the statute's First Amendment implications—that stands in stark contrast to the cursory treatment given by the

en banc Ninth Circuit in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), and the Seventh Circuit in *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001). For a discussion on *American Coalition of Life Activists*, see *supra* note 416. Unlike the Ninth and Seventh, the Second Circuit in *Operation Rescue* followed the Supreme Court's mandate in *Claiborne* to use "precision of regulation." In *Operation Rescue*, Mary Melfi and Michael Warren appealed injunctions applied against them under FACE. 273 F.3d 184. Acknowledging the constitutional issues raised by injunctions issued under FACE, the court undertook a de novo review of the record, "fulfilling [its] duty to conduct an independent examination of the record as a whole." *Id.* at 195.

The court first examined "whether the District Court was justified in granting the injunction [under FACE]" with respect to each of the two defendants individually. *Id.* at 192, 197. The court did not need to address the question of "intent" against Warren as it found that the district court had inadequate findings to support an injunction against him. *Id.* at 194. The injunction against Melfi was upheld because she "[did] not dispute the District Court's determination that her behavior was intentional." *Id.* Turning to Melfi's conduct, the circuit held that the district court's findings of prior FACE violations by the group with which Melfi was associated were "of limited utility with respect to Melfi. The validity of the District Court's injunction against Melfi turns on the findings made with regard to her *in particular*. . . . The record is replete with consistently [violative] egregious conduct by Melfi . . . ." *Id.* at 194-95 (emphasis added). The circuit then made a searching review of the district court's findings and rejected them because they "failed to differentiate illegal protestor activity from protected and typical, albeit aggressive, protest activities." *Id.* at 195. The circuit court continued, "protest activity [proscribed by the district court but] typically deserving of protection . . . included those who protest in 'an 'angry' tone,' and one protestor's habit of shouting at arriving patients in 'a loud deep voice.'" *Id.*

The court made a surgical analysis of the "true threats" issue: "We are . . . troubled . . . by the District Court's willingness to characterize a broad range of protestor statements as 'threats' without giving them the full analysis required by the First Amendment." *Id.* at 196. The court set out its own "true threat" standard: "When determining whether a statement qualifies as a threat for First Amendment purposes, a district court must ask whether 'the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . ." *Id.* (quoting *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)). Relying on the now-overruled panel opinion in *American Coalition*, the court observed "a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators)." *Id.* Applying this standard to Melfi's statement to a clinic doctor (made soon after the murder of Dr. Bernard Slepian) that "killing babies is no different than killing doctors," the court held that her "expression went to the core of her protest message, and the statement (even in context) did not suggest that Melfi was engaged in a plan to harm the clinic doctor . . . . [Nor did this] statement . . . indicate the 'unequivocal immediacy and express intention' of a true threat." *Id.* at 196-97 (quoting *Kelner*, 534 F.2d at 1027). Consistent with its duty to use "precision," the court examined each of Melfi's statements and acts separately. Although the circuit held that most of her statements were protected speech, two of them were found to construe "true threats" under the court's definition. *Id.* at 196 n.5 ("You won't be laughing when the bomb goes off," and "You're next, I hope you're next, you're next."). On that basis the circuit upheld the injunction as applied to her. *Id.* The circuit then addressed Warren, concluding that general findings regarding groups to which Warren belonged were insufficient, without specific facts, to uphold an injunction against him. *Id.* at 197-98.

## 2. The Sixth Circuit

The Sixth Circuit may still adhere to a construe-around, objective, hearer-based approach to true threats, but important evidence that the law in the circuit is in flux is found in *United States v. Baker*.<sup>624</sup> *Baker* involved a University of Michigan student who was prosecuted under 18 U.S.C. § 875(c) for posting graphic stories and sending graphic e-mails that described the torture, rape, and murder of one of his classmates.<sup>625</sup> The district court began its analysis by observing that “[b]ecause prosecution under 18 U.S.C. § 875(c) involves punishment of pure speech, it necessarily implicates and is limited by the First Amendment.”<sup>626</sup> “Under *Watts*,” the court observed, this means that “to pass constitutional muster the government must initially prove a ‘true threat.’”<sup>627</sup>

Next, the district court made an insightful observation: “The distinction between the two questions of whether a statement is a ‘true threat’ for the purposes of First Amendment limitation, and the intention of the statement’s maker, is important but unfortunately often confused. The confusion results from too loose a use of the phrase ‘true threat.’”<sup>628</sup> The court then addressed the first query, defining “true threats” for the purpose of the First Amendment. It

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After a brief look at state law nuisance and trespass claims also brought against the defendants, the circuit turned to the constitutionality of the terms of the FACE injunction issued by the district court. After finding that injunctions under FACE were generally content-neutral, the circuit undertook a site-by-site and injunction-by-injunction analysis to ensure that “provisions of the injunction burden no more speech than necessary.” *Id.* at 201–03 (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)). During this survey, the circuit noted, “The viability of injunctive restrictions on speech activities often rises and falls on its overall effect on free speech activity.” *Id.* at 206. The circuit specifically addressed the individual sites and injunctions to ensure that they, consistent with *Madsen*, were as narrowly construed and proscribed as little speech as possible. The court continued, “every incremental expansion in the size of buffer zones brings smaller benefits to patients and clinics, with greater injury to free speech. At some point, the balance shifts decisively.” *Id.* at 209. The Ninth and Seventh Circuits could learn much about First Amendment jurisprudence by carefully examining *Operation Rescue*.

624. 890 F. Supp. 1375 (E.D. Mich. 1995), *aff’d on other grounds sub nom.*, *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

625. Neither the content of the messages nor the stories is crucial to the court’s analysis; they need not—and therefore ought not—be republished here. For an example of the defendant’s work, see *Alkhabaz*, 104 F.3d at 1497 n.1 (Krupansky, J., dissenting).

626. *Baker*, 890 F. Supp. at 1381.

627. *Id.* The court rejected the government’s argument that *Watts* establishes a separate standard for political speech and instead held that it applies to all speech. *Id.* at 1381 n.10.

628. *Id.* at 1381.

pointed out that “[t]he only extended discussion of the constitutional dimension of the ‘true threat’ requirement with regard to § 875(c) is found in [*Kelner*],”<sup>629</sup> and it reiterated the *Kelner* objective standard.<sup>630</sup> The government objected, arguing that the Sixth Circuit followed a less stringent test of the objective, hearer-based variety, to wit, only that

the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of the President, and that the statement not be the result of mistake, duress, or coercion. The statute does not require that the defendant actually intend to carry out the threat.<sup>631</sup>

The district court rejoined: “*Lincoln* addresses the statute’s intent requirement . . . [But it] does not speak to the constitutional ‘true threat’ requirement imposed by the First Amendment and elucidated in *Watts* and *Kelner*.”<sup>632</sup> In fact, the district court added, Sixth Circuit precedent in the area—*United States v. Glover*<sup>633</sup> and *United States v. Vincent*<sup>634</sup>—similarly addressed the “statutory intent requirement rather than the constitutional limits of the statute. None of these cases indicate that a different constitutional standard for prosecution under § 875(c) applies in the Sixth Circuit than in the Second Circuit.”<sup>635</sup> The court then explained:

The confusion between the two requirements is understandable, because the phrase “true threat” has been used in the context of both requirements. . . . That the phrase “true threat” has been used to described both the statutory intent requirement and the constitutional “unconditional, unequivocal, immediate and

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629. *Id.*; see *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (producing the independent legal standard that the Second Circuit adopted in *United States v. Francis*, 164 F.3d 120 (2d Cir. 1999)).

630. See *supra* note 611 and accompanying text.

631. *Baker*, 890 F. Supp. at 1382 (quoting *United States v. Lincoln*, 462 F.2d 1368, 1368 (6th Cir. 1972) (per curiam)).

632. *Id.*

633. 846 F.2d 339, 343–44 (6th Cir. 1988).

634. 681 F.2d 462, 464 (6th Cir. 1982).

635. *Baker*, 890 F. Supp. at 1382.

specific” requirement does not imply that the two requirements are identical, or that any statement which meets the intent requirement may be prosecuted . . . without running afoul of the First Amendment. Typically, the in cases focussing [sic] the intent requirement, there is no dispute that the statement satisfies the constitutional standard, and the defendant seeks dismissal or reversal of his conviction on the ground that he or she lacked the requisite intent.<sup>636</sup>

It added: “*Kelner*’s standard for prosecution under [§ 875(c)] is not only constitutionally required, but also is consistent with the statute’s legislative history.”<sup>637</sup> Moreover, “[w]hether or not a prosecution under § 875(c) encroaches on constitutionally protected speech is a question appropriately decided by the court as a threshold matter.”<sup>638</sup> The court then dismissed the charges, noting that “[w]hatever Baker’s faults, and he is to be faulted,”<sup>639</sup> his messages “fall short of the *Kelner* standard of an unequivocal, unconditional, immediate and specific threat conveying and imminent prospect of execution and therefore are not ‘true threats’ unprotected by the First Amendment.”<sup>640</sup>

The district court’s opinion in *Baker* is commendable, but it is not yet fully the law of the circuit. On appeal, the circuit affirmed, but avoided the First Amendment issue:

Neither the district court’s opinion, nor the parties’ briefs contain any discussion regarding whether Baker’s e-mail messages initially satisfy the requirements of Section 875(c). For the reasons stated below, we conclude that the indictment failed, as a matter of law, to allege violations of Section 875(c). Accordingly, we decline to address the First Amendment issues raised by the parties.<sup>641</sup>

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636. *Id.* at 1383.

637. *Id.*

638. *Id.* at 1385. The district court referred to the Second Circuit’s assertion that “[m]ost cases are within a broad expanse of varying fact patterns which may not be resolved as a matter of law, but should be left to a jury,” but, significantly, it added that “where the factual proof of a ‘true threat’ is ‘insufficient as a matter of law,’ the indictment is properly dismissed before reaching the jury.” *Id.* (citing *United States v. Carrier*, 672 F.2d 300, 306 (2d Cir. 1982)).

639. *Id.* at 1390–91.

640. *Id.* at 1385.

641. *United States v. Alkhabaz*, 104 F.3d 1492, 1493 (6th Cir. 1997). Something about the prosecution struck a nerve in the Sixth Circuit; it announced a new standard for prosecution under § 875(c). The Sixth Circuit said:

While the district court's approach in *Baker* is praiseworthy, the prospects for its adoption are, unfortunately, not bright.<sup>642</sup>

## VI. BASIC PRINCIPLES OF FEDERAL CRIMINAL LAW

Any proposal to reform the law of threats in the circuit courts of appeal must reflect basic principles of federal criminal law. The en banc opinion in *American Coalition* wrongly viewed the policy issues it faced as if the general jurisprudence of federal criminal law played *no* role.<sup>643</sup> We disagree. We set out here the basic principles of the federal criminal law because we believe the en banc majority was twofold mistaken in failing to consider them: first, in construing the statute, which is a part of title 18, of the federal criminal code, and second, in fitting the laws of threats into First Amendment jurisprudence. Unfortunately, the Ninth Circuit is not alone in its failure to integrate these principles into its "true threat" jurisprudence. Much needs to be done.

Federal criminal law is written against a common law background.<sup>644</sup> Under the common law, "[c]rime . . . [was] a

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to achieve the intent of Congress, we hold that, to constitute 'a communication containing a threat' under Section 875(c), a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the *mens rea*), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the *actus reus*).

*Id.* at 1495 (emphasis added).

642. Indeed, in *United States v. Landham*, 251 F.3d 1072, 1080 n.5 (6th Cir. 2001), the court squarely rejected the *Kelner* standard. ("[The *Kelner* standard] differs from the rule in this circuit, as set forth in *Alkhabaz*, and we decline to apply it."); see *supra* note 641 (discussing *Alkhabaz* standard). Nevertheless, *Landham* does not directly address *Baker*'s crucial distinction between "threat" within a statute and "true threat" for the purposes of the First Amendment, though it seemingly equates the two questions. See *Landham*, 251 F.3d at 1080 (noting the *Alkhabaz* standard and then stating in conclusion that "it is well established that true threats, unlike political hyperbole and other protected speech, are not protected by the First Amendment"). If, despite *Landham*, the Sixth Circuit, on more mature reflection, redeems the promise of *Baker*, it will make an advance in the law.

643. See *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1076 (9th Cir. 2002) (finding that the subjective state of mind serves no "threat" related policy purpose).

644. ¶1. See *Morissette v. United States*, 342 U.S. 246, 262 (1952). But see *Carter v. United States*, 530 U.S. 255, 264–65 (2000) (holding that even though "take," employed in 18 U.S.C. § 2113(a) (1994) (bank robbery), is a word that is part of the common law definition of larceny ("take and carry away"), the statute is *not* read in light of common law, which required "intent to steal" for the purpose of inference of state of mind in statutory text). Because *Carter* did not follow the teaching of *Morissette*, it is an anomaly in the Court's

modern criminal law jurisprudence; it is also a profound disappointment to those who follow the work of the Court, when in recent years, it appeared that the Court's state of mind jurisprudence was finally going to be straightened out.

¶2. The importance of *Morissette* to the Supreme Court's jurisprudence of state of mind and federal criminal law can hardly be overstated. Before *Morissette*, the Court was moving toward a position that largely abandoned the traditional position in the criminal law of an indispensable requirement of state of mind (*mens rea*) and prohibited conduct (*actus reus*) for statutory offenses—the bulk of federal law, since the federal government under *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), does not have common law criminal jurisdiction. *Morissette* reversed that course of decisions and returned the Court to its traditional position, at least for major offenses. Understanding that turn in the jurisprudence of the Court requires putting it into a historical perspective.

¶3. The jurisprudence of state of mind in the nineteenth century in the Supreme Court was largely unremarkable. In *Felton v. United States*, 96 U.S. 699 (1877), one of the earliest decisions of the Court squarely to raise a state of mind issue, the Court had to determine the meaning of “willfully” in an Act of July 20, 1868. The government argued in its brief that consciousness alone of the prohibited conduct was sufficient. Government's Brief at 10, *Felton*, 96 U.S. 699. Instead, the Court construed “willfully” to mean, “not only a knowledge of the thing, but a determination with a *bad intent* to do it or to omit doing it.” *Felton*, 96 U.S. at 702 (emphasis added). The Act of 1868 dealt with drawing off spirits by a distillery; it prohibited drawing them off in the course of a fraud on the federal revenue tax on distilleries. Because the spirits were drawn off accidentally (the cistern into which the spirits flowed was inadvertently designed too small to handle the volume of production), the Court refused to permit the imposition of a \$1000 penalty solely on a showing of mere conscious awareness of the facts. “The spirit and purpose of the act,” Justice Field observed, “are not to be lost sight of in a strict adherence to its letter.” *Id.*

¶4. Significantly, Justice Field in *Felton* relied on Chief Justice Shaw's earlier holding in *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 220 (1838) (stating that the Act of 1782, based on the Provincial Act of 1670, prohibited “willfully blasphem[ing] the holy name of God”; “The word wilfully, in the ordinary sense [of the word] . . . means not merely ‘voluntarily,’ but with a bad purpose. . .”). Shaw is one of the giants of nineteenth century jurisprudence, and his influence on the law of his day was almost without parallel. In 1938, Dean Roscoe Pound, in his classic little volume, *THE FORMATIVE ERA OF AMERICAN LAW*, rightly counted Shaw among the “great judges” in America during the nineteenth century. *Id.* at 84. See generally, LEONARD W. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 207–28 (1957) (reviewing Shaw's contribution to the criminal law and concluding that while he was an innovator in the law of homicide, conspiracy, and insanity, he largely reworked and restated the traditional criminal law articulated by Chief Justice Matthew Hale in the seventeenth century and Sir William Blackstone in the eighteenth century, in particular that the “lawless and ungoverned will” was the principal object of the criminal law; thus, “only free moral agents could justly be held criminally responsible for their acts, because only the exercise of a free and rational will could cause a crime”).

¶5. Shaw's justly famous decision in *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 123–24 (1842), which articulated the modern definition of “conspiracy,” (“concerted action to accomplish . . . unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means”), was also adopted by the Supreme Court in *Pettibone v. United States*, 148 U.S. 197, 203 (1893). See 1 *WORKING PAPERS OF THE NATIONAL COMMISSION OF REFORM OF FEDERAL CRIMINAL* 381, 386–95 (1970) (containing report of G. Robert Blakey, “Conspiracy and Organized Crime,” that traces the origins of the law of conspiracy and its development in federal criminal law). In addition,



Shaw's equally famous decision in *Commonwealth v. Rogers*, 48 Mass. (7 Met.) 500, 501 (1844) which drew the basic distinction between the sane and the insane for criminal responsibility ("to constitute a crime a person must have [sufficient] intelligence and capacity . . . to have a criminal intent and purpose. . . [a] . . . will, . . . a conscious or controlling mental power[, that is, be a] responsible moral agent"), was adopted in *Davis v. United States*, 160 U.S. 469, 484–85, 493 (1895), though the Court declined to place the burden of proof on the issue on the defendant, as Shaw did.

¶6. In brief, the Court's reliance on Shaw in *Felton* put it in the main stream of its time in following the insistence of judges writing in the common law tradition on culpable state of mind and prohibited conduct as indispensable elements in the definition of criminal offenses. *Accord* *Spurr v. United States*, 174 U.S. 728, 735 (1899) (The Court held that it was error to exclude evidence of lack of willfulness where defendant acted without purposeful ignorance or gross indifference to the facts and believed in good faith sufficient funds were in account. "The wrongful intent is the essence of the crime."); *Potter v. United States*, 155 U.S. 438, 445–46 (1894) (holding it was error to exclude evidence of good faith in charge of "willful" certification of check without sufficient funds).

¶7. On the other hand, Shaw's understanding of "willfully" is not the law everywhere today, including in Massachusetts. *See* *Commonwealth v. Luna*, 641 N.E.2d 1050, 1053 (Mass. 1994) (The Court held that failure to instruct on "bad purpose" was not error in charge of "willfulness" in perjury prosecution, thus rejecting Shaw's classic definition. "[T]he modern definition is that 'wilful means intentional' without making reference to any evil intent . . ." (citations omitted)); 1 REPORT OF THE COMMISSIONERS OF THE PENAL CODE OF THE STATE OF NEW YORK § 763, at 280 (1865) ("The term 'willfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another or to acquire any advantage."). The 1865 Report is of the proposed, but not adopted, yet highly influential "Field Code," named after one of its commissioners David Dudley Field, the brother of Justice Field; the Code's recommendation for the definition of "willfully" was, for example, followed in the California Penal Code of 1872, section 7.1; in all, it was adopted in sixteen jurisdictions. 3 POUND, *supra* note 178, at 712.

¶8. During the early part of this century, the Supreme Court handed down a series of ill-fated decisions that departed from this early common law understanding of the basic requirements of criminal responsibility: culpable state of mind and prohibited conduct. In *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910), the Court faced a relatively simple issue: Was the imposition of double damages on a "casual and involuntary" trespasser for cutting timber on state land a violation of due process under the Fourteenth Amendment? The arguments of counsel for the company, however, substantially roiled the matter, which led to unfortunate constitutional dicta on state of mind by the Court that would come back to afflict its subsequent jurisprudence. Even though the state only asked for a civil remedy under the statute, the company sought to have its appeal reviewed by the Court in light of provisions in the statute that authorized both civil sanctions *and* criminal sanctions. Brief of Shevlin-Carpenter Co. at 16–19, *Shevlin-Carpenter Co.* (No. 139). It also sought to characterize the imposition of multiple damages as "penal" and to raise a double-jeopardy objection to the *possibility* that criminal and civil sanctions might be imposed on it for the same conduct. *Id.* at 44–47. Finally, it argued that the imposition of a criminal sanction (apart from public welfare offenses or negligence) without a showing of "criminal intent" was unconstitutional. *Id.* at 66. To decide the appeal, the Court only had to refuse to consider issues relating to criminal sanctions that were never imposed, to postpone consideration of the double-jeopardy question until it was properly before it, and to decline to characterize double damages as "penal." The Court had, of course, no duty to look at matters not before it (its duty was, in fact, to abstain

from them); furthermore, the fact that “multiple damages” need not be considered a “criminal” sanction was more than amply established in the Court’s jurisprudence. *See generally* G. Robert Blakey, *Of Characterization And Other Matters: Thoughts About Multiple Damages*, 60 LAW & CONTEMP. PROBS. 97, 102 (1997) (reviewing the history of various forms of damages, including nominal, liquidated or penal, actual, accumulative, and punitive damages in Biblical, Greek, Roman, English, and modern law and concluding that it “is a simplistic idea . . . that blithely asserts that all damages are either ‘actual’ or ‘punitive,’” that the purpose for which the particular form of recovery is authorized is the key to classifying it, and that multiple damages may be properly used for a variety of civil, not criminal, purposes). Nevertheless, while the Court refused to consider the authorization of criminal sanctions in the statute, since they could be separated from the civil sanctions, and found the claim of double jeopardy premature, *Shevlin-Carpenter Co.*, 218 U.S. at 65–67, it did far more than merely reject the company’s claim that the multiple damages could not be imposed without a showing of “criminal intent”; it took the arguments of counsel to the contrary, twisted them around, and used them against him. Counsel’s argument was that “criminal intent” was required before multiple damages could be imposed *except* for public welfare and negligent offenses. But the Court thought that the “concession of exceptions . . . destroy[ed] the principle.” *Id.* at 68. “[T]he principle, if it exist [sic] at all, must be universal.” *Id.* at 69. If the Constitution required “criminal intent,” a “conception of the public welfare” could not be “substituted” for the requirement of the Constitution. *Id.* at 68. “[I]f intent . . . [were] essential to the legality of penalties, it must be so, no matter under what power of the State they are prescribed.” *Id.* Fatefully, the Court then unnecessarily added, “[P]ublic policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.” *Id.* In fact, the Court never squarely decided the question before it: the characterization of multiple damages. Instead, tacitly assuming that multiple damages were a “penalty,” as counsel argued, it upheld them against the arguments advanced by counsel against them, but the reasoning of the Court on these points was all a superfluous exercise.

¶9. Sadly, the unwise constitutional dicta in *Shevlin-Carpenter Co.* soon led to the adoption of an equally unwise general principle of statutory interpretation in *United States v. Balint*, 258 U.S. 250 (1922). There, a district court dismissed an indictment under the Harrison Act, 38 Stat. 786 (1914) (making it unlawful for “any person to sell, barter, exchange, or give away” opium or coca leaves without a written order blank from the government), since the indictment did not charge “a *scienter*—that is, that it failed to allege that the defendants had knowingly sold the drugs in question.” Brief of the Government at 2, *Balint* (No. 480). The government appealed; the defendants did not file a brief. While the government’s brief extensively reviewed English and American authorities on the requirement of state of mind in common law offenses and statutory enactments, its argument boiled down to the assertion that no state of mind for the facts was constitutionally required under *Shevlin-Carpenter Co.*, so the issue was purely a matter of statutory interpretation. *Id.* at 5, 17 (“The extent and character of the evil, . . . the ease with which the law may be evaded, [and] the nature of the drugs in and of themselves . . . all lead to the conclusion that Congress would naturally provide an external standard, easily determined, and would make the subjective knowledge of the offender immaterial.”). In a painfully short opinion by Chief Justice Taft, the Court reinstated the indictment. Relying on *Shevlin-Carpenter Co.*’s constitutional dicta as a backdrop, the Court held, “[State of mind] is a question of legislative intent to be construed by the court.” 258 U.S. at 252. It then offered purely consequential reasoning for not finding a state of mind in the statute: “Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided.” *Id.* at 254.

¶10. In turn, *Balint's* approach to statutory interpretation was extended in *United States v. Behrman*, 258 U.S. 280 (1922), to a physician who in good faith dispensed drugs to a patient. The physician argued that he could only be found guilty if he acted outside his “professional practice,” an exception, “in bad faith [or with an] unlawful intent.” Brief on Behalf of the Defendant at 4, *Behrman* (No. 582). Without such an allegation, the indictment was, he argued, bad. *Id.* The government countered, as in *Balint*, that the statute “contemplate[d] merely an external standard and [did] not require either guilty knowledge or guilty intent . . .,” Brief on Behalf of the United States at 10, *Behrman* (No. 582), and that “professional practice” was a question of law for the court. *Id.* at 19. In another altogether short opinion, the Court, by Justice Day, relying on *Balint*, simply held, “If the offense be a statutory one, and intent or knowledge is not made an element of it, the indictment need not charge such knowledge or intent.” 258 U.S. at 288. Justices Holmes, McReynolds, and Brandeis dissented, not on the question of state of mind, but on the construction of the statute that the physician was not within his “professional practice.” *Id.* at 289–90.

¶11. Finally, the series ended with *United States v. Dotterweich*, 320 U.S. 277 (1943). There, the government charged Buffalo Pharmacal Co., a drug “jobber” (a company that obtains drugs from manufacturers and then packages, labels, and sends them to others in the distribution chain), and Dotterweich, its president and general manager, under the Food, Drug, and Cosmetic Act, which prohibited “any person” from “introduc[ing] into interstate commerce . . . any . . . drug . . . that is . . . misbranded.” 52 Stat. 1040 (1938) (current version at 21 U.S.C. §§ 301–392 (2002)). The jury found the corporation not guilty, but convicted Dotterweich. The Court affirmed the conviction. Relying on *Balint*, and adopting its purely consequential reasoning, Justice Frankfurter, for the Court, characterized the Act as a “now familiar type of legislation [in which] penalties serve as effective means of regulation . . . [and which] dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. . . . [i]n the interest of the larger good, . . . put[ting] the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” 320 U.S. at 280–81. Dotterweich fell within “any person,” the Court held, rejecting the effort of the lower court to read into the Act immunity for individuals under a provision of the statute that applied if drugs were received under a guarantee from the manufacturer. The Court observed:

Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

320 U.S. at 284–85.

¶12. Thus, a fateful series of decisions that began in 1910 with ill-advised dicta that made the absent state of mind, that is, strict liability, agreeable with due process ended thirty-three years later with a holding that made conduct statutorily unnecessary. From the common law position that prided itself on requiring both state of mind (*mens rea*) and prohibited conduct (*actus reus*) as indispensable prerequisites to individual responsibility under the criminal law, the jurisprudence of the Court came to rest on an underpinning that balanced relative interests and legitimated not only strict, but also vicarious criminal liability.

¶13. In 1952, a unanimous Court, in a masterful opinion by Justice Jackson, in *Morissette v. United States*, 342 U.S. 246 (1952), brought to an abrupt close this line of decisions in the Court’s jurisprudence. The twin requirements of state of mind and prohibited conduct for federal criminal law were resoundingly reaffirmed. There, Morissette, by trade a fruit stand operator in the summer and a scrap iron collector in the winter, went deer hunting

in the Michigan back woods country, as was the custom of the community, on land that had been leased by the Air Force from the State of Michigan to use as a government bombing range. Finding no deer, he decided to meet expenses by salvaging spent bomb casings that were dumped over the years in various heaps and were rusting from exposure to the weather. He realized \$84 for his efforts. Soon, he was visited by FBI agents, to whom he freely told his story. The visit was followed by an indictment under 18 U.S.C. § 641 (“Whoever embezzles, steals, purloins, or knowingly converts” property of the United States commits an offense) that charged him with “unlawfully, willfully and knowingly steal[ing] and convert[ing]” the property of the United States. Morissette testified that he did not “intend to steal” anything; he said that he believed that the casings were “abandoned.” The trial judge was unimpressed, and he instructed the jury that, on the facts the prosecution proved and the admissions of Morissette, “abandonment” was not an issue and that if Morissette took property that belonged to the government from government land, as he admitted—though the facts were ultimately up to the jury for its decision—he was guilty as charged. The Sixth Circuit affirmed, over a powerful dissent by Judge McAllister. 187 F.2d 427, 431–40 (1951) (arguing that under the common law principle of *noscitur a sociis* (a thing is known by the company it keeps), the various offenses in the statute carried with them a common, but an implicit requirement of *animo furandi*, or intent to steal, as at common law, a dissent that foreshadowed the Supreme Court’s ultimate reversal of Morissette’s conviction). The Sixth Circuit found that § 641, because of the “or” that separated the words, prohibited discrete offenses and that “knowingly converts” stated an individual offense that carried with it no additional “felonious intent” under the now well-accepted approach to statutory interpretations of *Behrman* and *Balint*. *Id.* at 430 (terming *Balint* an “outstanding” precedent). The Supreme Court reversed, holding that:

knowing conversion [by Morissette] require[d] more than knowledge that [he] was taking the property into his possession. . . . [; h]e must have had knowledge of the facts, though not necessarily the law, that made the taking a conversion. . . . [W]hether the mental element that Congress required be spoken of as knowledge or as intent . . . Morissette could [not] have knowingly or intentionally converted property that he did not know could be converted . . . if it was in fact abandoned or he truly believed it to be abandoned . . . .

*Morissette*, 342 U.S. at 270–71. The issue of the required state of mind was, the Court held, for the jury; it was up to it to “brand”—or not—Morissette “as a thief.” *Id.* at 256.

¶14. The holding of *Morissette* is far less important than its reasoning. Justice Jackson began his landmark decision, which owed little to the parties’ briefs, by commenting that the decision “would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law . . . .” *Id.* at 247. His decision is divided into two major parts: first, the proper approach to the general interpretation of federal criminal statutes, and second, the proper approach to the interpretation of § 641. First, he candidly conceded that *Behrman* and *Balint*, if they were “precedents for principles of construction generally applicable to federal penal statutes,” authorized the conviction. *Id.* at 250. Nevertheless, he suggested, that because an “effect . . . [was] ascribed to them . . . inconsistent with our philosophy of criminal law,” *id.*, a resume of their historical background was necessary. In brief, Justice Jackson’s skillful opinion transformed them from the status of general rules for interpreting federal criminal statutes to interpretive exceptions to be employed narrowly. “The contention that an injury can amount to a crime only when inflicted by intention,” he observed, “is no provincial or transient notion.” *Id.* “It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” *Id.* It was, he

wrote, the basis of the English and American criminal law in the eighteenth and nineteenth centuries. *Id.* at 251–52. “Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.” *Id.* at 251–52. However described—as *scienter*, *mens rea*, or guilty knowledge—courts always sought to use the concept “to protect those who were not blameworthy in mind from conviction of infamous common-law crimes.” *Id.* *Behrman* and *Balint* dealt, he suggested, instead with exceptions to this salutary approach; they dealt solely with “public welfare offenses.” *Id.* at 255. These offenses did not easily fit into any of the traditional categories of crimes against “the state, the person, property, or public morals.” *Id.* at 252. Lawmakers, wisely or not, he observed, citing *Felton v. United States*, 96 U.S. 699, 703 (1877) (“the law . . . is not so unreasonable as to attach [liability and punishment] where there is no intention to evade its provisions”), created new regulations required by the conditions of modern civilization, and they sought to make them effective by imposing criminal sanctions, but dispensing with “any ingredient of intent.” *Id.* at 253. He recognized that the distinction between “common-law offenses” and “public welfare offense” was not always easy to draw. Significantly, he emphatically rejected one rationale for distinguishing them: that requiring state of mind might “obstruct” their enforcement. *Id.* at 257. Nevertheless, he did not attempt a close-end definition of the “public welfare offenses” category; instead, he referred to scholarship that described them, offering, in effect, an ostensive definition of the category. *Id.* at 262 n.20 (citing Francis Sayer, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 73–84 (1933) ((1) liquor, (2) impure foods, (3) misbranded articles, (4) narcotics, (5) criminal nuisances, (6) traffic regulations, (7) motor-vehicle laws, and (8) police regulations for community safety, health or well-being)); see *infra* Appendix A (Definition) (analyzing various approaches to definitions). Accordingly, when Congress drafted new statutory offenses that were like traditional common law crimes, they would be read as reflecting “the cluster of ideas” traditionally associated with common law crimes unless Congress “otherwise instructed.” *Morissette*, 342 U.S. at 263. Silence alone, that is, “mere omission,” on the question of *scienter* would not be read as a “departure” from traditional concepts of criminal responsibility. *Id.*

¶15. Unfortunately, Justice Jackson’s opinion at this point is twofold ambiguous. First, *scienter* is to be implied into common law-type offenses. But the common law knew various states of mind, ranging from intent or purpose to recklessness or negligence. He does not tell us *which form* of *scienter* is to be read into the new statutory offenses. Presumably, he meant the nearest appropriate state of mind, as “intent to steal” would be read into larceny-type offenses, as Judge McAllister argued in dissent in the Sixth Circuit. Second, he does not tell us *which elements* of the offense would carry which states of mind, for different elements appropriately might have different states of mind: You could, for example, require “knowledge” for the conduct (method of “escape,” that is, “climbing” a fence or “digging” a tunnel) and for the result (achieving the goal of “escape”), two elements of the offense of “escape” under 18 U.S.C. § 751, but require only recklessness or negligence on the factual surrounding circumstance of the confinement. See *United States v. Baily*, 444 U.S. 395, 406–07, 409 n.7 (1980) (following *Morissette*, silence alone is not sufficient to have strict liability; finding conduct of escape is knowledge, but recklessness or negligence on surrounding circumstance of escape not decided). From hindsight, these questions were not adequately fleshed out in Jackson’s opinion, but noting them should not be read as detracting from the principal work of part one of the opinion, which remains a masterpiece of judicial craftsmanship.

¶16. Next, Justice Jackson turned to § 641 itself. He read its language, which was enacted as part of the codification of 1948, as simply bringing together from “scattered sources” “kindred” offenses that belonged “in one category.” *Morissette*, 342 U.S. at 266. “If

one crime without intent” was included in § 641, it was, he suggested, like Judge McAllister, “smuggled into a section whose dominate offenses do require intent. . . .” *Id.* at 269. It was “put,” he said, “in ill-fitting and compromising company.” *Id.* At this point, too, Justice Jackson’s opinion is unfortunately ambiguous. The conventional interpretation of the opinion puts the issue: “Does the mental state ‘knowingly’ apply (a) only to ‘converts,’ or (b) to ‘government property’ as well?” MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 54 (2002) (reading the opinion as holding (b)). In fact, the opinion can also be interpreted as reading an “intent,” that is, “intent to steal,” into the section as a whole. *See, e.g., Morissette*, 342 U.S. at 261 n.19, 271 (The Court cites a series of “intent to steal” decisions, but only describes them as demonstrating the retention of a requirement of “intent” in larceny-type offenses. “[W]hether the mental element that Congress required be spoken of as knowledge or as *intent*. . . it is not apparent how *Morissette* could have knowingly or *intentionally* converted property that he did not know could be converted . . . .”) (emphasis added). Thus, “abandonment” would have been a mixed question of fact *and* law, where a mistake of fact or law would have exculpated *Morissette*. *But cf. id.* (“had knowledge of the facts, *though not necessarily the law*”) (emphasis added). The point is of little moment to the outcome in *Morissette*, but its identification and resolution might have affected the reasoning, if not necessarily the result, in subsequent decisions. *See, e.g., Liparota v. United States*, 471 U.S. 419 (1985) (Brennan, J.) (issue is syntactically ambiguous whether “knowingly” modifies “use” *and* “unauthorized manner”; under background assumption of state of mind following *Morissette* and principle of lenity held to modify both); *id.* (White, J., dissenting) (background assumption of state of mind balanced by assumption of not requiring knowledge of law under *United States v. International Minerals & Chemical Corp.*, 403 U.S. 558, 564–65 (1971)). In *Liparota*, the Court evaluated 7 U.S.C. § 2024, which prohibited “knowing[ ] use of” food stamp coupons “in any manner not authorized.” *Id.* at 419. Treating § 2024 like a larceny-type offense and reading into it “intent to steal” would have made the issue one of contextual ambiguity disambiguated by the principle of *Morissette*, and it would obviate the dissent of White and made Brennan’s comment about not implicating an issue of “mistake of law” inapt. *See id.* at 426 n.9. On the distinctions between syntactical and contextual ambiguity in the interpretations of statutes, see *infra* Appendix B ¶¶ 2–5 (Natural Language: Generality, Ambiguity, and Vagueness.).

¶17. The Court’s unanimous *volte-face* in *Morissette* is open to a number of explanations. On the surface of the opinion, it is merely a clarification of the law and an explicit reaffirmation of an older position. Nevertheless, we think the significance of the decision runs much deeper, in particular in Justice Jackson’s case. Jackson had just returned from Nuremberg where he had to come to grips with the concept of individual responsibility in horrendous circumstances: the wartime (and previous) atrocities perpetrated by followers of National Socialism. Did anyone bear personal responsibility for the enormity of the war and its planning, its war crimes, and its crimes against humanity (including the persecution and “final solution” of the Jews), all committed in the name of the German people, but each one committed by individuals, singularly or in groups, one by one? If so, under what legal—or moral—standards? Jackson, the other prosecutors, and the defense counsel had to argue these points not abstractly, but concretely in the context of men on trial for their lives, where the ultimate decision of the tribunal would carry the force of law in the possible subsequent trials of thousands of other individuals in Germany and the occupied countries for these offenses, if they be criminal offenses. The defenses of the men on trial rested on two elementary arguments: (1) The prosecution itself was illegal, *ex post facto*; that is, no valid international *criminal* provision banned their conduct, which, they argued, was in accordance with German law and they were, in any event, only “following orders”; and (2) Apart from that violation of a basic principle of law, no showing of *individual* responsibility was made; that is, “I , for one,

did not know of these horrible actions.” That the Supreme Court, led by Jackson, returned to its roots and drew an acute distinction between Western society, with its traditional emphasis on individual responsibility and freedom, and the totalitarian ideology of the Nazis is hardly surprising. In fact, what needs to be accounted for is not the decision in *Morissette*, but the Court’s abandonment of its traditional moral roots in the years before 1952. *See generally supra* note 416 ¶¶ 7–17 (discussing the Nuremberg trial and Jackson’s prominent role in setting it up and acting as Chief United States Prosecutor, including his (and others’) arguments before the International Military Tribunal on the questions of state of mind and individual responsibility).

¶18. Increasingly, the indispensable character of blameworthiness is recognized in enlightened criminal jurisprudence. Canada treats the question of state of mind in criminal offenses as a matter of the “principles of fundamental justice,” and where imprisonment is authorized, Canadian law prohibits it under its Charter of Rights and Freedoms, Section 7, Part I, of the Constitution Act of 1982, as enacted by the Canada Act of 1982 (U.K.), c. 11. *In re* Section 94(2) of the Motor Vehicle Act, [1985] 24 D.L.R.4th 536. While no consensus is present in the academic world (it never is), we believe that the position that sees “moral blameworthiness” at the heart of the criminal law is correct, but more important, it reflects the moral experience of those who live the law. *Compare* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 U.C.L.A. L. REV. 1511, 1518 (1992) (“A moral agent, must be implicated in the breach of a moral norm that fairly obligates the agent’s compliance under the circumstances where that breach can be fairly attributed to the agent’s conduct.”), *with* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 209 (1987) (“[E]ven in that small corner of our lives when moral responsibility is relevant, there can really be no desert, because our conduct is so much affected, for better or worse, by its underserved antecedents.”), *and* MAX RADIN, LAW AS LOGIC AND EXPERIENCE 13 (1940) (“If we then gladly abandon logic as the life of the law and turn to experience, the first question that must be answered is: ‘Whose experience?’ And certainly the answer is inevitable. Not the experience of lawyers . . . [but] the great mass of the community . . .”), *and* DENNIS LLOYD, THE IDEA OF LAW 64–67 (1983 prtng.) (“The difficulty of reaching any agreement as to the true demands of morality has in some quarters led to a reaction in favour of trying to eliminate moral judgments from the criminal law, and concentrating on achieving its social purposes: to protect society and reform the prisoner. . . . It seems improbable that, at any rate in the present stage of human society, . . . [any] substitute for the morally based criminal would be either intelligible to the community as a whole or that it would appear to be in accord with the sense of justice of ordinary people upon which the effective administration of the law so largely depends. . . . To many minds the risks involved in eliminating or reducing the sense of moral responsibility of the individual remain markedly greater than the obvious imperfections of the existing system.”). Yet the judiciary continues to struggle with the implication of states of mind, particularly knowledge of law. *See, e.g.*, *United States v. Wilson*, 159 F.3d 280 (7th Cir. 1988) (Bauer, J.) (knowledge of facts, not law, solely required; under 18 U.S.C. § 922, unlawful for any person subject to a restraining order to possess a gun shipped in interstate commerce); *id.* (Posner, C.J., dissenting), *cert. denied*, 527 U.S. 1024 (1999) (Because of the obscure character of the law, knowledge of the law is required. “It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted *was* a crime, or even that it was a wrongful. This is one of the bedrock principles of American law. It lies at the heart of any civilized system of law.”). Indeed, in sharp contrast to the consequential reasoning of *Balint* or *Dotterweich*, modern economic analysis and utilitarian positions are in accord with traditional notions of moral blame in requiring state of mind. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 255–59 (5th ed. 1998); Arenella, *supra*, at 62–63. *See generally* Richard S. Murphy & Erin O’Hara, *Mistake of Federal*

compound concept, generally constituted only from concurrence of an evil-meaning mind . . . [and] an evil-doing hand . . . ”<sup>645</sup> William

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*Criminal Law: A Study of Coalitions and Costly Information*, 5 SUP. CT. ECON. REV. 217, 219 & nn.9–11 (1997) (collection of economic literature); John Shepard Wiley, *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1080 (1999) (The article contains a comprehensive analysis of decisions and review of the general literature and a collection of literature on criminal law as moral condemnation. It finds, “Strict criminal liability is bad for a simple reason. Our criminal process is a theater of shame for those convicted of serious criminal charges. This powerful condemnation should be reserved of those who deserve it.”).

645. *Morisette*, 342 U.S. at 250. See generally LAFAVE, *supra* note 56, at 175–76 (“[C]onduct, to be criminal, must consist of something more than a mere bad state of mind. . . . [In addition,] conduct to be criminal must consist of something more than mere action (or non-action where there is a legal duty to act); some sort of bad state of mind is required . . . .”); PERKINS, *supra* note 56, at 831 (“The *actus reus* is essential to crime but is not sufficient for this purpose without the necessary *mens rea*, just as *mens rea* is essential to crime but is insufficient without the necessary *actus reus*.” (emphasis added)); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 70 (2d ed. 1960) (“The principle of *mens rea* is the ultimate evaluation of criminal conduct . . . . Its paramount role in penal theory also results from the fact that *mens rea* is the fusion (‘concurrence’) of the elementary functions of intelligence and volition. ‘Only’ its projection into reality, its actualization in the external world, is required to form criminal conduct. . . .”); CLARK & MARSHALL, *supra* note 56, at 232–33 (“*Actus non facit reum, nisi mens sit rea* is the product of an effort to capture a theory of criminal responsibility, resting upon and requiring concurrence of a wrongful intent and wrongful act, in a maxim.”). See also ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 126–27 (1930) (“[T]he starting point of the criminal law . . . [in] the [nineteenth] century . . . [was] that a criminal was a person possessed of free will who, having before him a choice between right and wrong, . . . freely and deliberately chose[.] . . . to [do] wrong . . . .”); 2 FREDERICK POLLOCK & FREDERICK MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 449–511 (2d ed. Cambridge Univ. Press 1968) (1898) (tracing the development of the common law felonies before the time of Edward I, which ultimately came to comprise homicide, mayhem, wounding, false imprisonment, arson, rape, robbery, burglary, and larceny, and which embodied a principle that made a person responsible for conduct “no matter what may have been his intentions or his motives” (any “such ideas as the Roman *culpa* . . . are but slowly fashioned”), but which later, as a result of the “Christian church, . . . [which] exercised a not inconsiderable influence,” were mitigated, and caused a move away from the strict culpability of the early law; referring to St. Augustine as the original source of the later common law maxim: “*Et actus non facit reum nisi mens sit rea*.”).

The rationales offered for the sanctions of the criminal law are generally stated as retribution, deterrence, incapacitation, and rehabilitation. LAFAVE, *supra* note 56, at 22–26. The historical development of the various rationales of the criminal law, which did not (unfortunately for the consistency, at least, of criminal law theory) operate so that each replaced the previous but rather came to overlay one another, even though on particular matters they were logically at odds (e.g., sentencing is fixed under retribution (death or life for murder) but flexible for incapacitation/rehabilitation (if reformed, release is indicated no matter how much, if any, of a sanction is fulfilled; if not reformed, continued imprisonment or other restraint is appropriate even if his or her initial sanction is fulfilled)), is comprehensively traced in CARL LUDWIG VON BAR, *A HISTORY OF CONTINENTAL CRIMINAL LAW* (1916); additional sources are extensively collected and perceptively analyzed in Katherine P. Blakey, *The Indefinite Civil Commitment of Dangerous Sex Offenders Is an Appropriate Legal*



Blackstone wrote:

[A]s a vitious [sic] will without a vitious act is no civil crime, so, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.<sup>646</sup>

These two basic requirements of the criminal law are called *mens rea* (state of mind) and *actus reus* (conduct). “The basic premise that for criminal liability, some *mens rea* is required is expressed by the

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*Compromise Between “Mad” and “Bad”—A Study of Minnesota’s Sexual Psychopathic Personality Statute*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 227–99 (1996) (approvingly anticipating the Supreme Court’s decision in *Kansas v. Hendrick*, 521 U.S. 346 (1997) (upholding continuing civil commitment of dangerous sexual predators after end of service of criminal term)). *But see* *Kansas v. Crane*, 534 U.S. 407 (2002) (obtaining the civil commitment of a dangerous sexual predator requires a finding of the lack of ability to control behavior).

Matthew A. Pauley in *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97 (1994), convincingly demonstrates that each of the contemporary approaches to crime and punishment are closely linked to various, but not always consistent, assumptions about human nature. Compare James William Cecil Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31, 37–48 (1936) (arguing that the development of common law crimes was from strict liability, through culpable negligence, to a minimum of recklessness), with OLIVER WENDELL HOLMES, *THE COMMON LAW* 34–62 (Mark DeWolfe Howe ed., 1963) (arguing that the development of common law crimes was (1) from the desire for vengeance against intentional wrongs (subjectively assessed) to the desire to prevent dangerous conduct (objectively assessed) and (2) from moral retribution based on the assumption of a responsible person to utilitarian deterrence based on the assumption of behaviorism), and *United States v. Barker*, 514 F.2d 208, 227–37 (D.C. Cir. 1975) (Bazelon, C.J., concurring) (tracing the history of criminal responsibility as a natural development of the concept of *mens rea*, based on the theory of punishing the vicious will).

646. BLACKSTONE, *supra* note 130, at \*21. Blackstone’s exposition of the common law of England is authoritative for federal law. *See, e.g.*, *Schick v. United States*, 195 U.S. 65, 69 (1904) (“Blackstone’s Commentaries are accepted as the most satisfactory exposition of the common law of England.”). Blackstone himself wrote for the educated gentlemen of his day in a language accepted by all with a common, classical schooling. Nevertheless, Blackstone was also widely read by others, particularly in the colonies. In his famous Conciliation Speech in the House of Commons in 1775, Edmund Burke noted that the publishers sold nearly as many of BLACKSTONE’S COMMENTARIES in America as in England. A.E. HOWARD, *THE ROAD FROM RUNNYMEDE* 131–32 (1968). Men as different as James Kent (1763–1847), the first professor of law at Columbia College and Chancellor of New York, and Abraham Lincoln (1809–1865), a self-taught Illinois country lawyer and president, learned their law from Blackstone. DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW*, preface, 3–4 (1958). “From Blackstone,” Boorstin observed, “we can learn even more about what the American colonists were defending than by reading the violent tracts of Thomas Paine.” *Id.* The King James Bible, Shakespeare, and Blackstone were literary models and libraries for two or more generations of American lawyers; in particular, Blackstone’s perspective on the law, including the criminal law, became *the* American perspective.

Latin maxim *actus non facit reum, nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).<sup>647</sup> The concept of

647. ¶1. LAFAVE, *supra* note 56, at 225.

¶2. The issue of state of mind in criminal law is carefully surveyed from ancient times to the present era in Max Radin, *Criminal Intent*, in I ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 126–27 (1944):

[H]istorically the necessity for the existence of any mental element is the late requirement. The right of satisfaction recognized by early law is an undifferentiated claim which may in modern terminology be based on tort, crime or breach of contract . . . . Since the right . . . is a right to reparation, the question of the wrongdoer's intent is considered irrelevant. [Nevertheless, i]n . . . *Numbers* 27–28 a . . . distinction was made between “ignorant” and “presumptuous” wrongs because in theocratic society sins and crime are similarly regarded . . . . [I]n Plato's *Laws* voluntary and involuntary injuries are systematically distinguished . . . . This conception was adopted . . . more fully in the mature Roman law . . . . The term *dolus malus* [wittingly and willfully] . . . became . . . the embodiment of the concept of wrongful intent. While public punishment was permissible only if *dolus* was present, *culpa*, or negligence, sufficed for the *delicta privata* [private wrong]. A criminal theory had to be recreated for western Europe during the Middle Ages. The concept of law of the Germanic tribes consisted almost entirely of . . . elaborate tariffs of compensation for injuries. Practically no account was taken of intent or of wrongful purpose . . . . But contact with the Roman Law and especially the canon law—the developed Christian theology went the full distance of considering only the wicked will as really punishable and the harm done as immaterial—forced men once more to pay attention to the subjective condition of the wrongdoer.

¶3. The philosophical psychology reflected in the basic principles of the criminal law is principally rooted in Aristotle's ethical theories, as more fully developed in light of Christian moral philosophy by St. Thomas Aquinas. Compare Aristotle, *Nicomachean Ethics*, in GREAT BOOKS, *supra* note 130, at 339, with 1–2 Thomas Aquinas, *The Summa Theologica of Saint Thomas Aquinas, Part I of the Second Part*, in 19–20 GREAT BOOKS, *supra* note 130, at 583, 1–378. Those theories were fully developed in light of Christian moral philosophy and integrated with Roman law by the Spanish Natural Law School, of which the most original thinkers were the Dominican, Francisco deVitoria (1480–1546) (his principal works include *De Justitia* and *Indis et Ire Belli*) and the Jesuit, Francisco Swarez (1548–1617) (his principal works include *Disputationes Metaphysical* and *De Legibus acc Deo Legislatore*). See generally 2 FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 375–87, 398–411 (1950) (outlining St. Thomas's philosophical psychology and moral philosophy); *id.* at 335–36, 350–52, 380–405 (tracing the development and influence of Spanish legal philosophers, in particular, Swarez); JULIÁN MARIÁS, HISTORY OF PHILOSOPHY 205–09 (Dover ed. 1967) (tracing the history of Spanish legal philosophy). From there, they found their way into the writings of Hugo Grotius (1583–1645) (his principal work is *DeJure Belli acc Pacis*), Samuel Pufendorf (1632–1694) (his principal work is *De Jue Nataurae Et Gentium*), Charles de Secondat Montesquieu (1689–1755) (his principal works include *Persian Letters* and *Spirit of Laws*), Francois Voltaire (1694–1778) (his principal works include *Concerning the English Nation* and *Candide*, a satirical novel), and Cesare Beccaria (1738–1794) (his principal work is *On Crime and Punishment*). See generally CHARLES S. EDWARDS, HUGO GROTIUS (1981) (tracing Grotius's thought to various sources, including Aquinas, Vitoria, and Swarez); MARCELLO T. MAESTRO, VOLTAIRE AND BECCARIA AS REFORMERS OF CRIMINAL LAW 1–13, 124–51 (1972) (describing the criminal law at the beginning of the eighteenth century and the success of the reforms by the beginning of the nineteenth century).

¶4. Montesquieu's *SPIRIT OF THE LAWS* (1750) included the first articulation of the doctrine of separation of power, which inspired the American Constitution as well as the French Declaration of the Rights of Man; Beccaria's *ON CRIME AND PUNISHMENT* (1767) was the first succinct treatment of the thinking of Enlightenment figures on the rationale of criminal punishment; it formed the critical background that "helped Blackstone to crystallize his ideas" on English criminal law. 11 SIR WILLIAM HOLDSWORTH, *HISTORY OF ENGLISH LAW* 578 (1938); MAESTRO, *supra*, at 132 ("[T]he influence of Montesquieu and Beccaria [are clearly shown in] . . . Blackstone's work . . ."). For contrasting modern examinations of those philosophical foundations, compare RALPH MCINERY, *AQUINAS ON HUMAN ACTION* (1992) (resting Aquinas's view on a concept of "human nature"), with JOHN FINNIS, *FUNDAMENTALS OF ETHICS* (1983) (resting Aquinas's view on a concept of "human goods").

¶5. Needless to say, those philosophical foundations are no longer generally accepted. That they are not poses difficult issues for the theory of criminal law as well as its relation to theories of civil liberties. We may here put to one side the generally ignored historical wellspring of these liberties in early Christian writers seeking freedom of religion under the Roman Empire. *See supra* note 181. In fact, our modern concepts of civil liberty are typically traced historically no further back than the writings of John Locke (1632–1704), an English Puritan, whose views were solidly rooted in scripture but colored by his radical individualism, and an empiricist, whose views were firmly rooted in experience but colored by his religious perspectives; Locke, in fact, never reconciled the various strands of his thought; their conciliation, in fact, is problematic. *See infra* Appendix A ¶¶ 6–15. On the one hand, he rested man's "natural rights," expressed in a comprehensive understanding of "property," not so much on man's relation to God, but on "reason" and a "self" that preexisted government. John Locke, *Concerning Civil Government, Second Essay, ch. V, Of Property*, in 35 GREAT BOOKS, *supra* note 130, at 30–31 [hereinafter Locke, *Second*] ("[E]very man has a 'property' in his own 'person.' This nobody has any right to but himself.").

¶6. Locke's concepts of "self" and "property" are fundamental to the liberalism of the Lockean legacy that underlies modern liberal-democratic theory. C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962), summarizes the legacy when he suggests that the defining character of seventeenth century individualism was found in its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them. The individual was seen neither as a moral whole, nor as a part of a larger social whole, but as an owner of himself. The relation of ownership, having become for more and more men the critically important relation determining their actual freedom . . . was read back into the nature of the individual. The individual, it was thought, is free inasmuch as he is proprietor of his person and capacities. The human essence is freedom from dependence on the wills of others, and freedom is a function of possession.

*Id.* at 3.

¶7. On the other hand, Locke's nominalism, espoused in his *Essay Concerning Human Understanding*, in 35 GREAT BOOKS, *supra* note 130, at 93 [hereinafter Locke, *Essay*] led him to raise questions, which he never wholly resolved, about "self" and "personal identity." *Id.* at 218–28. First, he recognized that "self" and "personal identity" were necessary for the "justice of reward and punishment." *Id.* at 225; *see also id.* at 227 ("'person' a forensic term . . . [for] appropriating actions and . . . merit"). But then, he had difficulty squaring them with his radical nominalism; in the end, he moved on, leaving it up to the "goodness of God." *Id.* at 223. He attributed his difficulty to "this ignorance we are in of the nature of that thinking thing that is in us, and which we look on as *ourselves*." *Id.* at 227. Locke's ideas were, of course, shaped by his understanding of scripture, which taught him that each person was uniquely valuable because he was made in the image and likeness of God. *See Genesis* 1:26

(“And God said: Let us make man in our image, after our likeness . . .”). He found no conflict between his view of the teachings of scripture and his understanding of the teachings of reason. See Locke, *Second, supra* ¶ 5, at 26 (“[A]nd reason . . . teaches all mankind . . . that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions; for men being the all the workmanship of one omnipotent and infinitely wise Maker . . . they are His property . . . made to last during His, not one another’s pleasure.”).

¶8. The influence of Locke on the Declaration of Independence of 1776 is manifest: “We hold these truths to be self-evident, that all men are created equal; that they are endowed by their creator with certain unalienable rights: that among these are life, liberty and the pursuit of happiness.” THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776); 1 Stat. 1 (1790); 43 GREAT BOOKS, *supra* note 130, at 1; see also 11 HOLDSWORTH, *supra* ¶ 4, at 129–39 (noting that the political theories of Locke applicable to the Glorious Revolution of 1688 were only partially applicable to a modern, democratic polity and concluding that while Great Britain lost the greater part of her empire, her “rules of law . . . left deep marks . . . upon the Constitution of the United States”). But see 11 HOLDSWORTH, *supra* ¶ 4, at 118–21, 129–39 (noting that the American Revolution was justified on various bases, including laws of nature, but concluding that the “recognition of the [unqualified] sovereignty of Parliament [meant that they] . . . rested upon a political theory which the establishment of the modern state had rendered obsolete”).

¶9. That concept of equality was, tragically, not fully embodied in the Constitution of 1789 or the Bill of Rights of 1791; it was, however, at the heart of the Fourteenth Amendment (“equal protection of the laws”) that set aside *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (explaining that African-American slaves and their descendants were “regarded as beings of an inferior order [having] . . . no rights which the white man was bound to respect”). It took a civil war costing 600,000 lives to turn *Dred Scott* around. See *supra* note 178 (figures on civil war deaths). Even then, the Fourteenth Amendment’s promise of equality was not legally redeemed until *Brown v. Board of Education*, 347 U.S. 483 (1954). See WILLIAMS, *supra* note 178 ¶ 9 (discussing the story and jurisprudence behind formulation and argument in *Brown*).

¶10. While individuality, equality, responsibility, and civil liberty are, apart from Locke’s religious perspective, central values of the Enlightenment’s secular political theory, its empiricist epistemology always threatens to undercut them. In its rejection of the perspective of the Enlightenment itself, post-modernity takes square aim at these values and their foundation in secular theory. See POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN (Anthony Carty ed., 1990). Anthony Carty observes:

There is a very consistent argument to post-modernity . . . The Enlightenment . . . purported to secularise thought to render “Man” independent of a religious or metaphysical ground of “Being,” to liberate him from the “darkness” of history, tradition and authority. Its model of law . . . is above all perfectly clear. It is libertarian and contractarian. Man gives himself his law; men give to one another “their” law. The existence of “rights” means that man in society recognises that he has constituted a system of institutions, procedures, etc. which provide a context for these rights. About this there is no “mystery.” There is no need to reach out to “ultimate” foundations. . . . [A] post-modern perspective . . . [argues that] the Enlightenment . . . [fails] in its own terms, precisely in that it incorporated fundamentally religious/metaphysical assumptions into its own categories of thought. . . . Law, with a capital L, reason with a capital R, and man with a capital M, make up a defunct Trinity.

*Id.* at 2.

¶11. Carty notes that post-modern thinkers are “celebrated in the worlds of aesthetics and literary theory.” *Id.* But their “implications for legal theory” are not yet fully “elaborated.” *Id.* Nevertheless, “[p]ost modern thought sets a limit to the Enlightenment . . . [project] by being ‘deconstructive.’” *Id.* at 4. “It is not necessary to deconstruct or ridicule the Rights of Man. They will,” he says, “fall apart of their own accord because [of human] death . . . .” *Id.* “The deconstruction of secular rationalism is central to post-modernism . . . . The implications for modernist law are never far away. They concern, above all, the disappearance of the Rights of Man with Man’s own disappearance.” *Id.* at 5.

¶12. That disappearance was foreshadowed in Enlightenment thought itself. David Hume (1711–76), an empiricist like Locke, but unlike Locke a skeptic and an atheist, possessed no illusions about the goodness of God—though he, too, expressed his inability to develop a satisfactory theory of “self” and “personal identity.” In his *TREATISE OF HUMAN NATURE*, section VI, at 251–52 (1992), he concluded, “But self or person is not any one impression, but that to which our several impressions and ideas are supposed to have a reference . . . . But there is no impression constant and invariable. . . . [C]onsequently there is no such idea [of self or person].” *Id.* at 299–300; *see also id.* app. at 636 (“I cannot discover any theory [about self or person] which gives me satisfaction . . . . I must plead the privilege of a sceptic, and confess, that this difficulty is too hard for my understanding.”).

¶13. WILLIAM JAMES, *PRAGMATISM* (1995), speaks for the modern, secular, American mind, which follows in the path marked out by Locke and Hume:

Our personal identity, then, consists, for Locke, solely in pragmatically definable particulars. Whether, apart from these verifiable facts, it also inheres in a spiritual principle, is a merely curious speculation. Locke, compromiser that he was, passively tolerated the belief in a substantial soul behind our consciousness. But his successor Hume, and most empirical psychologists after him, have denied [the separate existence of] the soul.

*Id.* at 45.

¶14. James, too, recognizes the implications of radical empiricism for a regime of ethics or accountability, when he, as he must, empirically rejects “free will.” *See id.* at 54–57; *see also* 2 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 569–79 (1950) (finding that the means to resolve empirically the appearance of freedom with the fact of determinism, the basic postulate of science, are lacking; James resolves it ethically in favor of freedom, but excludes it from his treatment of the science of psychology).

¶15. Without a defensible basis for “self,” or “personal identity,” or “accountability,” that is, individual blame or merit, the basic principles of the criminal law remain, to be sure, as law, but they are without extra-legal support; it is, in short, one paradox of post-modernism. *See* WAYNE MORRISON, *JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM* 108–13 (1997). Morrison comments:

Thus Hume graphically describes the crisis of grounding or foundationism. We search for an absolute position to secure those calculations which will constitute the intellectual foundations of truly modern institutions but cannot find certainty. . . . This problem is at the centre of the so-called crisis of social sciences in late-or post-modernity. It was recognised in Hume’s time as the argument that without God there would be no way of guaranteeing our demarcation of good from evil, and ultimately nothing to give human life secure meaning; nihilism threatened. It continues to do so; how is it countered? Hume appeared to advocate a stoic acceptance of some natural flow underlying life’s ultimate mystery. The converse argument of Nietzsche—to take courage and create our own “truths”—has been seen to lead to irrational programmes.

*Id.* at 113–15 (footnote omitted).

¶16. *See also* JOHN STUART MILL, AUTOBIOGRAPHY (1957). Mill writes:

When the philosophic minds of the world can no longer believe its religion, or can only believe it with modifications amounting to an essential change of its character, a transitional period commences, of weak convictions, paralysed intellects, and growing laxity of principle, which cannot terminate until a renovation has been effected in the basis of their belief leading to the elevation of some faith, whether religions or merely human, which they can really believe: and when things are in this state, all thinking or writing which does not tend to promote such a renovation, is of very little value beyond the moment.

*Id.* at 153.

¶17. Similarly, Friedrich Nietzsche, in BEYOND GOOD AND EVIL 67 (1989), writes: [F]ormerly, one believed in “the soul” as one believed in grammar and the grammatical subject: one said, “I” is the condition, “think” is the predicate and conditioned—thinking is an activity to which thought *must* supply a subject as cause. Then one tried with admirable perseverance and cunning to get out of this net—and asked whether the opposite might not be the case: “think” the condition, “I” the conditioned; “I” in that case only a synthesis which is *made* by thinking.

¶18. Writers as diverse as BERTRAND RUSSELL, LET THE PEOPLE THINK 61–79 (1941), an atheist, and Pope John Paul II, VERITATIS SPLENDOR 48–49, 62–66, 68–72, 122–23 (n.d.), a believer, powerfully argue that epistemological relativism, or the idea that objective truth does not exist, and epistemological pragmatism, or the idea that truth is usefulness, are linked with authoritarian and totalitarian ideas.

¶19. *Accord* ROSCOE POUND, JUSTICE ACCORDING TO LAW 22–23, 91 (1951):

It is now held by many that an ultimate theory of values cannot be found. We are told that it is unscientific to seek to formulate values. They are held to be purely subjective. Objective valuations cannot be reached. . . . But it is significant that [the] experience of totalitarian government convinced [German legal theorist Gustav] Radbruch that he must modify his [legal positivist] teaching. There did seem to be certain fundamental expectations involved in life in civilized society . . .

. . . .  
[T]heories of the impossibility of justice according to law . . . have developed side by side with[] absolute theories in politics. . . . The real foe of absolutism is law.

¶20. Radbruch’s rethinking and new insights into the inadequacy of his prior positivistic perspective in light of the Nazi regime, that is, from a relativist to one who espoused objective values, is explored in W. FRIEDMANN, LEGAL THEORY 192–196 (5th ed. 1967). *See*, in particular, *id.* at 191–206.

¶21. Radbruch was not the only thinker to reconsider this thought after having witnessed the horrors of World War II. Jerome Frank, *L’enfant terrible* of realism in American in the 1930s, concluded in his FATE AND FREEDOM 105 (1945):

The deterministic-ascetic outlook has had even worse consequences. Its treatment of human values as irrelevant has created paralyzing doubts as to the reality of those values, and has encouraged a perspective which culminates in brutalitarian Nazism, with its life-negating philosophy, its irreverence for the dignity of man. . . .

Scientific fatalism is but a faith, a dismal and cruel one. We need not accept it. There is no reason why we should forsake the American faith—which rests on the facts of daily experience—that human purposes are real.

*See also* JEROME FRANK, LAW AND THE MODERN MIND, at xvii–xviii (6th prt. 1949) (“I do not understand how any decent man today can refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas. . . . Natural Law aims at justice, and at moderate certainty, in the man-made

rules, that is, in the more or less abstract generalized, human formulations of what men may or may not lawfully do.”); see *infra* note 793 (discussing a more nuanced consideration of relation between the general principles of natural law and its particular applications).

¶22. For a recent, comprehensive analysis of the natural law tradition, see John Finnis, *Natural Law: The Classical Tradition*, in JULES COLEMAN & SCOTT SHRPIO, *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 1–60 (2002).

¶23. See also 5 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 368–426 (1946–49) (Opening Statement of M. Francois de Menthon, Chief Prosecutor of the French Republic) (arguing that National Socialism denied all traditional spiritual, rational, or moral value and plunged humanity back into barbarism by adopting race as the unit of value, rejecting the value of the individual, save as an element of race, and taking Nietzsche’s will to power as the ultimate value as well as disregarding any sense of justice, or even pity, that then gave rise to a policy of terrorism, which resulted in atrocities that were perpetrated, not under mad passion, but as a result of cold calculation, of perfectly conscious methods and preexisting doctrine). But see MARK LILLA, *THE RECKLESS MIND* 193–216 (2001) (arguing that neither an excess of reason nor of emotion in the shifts in the intellectual currents is to blame for the politics of authoritarianism but rather the failure is to be sought in individual character that does not control the natural tendencies of human conduct).

¶24. Hans Kung aptly describes the post-modern world:

In the second half of the twentieth century, [Nietzsche’s new man, rooted in the will to power] has become only too well known: men without God, whose relationships with one another are concretized even into the private sphere, determined by functional and practical values, guided by power interests, the weak everywhere being the victim of the stronger, superior, less scrupulous. The horizon of meaning is in fact effaced, there are no longer any supreme values, reliable guiding principles, absolute truth. In practice, does this not mean that a nihilism of values is determining human behavior? Has that not come to pass which Nietzsche foresaw—more clearsightedly than many before him? But it is often a mild, concealed, unemotional nihilism, without the passion of a Zarathustra but no less dangerous. Many today are distrustful toward a loud, public nihilism, and no politician, anyway, could afford to indulge in it. But people permit themselves a mild, private nihilism, often guilelessly, innocently, perceiving the consequences only at a very late stage. For, after so many taboos were broken in the war years and subsequently, so many traditions disappeared, conventions were dropped, humanisms were emptied of meaning, despite all the prosperity and better education, in many families parents no longer know to which values, guiding principles, ideals, norms, to which truth, they should cling and to which they should educate their children: devaluation (often without any revaluation) of values, the loss of which can then be noted, but can be canceled only with difficulty. In education, culture, economy, science, politics, “an incomplete nihilism” lived in a middle-or upper-class style, feeble and only half affirmed: “we live in the midst of it.”

Sometimes, however, more is involved. Nihilism presents many faces, from bored, intellectual skepticism to brutal political anarchism. Undoubtedly it is not only because of a whole packet of social factors but in the last resort also because of a nihilistic lack of orientation and lack of norms, that there has been an alarming increase in the number of thefts, robberies, crimes of violence, murders, by children, young people, students (more and more of them female), that the number of drug addicts, dropouts, suicides has risen tremendously in the past decade, that

susceptibility to ideologies has often amounted to mania. The ‘meaning deficit’ and ‘meaning vacuum’ in the Western affluent society, for a long time now, has not only provided the middle classes with intellectual titillation in the ‘theater of the absurd’ of an Ionesco or a Beckett, has not only been diagnosed and deplored by psychotherapists and psychiatrists. It is beginning to be a political fact.

HANS KUNG, DOES GOD EXIST? AN ANSWER FOR TODAY 411 (Edward Quinn trans., 1980) (citations omitted).

¶25. St. Augustine terms the view that everything is uncertain as “madness.” St. Augustine, *City of God*, in 18 GREAT BOOKS, *supra* note 130, at 523. “Regarding matters which it apprehends by the mind and reason it has most absolute certainty, although its knowledge is limited because of the corruptible body pressing down the mind . . . It believes also the evidence of the senses . . . for he is more wretchedly deceived who fancies he should never trust [the senses].” *Id.*; see also St. Augustine, *The Retractions*, in 60 THE FATHERS OF THE CHURCH 6–11 (1968) (discussing his writings and the New Academy, a school of Greek philosophy that questioned all dogma and adopted a modified form “scepticism” (all dogmas are to be questioned) and “probabilism” (only that which is, in light of a balance of reasons, “probable” should be, at least provisionally, accepted as “true”)). COCHRANE, *supra* note 181, at 431, sums up Augustine’s position as “at once intellectual and moral. It thus depended . . . upon the [intellectual] conviction that there could be no significant doubt except upon the presumption of actual knowledge . . . and the [moral] fear that the acceptance of probabilism [of the New Academy] as a way of life would engender in many minds an utter despair of any truth to be discovered . . .”

¶26. The prospect for a general change in viewpoint, however, is not bright. For too many among us, other people are no longer valuable in themselves; they are merely means to an end; and no limits are placed on the means to be chosen to achieve a particular end, save those of utility in achieving the end. Intellectually, the result can be (and has been) ominous from a traditional perspective. If you abandon the individual as the unit of analysis (it is merely a “construct”), use group (e.g., “race”) as the unit, and adopt consequentialisms without any limit on the means to be employed, the policies of the Third Reich become—perversely—“rational.” A “life unworthy of life” or a “useless eater” (*lebensunwerten Leber* or *unnutze Esser*), that is, a handicapped person, a Gypsy, a homosexual, or a Jew, even six million of them, may simply be eliminated. The issue is not basically moral; it is merely technical. If you think you need land, seize it by forceful diplomacy or force without diplomacy. The consequences of that philosophical perspective in World War II were breathtaking. See *supra* notes 178, 416 (discussing Third Reich and Nuremberg Trial).

¶27. For devastating critiques of the standard form of consequentialism, see J.R. LUCAS, RESPONSIBILITY 33–56 (1993) (arguing that consequentialism, where the individual is the unit of analysis, dilutes responsibility, as it imposes unlimited negative responsibility, and therefore, has ironically, bad consequences; and in a world of more than one actor—our world—is a poor maximizing strategy (i.e., is again, ironically, “bad” consequentialism), unless it takes into consideration the decisions of others, which in fact, requires shared responsibility in a community); Philippa Foot, *Utilitarianism and the Virtues*, in CONSEQUENTIALISM AND ITS CRITICS 241 (Samuel Scheffler ed., 1988) (arguing that consequentialism proceeds from the premise that morality is a device for achieving a certain end state, but that premise is itself a premise of consequentialism that must be established (i.e., it begs the question to start with a premise of consequentialism if the validity of consequentialism is itself on the table for discussion); “morality” need not have any meaning beyond which the “virtues” give it; if this action is “unjust,” a “moral” person need not engage in it without worrying about “consequences”; and concluding, “If we accustom ourselves to the thought that there is simply a blank where consequentialists see ‘the best state of affairs’ we may be better able to give



individual and moral responsibility embodied in the common law is rooted in the Judeo-Christian tradition.<sup>648</sup> Nevertheless, under the

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other theories the hearing they deserve"); *infra* note 656 (discussing theory of virtues); *see also* CICERO, ON MORAL ENDS 41 (Julia Annas ed., 2001) ("By 'moral' . . . I mean that which can justly be esteemed on its own account, independently of any utility, and of any reward or profit that may accrue.").

¶28. Nevertheless, for a sustained, if concededly inconsistent, effort to describe a "liberal" but "foundationless" culture that "copes" and an expression of a hope that it will be free of violence and characterized by "conversation" among its "diverse" people, *see* RICHARD RORTY, CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972–1980), at xiii–xvii (1982) (arguing that for pragmatists, "truth" is just the name of a "property" which all "true" statements share, but not much can be said about the common features between true statements; modern pragmatists also see certain acts as "good," but similarly doubt that anything general may be said about what makes them all "good"; finally, that modern pragmatists find the Platonic tradition of absolute "good" as having outlived its "usefulness"; modern science does not enable us "to cope" because its theories "correspond to reality"; it just plain enables us "to cope"); RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 163 (First Princeton Paperback prtg. 1980) (arguing that the original dominating metaphor of philosophy was having our beliefs determined by a "face to face" confrontation ("seeing") with the object of belief ("reality"), which was the "foundation," that is, the framework within which knowledge, life, and culture must be believed ("correspondence") as "true or false" and the "standard" against which "conduct" must be measured as "good or evil," but that we need not go, in fact, beyond "conversation" in our own society; it is sufficient "to cope"; and the search for "confrontation" or "correspondence" may be abandoned); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY XV–XVI (1989) (arguing that we must drop the demand for a unifying theory of truth or goodness, "face" up to the "contingency" of our own most central beliefs and desires and abandon the idea that those central beliefs and desires refer back to something; a post-metaphysical culture is no more impossible than a post-religious culture, and it is "equally desirable"). *But see* KARL POPPER, CONJECTURES AND REFUTATIONS (3d ed. 1968) ("I believe that we simply cannot do without something like . . . [an] idea of a better or worse approximation to truth.").

¶29. For a less sanguine view than Rorty about life in a post-modern society, *see* JOHN LUKACS, THE HITLER OF HISTORY 115 n.\* (1997) (Hitler: "There can be only one dogma, in brief: what is useful is right."); KERSHAW, *supra* note 130 ¶ 9, at 30–31 ("Hitler [lacked] genuine warmth and affection . . . [O]ther human beings . . . were of interest to him only as long as they were useful. . . . In his own eyes . . . he was the only person that mattered. His wishes, his feelings, his interests alone counted."). Indeed, Hitler may be aptly characterized as the perfect embodiment of Friedrich Nietzsche's (1844–1900) *ubermensch*, the superman, or a "person" quintessentially post-modern. *See* D.W. HAMLYN, A HISTORY OF WESTERN PHILOSOPHY 262–65 (1990) (summarizing Nietzsche's views on the *ubermensch* as the individual who transcends "the guilt-laden inhibitions of ordinary men" and who affirms a "radical subjectivity," for whom, without "access to facts independent of human points of view," truth "lies in the superiority of a point of view," which secures "dominance," where truth is "power," "God is dead," and Christianity, in particular, merely reinforces a "slave morality" or subservience, rather than a "master morality," a slave morality rooted not in love, but the *resentment* by those unable to use power, the use of which for the master morality is not only "the supreme value, it is the only reality").

648. 2 POLLOCK & MAITLAND, *supra* note 645, at 476–78 (tracing the influence of Christianity on the development of the common law felonies).

Old Covenant in the Mosaic Decalogue, responsibility was collective, not individual.<sup>649</sup> The ancient Semitic world was “collectivistic[;] the individual person did not have . . . importance . . . [Phrases like] the dignity of man [and] personal liberty . . . would have been idiot’s jargon to the men of Mesopotamia . . . .”<sup>650</sup> Individual responsibility was prophesied as a New Covenant in Jeremiah<sup>651</sup> and Ezekiel.<sup>652</sup>

The dignity of the human person and the values of human life rest[ed for the Hebrews,] on a belief in the inner worth of the human person, a worth which consist[ed] in this, that there is a kinship . . . between man and God that is not shared by the lower animals. Otherwise, man is trapped in the organic cycle of birth, nutrition, and decay, and there is no hope more foolish than the hope that he can escape from this cycle.<sup>653</sup>

Today, that responsibility is based on personal conduct and state of mind is fundamental.<sup>654</sup>

649. See, e.g., *Exodus* 20:1–5 (A violation of God’s commandment to have no “other gods besides me” resulted in “inflicting punishment for their father’s wickedness on the children of those who hate me, down to the third and fourth generations.”).

650. JOHN L. MCKENZIE, *THE TWO-EDGED SWORD: AN INTERPRETATION OF THE OLD TESTAMENT* 78 (1966); see also *supra* note 181 (discussing the ideal of human worth in the ancient world before the impact of Christianity); *THE CODE OF HAMMURABI* §§ 229–30, in *BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS* (Legal Classics 1987):

If a builder has built a house for a man, and has not made his work sound, and the house he built has fallen, and caused the death of its owner, that builder shall be put to death. If it is the owner’s son that is killed, the builder’s son shall be put to death.

651. *Jeremiah* 31:30 (“But every one shall die for his own iniquity . . .”).

652. *Ezekiel* 18:4 (“[t]he man who has sinned, he is the one who shall die”); see J. HOLLAND SMITH, *UNDERSTANDING THE BIBLE* 232 (1968):

Ezekiel effected one of the most important revolutions in moral thinking . . . For to make every human being personally responsible for his or her own actions is to make every human being a complete person, an individual in his or her own right, no longer merely a son or daughter of so-and-so, the tribal father, but also a separate individual with a personal . . . destiny.

653. MCKENZIE, *supra* note 650, at 130–31.

654. ¶1. See, e.g., *Scales v. United States*, 367 U.S. 203, 203–24 (1961) (“In our jurisprudence guilt is personal.”); see also *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) (“[I]f any fundamental assumption underlies our system it is that guilt is personal and not inheritable.”). That is not to say that the law does not know exceptions to individual responsibility. See, e.g., *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–95 (1909) (holding that, consistent with due process, a corporation may be held criminally liable for acts of agents or employees done with intent to benefit the corporation); *United States v. A & P Trucking Co.*, 358 U.S. 121, 125–26 (1958) (same rule followed in a partnership). The point is that these rules are *exceptions*. Not only is responsibility personal in the law, so, too, are constitutional rights, including free speech rights.

*See supra* note 133 (discussing the personal character of constitutional rights).

¶2. Ultimately, this notion of individual responsibility became fundamental in the jurisprudence of the federal criminal law. But even more basic is the notion of human freedom that lies behind it, a notion in itself that merits at least some exploration in these materials. “To act freely is to be unhindered in ‘the pursuit of’ your purposes . . . .” ROBERT KANE, *THE SIGNIFICANCE OF FREE WILL* 4 (1996). “[T]o will freely . . . is to be the ultimate creator . . . of your own purposes . . . .” *Id.* The notion of “ultimate creator” is “obscure,” but its meaning “can be captured” in an image: “when we trace the . . . explanatory chains of action back to their sources in the purposes of free agents, these causal chains must come to an end . . . in the willing choices, decisions, or efforts of the agents . . . .” *Id.* In turn, if these willings were themselves caused by something else, so that the explanatory chains could be traced back further “to heredity or environment, to God, or fate,” then the final cause of our conduct “would not lie with the agents but with something else.” *Id.* Thus, the idea is that “ultimate responsibility lies where the ultimate cause is—where the buck stops.” *Id.* This image, too, accounts for “the association of free will with human dignity.” *Id.*; *see also* GREGORY A. BOYD, *SATAN AND THE PROBLEM OF EVIL* 56 (2001) (“[T]he total set of antecedent causes does not determine a truly free action. While factors outside the agent are *influential* in every decision an agent makes, such factors are never coercive when the decision is in fact free. Thus, appealing to factors external to the agent can never *exhaustively* explain the free choice of the agent. In light of all influences and circumstances, agents ultimately *determine themselves*.”).

¶3. Religiously, the notion of human dignity may be rooted in the Biblical teaching that “humans are made in [the] image of God.” *Id.*; *see also supra* note 181 ¶ 6 (discussing image and likeness of God). Rationally, it may be rooted in the notion of the “autonomy [of the human person] arising from his freedom” that gives rise to his “*personality*” by virtue of which he is “an *end in himself*.” IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 155–56 (1st ed. 1788). Kant’s moral or practical postulates are summarized at *id.* 238–41 (immortality of self, freedom of self, the existence of God, and the objective reality of the *summum bonum* or highest good); IMMANUEL KANT, *RELIGION WITHIN THE LIMITS OF REASON ALONE* 40 (1960) (“Man *himself* must make or have made himself into whatever, in a moral sense, whether good or evil he is or is to become . . . ; for otherwise he could not be held responsible for it and could not be *morally* good nor evil.”); *see also* ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 291–399 (1981) (reviewing choice and indeterminism, determinism and aligning with value, and retributive punishment); 1–2 MORTIMER J. ADLER, *THE IDEA OF FREEDOM: A DIALECTICAL EXAMINATION OF THE CONCEPTIONS OF FREEDOM* (1958) (constituting the collaborative work of the Institute for Philosophical Research: classifying theories of freedom, drawing out of them their common elements, and identifying controversies).

¶4. The notion of “freedom” outlined here is variously termed “self-determining freedom,” “libertarian freedom,” or “incompatibilist freedom” (in contradistinction with “compatibilist freedom,” that is, freedom that either is or is not “compatible” with one or more forms of “determinism”); *see* BOYD, *supra* ¶ 2, at 417–30 (glossary of terms, including “compatibilism,” “incompatibilistic freedom,” “mechanistic worldview,” “quality of freedom,” self-determining freedom). As so understood, it frankly faces formidable objections from two radically dissimilar sources: theology and science (including the philosophy of science).

¶5. Theology (literally “talk about God”) must reconcile God’s omniscience (perfect knowledge of past, present, and future events, including human action) and omnipotence (all that was, is, and will be, was, is, and will be by virtue of divine power) with human free will. How is it that God’s grace or power, which by definition is infallible in effect, can be reconciled with the free consent of the human will?

¶6. Caught up in this issue, too, is the vexing question of human suffering. If God is pure love or unqualified good, how is it that humans, apparently just, suffer at the hand of a righteous God? Various answers to this insistent question are given in the Western tradition. For Jews, the question is most prominently considered in the book of *Job*, which because of its artistic structure, elegant style, and deep theological meditations, is universally marked as one of the literary masterpieces of all time. In this eponymous book, Job knows himself to be righteous, but he suffers not only from physical pain, but also from the conventional explanations of human suffering presented to him by his “friends,” which he knows to be false, at least in his case, creating a classic conflict between doctrine and experience. Not finding an answer in human wisdom, Job cries out to God for an answer, an “answer” he gets in Chapter 40 “out of the storm.” *Job* 40:6 (“Will we have arguing with the Almighty by the critic?”). In short, God tells him that he is not capable of understanding the “answer,” an “answer” Job accepts in faith. *Id.* at 42:3 (“I have dealt with great things that I do not understand; things too wonderful for me, which I cannot know.”).

¶7. Christians find their “answer” in, among other places, Paul. *See Colossians* 1:24 (“Now I rejoice in my sufferings for your sake, and in my flesh I am filling up what is lacking in the afflictions of Christ on behalf of his body, which is the church . . .”). This cryptic passage is one of the most difficult to interpret in Holy Scripture. *See, e.g., A CATHOLIC COMMENTARY ON HOLY SCRIPTURE* 1135 (1953) (setting out alternative readings and concluding that while “exegete here can advance only with caution,” “suffering can be, not a terrifying enigma . . . but something very precious, since it is the instrument God chose to redeem us, and we can make our sufferings serve in the cause of Christ’s Passion.” (citations omitted)). *See generally*, PETER KREEFT, *MAKING SENSE OUT OF SUFFERING* (1986) (comprehensive analysis of objections and considerations on the issue for the modern but questioning mind). Other traditions offer other “answers,” but we need not survey or analyze all of them. Needless to say, for some modern Americans, if not most, this sort of general intellectualizing based on readings of sacred scripture is too abstract for our pragmatic character; it is, too, hardly satisfying to a person actually in pain (unless he is already a saint), even among believers, to say nothing about nonbelievers, who typically find it all simply unintelligible.

¶8. The reconciliation of God’s omniscience and omnipotence in theology came to a head among Catholic theologians in the late sixteenth and early seventeenth centuries. Two sides of the question developed, one represented by the Dominican Order (Domingo Bañez (1528–1604) was a leading figure) that emphasized the efficacy of Divine grace, the other was represented by the Society of Jesus (“Jesuits”) (Luis de Molina (1535–1600) was a leading figure). The Jesuit position came to be called “Molinism”; it emphasized the unrestrained character of human freedom of the will. The Dominicans declared that the Jesuits conceded too much to human free will, tending toward the Pelagian heresy that denied the corrupted character of human nature and thought that humans could “do good” by themselves without Divine grace. In turn, the Jesuits thought that the Dominicans did not sufficiently safeguard human liberty, tending toward the Calvinists’ heresy of predestination. Eventually, the matter was referred to Rome for decision by the Pope, then Clement VIII, who set up a commission to hear the matter (*Congregatio de Auxiliis*). Between 1602 and 1605, he personally heard no less than sixty-eight debates between the contenders for each Order’s position, which were passionately delivered. He died in 1605 without having rendered a decision on the matter. After the brief reign of Leo IX, Paul V, his successor, heard no less than seventeen debates on the issue. Then, in 1607, a Papal degree was issued that allowed each party to continue to defend its own doctrine, but solemnly enjoined each from condemning the other as embracing heresy and told them both to await the final decision of the Apostolic See. The decision is, as of this date, still pending. *See generally* CATHOLIC ENCYCLOPEDIA, *Congregatio de Auxiliis*

(1999) (online edition at [www.newadvent.org/cathen](http://www.newadvent.org/cathen)); *id.* (Domingo Bañez); *id.* (Luis de Molina); *id.* (Molinism).

¶9. Science (and its philosophy) (literally, “talk about wisdom”), too, quarrels with the traditional notion of freedom. Excellent collections of essays on the question, which continues to spill much ink and to fell many trees, may be found in OXFORD HANDBOOK OF FREE WILL (Robert Kane ed., 2002); AGENTS, CAUSES AND EVENTS (Timothy O’Connor ed., 1995); THE PROBLEM OF FREE WILL (Willard F. Enteman ed., 1967); DETERMINISM AND FREEDOM (Sidney Hook ed., 1958). A scientific objection to freedom in a popular form is RICHARD DAWKINS, THE SELFISH GENE (1976).

¶10. Any short review or analysis of these materials is daunting. The arguments and counter arguments do not lend themselves easily to summary or verification or falsification. But while the traditional conception of free will, at least since the seventeenth century, continues to be attacked, a supreme irony, which merits identifying, stands out: Many of the values, ideas, and institutions that modernity (and post-enlightenment modernity) ranks high, for whatever reason, that is, value pluralism, fallibilism, individual autonomy, individual dignity, freedom of speech, abhorrence of totalitarianism, etc., are “intimately related” to free will. OXFORD HANDBOOK OF FREE WILL, *supra* ¶ 9, at 212. If free will was, as it is seen traditionally, “free,” then these are the values, ideas, and institutions that those who so hold would “promote.” *Id.* Yet, for many moderns, the belief is prevalent that free will cannot be squared with science, which today replaces religion “as the last court of appeal.” *Id.* Free will is “obscure and mysteriously better suited (like ghosts and witches) to premodern, religious world views.” *Id.* If it is “related,” the relation is a “coincidence.” *Id.*

¶11. Nevertheless, our “basic intuitions regarding the nature of personhood, moral responsibilities, human dignity and individuality depend on the conviction[, illusion or not,] that our deeds are *in our control*.” BOYD, *supra* ¶ 2, at 56–57. Rejection of the basic notion of freedom “fails to explain our basic sense of morality . . . [, and] our phenomenological experience of ourselves as self-determining personal agents.” *Id.* at 65. Indeed, we see that strict “Calvinists and deterministic behaviorists alike simply do not and cannot live in congruity with their beliefs about the nature of the world and of themselves.” *Id.* at 68. They, too, carry day planners or Palm Pilots. Those who hold firmly to the traditional idea of free will or freedom can readily concede that the issue is not all or nothing; that it is a question of degree. Circumstances—heredity and environment—do influence choices, but over time, we form our own characters, create our personality, and form who we are, for good or for ill, one choice at a time. Ultimately, our characters are of our own making. *See supra* note 656 ¶¶ 2–6 (discussing the concept of character).

¶12. At the same time, the resolution of the theological or scientific issues underlying our traditional notion of free will, though it is fundamental to our notions of individual responsibility in federal criminal jurisprudence, is not a judicial issue. Nothing in the process of nomination, confirmation, swearing in, or donning a black robe qualifies judges or justices to take one side or another in these controversies. Nor does merely gaining tenure in the academic process in a law school warrant inflexible or dogmatic judgments on these issues. We have no quarrel with Justice Holmes’s insight: “[A]lthough practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end.” Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899). Yet Holmes was talking about theory at an intermediate level, while we are here at this point in these materials are dealing with theory at a higher level. Understanding what freedom ultimately means and its implications for the law is necessary, but accepting it as fact in your individual life is hardly necessary, as Holmes’s career itself indicates in ample measure. *See supra* note 178 ¶¶ 5–10 (discussion of Holmes as a skeptic and an agnostic). Holmes was, as these materials show, despite his soulless philosophy,

Christianity did not change the commandments of Mount Sinai;<sup>655</sup> it added the teachings of the Sermon on the Mount.<sup>656</sup> But

one of those who contributed mightily to our understanding of what free speech means in a free society. While it is valuable to go beyond the law, as it is, to try to understand ultimate issues as they are, nothing in the administration of justice at the level of day-to-day choices on particular issues requires answering ultimate issues. In the last analysis, the law is practical; it can be administered well enough by those who disagree on ultimate questions, but can find practical compromises on particular issues. *See infra* Appendix A (Definition); *see also infra* note 919 (work of Jacques Maritain on the adoption of Universal Declaration of Human Rights).

655. *Exodus* 19–20.

656. ¶1. *Matthew* 5:1–48. In the Hebrew Scriptures, for example, the law of Moses forbade “adultery,” focusing primarily on conduct; in the Christian Scriptures, Christ condemned “lust,” focusing primarily on the interior disposition that leads to “adultery.” *Compare Exodus* 20:14, and *Deuteronomy* 5:18 (“Neither shalt thou commit adultery.”), with *Matthew* 5:27–28 (“You have heard that it was said; you shall not commit adultery. But I say to you, everyone who looks on a woman with lust has already committed adultery with her in his heart.”).

¶2. This vivid contrast marks the beginning of a peculiarly Christian undertaking, the complementary definitions of “virtue” and “vice,” though the basic idea of “virtue,” of course, goes back to the Greeks and the Romans. See, for example, the justly famous dialogue of Marcus Tullius Cicero (106–43 B.C.), the Roman orator, statesman, and one of the writers who did much to popularize the philosophical ideas of the ancient world. CICERO, ON MORAL ENDS 43 (Julia Annas ed., Cambridge Texts in the History of Philosophy 2001) (discussing, in the form of a Socratic dialogue, the role of “virtue” in Epicurean, Stoic, and Aristotelian ethical theory and noting the principal virtues: “wisdom, courage, justice, and temperance”); *see* ALISDAIR MACINTYRE, AFTER VIRTUE 121–80 (2d ed. 1984).

¶3. Cicero’s influence on St. Thomas Aquinas, whose traditional, philosophical psychology *is* the psychology of the modern criminal law, *see supra* note 647 ¶ 3, can hardly be understated. *See* E.K. RAND, CICERO IN THE COURTROOM OF ST. THOMAS AQUINAS 4 (1946) (“The ancient Latin authors to whom St. Thomas most frequently refers are Cicero, Seneca and Boethius.”). Rand writes that St. Thomas followed Cicero when he adopted the four cardinal virtues of the Greco-Roman world. *Id.* at 25–26 (noting that Cicero in his *De Inventione* began his discussion of the relation between the right (*honestum*) and the expedient (*utile*) with a description of the four cardinal virtues: wisdom, justice, bravery, and temperance, though St. Thomas titled them: “Wisdom, Justice, Fortitude, and Temperance (*Prudentia* (not philosophy itself, *Sapientia*), *Iustitia*, *Fortitudo*, and *Temperantia*)”).

¶4. Though the idea of “virtue” goes back to the Greco-Roman world, the theological idea of “sin” does not. To be sure, “sins are abundantly and vividly . . . described in the Old Testament . . . the idea of sin is preeminently a construction of Christian theology.” HENRY FAIRLIE, THE SEVEN DEADLY SINS TODAY 7 (1978). No word in the Hebrew Scriptures “means precisely theological sin.” JOHN L. MCKENZIE, DICTIONARY OF THE BIBLE 817 (1965). The word commonly translated as sin is *het* or *hatta’t*, which, like the Greek *hamartia*, means “miss the mark.” *Id.* In context, the texts often mean “rebellion,” “breach of agreement,” “disloyalty,” or “folly.” *Id.* at 817–18. In Judaism, “sin” is “primarily an offense against the law. . . .” *Id.* at 819.

¶5. The Christian Scriptures are, of course, written against this background of the Old Testament, but “sin” becomes in Christian writing a theological concept. *Id.* Three new elements are added: sin as (1) a single act, (2) a state or condition, and (3) a power. The fullest

theology of sin appears in St. Paul's writings, in particular in his *Letter to the Romans*. *Id.* at 820. In the Middle Ages, "our concept of human personality was continually expanded by the models . . . with which Christian theology went about its work." FAIRLIE, *supra* ¶ 4, at 7. The "emphasis in the Sermon on the Mount is very different from that in the commandments that Moses brought down from Sinai. The commandments have been translated into the beatitudes." *Id.* at 9.

¶6. In Christian theological and moral philosophy, "virtue" is fully categorized: the theological virtues (Faith, Hope, and Charity); the cardinal virtues (Prudence, Justice, Fortitude, and Temperance); the capital virtues (Humility, Liberality, Chastity, Meekness, Temperance, Brotherly Love, and Diligence); and, contrasting the capital virtues, the seven deadly sins: Pride (Humility), Envy (Generosity), Anger (Meekness), Sloth (Zeal), Avarice (Liberality), Gluttony (Temperance), and Lust (Chastity). JOHN A. HARDON, POCKET CATHOLIC DICTIONARY 60-62 (1985) ("Theology justifies the number by pointing to the goods that human nature seeks to attain or the evils it wants to avoid."). These distinctions are embodied in the comprehensive notion of "character," which reflects "an elaborate intellectual construction . . . intended to illustrate profound moral truths." FAIRLIE, *supra* ¶ 4, at 34. As the Sermon on the Mount went beyond an ideal of law to hold up an ideal of love, so each virtue was an aspect of love, as each sin was a failure to love, i.e., pride is inordinate self-love. *See generally id.* at 39-58. "But it is only when we know the working of Pride in us that we see how deeply the [various deadly] sins are interwoven." *Id.* at 43. "Here is the keystone of the arch, and once we recognize that it runs through almost everything that we do, everywhere in our natures, we are in a better position to fight the other [capital] sins." *Id.* "Modern nihilism feeds our Pride." Fairlie writes:

We may decide what is and is not good, what is and is not absurd, and what does and does not exist, and what deserves and does not deserve to live. It tells us we are gods in this small moment in which we live. The kinds of debased nihilism that run through so many attitudes today are, like Pride itself, a denial of human limitation and the boundaries of real life.

*Id.* at 49.

¶7. These concepts about the human condition and human character were once embodied in great literature. "If it is the greatness of Dante[']s *The Divine Comedy*] that he lays bare our souls in his exposition of the sins, it is no less the greatness of Chaucer [in the "Parson's Tale" in *The Canterbury Tales*] that he lays bare our conduct." *Id.* at 12-13; *see* RAND, *supra* ¶ 3, at 25 (Rand quotes some as saying, "Dante is nothing but Aquinas set to music."). So, too, in Shakespeare, though he can "hardly be described as a Christian writer, . . . the Christian vision of man . . . inform[s] his own vision." FAIRLIE, *supra* ¶ 4, at 8.

¶8. Needless to say, these concepts are largely meaningless to most modern Americans. That transformation is comprehensively traced in MACINTYRE, *supra* ¶ 2, as well as, GERTRUDE HIMMELFARB, *THE DE-MORALIZATION OF SOCIETY* 9 (1996). Himmelfarb summarizes the process:

Long before the advent of that bourgeois, democratic era, those classical virtues had been supplemented or displaced by the Christian virtues of faith, hope, and charity—the latter in its original meaning of the love of God. Where Aquinas saw these religious virtues as complementing the classical ones, Augustine saw them as irreconcilable, virtues that have no reference to God being "rather vices than virtues." Later secular philosophers, in the seventeenth and eighteenth centuries, subverted the classical virtues more subtly, and the Christian ones more radically. But all of them insisted upon the importance of virtues not only for the good life of individuals but for the well-being of society and the state. And all of them believed in the intimate relation between the character of the people and the health of the

polity. Even those philosophers like Montesquieu who assigned different virtues to different regimes, and different *moeurs* to different societies, did not denigrate or deny the idea of virtue itself.

.....

It was not until the present century that morality became so thoroughly relativized and subjectified that virtues ceased to be “virtues” and became “values.” This transmutation is the great philosophical revolution of modernity, no less momentous than the earlier revolt of the “Moderns” against the “Ancients”—modern science and learning against classical philosophy. Yet unlike the earlier rebels, who were fully conscious of the import of their rebellion, the later ones (with the notable exception of Nietzsche) seemed almost unaware of what they were doing. There was no “Battle of the Books” to sound the alarm and rally the troops. Even the new vocabulary, which was so radical a departure from the old and which in itself constituted a revolution in thought, passed without notice.

This is all the more curious because the inspirer of the revolution and the creator of the new language was acutely aware of the significance of it all. It was in the 1880s that Friedrich Nietzsche began to speak of “values” in its present sense—not as a verb, meaning to value or esteem something; nor as a singular noun, meaning the measure of a thing (the economic value of money, labor, or property); but in the plural, connoting the moral beliefs and attitudes of a society. Moreover, he used the word consciously, repeatedly, indeed insistently, to signify what he took to be the most profound event in human history. His “transvaluation of values” was to be the final, ultimate revolution, a revolution against both the classical virtues and the Judaic-Christian ones. The “death of God” would mean the death of morality and the death of truth—above all, the truth of any morality. There would be no good and evil, no virtue and vice. There would be only “values.” And having degraded virtues into values, Nietzsche proceeded to de-value and trans-value them, to create a new set of values for his “new man.”

When, early in the twentieth century, shortly after Nietzsche’s death, the sociologist Max Weber borrowed the word “values,” he had no such nihilistic intentions, which is perhaps why he did not comment on the novelty of the term, still less attribute it to Nietzsche. Instead he used the word matter-of-factly, as if it were part of the accepted vocabulary and of no great moment. For that reason, because it seemed so familiar and unthreatening, it was all the more effective, for it was absorbed unconsciously and without resistance into the ethos of modern society, as it was absorbed into the vocabulary. “Values” brought with it the assumptions that all moral ideas are subjective and relative, that they are mere customs and conventions, that they have a purely instrumental, utilitarian purpose, and that they are peculiar to specific individuals and societies. (And, in the current intellectual climate, to specific classes, races, and sexes.)

So long as morality was couched in the language of “virtue,” it had a firm, resolute character. The older philosophers might argue about the source of virtues, the kinds and relative importance of virtues, the relation between moral and intellectual virtues or classical and religious ones, or the bearing of private virtues upon public ones. They might even “relativize” and “historicize” virtues by recognizing that different virtues characterized different peoples at different times and places. But for a particular people at a particular time, the word, “virtue” carried with it a sense of gravity and authority, as “values” does not.

Values, as we now understand that word, do not have to be virtues; they can be beliefs, opinions, attitudes, feelings, habits, conventions, preferences, prejudices,



even idiosyncrasies—whatever any individual, group, or society happens to value, at any time, for any reason. One cannot say of virtues, as one can of values, that anyone's virtues are as good as anyone else's, or that everyone has a right to his own virtues. Only values can lay that claim to moral equality and neutrality. This impartial, "nonjudgmental," as we now say, sense of values—values as "value-free"—is now so firmly entrenched in the popular vocabulary and sensibility that one can hardly imagine a time without it.

*Id.* at 9–12 (footnotes omitted).

¶9. Himmelfarb also set out the etymology of "value":

It is odd that the *Oxford English Dictionary*, the generally accepted authority for the early usage of words, cites neither Nietzsche nor Weber as the source of "values." The word, in the plural, does not appear at all in the 1928 edition. In the 1986 supplement and in the new edition of 1989, the earliest citation is from William I. Thomas and Florian Znaniecki, *The Polish Peasant in Europe and America* (published in English in 1918), a work much influenced by Weber. A German-English dictionary of the 1940s still does not give "values," *Werte*, its present sense or recognize the distinctive meaning of the plural. Even the article on "Values" in the revised edition of the *International Encyclopedia of the Social Sciences* (1968) ignores both Nietzsche and Weber. Yet Nietzsche's works were translated into English in the 1890s and acquired something of a notoriety in the circles of Havelock Ellis and George Bernard Shaw. And although Weber's *Protestant Ethic and the Spirit of Capitalism* was not translated until 1920, the German version of 1904–5 had generated a good deal of interest and controversy in England long before. Weber himself was sufficiently well known in America to be invited to address the Congress of Arts and Science in Saint Louis in 1904; his paper was one of the highlights of the session.

It is also strange that although Weber's "fact-value" distinction has generated a good deal of controversy, and although Weber himself professed to be dissatisfied with the meaning generally attached to "value-free" (*Wertfrei*), there has been little or no discussion of his use of "values" as distinct from "virtues." The editor of an English translation of one of Weber's works supplies many footnotes about the meaning and translation of German words, but does not footnote the word "values." The index to another English translation has several references to "values" but only one to "virtues": "Virtues, in Chinese *Annals*." Weber himself, in the *Sociology of Religion*, uses "virtues" only in the context of religious virtues.

There are a few, but probably only a few, earlier usages of "values" in English, in the current sense, that escaped the *OED*. T.H. Green's *Prolegomena to Ethics* (1883) refers at one point to a "universe of values." But this is an isolated use of the word. It appears in a chapter entitled "Virtue as the Common Good"; it is followed by a sentence dealing with the "impalpable virtues of the character and disposition"; and in the book as a whole (a very long book), the words "virtue" and "good" (but not "values") appear on almost every page.

*Id.* at 19–20 (endnotes omitted).

¶10. For perspectives that reject the Enlightenment's classic distinction (in particular David Hume's distinction) between "objective fact" and "subjective value," see MORTIMER J. ADLER, TEN PHILOSOPHICAL MISTAKES 108–27 (1985) (Adler analyzes the views of Aristotle, David Hume, and A.J. Ayer, among others; he concludes that the proper distinction is between "wants" that are subjective ("apparent goods") and "needs" that are objective ("real goods"); he finds that Hume's famous criticism of traditional morality—that one should not improperly draw an ethical conclusion ("ought") from a factual premise ("is")—is logically

correct, but rejects the conclusion that *all* ethical conclusions are relative as improper, since the basic ethical standard is self evident (“do good, avoid evil”); the basic ethical standard can then be used to provide an “ought” premise that would support an “ought” conclusion (i.e., do whatever is good; fulfilling needs is good; this is a need; this, therefore, ought to be done)); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 33–47 (1980) (reviewing and rejecting the Humean objection to a late scholastic view of ethics that arguably made an illicit inference from fact to norm, that is, its natural law reasoning preceded first from a knowledge of human nature and only then to an understanding of natural norms; following Aquinas who proceeded from a grasp of human goods attained by action and practical reasoning about them that arguably does not make an illicit inference from fact to norm, but moves from action to goods to action); RALPH MCINERNEY, *ETHICA THOMISTICA: THE MORAL PHILOSOPHY OF THOMAS AQUINAS* 44–59 (rev. ed. 1997) (explaining Aquinas’s view of the natural law, that is, man is peculiarly a rational agent, so the perfection of rational activity is man’s end, noting that “natural law precepts are rational directives aiming at man’s comprehensive good”; and rejecting C.E. Moore’s *Principia Ethica* (1903), which developed a doctrine known as the Naturalistic Fallacy (e.g., the properties of a thing can account for our calling it “good” (i.e., if a car runs fast, it is a good car)), explaining that Moore thought that it was a fallacy to attempt to bridge the gap between fact and values by citing facts about the valued thing; “good” only registered “approval”; following Peter Geach who points out that Moore fails to distinguish between attributive (value: it is a good car) and predicative (fact: it is fast car) adjectives; noting that as such, “good” could not be reduced to “approval”; finding that it was, not a predicate of a thing, but an attribute of it) (citing P.T. Geach, *Good and Evil*, 17–18 *ANALYSIS* (Bernard Mayo ed., 1967)).

¶11. These contrasting views of “character” are not solely of interest to religion, philosophy, or history, but they are also tellingly relevant to the practical concerns of lawyers, and not just in reference to the concepts of individual responsibility based on personal conduct and state of mind, which are of paramount importance to these materials. These two views of “virtue” and “vice,” in fact, inform debates about “character” in the law today, though the participants hardly know the sources of the attitudes they represent. When the Federal Rules of Evidence were processed in Congress on the floors of the Senate and House and in hearings before each body, the “admissibility of convictions to impeach [the defendant was one of the] most controversial [issues] . . .” 28 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 6131 (1993). The traditional argument for admitting convictions to impeach the defendant is that the evidence is probative of credibility, “since one who has committed a crime is more likely to lie than is a person with a spotless record.” *Id.* Julia Annas writes:

[I]t is implausible [for the ancients] that you could make correct judgments in only one area of life, isolating considerations of bravery, say, from those of justice and issues of what is worth standing up for. Hence there is a tendency in all ancient schools to see the virtues as mutually dependent. Some emphasize this point to the extent of thinking of virtue as . . . excellent practical reasoning in all spheres.

CICERO, *supra* ¶ 2, at xix.

¶12. On the other side, the modern argument assumes that a conviction for a crime is of little probative value, where the crime itself does not have anything to do with “untruthfulness.” WRIGHT ET AL., *supra* ¶ 11, at 143. The question then is a matter of unfair prejudice to the defendant, that is, will the jury convict based on his “character” instead of his “conduct.” *Id.* The traditional argument reflects a *general* view of “character.” *See, e.g.*, Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884) (Holmes, J.) (The fact of conviction is introduced under “the general proposition that . . . [the witness] is of bad character and unworthy of credit.” (emphasis added)). The modern perspective disagrees. *See, e.g.*, *Rationale of Judicial Evidence*, in VII THE WORKS OF JEREMY B. BENTHAM 413 (John Bowling ed.,

Christianity worked a revolution in thought and action on the Greco-Roman world.<sup>657</sup> While Roman law generally reflected concepts of individual responsibility, it did not fully distinguish between crime and tort.<sup>658</sup> In Roman Law, the distinction was “between crime, which [fell] within the province of the public law,

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1843) (arguing that a man who engages in a duel, for example, to uphold his reputation for truthfulness, nevertheless, commits a felony, from which we should hardly conclude that he might lie under oath). Bentham, of course, successfully refutes by falsification through a single imaginative illustration the proposition that *all* felons are liars, but he does *not* establish the contrary proposition that the records of felons should *never* be considered. Neither position stated without qualification is supportable. The wisdom of a judge deciding on all the relevant circumstances, case by case, when, if at all, to admit prior convictions is manifest. The views are contrasted in WRIGHT ET AL., *supra* ¶ 11, at 193–200, but largely in terms of modern, empirical psychology. Noticeably, the traditional philosophical concept of “character” as an integration of virtues—or vices—closely interwoven, one with another, so that the absence of one (the commission of a serious crime) cannot be so easily separated from another (willingness to lie about a serious matter) is wholly missing. Except as an unspoken assumption, it is no longer part of our modern intellectual world.

657. For a powerful analysis of the impact of Christianity on various aspects of classic civilization, including philosophy and law, see generally COCHRANE, *supra* note 181. The impact of Christianity on the concept of responsibility is also well-summarized by Clarence Crane:

Christianity so sets the way Westerners, even Westerners who would hate to think of themselves as Christians, think and feel about morals that it is worth . . . while . . . to put the broad lines of that way and its difficulties as succinctly as possible.

The individual, endowed with an immortal soul of priceless value, is a free moral agent. Once he is mature, he knows, by the grace of God and through the teachings of the church, right from wrong. If he chooses to do wrong, the conscience God has made part of, or a function of, his soul tells him he is guilty. He can perhaps plead physical duress, and, to a limited extent, ignorance, but he cannot plead total irresponsibility, cannot claim that he acted under cosmic necessity. He is, through his conscience, aware of the ‘civil war within the breast,’ aware within himself of something that drives him to sin, and of something within himself that urges him to virtue. Put in another way, he is aware of the contrast between his soul and his body, and aware that the soul ought to be the master of the body.

CLARENCE N. CRANE, A HISTORY OF WESTERN MORALS 109 (paperback ed. 1990); *see also id.* at 171 (“In modern times . . . the chief threat to . . . [the] Christian [view] has been a heresy as profound as any Christianity has faced. The doctrines . . . [of the] Enlightenment . . . the natural goodness . . . of man and . . . [its] corollary, the belief that evil is the product of environment . . . mostly of human or socio-economic environment . . .”). That “heresy” also plagued Greek thought. *See* Plato, *Laws: Book X*, in 7 GREAT BOOKS, *supra* note 130, at 757–71 (arguing against a view of nature based on chance (*tuché*) and for a view of nature based on design (*techné*) as necessary for absolute, not relative, moral standards, as materialism breeds relativism, which corrupts into skepticism and then degenerates into nihilism).

658. *See generally* BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 207–26 (1962). *But see supra* note 181 ¶ 6 (discussing the Greek notion of “idiot”).

and delict, which [was] a matter of private law.”<sup>659</sup> Delict had four essential elements: (1) *actus*, (2) *iniuria*, (3) *damnum*, and where relevant, (4) title to property in the plaintiff. Originally, *iniuria* meant *non iure*, that is, without justification; it came to mean *dolus* or *culpa*, or fault.<sup>660</sup>

The common law first grew, of course, from Germanic, not Roman, roots.<sup>661</sup> “Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deeds bring upon their fellows.”<sup>662</sup> Nevertheless, it, too, felt the powerful influence of Christianity, and it slowly began to consider issues of state of mind.<sup>663</sup> Today, that responsibility is based on personal conduct *and* state of mind is basic.<sup>664</sup>

“Ancient law has as a general rule no punishment for those who have tried to do harm but have not done it.”<sup>665</sup> Eventually, those who molded common criminal responsibility drew a distinction between the completed crimes and the attempt.<sup>666</sup> The conduct and

659. NICHOLAS, *supra* note 658, at 208.

660. *See id.* at 222.

661. 2 POLLOCK & MAITLAND, *supra* note 645, at 470.

662. *Id.*

663. *Id.* at 478.

664. *But see supra* note 644 ¶¶ 8–11. (discussing exceptions to state of mind). The law knows exceptions to the requirements of conduct and state of mind. The point is that they are *exceptions*.

665. 2 POLLOCK & MAITLAND, *supra* note 645, at 509.

666. The crime of attempt is a “relatively recent development of the common law . . .” LAFAYE, *supra* note 56, at 535. Indeed, Blackstone did not even mention the concept. For general discussions of the doctrine, its rationale, and its various applications, see generally PERKINS, *supra* note 56, at 611–42; HALL, *supra* note 645, at 558–99; CLARK & MARSHALL, *supra* note 56, at 202–31.

The classic article is Francis Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 822–37 (1928). Occasionally, early common law judges convicted for a felony where a complete felony had not occurred. “These convictions apparently were rested upon the doctrine that *voluntas reputabitur pro facto* . . .” LAFAYE, *supra* note 56, at 535. The maxim is best translated as, “The will is taken for the fact.” Nevertheless, the general rule was that *mere* intent would not suffice. *See* Sayre, *infra*, at 822 n.5 (“So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing.” (quoting EDWARD COKE, THIRD INSTITUTE 5 (1644))). Even then, such early convictions were “confined to attempts to commit the more heinous felonies; even these are . . . rare.” *Id.* at 827. The general conception of attempt, in fact, developed only later. Sayre concludes that the earlier doctrine was abandoned by the time Sir Matthew Hale wrote his justly famous treatise in the seventeenth century. *Id.* at 821–22; *see* 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 532 (1678) (“yet the law is held otherwise at this day”).

state of mind of attempt received a classic treatment by Justice Holmes, as Chief Justice of the Supreme Court of Massachusetts, in *Commonwealth v. Peaslee*:

That an overt act, although coupled with an intent to commit the crime, commonly is not punishable . . . is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be . . . [an offense.] [T]he degree of proximity held sufficient may vary with circumstances, including among other things the apprehension which the particular crime is calculated to excite.<sup>667</sup>

The modern formulation of a general doctrine begins with dicta in *Rex v. Sutton*, 95 Eng. Rep. 241 (1736) (Lee, J.). In *Sutton*, the defendant was indicted for possession of stamps for counterfeiting coins with intent to counterfeit. His counsel objected that the common law did not take notice of bare intent. In response, Justice Lee agreed, but commented: “[Y]et when joined with acts whose circumstances may be tried, it is so; so an action innocent in itself, may be made punishable by an intention joined to it . . .” *Id.* (citing 1 HALE, *supra*, at 229 (“[T]he best trial of an intention is by the act intended when it is done, yet the intent . . . may be tried . . . by circumstances of fact, by words, letters, and a thousand evidences besides the bare doing of the fact . . . [F]or tho bare intentions cannot receive any trial, yet intentions joined with an overt act . . . may be tried and discovered by circumstances.”)). Nevertheless, the defendant’s conviction rested, not on the common law, but a particular statute that prohibited the defendant’s precise conduct. 8 & 9 Will. 3, c. 26 (1703) (Eng.). Lord Mansfield turned the *Sutton* dicta into a rule of law in *Rex v. Scofield*, Cald. 397 (K.B. 1784), where an indictment was upheld for an attempt to commit arson on a showing that the defendant put a lighted candle among small pieces of wood with intent to burn a house. Mansfield observed:

The *intent* may make an act, innocent in itself, criminal . . . . So long as an act rests in bare intention, it is not punishable by our laws; but immediately when an act is done, the law judges [take notice of it] not only of the act done, but of the intent with which it is done; and, if it is coupled with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. The case cited of the *King v. Sutton* is an express authority. We are therefore of opinion that the indictment is good.

*Id.* at 400–03 (citation omitted). *Scofield* and *Rex v. Higgins*, 102 Eng. Rep. 269 (1801), which followed *Scofield*, “settled the law.” Sayre, *supra*, at 836.

667. 59 N.E. 55, 56 (Mass. 1901) (indicting defendant for attempt to burn a building with intent to injure the insurers; alleging that the defendant arranged combustibles (wood in a pan of turpentine) with a candle and he solicited another to light it; the person refused; the defendant turned his wagon and drove it toward the building with the person who refused; after riding away, he announced that he changed his mind, and he drove away; a motion to quash the indictment or direct a verdict was sustained, not on the facts, but a point of pleading).

The narrow definition of attempt articulated in *Peaslee* was thought to be superseded statutorily in *Commonwealth v. Mehailes*, 188 N.E. 261, 263 (Mass. 1933), but it still retains

The *mens rea* for common law attempt was, therefore, intent to engage in the conduct constituting the completed offense.<sup>668</sup>

The conduct element, the *actus reus*, of attempt received various formulations.<sup>669</sup> “The situation is . . . complicated,” as LaFave rightly suggests, “by the fact that the acts in question may be committed in so many different ways because of the great number of offenses on which the crime of attempt may be overlaid.”<sup>670</sup> Nevertheless, LaFave characterizes the common law and modern approaches as ranging from, on the one hand, the “Proximity Approach” to the “Model Penal Code Approach” on the other hand.<sup>671</sup> Each reflects a varying emphasis on which purpose of the criminal law should be the focus in articulating the crime of attempt: retribution, deterrence, or law enforcement intervention.<sup>672</sup> The greater the emphasis on

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vitality. See *Commonwealth v. Ortiz*, 560 N.E.2d. 698, 703–04 (Mass. 1990) (*Peaslee* cited with approval and followed); see also HOLMES, *supra* note 645, at 54:

Attempt and intent, of course, are two distinct things. Intent to commit a crime is not itself criminal. There is no law against a man’s intending to commit a murder the day after tomorrow. The law only deals with conduct. An attempt is an overt act. It differs from the attempted crime in this, that the act has failed to bring about the result which would have given it the character of the principal crime. If an attempt to murder results in death within a year and a day, it is murder. If an attempt to steal results in carrying off the owner’s goods, it is larceny.

668. LAFAVE, *supra* note 56, at 540 (“an intent to commit [the target] crime”).

669. *Id.* at 545, summarizes the general formulations:

[W]hat kind of act is required is not made . . . clear by the language . . . used by courts and legislatures. It is commonly stated that more than an act of preparation must occur, which . . . is of some help, although the situation is confused somewhat because courts occasionally say that preparatory acts will be enough under certain circumstances. The traditional attempt statute requires an “act toward the commission of” some offense, although slightly different wording is also to be found: “conduct which tends to effect the commission of” a crime; an act “in furtherance of” or “tending directly toward” or which “constitutes a substantial step toward” the commission of an offense. Similarly, the courts use a wide variety of phrases: “a step toward the commission of the crime,” an “act in part execution of the intent”; “a direct movement toward the commission of the offense”; “the commencement of the consummation”; or “some appreciable fragment of the crime.”

(citations omitted).

670. *Id.*

671. *Id.* at 546–54.

672. *Id.* at 538–40; see also *supra* note 645 (discussing the rationales of the criminal law). Compare *Commonwealth v. Kennedy*, 48 N.E. 770 (Mass. 1897) (Holmes, J.) (“As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it.”), and *Hyde v. United States*, 225 U.S. 347, 387–88 (1912) (Holmes, J., dissenting) (Sherman Act) (“[I]ntention and overt act may all be present without amounting to a criminal attempt—as if all that were

done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success.”), *with* Glanville Williams, *Police Control of Intending Criminals*, 1955 CRIM. L. REV. 66, 66–69:

In a rational system of justice the police would be given every encouragement to intervene early where a suspect is clearly bent on crime. Yet in England, if the police come on the scene too early they may find that they can do nothing with the intending offender except admonish him.

This is largely because of the rule that an attempt, to be indictable, must be sufficiently “proximate” to the crime intended . . . . One is led to ask whether there is any real need for the requirement of proximity in the law of attempt. Quite apart from this requirement, it must be proved beyond reasonable doubt that the accused intended to commit the crime . . . and that he did some act towards committing it. If only a remote act of preparation is alleged against him, that will weigh with the court in deciding whether he had the firm criminal intention alleged against him. If, however, the court finds that this intention existed, is there any reason why the would be criminal should not be dealt with by the police and by the criminal courts?

and GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 632 (2d ed. 1961) (footnote omitted):

Another way of supporting the proximity rule is to say that it results from the notion of crime as a punishable wrong. Society has not thought it desirable to extend the scope of punishment too widely. So long as the law was purely deterrent or retributive in its aim, this circumscription of the offence of attempt was perhaps justified. At the present day, when courts have wide powers of probation, there is much to be said for a broader measure of responsibility. Any act done with the fixed intention of committing a crime, and by way of preparation for it, however remote it may be from the crime, might well be treated as criminal. The rational course would be to catch intending offenders as soon as possible, and set about curing them of their evil tendencies: not leave them alone on the ground that their acts are mere preparation. It must be said, however, that this opinion is not generally held in the legal profession.

and MODEL PENAL CODE § 5.01 (1961):

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

. . . .

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct Which May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor’s criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the actor’s criminal purpose, shall not be held insufficient as a matter of law:

- (a) lying in wait, searching for or following the contemplated victim of the crime;
- (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
- (c) reconnoitering the place contemplated for the commission of the crime;
- (d) unlawful entry of a structure, vehicle or enclosure in which it is

retribution or deterrence, the greater the conduct requirement; conversely, the greater the emphasis on law enforcement intervention, the less the conduct requirement.

Federal law contains no generally applicable attempt provision. If at all, attempt to commit a particular federal offense—in or outside of title 18—is criminal only if the specific statutory provision also expressly criminalizes attempt.<sup>673</sup> Moreover, nowhere in title 18 (or outside of it) is “attempt” defined; thus, its definition in each section in which attempt language is contained is a matter of judicial construction, which varies between the circuits and between different offenses. Judge W. Eugene Davis’s opinion in *United States v. American Airlines, Inc.*<sup>674</sup> is illustrative. Reviewing the law of the Fifth Circuit, in a proceeding under the Sherman Act,<sup>675</sup> he contrasts attempt under the Act, which reflects the teaching of Justice Holmes,<sup>676</sup> with the law of attempt generally applicable in the Circuit, which, in turn, reflects the Model Penal Code approach. Judge Davis writes:

The focus of dangerous probability of success [under the Sherman Act] is upon the likelihood of the prohibited result, whereas the focus of the substantial step toward commission [under the general law of attempt] is upon a defendant’s intent. The move along the increasing

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contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

The illustrations of Section 5.01(2) are not designed to not reflect common law fact patterns, but to assure that the issue is a jury, not a judge decision, in effect setting aside the narrow common law rules. MODEL PENAL CODE AND COMMENTARIES § 5.01, at 297 (1985).

673. See, e.g., 18 U.S.C. § 1951 (1994) (attempted extortion); *id.* § 2113 (attempted bank robbery).

674. 743 F.2d 1114 (5th Cir. 1984) (holding that mere solicitation may constitute an attempt under the Sherman Act; offer to fix prices mutually made by the president of one airline to the president of another airline, where if combined, the airlines possessed market power, constituted an attempt).

675. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1994) (“attempt to monopolize”).

676. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905) (Sherman Act) (“dangerous probability”).



scale of proximity of attempt to offense carries with it a corresponding shift in focus from intent alone to substantive result.<sup>677</sup>

Consistent with the principle of legality, federal criminal law defines substantive offenses using the building blocks of the common law.<sup>678</sup> The conduct element is constitutionally required.<sup>679</sup> The state of mind element is not a question of constitutional law but a question, at least for now, of legislative intent<sup>680</sup> (except—significant to these materials—under the First Amendment).<sup>681</sup>

677. *Am. Airlines*, 743 F.2d at 1119 (citing *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974) ((1) culpability required by offense and (2) substantive step)). The federal jurisprudence on attempt is most thoroughly worked out, as might be surmised, under 18 U.S.C. § 2113 (attempted bank robbery), a statute first enacted in 1934. The major decisions are collected in Russell J. Davis, Annotation, *What Constitutes Attempted Bank Robbery Under 18 U.S.C.A. § 2113(a) Making It Offense To Take or Attempt to Take, by Force, Violence, or Intimidation, Any Property, Money, or Other Thing of Value from Bank*, 37 A.L.R. FED. 255 (1978). The law of the circuits is also ably surveyed by Judge Harry Pregerson in the context of a defense of impossibility under 18 U.S.C. § 1951 (1994) (attempted extortion) in *United States v. Brooklier*, 459 F. Supp. 476, 480–81 (C.D. Cal. 1978), *aff'd on other grounds*, 685 F.2d 1208 (9th Cir. 1982). The many decisions on attempt under the Hobbs Act, first enacted in 1934, are collected in Howard J. Alpern, Annotation, *Elements of Offense Proscribed by Hobbs (18 U.S.C. § 1951) Against Racketeering in Interstate or Foreign Commerce*, 4 A.L.R. FED. 881 (1998). See also *United States v. Everett*, 700 F.2d 900, 903–08 (3d Cir. 1983) (collecting decisions on attempt and impossibility under 21 U.S.C. § 846 (1994) (attempted sale of drugs)). When Congress wishes to avoid the complexity of the jurisprudence of the common law on impossibility and attempt, it uses the term “endeavors,” rather than “attempts.” See *United States v. Russell*, 255 U.S. 138, 143 (1921); *Osborn v. United States*, 385 U.S. 323, 332–33 (1966).

678. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (The Court found that the federal government does not possess common law crime jurisdiction. “[T]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence [sic].”). HALL, *supra* note 645, at 27–28 (“In a very wide sense, the principle of legality—the ‘rule of law’—refers to and requires not only a body of legal precepts but also supporting institutions, procedures, and values . . . . [T]he principle of legality so far as the criminal law is concerned . . . is usually called *nulla poena sine lege* [no punishment without law].”).

679. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that status of being an addict cannot be made criminal consistent with the principle of cruel and unusual punishment).

680. *Montana v. Egelhoff*, 518 U.S. 37, 41–56 (1996) (plurality opinion) (finding that a right to present evidence of intoxication to negate “purpose” or “knowing” causing death is not a matter of historical due process); *Staples v. United States*, 511 U.S. 600, 604–06 (1994); *Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Balint*, 258 U.S. 250, 253 (1922). But cf. *Baender v. Barnett*, 255 U.S. 224, 225–26 (1921) (construing possession of counterfeit check to require “conscious” possession to avoid constitutional issue).

681. As an exception to the general rule that state of mind is not constitutionally required, the First Amendment, for an obscenity prosecution, requires “knowledge” of the

Three distinct states of mind may be differentiated: “intent” (purpose), “knowledge” (conscious awareness), and “recklessness” (conscious risk taking); “negligence” (should have known), must also be considered.<sup>682</sup> Despite conceptual difficulties, negligence may also be a lesser form of state of mind.<sup>683</sup> Other words are used to denote state of mind, but they do not necessarily carry separate meanings.<sup>684</sup> The words used to denote “state of mind” are also semantically ambiguous. “Intent” can mean “state of mind” or “purpose.”<sup>685</sup> “Willfully” is also semantically ambiguous.<sup>686</sup>

sexually explicit character of materials (a factual matter), though it does not require “knowledge” that the materials themselves are “legally obscene” (a legal matter). *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 73 n.3 (1994) (citing *Hamling v. United States*, 418 U.S. 87, 120 (1974) (need not know sexually explicit materials are legally obscene); *Smith v. California*, 361 U.S. 147, 152 (1959) (requiring “knowledge” of sexually explicit character of obscene material).

682. *United States v. Bailey*, 444 U.S. 394, 403–06 (1980) (distinguishing between “general intent” and “specific intent”; “purpose,” “knowledge,” “recklessness,” and “negligence”; requiring element by element analysis); *Liparota*, 471 U.S. at 423 n.5 (same); *United States v. U.S. Gypsum*, 438 U.S. 422, 437 (1978) (same); *United States v. Freed*, 401 U.S. 601, 612–14 (1971) (Brennan, J., concurring) (same). *But see* *Rex v. Tolson*, 23 Q.B.D. 138, 185 (Q.B. Div’l Ct. 1889) (Stephen, J.) (“It seems confusing to call so many dissimilar states of mind by one name.”). *See generally* Paul Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983); Matthew Ficker & Kelly Gilchrist, Note, *United States v. Nofzinger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirement of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803 (1990) (application of element analysis to federal criminal law in context of historical background and proposals for a new federal criminal code); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999); Katherine R. Trumble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521 (1999).

683. *Stevenson v. United States*, 162 U.S. 313, 320 (1896) (holding manslaughter as lesser-included offense in murder; cited with approval in *Schmuck v. United States*, 489 U.S. at 705, 720 (1989) (requiring lesser included offense to be subject of greater offense)).

684. LAFAVE, *supra* note 56, at 224–26 (“willfully,” “maliciously,” etc.); 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 119 (1970) [hereinafter WORKING PAPERS] (identifying “a staggering array” of words used to denote state of mind in federal offenses).

685. MODEL PENAL CODE AND COMMENTARIES 223 (1985).

686. In *Bryan v. United States*, 524 U.S. 184, 191–96 (1998) (citing, as “correctly observed,” Justice Jackson’s dissenting opinion in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 345 (1952) (“the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law”)), the Court undertook to bring together its confusing and contradictory jurisprudence on the definition of the word “willfully.” After a review of a plethora of federal and state decisions, the Court, in an opinion by Justice Stevens, held that “willfully,” within 18 U.S.C. § 924(a)(1)(D) (1994) (firearms),

Each element of an offense must be considered separately on the issue of state of mind.<sup>687</sup> Typically, this gives rise to a syntactical ambiguity.<sup>688</sup> Congress drafts legislation against a common law background.<sup>689</sup> Viewed against that background, strict liability becomes the exception, and silence is not enough to infer that Congress intended strict liability on any element.<sup>690</sup> The general rule is that knowledge is required on conduct elements.<sup>691</sup> Knowledge is required on factual-surrounding-circumstance elements if they establish liability, but not if they establish only jurisdiction or grading.<sup>692</sup> Sometimes knowledge of surrounding circumstances of a

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requires proof only that the defendant knew his conduct was unlawful, not that he also knew of the specific federal legal requirements under the licensing provisions of the statute. The Court then confined *Cheek v. United States*, 489 U.S. 192, 201 (1991) (knowledge of the law required for tax evasion, but not knowledge of the Constitution) and *Ratzlaf v. United States*, 510 U.S. 135, 149 (1994) (knowledge of the law required for structuring) to “highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.” *Bryan*, 524 U.S. at 195. It also confined *Liparota*, 471 U.S. at 428–30 (1985) (knowledge of law required in unauthorized use of food stamps) to situations where the statute itself “dictates a different result,” a dubious distinction at best. Compare *Bryan*, 524 U.S. at 193 n.15, with *infra* Appendix B (Natural Language: Generality, Ambiguity, and Vagueness) ¶ 4 (discussing syntactical ambiguity). See also *United States v. Jewell*, 532 F.2d 697, 700–03 (9th Cir. 1976) (deliberate ignorance or willful blindness); Rollin M. Perkins, “Knowledge” as a Mental State Requirement, 29 HASTINGS L.J. 953 (1978). Compare *Browder v. United States*, 312 U.S. 335, 341–42 (1941) (construing “willful” to denote “intentional,” as opposed to “accidental”), with *United States v. Murdock*, 290 U.S. 389, 394–95 (1933) (construing “willfully” to denote done with a bad purpose, that is, to violate the law, including conduct marked by careless disregard”), and MODEL PENAL CODE AND COMMENTARIES 249 (1985) (“Judge Hand: . . . [Willfully is] an awful word! It is one of the most troublesome words in a statute that I know. If I were to have [an index of words] purged ‘willful’ would lead all the rest in spite of its being at the end of the alphabet.” (citing ALI Proceedings 160 (1955))), and WORKING PAPERS, *supra* note 684, at 148–51 (discussing “willfulness”).

687. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72–73 (1994); *Liparota*, 471 U.S. at 423 n.5 (citing *Bailey*, 444 U.S. at 405–06).

688. LAFAVE, *supra* note 56, at 227 (“[W]hat, for instance, does ‘knowingly’ modify in . . . ‘knowingly sells a security without a permit[?]’. . . As a matter of grammar . . . it is not at all clear how far down the sentence the word . . . travel[s].”); see *infra* Appendix B (Natural Language: Generality, Ambiguity, and Vagueness) ¶ 4 (discussing syntactical ambiguity).

689. *X-Citement Video, Inc.*, 513 U.S. at 70 (citing *Morissette v. United States*, 342 U.S. 246, 248 n.20 (1952)); *Staples v. United States*, 511 U.S. 600, 604 (1993).

690. *Staples*, 511 U.S. at 605; *Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 522–23 (1994); *Bailey*, 444 U.S. at 406 n.6 (citing *Morissette*, 342 U.S. at 263); see also *United States v. U.S. Gypsum*, 438 U.S. 422, 437 (1978) (“an interpretative [sic] presumption that *mens rea* is required”).

691. *Posters ‘N’ Things, Ltd.*, 511 U.S. at 523; *Bailey*, 444 U.S. at 408.

692. *Staples*, 511 U.S. at 604 (character of gun as automatic weapon); see *infra* notes 700 and 946 (discussions of jurisdiction, legal, and grading elements).

legal<sup>693</sup> character is required.<sup>694</sup> Result elements are also knowledge.<sup>695</sup> The requirement of a state of mind for factual elements gives rise to the general rule that a mistake of fact is a defense, which is reflected in the Latin maxim *ignorantia facti excusat* (ignorance of the fact excuses). On the other hand, a mistake in reference to the existence, meaning, or application of a legal principle is not typically a defense, since state of mind is generally not required for legal elements.<sup>696</sup> That general rule is reflected in the

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693. *Ratzlaf v. United States*, 510 U.S. 135, 140–49 (1994) (finding the “willful” character of structuring of financial transaction act as unlawful); *Liparota v. United States*, 471 U.S. 419, 425 (1985) (finding the “knowingly” character of use of food stamps as unlawful).

694. *See also* *United States v. Aguilar*, 515 U.S. 593, 598–602 (1995) (in a case involving obstruction of justice, if intent accompanies conduct, knowledge properly accompanies the factual circumstances, other than conduct or result). *But see Bailey*, 444 U.S. at 407, 409 n.7 (declining to decide whether “recklessness” or “negligence” suffices for factual circumstance in crime of escape); *United States v. Int’l Minerals & Chem. Corp.*, 402 U.S. 558, 561–62 (1971) (construing knowingly violate regulation not to require knowledge of regulation).

695. *U.S. Gypsum*, 438 U.S. at 444 n.21 (In an antitrust suit, “conduct was undertaken with knowledge of its probable consequences.”). *But see Pereira v. United States*, 347 U.S. 1, 8–9 (1954), involving the use of mail and interstate transportation:

[Where] one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he “causes” the mails to be used . . . . It is common knowledge that . . . checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send . . . [the] check across state lines.

(citing *United States v. Kenofsky*, 243 U.S. 440, 443 (1917) (“bringing about”); *United States v. Sheridan*, 329 U.S. 379, 391 (1946) (“One who induces another to do exactly what he intends . . . hardly can be held not to ‘cause’ what is so done.”)). *See generally* Blakey & Roddy, *supra* note 11, at 1410–18 (discussion of “cause” in federal criminal law).

696. *See Ratzlaf*, 510 U.S. at 149 (Despite “the venerable principle that ignorance of the law generally is no defense to a criminal charge,” knowledge of the legal regulation is required.); *Cheek v. United States*, 498 U.S. 192, 199 (1991) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.”); *Williams v. North Carolina*, 325 U.S. 226, 238 (1945) (bigamy is mistake of law on validity of divorce; no due process violation; “[m]istaken notions about one’s legal rights are not sufficient to bar prosecution for crime”); *Sinclair v. United States*, 279 U.S. 263, 299 (1929) (contempt of Congress; good faith reliance on advice of counsel question not pertinent: “his mistaken view of the law is no defense”); *Horning v. District of Columbia*, 254 U.S. 135, 137 (1920) (Holmes, J.) (conducting criminal loan-sharking business in District of Columbia from Virginia; “[i]t may be assumed that he intended not to break the law but only to get as near to the line as he could, . . . but if the conduct . . . crossed the line, the fact that he desired to keep within it will not help him”); *Reynolds v. United States*, 98 U.S. 145, 167 (1878) (religious belief is not a defense against charges of bigamy; “[i]gnorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law . . . . belief that the law ought not to have been enacted . . . [is] still belief and belief only”).

Latin maxim *ignorantia juris quod quisque tenetur scire, neminen excusat* (ignorance of the law, which everyone is bound to know, excuses no man).<sup>697</sup> Regulatory<sup>698</sup> and child sex<sup>699</sup> offenses, where strict liability is the norm, are exceptions to the general requirement of state of mind, at least on certain aspects of the offense. Similarly, strict liability generally applies in all offenses on elements that play only a grading or a jurisdiction role.<sup>700</sup> Nevertheless, some awareness that the item may be subject to regulation because of its dangerous, deleterious, or obnoxious character is required even in regulatory offenses.<sup>701</sup> The regulatory offense category, too, is not closed-ended.<sup>702</sup> Accordingly, in light of the general interpretative

697. See generally BLACKSTONE, *supra* note 130, at \*27 (“But this must be an ignorance or mistake of fact, and not an error in point of law.”); HALE, *supra* note 666, at 42 (“Ignorance of the municipal law of the kingdom . . . doth not excuse any . . . because every person . . . is bound to know the law, and presumed so to do . . . . But in some cases *ignorantia facti* doth excuse . . . .”). But see *Ratzlaf*, 510 U.S. at 136. (“Congress may decree otherwise.”). Radin, *supra* note 647, at 129 observes:

To realize the full reach of the doctrines of criminal responsibility it is also necessary to consider the effects of the doctrines of mistake or ignorance of fact or law . . . . The general tendency in all mature legal systems has been to excuse mistake of fact . . . . On the other hand, errors of law have been very rarely excused. However, for . . . the Roman law . . . it has been disputed whether a consciousness of criminality was necessary. The Roman law seems to have allowed the plea of *ignorantia juris* to be made by rustics or women . . . . [M]ens rea in English law was never held to mean that ignorance of the criminal law was an excuse. In the German common law down to the end of the eighteenth century the rule was *error juris non excusat*. . . . In fact[, however,] many continental theorists are in favor of abrogating or at least modifying the generally prevailing old rule . . . [, since] modern criminal norms are so complex that the average citizen cannot be expected to know them all.

698. See *Staples v. United States*, 511 U.S. 600, 606–16 (1994) (rejecting strict criminal liability for regulatory offenses in context of crime of possessing certain kind of gun).

699. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994) (recognizing the *Morissette* principle that common law presumption of *mens rea* does not necessarily apply to sex offenses).

700. *Id.* at 469 n.3 (citing *United States v. Feola*, 420 U.S. 671, 671 (1975) (assault on federal officer; conspiracy)); LAFAYE, *supra* note 56, at 808 n.18 (“[O]ne who steals a valuable necklace, believing it to be costume jewelry, is guilty of grand larceny”). But see *United States v. Yermian*, 468 U.S. 63, 75 n.14 (1984) (involving a false statement in federal jurisdiction and holding, despite *Feola*, that the “actual knowledge of federal agency jurisdiction” element is not required but not deciding whether the element was “negligence”); *Commonwealth v. Murphy*, 42 N.E. 504, 505 (Mass. 1896) (“The defendants in [this statutory rape prosecution] knew that they were violating the law. Their intended crime was fornication, at the least.”).

701. See *Staples*, 511 U.S. at 607.

702. See *Morissette v. United States*, 342 U.S. 246 (1952) (“We attempt no closed definition [of regulatory offenses], for the law on the subject is neither settled nor static.”); *supra* note 644 ¶¶ 13–17 (discussion of “public welfare offenses” in *Morissette*).

presumption of *mens rea*, but the less-than-precise regulatory exception, federal criminal statutes that do not expressly set out a state of mind for each element are contextually ambiguous. In a sharply narrow class of cases, liability may also be both strict and vicarious.<sup>703</sup> General common law defenses are often not expressly included in the elements of particular offenses. Sometimes they are statutory; sometimes they are implied in particular offenses.<sup>704</sup> This contextual ambiguity in federal criminal law is pervasive.

Once Congress selects the elements of an offense, the government is constitutionally required to prove each element of the offense to a jury beyond a reasonable doubt.<sup>705</sup> The burden of proof on elements

703. See *United States v. Park*, 421 U.S. 658, 668–72 (1975) (holding corporate officer strictly liable for his subordinates' failure to prevent contamination of food shipped in interstate commerce, but mandating affirmative defense of impossibility); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (noting in dicta that knowledge that the items were misbranded or adulterated was not required for a statute criminalizing the shipment of adulterated or misbranded drugs); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68–70 (1910) (holding, consistent with due process, that accidental removal of trees may be criminal and subject to multiple damages); *infra* Appendix B (Natural Language: Generality, Ambiguity, and Vagueness) ¶ 5 (discussion of contextual ambiguity).

704. See, e.g., 18 U.S.C. § 17 (Supp. 2000) (insanity); *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc.*, 508 U.S. 49, 56 (1993) (“Those who petition government for redress are generally immune from antitrust liability.”); *United States v. Bailey*, 444 U.S. 394, 399–400 (1980) (duress as defense to escape from prison); *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 670–75 (1973) (misleading defendant by government conduct); *United States v. Laub*, 385 U.S. 475, 487 (1967) (same); *Cox v. Louisiana*, 379 U.S. 559, 569–71 (1965) (same); *Raley v. Ohio*, 360 U.S. 423, 437–40 (1959) (same); *Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.) (“[I]f a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and . . . if he kills him he has not exceeded the bounds of lawful self-defense.”); *Cunningham v. Neagle*, 135 U.S. 1, 75–76 (1890) (recognizing federal public duty defense as defense to state murder charge); *Rowe v. United States*, 164 U.S. 546, 555 (1896) (self-defense; provocation and withdrawal); *United States v. Vigol*, 2 U.S. (2 Dall.) 346, 347 (1795) (duress or terror as defenses to treason); LAFAVE, *supra* note 56, at 7 (“The substantive criminal law is . . . concerned with much more than is found in the definitions of the specific crimes, for there are many general principles . . . [that] apply to more than a single crime.”).

705. *Harris v. United States*, 122 S. Ct. 2406, 2417 (2002) (explaining that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not overrule *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); brandishing a weapon during the course of a narcotics offense is a sentencing factor that may be found by the judge if it does not extend the authorized term.); *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002) (overruling *Walton v. Arizona*, 497 U.S. 639 (1990); sentencing judge may not find aggravating circumstances necessary for the imposition of capital punishment since they operate as the “functional equivalent of an element of a greater offense” under *Apprendi*, 530 U.S. 466 (citations omitted)); *Apprendi*, 530 U.S. 466 (Except for prior convictions, each element of an offense, including a factor of aggravation that enhances the offense beyond authorized term, must be included in the charge and submitted to the fact finder for its determination.); *United States v. Gaudin*, 515 U.S. 506, 511 (1995)

of the offense may not be shifted to the defendant.<sup>706</sup> But the burden of proof may be shifted to the defendant on affirmative defenses.<sup>707</sup> Affirmative defenses may also carry different burden-of-proof requirements.<sup>708</sup> “Presumptions,” if they are understood as permissible inferences, are also not a violation of due process.<sup>709</sup> These, too, are basic principles of federal criminal jurisprudence.

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(“The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.”); *see also* *Blanton v. N. Las Vegas*, 489 U.S. 538, 542 (1989) (“[A] defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months.” (citing *Baldwin v. New York*, 399 U.S. 66, 69 (1970)); *In re Winship*, 397 U.S. 358, 364 (1970) (requiring proof beyond a reasonable doubt of every fact regardless of whether accused is an adult or a child; “Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (Defendant accused of a crime punishable by two years in prison is entitled to a jury trial; “the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”); FED. R. CRIM. P. 22(b) (12 member jury unless stipulated); FED. R. CRIM. P. 31(a) (requiring unanimity).

706. *Mullaney v. Wilbur*, 421 U.S. 684, 703–04 (1975) (holding it impermissible under due process clause for state to shift burden of proof to defendant to establish heat of passion to reduce murder to manslaughter). *Compare Gaudin*, 515 U.S. at 525 (Rehnquist, C.J., concurring) (“Federal and State legislatures may reallocate burdens of proof by labeling elements as affirmative defenses . . . or they may convert elements into ‘sentencing factors’ for consideration by the sentencing court.” (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 85–86 (1986))), *with Apprendi*, 530 U.S. at 476 (2000) (other than the fact of a prior conviction, any fact that increases the penalty for an offense beyond the prescribed statutory maximum must be submitted to the jury for decision under the beyond a reasonable doubt standard). That *Apprendi* represents a “shift[ing of] tectonic plates insofar as criminal sentencing is concerned,” *United States v. Robinson*, 241 F.3d 115, 123 (1st Cir. 2001)), and, if so, to what extent, is beyond the scope of these materials. See generally B. Patrick Costello Jr., Case Comment, *Apprendi v. New Jersey: Who Decides What Constitutes a Crime? An Analysis of Whether a Legislature is Constitutionally Free to “Allocate” an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205 (2002), for a comprehensive and insightful, though disapproving, review of the relevant materials.

707. *Patterson v. New York*, 432 U.S. 197, 206–09 (1977) (permitting New York to require homicide-defendant to prove by preponderance of evidence the affirmative defense of extreme emotional disturbance to reduce murder to manslaughter); *accord Martin v. Ohio*, 480 U.S. 228, 235–36 (1987) (allowing Ohio to place burden of proving self-defense on defendant charged with committing aggravated murder).

708. *Compare LeLand v. Oregon*, 343 U.S. 790, 798–99 (1952) (allowing Oregon to require a defendant to prove the affirmative defense of insanity beyond a reasonable doubt), *with Martin*, 480 U.S. at 230–31 (allowing Ohio to require a defendant to prove the affirmative defense of self-defense by a preponderance of the evidence).

709. *Barnes v. United States*, 412 U.S. 837, 841–47 (1973) (holding due process clause not violated by presumption that defendant in possession of recently stolen checks had knowledge that such checks were stolen).

We vigorously argue that, contrary to the current approach of the circuit courts of appeals, these basic principles of federal criminal jurisprudence must be taken into consideration in any formulation of the jurisprudence of “true threats.” Sadly, the jurisprudence of the circuits on “true threats” is today seriously defective in its failure to take these principles into account and give them their just due. Accordingly, any effort at reform must reflect not only the jurisprudence of the First Amendment but also the jurisprudence of the federal criminal law. We turn now to that task.

#### VII. DEALING WITH TRUE THREATS: A PROPOSAL

The various circuits currently espouse tests, usually objective (speaker, listener, or reasonable person based) or similar approaches, for deciding if speech or expressive conduct is protected speech or an unprotected “true threat.” Yet no approach, as currently administered by trial and appellate courts—including, in particular, the admission of evidence of “context” and the implementation of the special safeguards (pleading, etc.) mandated by *Claiborne*—conforms with the free speech guarantees of the First Amendment rightly glossed by the Supreme Court. Nor do they reflect an appreciation of the basic principles of federal criminal law, particularly the requirements of personal conduct, culpable state of mind, and the crucial distinction between an attempt and a completed offense. Nevertheless, the circuits’ work, especially that of the panel opinion in *American Coalition*, provides helpful ideas that can be used to formulate an approach that will produce results consistent with Supreme Court jurisprudence and basic principles of federal criminal law. Apart from the special safeguards of *Claiborne*, three areas are of paramount importance:

- (1) whether speech or expressive conduct constitutes a “true threat” is initially and independently a question of law for a judge or is, in most cases, to be submitted to fact finder; that is, the relative roles of courts—trial and appellate—and fact finders;
- (2) what ought be the appropriate standard for determining whether speech or expressive conduct is a “true threat”; that is, ought it be objective, and if so, what ought to be the proper perspective (speaker, listener, or perspective



neutral), and ought it, if at all, include a subjective element (intent, knowledge, or recklessness); and

- (3) ought evidence of “context” be admitted for any reason, including to establish a standard of reasonableness in reference to the speech or expressive conduct, or showing the state of mind of the speaker, and if so, what kinds of evidence of “context” ought to be considered (including limitations).

#### *A. Roles of Court and Fact Finder*

While the question of the appropriate standard against which to measure whether speech or expressive conduct is a prohibited “true threat” is crucial, articulating a standard for “true threats” that will ensure breathing room for free speech and be consistent with the basic principles of federal criminal jurisprudence is, by itself, not enough. Just as important as the standard is the role of a court or jury in implementing it.<sup>710</sup> The best way to ensure that a speaker whose language strays close to the boundary of unprotected “true threats” receives the full protection of the First Amendment is to make the question an independent issue of law for the judge, as in the Second Circuit.<sup>711</sup> The approach enforced by the other circuit courts of appeal, submitting all but the least disputable cases of protected speech or expressive conduct to the jury (the usual fact finder, even with an appropriate instruction), substantially undermines First Amendment freedoms.<sup>712</sup> The reasons supporting judicial review in the first instance are compelling. Two stand out.

##### *1. Independent decision maker*

First, judges, who by background and experience are generally neutral and sensitized to First Amendment concerns, are better able to draw the line between protected and unprotected speech—

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710. JEREMY BENTHAM, *OF LAWS IN GENERAL* 1 (H.L.A. Hart ed., 1970), included in his definition of “complete law” not only the rules themselves but also sanctions (“proximate subsidiary law”) and enforcement procedures (“remote subsidiary law”). His point is well taken, though expressed in typically infelicitous phraseology. *See generally* HILARE Q. MCCOUBREY & NIGEL D. WHITE, *JURISPRUDENCE* 10–31 (3d ed. 1999) (reviewing the theories of Jeremy Bentham (1748–1832) and John Austin (1790–1850)).

711. *See, e.g.*, *United States v. Francis*, 164 F.3d 120 (2d Cir. 1999).

712. *See, e.g.*, *United States v. Fulmer*, 108 F.3d 1486, 1492 (2d Cir. 1997).

particularly in close cases. Professor Anderson points out the importance of judges as decisionmakers in the context of libel, another categorical exception to the First Amendment:

The constitutional libel law reforms of the past quarter century have been effective in protecting speech primarily because they have transferred a great deal of power from juries to judges . . . .

. . . .

Ironical as it may be, the shift of power away from juries is unquestionably necessary. Today it is the prejudice and profligacy of juries that threaten free speech, not the criminal law of libel . . . . On the whole, judges are more sympathetic to speech interests than jurors and more sensitive to subtle threats against those interests. We may as well be candid: constitutional protection of speech against the chilling effects of libel consists primarily of rules encouraging judges to decide factual matters that previously were left to juries.<sup>713</sup>

713. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 539–40 (1991); accord Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 765 (1986):

What emerges from looking at the history is the conclusion that much of the history of free speech thinking in the eighteenth century is a history of promoting free speech by promoting the power of the jury.

Today, in sharp contrast, the tables have turned. We no longer view juries as primary or even important protectors of free speech. On the contrary, much of contemporary [F]irst [A]mendment doctrine, theory, and commentary is devoted to protecting speech *from* the jury. Where 250 years ago, more jury power was taken as coincident with greater freedom of speech, more jury power now is taken as just the opposite.

On another occasion and in another place, we might be willing to essay our opinion on negligence as a basis of criminal as opposed to civil liability and on the central role of the jury in making a determination that it is present. Here, in the First Amendment context, only a few comments are required. Negligence is *not* one of a series of alternative “states of mind” used to assess culpability. “It is distinguished from purposeful, knowing or reckless action in that it does *not* involve a state of awareness.” MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. 4 (1985) (emphasis added). Accordingly, it must be used with care in a system of responsibility that assesses moral or legal culpability. If negligence possesses any place, at least in the criminal law, it is surely limited to the handling of physically dangerous things, including, particularly vehicles or weapons. See LAFAYE, *supra* note 56, at 246 (careless driving, negligent conduct causing death or serious bodily harm or destruction of property). But that is not our task in these materials. Here, we consider what role, if any, negligence (an objective standard of responsibility) should play by itself (the current approach in the circuits) for “true threats,” or in connection with an additional requirement of a subjective state of mind (intent or purpose to make a “threat”) coupled with heightened judicial review at the trial and appellate level. We conclude that an objective standard is appropriate to test the

meaning of speech or expressive conduct, but more ought to be required to impose civil or criminal liability for a "true threat." In addition, an intent or purpose to make a threat (but not necessarily to carry it out) ought to be an additional prerequisite for liability, and the process of assessing that culpability should be subject to heightened judicial review for First Amendment concerns at the trial and appellate levels. *See supra* Part VII.A and *infra* Part VII.B. Given the realities of our diverse and contentious society, especially in public discourse, but even if that private discourse that takes place face to face, the application of the traditional concepts of tort law to areas of speech or expressive conduct is bound to create the unacceptable danger of chilling freedom of speech or expressive conduct. The reasonable person standard for liability—apart from issues of speech or expressive conduct—serves admirably the essential function of imposing a socially determined and "acceptable [civil] limit on the freedom of an individual to act with relation to others." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). But when speech or expressive conduct is at issue, negligence alone is insufficient, and other factors must be placed in the balance. *Id.* A community that imposes civil or criminal liability on all statements deemed "threats" solely by an objective standard (speaker based, listener based, or otherwise) to be decided by a jury where a material question of fact is raised (the usual situation, *see supra* note 137 (discussing standards of review)), would in our judgment be abandoning the basic protections of the First Amendment to the vicissitudes of juries that may be enflamed by the hot button questions of the day. Likewise, the preponderance of the evidence standard "plays an indispensable role in the control of private negligence." *Monitor Patriot Co.*, 401 U.S. at 275. Here, however, we deal with speech or expressive conduct, where mere negligence ought not to play the determining role, wholly apart from the question of the burden of proof imposed. *See infra* note 768 (discussion of burdens of proof). That a case posing issues touching on speech or expressive conduct goes one way or another is not a matter largely of indifference. Freedom may be at stake, not mere money or property. Where the preponderance standard is employed, "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). But the possibility of error itself "would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (Brennan, J.). Our easy acceptance of a negligence standard in civil law—and even in criminal law—too often inures us to the threats it poses where speech or expressive conduct is at stake. If substantial objections may be lodged against a negligence standard in criminal law at all, and they can, any doubt about the propriety of its use as the principal standard of liability where issues touching on speech or expressive conduct are raised ought to be resolved against its use as the primary method of drawing the line between freedom and tort or crime.

The controversy over the use of a negligence standard for criminal responsibility is recognized but rejected in the Model Penal Code. *See* MODEL PENAL CODE AND COMMENTARIES 243 n.31 (1985) ("No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior. . . . [N]egligence, as here defined, [in a manner considerably more rigorous than simple negligence as usually treated in the law of torts] should not be wholly rejected as a ground of culpability . . ."). The issue is perceptively discussed in Peter Arenell, *Character, Choice, and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POL'Y 59, 70–71 (1990). The case for its use, at least as the Model Penal Code limits it, is well put by the author of the *Commentaries on the Model Penal Code* in Peter W. Low, *The Model Penal Code, the Common Law and Mistakes of Fact: Recklessness, Negligence or Strict Liability?*, 19 RUTGERS L.J. 539 (1988). The classic essay on negligence and the criminal law is H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 136–57

Second, the Supreme Court insists—albeit to date only on appellate review—that the First Amendment requires an independent examination of the facts that *cannot* be delegated to the finder of fact.<sup>714</sup> Currently, it independently examines records to ensure protection of First Amendment freedoms in cases involving other categorical exceptions, i.e., defamation,<sup>715</sup> obscenity,<sup>716</sup> and incitement.<sup>717</sup> Litigation involving alleged “true threats” warrants similar treatment.

Moreover, holding that two different rules apply—one to appellate judges and another to trial judges—is anomalous and hardly defensible. That a defendant is *not* entitled to a judge’s uniquely qualified interpretation of his or her constitutional rights

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(1968) (discussing the views of Glanville Williams, Jerome Hall, and James William Cecil Turner, generally rejecting the role of negligence in assessing criminal responsibility, and pointedly questioning the often tacit assumption in discussions of negligence and criminal responsibility that the rest of the criminal law is wholly subjective while negligence is wholly objective).

714. Cf. Schauer, *supra* note 713, at 765–66 (footnotes omitted):

The role of juries, involved in a wide range of cases with free speech implications, is a recurrent issue in areas such as defamation, speech by public employees, obscenity, invasion of privacy, and incitement. The common wisdom is that if juries were given more decisional power in these areas, either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow.

The contemporary distrust of juries has numerous manifestations. A long line of cases . . . has increased the power and obligation of appellate courts to review juries’ factual determinations about activity that, depending on the jury’s verdict, may fall within the protection of the [F]irst [A]mendment. This obligation of independent appellate factual review extends not only to the determination of malice at issue in *Bose*, but also to the question . . . whether a given publication can be considered defamatory at all. Similarly, appellate courts routinely evaluate materials found obscene by juries against an independent standard of constitutionality. Likewise, questions of imminence and likelihood in the application of *Brandenburg* . . . are not left even to properly instructed juries, but . . . remain subject to judicial scrutiny.

For further discussion of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), see *infra* notes 751–53 and accompanying text and accompanying text (comparing *Brandenburg* and *Watts v. United States*, 394 U.S. 705 (1969)).

715. See, e.g., *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510–11 (1984); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 280–87 (1974); *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283–85 (1964).

716. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974); *Miller v. California*, 413 U.S. 15, 29–30 (1973); *Jacobellis v. Ohio*, 378 U.S. 184, 188 (1964) (plurality opinion); *Manual Enters., Inc. v. Day*, 370 U.S. 478, 488 (1962) (plurality opinion); *Kingsley Int’l Pictures Corp. v. Regents of N.Y.*, 360 U.S. 684, 708 (1959) (Harlan, J., concurring).

717. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 107–09 (1973).

*unless he or she first subjects himself or herself to a jury trial and a losing verdict* cannot be argued with a straight face. The power of a trial judge to determine, initially and independently, the constitutional question of whether a speech or expressive conduct is protected under the First Amendment *must* be the same as—no more than and no less than—that of an appellate judge.<sup>718</sup>

## 2. *The gatekeeper function*

Leaving the decision of whether speech or expressive conduct is protected to a jury—however well-instructed—necessarily chills free speech, even under the most protective “true threat” standard. Particularly in civil threats litigation, the chill comes not principally from an opponent obtaining a judicial remedy against you but from

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718. One author makes a similar argument in the related context of libel:

Having abandoned the fact of jury hegemony in libel, we should now abandon the fiction of it. Allowing judges to make these determinations early in the litigation avoids the expense and delay of unnecessary jury trials. These benefits are lost when judges make their decisive judgments only *after* a jury has made its own determination of the matter. We cling to the notion that the judge’s role, though “independent” of the jury, is still one of “review.” In some cases, judges convert the power of independent review into a power of preliminary disposition by fudging on the usual summary judgment standards. In most cases, however, to preserve an illusion of deference to the jury, judges exercise their power only at the end of litigation. Even though the eventual holding is that no liability can be constitutionally imposed whatever the jury may find, that judgment is not made until after jury trial.

Anderson, *supra* note 713, at 540. Our argument here, too, draws on the insightful work of Professor Henry P. Monaghan. See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985). As Professor Monaghan so aptly puts it:

[I]n addition to the familiar judicial duty to “say what the law is,” the [F]irst [A]mendment imposes a special duty with respect to law application: both trial and appellate judges must examine the evidence, marshal (sic) the relevant adjudicative facts, and then apply the controlling [F]irst [A]mendment norms to those facts . . .

*Id.* at 229 (footnotes omitted). We could not say it better or more succinctly, though Monaghan here is expressing not his own view but his understanding of the law.

Three distinct functions, not analytical distinctions that allocate roles between court and jury, are implicated: law declaration, fact identification, and law application. *Id.* at 234. We believe that in the First Amendment area, wise policy gives the trial and appellate courts wide power to play a crucial role in *all three functions*. But see *id.* at 276 (“The judicial duty of appellate courts . . . [is] limited to saying what the law is [where the review is of lower federal and state courts, though at least federal appellate courts possess a competence to independently review constitutionally decisive facts, but it] goes too far to convert this competence into a duty[, and] a persuasive case for treating the [F]irst [A]mendment differently [has not been made by *Bose*].”). For a comprehensive discussion of the law and the relative functions of court and jury in a wide range of areas, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 596–627 (4th ed. 1996).

the various aspects of the litigation itself—including time spent in discovery and trial, money spent on legal and related fees, and the loss of peace of mind from the prospect of an adverse legal judgment, however unlikely it might be. And of course, in criminal litigation, while discovery battles may be less protracted, the fear of an adverse criminal judgment is potentially more incapacitating than that of an adverse civil judgment. Money, while important, is, after all, only money; prison is something else entirely. Unless the standard for pleading is, for example, heightened in civil cases in the area of the First Amendment (as under current jurisprudence it should be<sup>719</sup> but often in fact it is not) a complaint that will survive a

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719. Justice Souter, in his concurrence in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 264–65 (1994), for example, recognized a line of cases that would, if universally followed, soften the chilling effect by requiring heightened pleading for cases where the pendency of an action itself would threaten to chill First Amendment freedoms. *See id.* at 264 (“[T]he First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression.”).

The seminal circuit court decision in this line, which Justice Souter regrettably failed to mention, is *Franchise Realty v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976). That decision states:

[I]n any case, whether antitrust or something else, where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.

*Id.* at 1082–83.

In fact, district courts in all but two circuits (the Fourth and the Fifth) ostensibly follow *Franchise Realty*. *See* Kottle v. N.W. Kidney Ctrs., 146 F.3d 1056, 1063 (9th Cir. 1998); Or. Natural Res. Council v. Mohla, 944 F.2d 531, 533 (9th Cir. 1991); Hydro-Tech. Corp. v. Sundstrand Corp., 673 F.2d 1171, 1177 n.8 (10th Cir. 1982); Mark Aero v. Trans World Airlines, 580 F.2d 288, 297 (8th Cir. 1978); Letica Corp. v. Sweetheart Cup Co., 790 F. Supp. 702, 705–06 (E.D. Mich. 1992); Cash Energy v. Weiner, 768 F. Supp. 892, 899 (D. Mass. 1991); Premier Elec. Constr. Co. v. Int’l Bhd. of Elec. Workers, 627 F. Supp. 957, 966 (N.D. Ill. 1985), *rev’d sub nom. on other grounds*, Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Assoc., 814 F.2d 358 (7th Cir. 1987); St. Joseph’s Hosp. v. Hosp. Auth. of Am., 620 F. Supp. 814, 833 n.22 (S.D. Ga. 1986), *vacated on other grounds*, 795 F.2d 948 (1986); Spanish Int’l Communications Corp. v. Leibowitz, 608 F. Supp. 178, 182–84 (S.D. Fla. 1985), *aff’d*, 778 F.2d 791 (11th Cir. 1985); Caplan v. Am. Baby, 582 F. Supp. 869, 871 (S.D.N.Y. 1984) (copyright and trademark); WIXT Television v. Meredith Corp., 506 F. Supp. 1003, 1035 (N.D.N.Y. 1980); Newark v. Delmarva Power & Light Co., 497 F. Supp. 323, 326–27 (D. Del. 1980); Gainesville v. Fla. Power & Light Co., 488 F. Supp. 1258, 1266–67 (S.D. Fla. 1980); Fed. Prescription Serv. v. Am. Pharm. Assoc., 471 F. Supp. 126, 129 (D.D.C. 1979), *aff’d on other grounds*, 663 F.2d 253 (D.C. Cir. 1981); Realco Servs. v. Holt, 479 F. Supp. 880, 884 (E.D. Pa. 1979); Miller & Son Paving v. Wrightstown Township Civic Ass’n, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978), *aff’d on other grounds*, 595 F.2d 1213 (3d Cir. 1978); Bethlehem Plaza v. Campbell, 403 F. Supp. 966, 971 (E.D. Pa. 1975).

motion to dismiss on the pleadings is not difficult to draft; nor do the standards for criminal pleading erect high burdens for prosecutors.<sup>720</sup> Further, a well-pleaded complaint of a violation of a

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If all district and appellate courts followed this line of precedent faithfully and required more specific pleading in cases where a “true threat” is alleged—which they do not—a defendant could, in proper cases, get a suit dismissed before having to incur the substantial costs of civil discovery; it would not be necessary to proceed through to summary judgment, and, if unsuccessful, on a FEDERAL RULE OF CIVIL PROCEDURE 56 motion, to a trial on the merits. Because of the material question of fact standard of Rule 56, many complaints, in fact, might well go to trial. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Such an approach would give speakers confidence to exercise their constitutional rights as they would be secure in the knowledge that staying close to the boundary separating “true threats” from unprotected speech or expressive conduct would not subject them to unduly expensive legal proceedings when they stay on the correct side of the boundary.

720. As Justice Holmes once aptly observed: “We . . . need education in the obvious . . .” OLIVER WENDELL HOLMES, *THE COMMON LAW AND OTHER WRITINGS* 102 (1913). We turn thus to the obvious, the effect of which is lost on too many of us. Civilly, a plaintiff need only file a pleading containing “(1) a short and plain statement of the grounds upon which the court’s jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.” FED. R. CIV. P. 8(a). If a plaintiff meets these minimal requirements, then the pleadings are legally sufficient to proceed unless the defendant can show that the pleadings “fail[] to state a claim upon which relief can be granted.” *Id.* at 12(b)(6). For the vast majority of defendants, this standard is possible to meet since the Supreme Court makes clear, “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). Thus, provided a plaintiff sets out in the pleadings *any* recognized claim for relief, the defendant will be subjected to discovery at least. In addition, two recent Supreme Court decisions squarely reaffirm *Conley*. *See* *Swierkiewicz v. Sorema*, 122 S. Ct. 992, 998 (2002) (The standard of Rule 8 is notice pleading; “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions.”); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (“[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.”). In short, efforts by lower courts to impose heightened pleading standards, despite the plain language of the federal rules, to certain claims for relief were scratched by *Leatherman*. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (Posner, C.J.) (other rules not “authoritative after *Leatherman*”). Indeed, those efforts abound. *See, e.g.*, *Powers v. British Vita P.L.C.*, 57 F.3d 176, 192 (2d Cir. 1995) (holding that facts giving rise to a “strong inference” of state of mind must be pled); *Tapia-Ortiz v. Winter*, 185 F.3d 8 (2d Cir. 1999) (per curiam) (deciding that a factual basis must be set out for RICO conspiracy); *Beck v. Mfrs. Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987) (finding that elements of RICO enterprise must be specifically pled), *overruled sub nom. on other grounds*, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (en banc). Whether the lower courts will reconsider these rules in light of *Sorema* and *Leatherman* is problematic.

The general pleading standards in criminal prosecutions are also not particularly vigorous. FEDERAL RULE OF CRIMINAL PROCEDURE 7(c)(1) requires only “a plain, concise

civil threat statute gives plaintiffs the right to depose individuals and call for the production of documents.<sup>721</sup> Civil discovery, necessary in most types of civil litigation,<sup>722</sup> imposes crushing costs on those who might protest where their opponents are of a mind to take the controversy out of the public forum—where the First Amendment assigns it—and put it into the judicial forum, in an effort to enlist the powers of the courts on their side of the controversy. Because the

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and definite written statement of the essential facts constituting the offense charged.” Every element must, of course, be alleged. *United States v. DeBrow*, 346 U.S. 374, 376 (1983). The standard assures the defendant can prepare his defense and, if necessary, plea double jeopardy in any subsequent proceeding. *Russell v. United States*, 369 U.S. 749, 763–64 (1962). In addition, the indictment must also negate any statutory exception so incorporated into the definition of the offense that it cannot be stated accurately if the exception is omitted. *United States v. Cook*, 84 U.S. (1 Wall.) 168, 173 (1872). Generally, an indictment is sufficient if it only charges the offense in the language of the statute, *Hamling v. United States*, 418 U.S. 87, 117 (1974), unless the face of the statute omits an essential element of the offense, where that element must be alleged. *United States v. Carll*, 105 U.S. 611, 612 (1881). While the courts require, at least according to some decisions, more definite civil pleadings where First Amendment issues are at stake, similar requirements are not imposed on criminal pleadings. *See United States v. McDade*, 28 F.3d 283, 298–99 (3rd Cir. 1994) (holding that the Speech or Debate Clause does not require specificity of pleading, but it may require pretrial hearing to determine if particular allegations may be the subject of a trial), *cert. denied*, 514 U.S. 1003 (1995). One of our number, Blakey, argued that appeal. Some flexibility may be found under FEDERAL RULE OF CRIMINAL PROCEDURE 7(f) that provides for a Bill of Particular; yet its filing lies within the discretion of the court. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927). Its purpose “is to inform the defendant of the nature of the charges brought against him to adequately prepare this defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense.” *United States v. Addonizio*, 451 F.2d 49, 63–64 (3d Cir. 1971) (citations omitted), *cert. denied*, 406 U.S. 936 (1972). The government may be required to define “vague” terms in the indictment. *See, e.g., United States v. Hubbard*, 474 F. Supp. 64, 80 (D.D.C. 1979) (“covertly”). But the jurisprudence under the Rule does not speak to the issues raised here. The cases under the Speech and Debate Clause, U.S. CONST. art. 1, § 6, cl. 1, may offer an analogy that could be used to terminate a prosecution that would be improper under the First Amendment. There, if necessary, a factual hearing may be held to supplement the allegations to determine if a trial may be held on the indictment. *United States v. Dowdy*, 479 F.2d 213, 223 (4th Cir. 1973) (assessing the sufficiency of an indictment in light of the Speech or Debate Clause), *cert. denied*, 414 U.S. 823 (1973). The government may also be required to make an offer of proof to flesh out its allegations. *See, e.g., United States v. Gillock*, 445 U.S. 360, 363 (1980) (text of offer of proof in Speech or Debate prosecution set out in appendix to the lower court opinion at 587 F.2d 284 (6th Cir. 1978)); *see also United States v. Stofsky*, 409 F. Supp. 609, 616 (S.D.N.Y. 1973) (government required to file an additional memorandum in connection with “critical factual issues” in prosecution under 18 U.S.C. § 1951). In brief, the Rules, as currently written or interpreted, do not offer much hope of stopping at the pleading stage a prosecution that would, if held, violate the First Amendment. Greater flexibility is needed to protect free speech or expressive conduct rights.

721. *See* FED. R. CIV. P. 26(a)(5).

722. *See id.*



pleading requirements to survive a motion to dismiss are so minimal, individual protesters must bear the enormous costs of even a successful defense of threat litigation.<sup>723</sup>

In criminal cases, “precision of regulation,” as required by the First Amendment, demands—in light of *Claiborne*—more than special pleading rules. *Claiborne* squarely points to appropriate limitations on arguments,<sup>724</sup> evidence,<sup>725</sup> instructions,<sup>726</sup> etc., in an effort to discriminate between individual and group conduct and results brought about by protected conduct and unprotected conduct. Accordingly, the circuit and district courts must also begin to implement—with due vigilance—these essential aspects of the necessary procedural protections required by the interests protected by the First Amendment. Getting the standard right is necessary, but it is not sufficient in a free society that rightly values more than paper rights. Regrettably, these aspects of *Claiborne* are largely ignored—wittingly or unwittingly.<sup>727</sup>

### *B. The Appropriate Standard*

When they consider the issue of what standard to employ for “true threats,” the circuit courts are uniform in adopting some

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723. In the related area of libel, one commentator argues similarly:

When the determination depends upon full development of facts, there can be no preliminary disposition no matter who makes the decision. Many cases, though, are ultimately disposed of on the basis of judicial analysis of the publication itself. Cases are litigated for years, only to have an appellate court eventually decide that the statement itself is constitutionally incapable of supporting a libel judgment.

Anderson, *supra* note 713, at 541 (footnotes omitted).

724. See *supra* note 416 (discussing the Seventh Circuit’s decision in *Scheidler*, imposing liability on individuals, based on group conduct, without compliance with the teaching of *Claiborne*).

725. *Id.*

726. *Id.*

727. Here, too, our analysis draws on Professor Monaghan’s impressive work, though this time we find ourselves in agreement not only with his analysis but with his conclusions. Henry P. Monaghan, *First Amendment Due Process*, 83 HARV. L. REV. 518, 519 (1970):

If the Constitution requires elaborate procedural safeguards in the obscenity area, a fortiori it should require equivalent procedural protection when the speech involved—for example, political speech—implicates more central [F]irst [A]mendment concerns. Like the substantive rules themselves, insensitive procedures can “chill” the right of free expression. . . . The government . . . may regulate certain types of activity, but it must make sure, via proper procedural safeguards, that protected speech is not the loser.

*Id.* at 519–20 (footnotes omitted).

variation of an objective standard, that is, some form of “negligence.” Needless to say, they do not agree on what that objective standard should be. Most espouse a general reasonableness standard while the Second Circuit requires a heightened showing of a threat, albeit still based on an objective standard. Nor do the circuits agree from which viewpoint the speech or expressive conduct should be analyzed—that of the speaker, of the hearer, or of a “reasonable person.” Ultimately we see, as did the en banc decision in *American Coalition*, little in the opinions of the various courts by way of difference in results brought about by the various formulations.<sup>728</sup> In short, none of the current standards achieves that high level of protection for free speech demanded by Supreme Court jurisprudence or basic principles of federal criminal jurisprudence. A different approach is required.

First, the interests behind a prohibition of “true threats” must be carefully identified. In *R.A.V.*, the Supreme Court identified the three crucial interests: “protecting individuals [1] from the fear of violence, [2] from the disruption that fear engenders, and [3] from the possibility that the threatened violence will occur.”<sup>729</sup> To begin, a distinction must be drawn between these interests and formulation. Each interest at issue need not be represented in the formulation if other bodies of law meet that interest and, in particular, if representing the interest in the formulation would be accompanied by adverse side effects. Indeed, that the standard for “true threats” should reflect in its formulation the possibility that the threatened violence will occur is problematic.

A multitude of federal and state criminal statutes and forms of civil liability already protect independently against violence itself. One example, but certainly not the least important, is the law of homicide, that is, “murder” and “wrongful death.”<sup>730</sup> Obviously, its prosecution criminally and civilly vindicates the social interest in the sanctity of life. More is not required. To the degree that the

728. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1074–75 (9th Cir. 2002).

729. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992); accord *Am. Coalition*, 290 F.3d at 1076 (citing *R.A.V.*, 505 U.S. 377).

730. Famously, after his acquittal for the murders of Nicole Brown Simpson, his wife, and Ronald Lyle Goldman, a waiter who was bringing her glasses to her home, O.J. Simpson was successfully sued for wrongful death. See *Rufo v. Simpson*, 103 Cal. Rptr. 2d 492 (Ct. App. 2001). For further discussion of wrongful death, see generally WILLIAM LLOYD PROSSER & PAGE KEETON, *PROSSER & KEETON ON TORTS* § 127, at 945–61 (5th ed. 1984).

jurisprudence of “true threats” is focused not only on fear or disruption but also on the prevention of threatened conduct that might endanger life (or property or other protected interests), its focus is mistakenly shifted from its role as a complete offense to that of an inchoate offense.<sup>731</sup> To be sure, if offenders telegraph future violence, the law ought to read the message, intervene, and prevent it. Barn doors ought to be locked before horses are stolen; guards, too, may be appropriately posted at barn doors before the thief arrives.

Nevertheless, fundamental principles of criminal law are implicated by the shift. Inchoate offenses rightly require a heightened showing of state of mind as their prohibited conduct element moves further away from conduct that the law ultimately seeks to prevent. Under its traditional formulation, murder, for example, is a “general intent” (“knowledge”) offense, but attempted murder is a “specific intent” (“intent to murder”) offense.<sup>732</sup> In brief, the principal legal interest behind a prohibition of threat of violence is *not* the violence itself but rather the *fear* it generates or the need to protect a person from the disruption that taking a threat seriously generates; the prohibition only secondarily serves to prevent the violence itself. Other bodies of law serve well enough to protect from attempted violence, violence itself, conspiracy, or solicitation to

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731. See *supra* text accompanying note 598 (discussing the difference between a completed offense and an inchoate offense).

732. LAFAVE, *supra* note 56, at 540 (citations omitted; emphasis added), illustrates the general law:

Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state *which need not be an intent to bring about the result*. Thus, if A, B, C, and D have each taken the life of another, A acting with intent to kill, B with intent to do serious bodily injury, C with reckless disregard of human life, and D in the course of a dangerous felony, all three are guilty of murder because the crime of murder is defined in such a way that any one of these mental states will suffice. However, if the victims do not die, then only A is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to serious bodily harm, that he actual is reckless disregard for human life or that he was committing a dangerous felony. *Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another)*.

Needless to say, we are dissatisfied, as is the teaching profession and the Supreme Court but not all of the courts of appeal, with the traditional distinction between “general intent” and “specific intent” crimes. See *supra* note 513 (discussing the troublesome distinction between “general intent” and “specific intent”).

commit violence.<sup>733</sup> Accordingly, if we look at a “true threat” as if it were an attempt offense, the appropriate state of mind would be “intent to accomplish the threatened result.” But courts now are in universal agreement that the defendant need *not* intend to carry out the threat, and we have no quarrel with these holdings. Indeed, we agree that they make eminently good sense. The legal mistake is to conclude—in the same breath—that the defendant need not have *any* state of mind at all, much less the preferred result, requiring an “intent to threaten.” We now turn to that preferred result.

While a pure negligence standard (objective evaluation of the speech whether formulated as speaker-based, hearer-based, or neutral) may well advance the basic policies behind proscribing “true threats,” it does not adequately protect the policies mandated by the First Amendment nor is it consistent with the basic principles of federal criminal law requiring individual conduct and a culpable state of mind. First, as we repeatedly emphasize in these materials, free speech rights are personal.<sup>734</sup> An individual’s right to free speech ought not be defined in the first instance by how it might affect others. In particular, it ought not be allowed to ebb and flow with the special sensitivities of listeners.<sup>735</sup> Indeed, affecting other persons is precisely why people in a free society engage in speech or expressive conduct. Change *is*, in short, its objective.

The First Amendment, too, protects speech and expressive conduct precisely because the doors to change must always be kept unlocked in a free society. Locking them only pents up social, economic, and political unrest; inevitably, as history teaches, and as we can see throughout the world today, it produces problems far more serious than the toleration of the expression of differences in an increasingly pluralistic society. Ironically, our increasingly diverse society is also one that is ever more unified economically and through mass communication. Unfortunately, the present tests (as adopted and administered by the circuit courts) necessarily lead to self-censorship by speakers or actors, who are forced to guess where the line between protected and unprotected speech or expressive conduct will be drawn. The application of the tests often takes place only after the litigation finds its way to the appellate level, well after

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733. *See, e.g.*, 18 U.S.C. § 371 (1994) (conspiracy).

734. *See supra* note 133 (discussing the personal character of constitutional rights).

735. *See supra* note 133.

the speakers spoke and the actors acted. If non-violent protestors are protected by the First Amendment—and they are—but lose that protection when they utter a “true threat,” then when protestors raise issues that are sufficiently contentious to bring into the struggle other violent individuals for whom they are not legally responsible, non-violent protestors will decide to exercise less than the full measure of their constitutional freedoms. Indeed, protestors who *should be protected by the First Amendment*<sup>736</sup> will be inevitably and justifiably afraid of crossing the murky line between vociferous protest into the area of “true threat.”

Ineluctably, given the current state of the law, protestors will necessarily lack the ability to gauge accurately the extent to which a “context” created by others will be taken into account—well after the fact—by a court or a jury in evaluating their speech or expressive conduct.<sup>737</sup> When tested against the possibility of the imposition of a criminal sanction, this fear remains real, though the sound exercise of prosecutorial discretion may well limit the danger, assuming that those in charge of the administration of the law are not pursuing an agenda of their own.<sup>738</sup> Nevertheless, where political, social, economic, or other opponents are given the powerful weapon of civil

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736. That proposition is beyond argument. *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007, 1014 (9th Cir. 2001); *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687, 700 (7th Cir. 2001).

737. As the ACLU Foundation recognized:

Whenever First Amendment rights are at stake, clear and understandable rules are often the only safeguard against the chilling effect of self-censorship that follows from imprecise and uncertain applications of ambiguous standards. If the line between protected and unprotected speech is unclear, a speaker is likely to refrain from engaging in protected speech in order to avoid the potentially serious adverse consequences of making a wrong decision. Such adverse consequences may include not only criminal punishment but also civil damage awards, including punitive damages.

Brief of Amicus Curiae ACLU Foundation of Oregon, Inc. at 2–3, *Am. Coalition*, 244 F.3d 1001.

738. See *United States v. Lynch*, 952 F. Supp. 167 (S.D.N.Y. 1997). In *Lynch*, Bishop George Lynch and Franciscan friar Christopher Moscinski were prosecuted for criminal contempt of an anti-demonstration order issued under FACE by District Court Judge John Sprizzo. Judge Sprizzo found them “not guilty.” Despite the Double Jeopardy Clause of the Fifth Amendment, the government appealed; it lost. Undaunted, the government sought a rehearing *en banc* but lost again. The story of this sad chapter in prosecutorial abuse in the appeals process is ably told in Christopher J. Bellotti, *The Double Jeopardy Category Is . . . Abortion Protest: United States v. Lynch, the United States' Appeal from a Criminal Acquittal in the Southern District of New York*, 45 N.Y.L. SCH. L. REV. 235 (2001). One of our number, Blakey, argued the appeal.

litigation to curtail the free speech or expressive conduct of the opposition, a weapon not limited by prosecutorial discretion, that fear is fully justified, and First Amendment freedoms are not only unjustifiably curtailed but also the fundamental principles of the criminal law are impermissibly distorted.<sup>739</sup>

The appropriate balance of all interests is only fairly struck by the adoption of a hybrid, subjective/objective standard. Justice Marshall once advanced a compelling argument in favor of such a standard. We wholeheartedly agree with it. In his concurring opinion in *Rogers v. United States*,<sup>740</sup> a prosecution for threatening the President under 18 U.S.C. § 871, Marshall observed, “The District Court and the Court of Appeals adopted what has been termed the ‘objective’ construction of the statute. . . . [T]his Court has expressed ‘grave doubts’ as to its correctness . . . .”<sup>741</sup>

He then pointedly commented on the objective standard:

I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President. This construction requires proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threatening in nature. Under the objective construction by contrast, the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker’s intention. In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. . . . [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.<sup>742</sup>

He continued:

If [the statute] has any deterrent effect, that effect is likely to work only as to statements intended to convey a threat. Statements

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739. Both RICO and FACE, for example, provide for both criminal *and* civil sanctions for certain kinds of threats; they may, therefore, be used by public prosecutors *and* private plaintiffs, as the *American Coalition* litigation well illustrates.

740. 422 U.S. 35 (1975) (Marshall, J., concurring).

741. *Id.* at 43 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)). The lower courts did not respond appropriately to the Supreme Court’s expression of concern in *Watts* with the District of Columbia’s state of mind requirement. *See supra* note 81 (discussing the inadequate response of the lower courts to the Supreme Court’s comment in *Watts*).

742. *Id.* at 47 (citation omitted).

deemed threatening in nature only upon “objective” consideration will be deterred only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence would have substantial costs in discouraging the “uninhibited, robust, and wide-open” debate that the First Amendment is intended to protect.<sup>743</sup>

Finally, he concluded:

I would therefore interpret [the statute] to require proof that the speaker *intended* his statement to be taken as a threat, *even if he had no intention of actually carrying* it out. The proof of intention would, of course, almost certainly turn on the circumstances under which the statement was made . . . . But to permit the jury to convict on no more than a showing that a reasonably prudent man would expect his hearers to take his threat seriously is to impose an unduly stringent standard in this sensitive area.<sup>744</sup>

We cannot say it better. We would also emphasize that basic principles of federal criminal law point toward Justice Marshall’s suggestion, as they do toward our proposal. Accordingly, our hybrid standard incorporates two elements: (1) that the speaker subjectively intended to threaten an unlawful result, and (2) that the speech or expressive conduct was objectively threatening in character. These two elements square nicely with the two main reasons for proscribing “true threats” (fear; disruption) with the Supreme Court’s First Amendment jurisprudence (state of mind before sanctions applied to restrict free speech; personal character of free speech rights) and with basic principles of federal criminal law (personal conduct; appropriate state of mind; the distinction between inchoate and completed offenses).

### *1. The subjective element*

The first element—whether the speaker intended his communication be taken as a threat—is, given the circuits’ uniform adoption of a purely objective standard and their consistent rejection of a requirement of a subjective state of mind, the more controversial aspect of our proposal (as well as Justice Marshall’s). Nevertheless, it

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743. *Id.* at 47–48 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

744. *Id.* at 48 (emphasis added).

should be adopted if the law is to remain faithful to fundamental First Amendment principles and the demands of the federal criminal law. First, a listener is certainly likely to be placed in legitimate fear by speech or expressive conduct when a speaker or actor *actually intends* that his communication be taken as a “threat.” Similarly, the effectiveness of threat-proscribing statutes is likely to be highest when applied to speech and expressive conduct that the speaker intends to be threatening. Accordingly, a subjective intent, or purpose, requirement serves to protect listeners from either fear or disruption<sup>745</sup> while at the same time permitting a maximum amount of free speech—speech that will be, in fact, largely free from the self-censorship that speakers would have to engage in to avoid prosecution if the standard were wholly objective.

Second, the Supreme Court already imposes a state of mind requirement in free speech cases when the issue is squarely presented to it. We read those decisions to prohibit, *as a matter of current law*, a purely objective standard for “true threats,” though we readily concede that we are ahead of the curve on our reading of the cases. Strict liability is, for example, unconstitutional under well-established

745. An intent standard is actually *more* protective of the interests of victims of “true threats” since it *increases* the extent to which damages may be recovered for more remote consequences and tends to cut off arguments about supervening causes. The Supreme Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982), rested its decision on a failure to meet the incitement to violence standard, but it noted that “[u]nquestionably, these individuals [that engaged in violence or threats of violence] may be held responsible for the injuries that they caused.” The Court in *Claiborne* did not elaborate on its understanding of “cause.”

On the role of “intent” in assessing “cause,” see CHARLES T. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* §§ 72–76 (1935) (If there is intentional wrongdoing, the range of responsibility for remote and less foreseeable consequences widens and even if a new agency plays a principal role in bringing about the result, the chain of causation is not broken if the wrongdoer could have appreciated that his conduct would create a substantial risk of the new agency’s action.); *RESTATEMENT (SECOND) OF TORTS* § 870 (1979) (intentionally causing injury); *id.* § 425 (If the consequences are intended, liability may be proper even if, where negligent, no liability would obtain.); and *id.* § 435B (“[R]esponsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent . . .”).

On the substantial limitation posed by the doctrine of supervening cause, see *Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 836–42 (1996) (The common law doctrine of proximate cause in admiralty includes the doctrine of superseding cause as a necessary limit on liability; ship owner whose own extraordinary negligence led to the grounding of a ship that broke its moorings that were negligently attached not permitted to recover from the dock company based on the dock company’s negligence.).



precedent in the obscenity area.<sup>746</sup> Surely, “obscenity” is not deserving of *more* protection than “speech or expressive conduct” generally? Nor may libel, where a public figure is alleged to be defamed, rest on less than a showing of “malice.”<sup>747</sup> Indeed, the analogy is compelling between the equally well-established principles of the First Amendment applicable to public discourse, truth, and falsehood and the general area of speech and expressive conduct.<sup>748</sup>

Here, too, *Brandenburg v. Ohio*,<sup>749</sup> on state of mind, is crucial.<sup>750</sup>

746. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 n.3 (1994).

747. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring actual malice in suits for defamation of public officials).

748. Judge Berzon, in *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), aptly observes:

Like “true threats,” false, defamatory speech can severely disrupt peoples’ lives, both by affecting them emotionally (as does apprehension of danger) and by impairing their social ties, their professional activities, and their ability to earn a living (as does the perceived need to protect oneself from physical harm).

The Supreme Court since the 1960’s has developed . . . doctrinal protections within defamation law that minimize self-censorship of truthful speech. Those protections are based upon realistic assessment of the vagaries of litigation and the fear of crippling damages liability.

749. 395 U.S. 444 (1969).

750. “True threats” and “incitement to violence” are distinct theories, and we do not mean to equate the two theories, as does Professor Gey who argues that the Supreme Court’s “incitement to violence” jurisprudence in *Brandenburg* should govern “true threats.” See Gey, *supra* note 42, at 591 (arguing that “it is not difficult to adapt *Brandenburg* principles to guide courts in separating intimidating political speech from true threats”). Under current Supreme Court “incitement to violence jurisprudence,” speech may be proscribed if: (1) the speaker subjectively intends incitement; (2) in context, the words spoken are likely to produce imminent, lawless action; and (3) the speaker’s words objectively encourage, urge, and provoke imminent action. See also *Hess v. Indiana*, 414 U.S. 105 (1973). The third prong of this test comes, in fact, not from *Brandenburg* but from *Hess*.

Gey’s suggestion is not without plausibility as “true threats,” like “incitement to violence,” are a categorical exception to protected speech, as is “obscenity.” Unfortunately for Gey (as for our suggestions), the courts uniformly reject it. See, e.g., *United States v. Dinwiddie*, 76 F.3d 913, 922 n.5 (8th Cir. 1996) (“The *Brandenburg* test applies to laws that forbid inciting someone to use violence against a third party. It does not apply to statutes . . . that prohibit someone from directly threatening another person.”); *McCalden v. Cal. Library Ass’n*, 955 F.2d 1214, 1222 (9th Cir. 1992) (finding that *Brandenburg* and *Claiborne* involved advocacy at public speeches and not privately communicated threats, which are not protected); *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (“While Howell’s statements may have been unlikely to incite or produce imminent lawless action, the *Brandenburg* test applies by its terms to advocacy, not to threats such as those made by Howell. The line between the two forms of speech may be difficult to draw in some instances, but this is not one of them.”); see also *United States v. Brock*, 863 F. Supp. 851, 857 n.7 (E.D. Wis. 1994) (finding counsel’s argument that “because th[e] proscription [at issue] is not limited to the traditional ‘fighting words’ and ‘incitement to imminent lawless action’ categories, it is unconstitutional” not “persuasive” because “[i]t is well-settled that,

Like *Watts*, *Brandenburg* was decided in 1969 and was a per curiam decision. Like *Watts*, too, it dealt with a categorical exception: “incitement to violence.” Accordingly, *Brandenburg* and *Watts* each share a common constitutional heritage, since each springs from Holmes’s “clear and present danger” test.<sup>751</sup> Significantly, for our analysis, the Court in *Brandenburg* adopted a highly protective hybrid standard for “incitement,” similar to that which Justice Marshall and we propose for “true threats.”<sup>752</sup> The Court explained that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is *directed* to inciting or producing imminent lawless action and is *likely* to incite or produce such action.”<sup>753</sup>

Given the common history of “incitement” and “true threats” (each is a categorical exception and each must be carefully applied to

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notwithstanding the ‘fighting words’ and subversive advocacy doctrines, the First Amendment does not prohibit Congress from outlawing threats”).

In fact, the three elements of the Court’s “incitement to violence” jurisprudence look like the reasons for proscribing threats outlined in *R.A.V.* Nevertheless, the third element—that the words used by the speaker objectively encourage, urge, and provoke imminent action—is more concerned with preventing violence than with preventing the bad results of the speech itself, that is, fear and disruption. Other statutes directly deal with the violence itself; threat statutes serve their most important purpose by focusing on fear and disruption. *See generally* United States v. Velasquez, 772 F.2d 1348, 1357 (7th Cir. 1985) (construing 18 U.S.C. § 1513 (1994), and observing that “[w]hen making a threat one hopes not to have to carry it out; one hopes that the threat itself will be efficacious. Most threats, indeed, are bluffs. But if the bluff succeeds in intimidating the threatened person, or at least . . . is intended to succeed, it ought to be punished . . . . And a bluff has no more to do with the marketplace of ideas than a serious threat”). Thus, while incitement jurisprudence is helpful in giving content to a “true threats” standard, simply uprooting it, modifying it slightly to address “threats,” rather than “incitement,” and applying it in the true threats context is inappropriate. These two categories are different because the interests they protect are different. They also implicate different principles of criminal jurisprudence and First Amendment freedoms. Maintaining separation will, therefore, better protect these different interests.

751. *See* 4 ROTUNDA, TREATISE, *supra* note 133, at 309.

752. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975) (arguing that *Brandenburg* combines the most protective elements of Learned Hand’s First Amendment vision, which placed emphasis on what the speaker actually said rather than on the purported impact of those words on the audience in order to prevent the government from suppressing speech based on a fear of future harm, “with the most useful elements of the clear and present danger heritage,” which emphasized the importance of proving harm so imminent that it might occur before there is an opportunity for full discussion to prevent the government from suppressing speech to which the opportunity for more speech would constitute adequate protection).

753. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (emphasis added).

avoid exposing speakers and actors to constitutionally adverse consequences, or equally as bad, self-censorship and the chilling of otherwise protected speech or expressive conduct), the *Brandenburg* test offers strong support for—if it does not demand—the adoption of Marshall’s and our proposed approach that requires a subjective element (intent) in the analysis of “true threats.”<sup>754</sup> If speech or expressive conduct about controversial and emotionally charged issues can become a “true threat” and lose its First Amendment protection—without specific proof of an intent to threaten—the line between protected and unprotected speech will be far less certain<sup>755</sup> than what the First Amendment requires if speech is to be “uninhibited, robust, and wide-open.”<sup>756</sup>

Nor may basic principles of the federal criminal law be ignored here. We develop those principles at length in these materials.<sup>757</sup> In summary, when drafting legislation, Congress acts with a common-law background in mind. That the text of a statute is silent on the issue of state of mind, as are most threat statutes, does not mean that they are strict liability statutes. The Supreme Court applies a fairly well-developed body of law to govern the interpretation of criminal statutes on state of mind. Strict liability requires more than silence to warrant its imposition. The Court requires a minimum showing of “knowledge”; neither “negligence” nor “recklessness” is, apparently, in the Court’s lexicon.<sup>758</sup> Where appropriate, as here, since the

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754. As Marshall himself emphasized, of course, the operative state of mind here is not that the speaker intends to carry out his threat. If it were, that would go to preventing the actual violence, which is, as we argue *supra* note 598, not the principal function of threat statutes. Prevention of violence is a side effect of the enforcement of threat statutes. If the side effect is given principal attention, it will either distort this law of threats or federal criminal law. Rather, the subjective portion of our hybrid test merely requires that a speaker subjectively intended to threaten his victim, not that he actually intended to carry out the threat, which would be required if a threat was viewed as an inchoate offense. See *supra* note 732 (analysis of attempted murder).

755. Cf. *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (“The separation of legitimate from illegitimate speech calls for more sensitive tools . . .”).

756. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

757. See *supra* Part VI.

758. *Morissette v. United States*, 342 U.S. 246 (1951), requires that in common law-type statutes a “*scienter*” must be read into a statute otherwise silent on the issue of state of mind. The Court did not specify which state of mind (intent or purpose, knowledge, etc.) should be read into which elements. See *supra* note 644 (detailed discussion of *Morissette*). *United States v. Bailey*, 444 U.S. 394 (1980), identifies these two issues and holds that “knowledge” should be read into conduct, but it left open whether to read “recklessness or negligence” into surrounding circumstances. See *supra* note 644 ¶15 (discussing *Morissette*’s ambiguities and

defendant's state of mind relates to the result he seeks to achieve (fear or disruption), not merely to surrounding circumstances, "intent or purpose" should be the proper state of mind to imply.<sup>759</sup> We read this jurisprudence not to prohibit the implication of "negligence or recklessness," but to require a special justification at the minimum for "negligence," since "negligence" is not a state of mind, but an imputed condition.<sup>760</sup> That special showing before negligence is implied is not made anywhere in the "true threat" area of which we are aware. We believe it cannot be made in light of First Amendment considerations.<sup>761</sup>

Finally, a speaker must intend to threaten *unlawful* conduct. The Supreme Court squarely holds that "[t]o the extent that [a] court's judgment [sanctioning "speech"] rests on the ground that . . . citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment."<sup>762</sup> Justice Holmes put it aptly:

[T]he word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention . . . .<sup>763</sup>

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*Bailey*). Since *Bailey*, the Court shows no willingness to read either "recklessness or negligence" into federal criminal statutes. Indeed, it poses the issue as if the choice were between "knowledge and strict liability," and then chooses "knowledge." See, e.g., *Staples v. United States*, 511 U.S. 600, 605–19 (1994) (holding that the National Firearms Act requires "knowledge" on the automatic character of a firearm; "[T]he usual presumption that a defendant must know the facts that make his conduct illegal should apply" (citing *Morrisette*, 342 U.S. 246, and its progeny)).

759. Compare *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 522–25 (1994) (Mail Order Drug Paraphernalia Control Act requires "knowledge" of character of paraphernalia shipped; general rule is that "knowledge" not "intent or purpose" is implied; "knowledge" of the applicability of the statute to the material not required).

760. Recklessness, on the other hand, is a subjective state of mind. We readily concede that we are ahead of the curve on our interpretation of these cases.

761. See *supra* note 713 (discussing "negligence" as a proper or improper culpability standard).

762. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921 (1982); see *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1071–72 (9th Cir. 2002) (recognizing the applicability of *Claiborne*).

763. *Vegelahn v. Guntner*, 44 N.E. 1077, 1081 (Mass. 1896).

Thus, a mere showing that a speaker intended to put a hearer in “fear” is flatly insufficient to show the existence of a “true threat.” A “warning” of what may happen when the speaker is not in control of the course of events is not a “threat.” It is a warning, a statement of fact or probable fact. In short, the speaker must intend to put the hearer in “fear” of *unlawful* conduct by the speaker or others for whom the speaker is legally responsible. For example, a “threat” to sue another or to enforce a contract may cause “fear,” but it is not a “threat” that may be characterized as “extortion.”<sup>764</sup> To be sure, as some courts recognize in adopting an objective standard, prosecutors or plaintiffs may often find it difficult to show the required subjective state of mind.<sup>765</sup> But in a society where freedom of speech is a core value, the price to pay is small; errors should always be on the side of

764. See, e.g., *Union Nat'l Bank v. Fed. Nat'l Mortgage Ass'n*, 860 F.2d 847, 856–57 (8th Cir. 1988) (good faith exercise of contract claims is not extortion); *First Pac. Bancorp, Inc. v. Bro*, 847 F.2d 542, 547 (9th Cir. 1988) (threat of suit *not* extortion); *I.S. Joseph Co. v. Lauritzen*, 751 F.2d 265, 267 (8th Cir. 1984) (mere threat to sue, even groundlessly, is not extortion); *Iden v. Adrian Buckhannon Bank*, 661 F. Supp. 234, 237–39 (N.D. W. Va. 1987) (the process through which a bank loan in danger of default was renegotiated was not extortion); see also *Brokerage Concepts, Inc. v. U.S. Health Care, Inc.*, 140 F.3d 494, 522–53 (3d Cir. 1998) (“wrongful” within Hobbs Act, 180 U.S.C. § 1951 (1994), absent force, is a word of limitation that excludes legitimate business practices). But see *Battlefield Builder, Inc. v. Swango*, 743 F.2d 1060 (4th Cir. 1984).

765. Compare *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997) (defending the use of a purely objective standard for true threats, arguing that “[t]his approach also protects listeners from statements that are reasonably interpreted as threats, even if the speaker lacks the subjective, specific intent to threaten, or, as would be more common, the government is unable to prove such specific intent which, by its nature, is difficult to demonstrate”), with *United States v. Merkt*, 764 F.2d 266 (5th Cir. 1985) (construing 18 U.S.C. § 1324(a)(2) (1994), a criminal statute that prohibits transporting an alien who is in the United States in violation of law and finding that the statute required that the defendant specifically intend to further the alien’s violation). In *Merkt*, the Fifth Circuit reasoned:

The government . . . asserts, in essence, that it is difficult to establish that a defendant acted with the specific intent necessary to establish a violation of this section. The statute, however, punishes only an intentional act. No matter how difficult it may be to establish the defendant’s state of mind, the government must prove this portion of its case, like every other element of the alleged crime, beyond a reasonable doubt. The government’s problems of proof do not warrant an instruction that removes one of the essential elements of the offense from the jury’s consideration.

Given that the jury must ultimately determine [the defendant’s] intent, it should be instructed to consider all of the evidence it finds credible about her intentions, direct as well as circumstantial . . .

*Id.* at 272. But see *supra* note 644 ¶ 14 (discussing Supreme Court’s rejection, in *Morissette v. United States*, 342 U.S. 246 (1951), of difficulty of proof as rationale for setting proper state of mind).

free speech or expressive conduct. In criminal cases, too, the burden of proof rightly rests on the prosecution to prove its case beyond a reasonable doubt.<sup>766</sup> That commitment of basic due process expresses our society's value of individual liberty.<sup>767</sup> Civil cases are different, but the substantive standard, if not the burden of proof, is the same.<sup>768</sup> In addition, proof of individual responsibility—shown

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766. See *infra* note 70568 (discussing shifting or allocating burdens of proof).

767. As Justice Brennan observed in *In re Winship*:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall*: "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

*In re Winship*, 397 U.S. 358, 363–64 (1970) (citations omitted).

768. ¶1. See *supra* note 314 (discussion of *Claiborne's* requirement of "clear proof").

¶2. We believe that the Court already requires clear and convincing proof to establish a claim for relief that overcomes a free speech justification that draws the line between free speech or expressive conduct and true threat. See *supra* note 314 (analysis of procedural and evidentiary aspects of *Claiborne*). We readily concede that our reading of *Claiborne* is ahead of the curve. At the same time, our reading of *Claiborne* is not rejected by any court; in brief, it is an aspect of the decision that is today unrecognized. Accordingly, we consider the issue here as if the matter were open.

¶3. "Proof is an ambiguous word." MCCORMICK ON EVIDENCE 783 (Edward Cleary ed., 1972). It can mean "evidence" (testimony, documents, etc.) or that which must be proven (an element of a claim for relief). *Id.* "[B]urden of proof shares this ambivalence." *Id.* Classically, two meanings of burden of proof are identified: coming forward with evidence (introducing evidence in a proceeding), and persuasion (having the risk of loss on a failure of proof on an issue). *Id.* (citing *Powers v. Russell*, 30 Mass. (13 Pick) 69, 76 (1832) (Shaw, C.J.)). Generally, three standards for burden of persuasion are recognized, ranging from the preponderance of the evidence standard employed in most civil cases to the clear and convincing standard (however phrased) reserved to protect particularly important interests, to the requirement that guilt be proved beyond a reasonable doubt in criminal prosecutions. *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90 (1981) (*per curiam*) (declining to impose "beyond a reasonable doubt" on an action for a public nuisance against theaters showing obscene motion pictures). The function of a standard for the burden of persuasion is to instruct the fact finder concerning the degree of confidence the law

mandates he or she must possess in the correctness of a factual conclusion; it serves to allocate the risk of error between litigants and to indicate the relative importance the law attaches to the fact finder's ultimate decision. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citing *In re Winship*, 397 U.S. at 370, 423 (Harlan, J. concurring)). We use burden of proof in both senses. We believe that the defendant in litigation involving drawing the line between protected speech or expressive conduct and true threat ought to come forward with evidence that puts in issue a free speech justification but that once the matter is in issue, the plaintiff ought to persuade the fact finder by clear and convincing evidence that the free speech justification does not apply; he or she must, in short, carry the risk of loss on the free speech justification by the heightened burden of proof.

¶4. Traditionally, the standard for the burden of persuasion applied in federal civil claims for relief is left by the Congress to the courts. *Santosky v. Kramer*, 455 U.S. 745, 755–56 (1982). Nevertheless, the issue is generally one of legislative intent. *Steadman v. SEC*, 450 U.S. 91, 96 n.10 (1981); *Vance v. Terrazar*, 444 U.S. 252, 265 (1980). In a criminal prosecution, however, the government is constitutionally tested by “beyond a reasonable doubt.” *In re Winship*, 397 U.S. at 361–68. Generally, the plaintiff in a civil claim for relief is tested by a preponderance of the evidence. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (securities fraud preponderance); *Ramsey v. UMW*, 401 U.S. 302, 307–11 (1971) (antitrust treble damages; preponderance of evidence, except for authorization by union, which is governed by Norris-LaGuardia Act (29 U.S. § 106 (1994)) (“clear proof”); *Steadman*, 450 U.S. at 97–104 (government administrative proceeding for fraud by preponderance); *Price Waterhouse v. Hopkins*, 440 U.S. 228, 252–53 (1989) (defendant Title VII refutation of gender discrimination allegation preponderance); *Grogan v. Garner*, 498 U.S. 279 (1991) (fraud exception to bankruptcy discharge preponderance); *cf.* *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 491 (1985) (civil RICO preponderance); *accord* *United States v. Capetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (action by government); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1303 (7th Cir. 1987) (action by private person), *cert. denied*, 492 U.S. 917 (1989). *See generally*, G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* *Bennet v. Berg*, 58 NOTRE DAME L. REV. 237, tbl. 258 n.59 (1982) (legislative history, analogies, and economic analysis); Leigh Ann Mackenzie, Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566, 580–88 (1985) (analyzing history and policy considerations for imposing different standards of burden of proof). Whatever the rationale offered for the rule, it “expresses a preference for one side's interests,” *Herman & MacLean*, 459 U.S. at 387–91, and for that reason alone, the Court is reluctant to impose a higher burden of persuasion than preponderance in civil proceedings. *Crawford v. Britton*, 523 U.S. 574, 594 (1998) (“chang[ing] the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority”). Nevertheless, substantial numbers of civil claims for relief or particular issues in the trials of the claims are tested by the clear and convincing evidence. MCCORMICK, *supra* ¶ 3, at 797–98 (e.g., undue influence, lost will, etc.). The Court itself imposes a clear and convincing standard (sometimes as a matter of constitutional due process) on civil proceedings that implicate important individual or societal rights. *See, e.g.*, *Colorado v. New Mexico*, 467 U.S. 310, 315–17 (1984) (action for diversion of water); *Santosky*, 455 U.S. at 766–67 (action to terminate parental rights); *Addington*, 441 U.S. at 433 (action for involuntary civil commitment); *Woodby v. INS*, 385 U.S. 276, 285–86 (1966) (action for deportation). Our reading of the interests implicated by the jurisprudence of free speech and individual responsibility fully warrant the imposition of the clear and convincing standard. We do not argue that *all* First Amendment issues need to be resolved by a heightened burden of persuasion. *See, e.g.*, *Ellis v. Bhd. of Ry. Employees*, 466 U.S. 435, 457 n.15 (1984) (invoking First Amendment on issue of use of dues by union insufficient to

by a culpable state of mind, subjective (not objective or imputed by law) and personal (not vicarious conduct, except on a showing under the most stringently applied standards)—is what our most sacrosanct traditions in the criminal law manifestly demand. Free speech considerations dictate similar standards on the civil side.

## 2. *The objective element*

The second element of the hybrid test—the objective element—tracks the objective tests now followed in the circuits. It is aimed at the second policy behind proscribing “true threats,” that is, avoiding the unlawful fear and disruption that such threats engender. When a statement is, in fact, threatening in nature, it is likely to create fear or disrupt the activities of the hearer. While the circuits vacillate on the correct viewpoint from which to approach this element, and Marshall’s test is silent on that score, the best approach is to ask whether a reasonable person in the position of the hearer would understand the speech or expressive conduct to be threatening. Justice Holmes’s point about the interpretation of statutes is relevant here: “We do not inquire what the legislature meant; we ask only what the statute means.”<sup>769</sup> State of mind is relevant to assess responsibility, but the *meaning* of speech and expressive conduct is a

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impose heightened standard of proof). But we do argue that drawing the difficult line between protected speech or expressive conduct and true threat is too important an issue in a free society, which is increasingly characterized by diversity, to be left to the fact finder to resolve by a matter of probabilities.

¶5. We have no illusions. Defendants who raise free speech justifications will not be saved from perdition by altering the burden of persuasion. More often than not, the standard for the burden of persuasion is little more than a matter of words in a jury instruction. See MCCORMICK, *supra* ¶ 3, at 784 n.6 (“‘burden of persuasion’ has become very largely a matter of the technique of the wording of instructions to juries”). The experience of one of our number, Blakey, for forty years as a prosecutor, committee counsel, counsel for civil litigants (plaintiffs and defendants), juror, and defense counsel is that few trials turn on the standard for the burden of persuasion; in brief, it is not outcome determinative in the vast majority of cases. In fact, counsel for litigants of all kinds generally try mightily to win the case wholly independent of whatever the standard of the burden of persuasion. Leaning on the burden of persuasion rather than undertaking to prove your contentions is a risky business. Even in criminal prosecutions when the defense does have a defense, it undertakes to prove it just as surely as the prosecution undertakes to prove the elements of the offense. But the standard for the burden of persuasion in a select few cases can cue sensitive jurists and jurors how to resolve close issues. There—and only there—the issue is crucial, and its resolution is telling on the character of the law’s commitment to its highest ideals and most important values.

769. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).



matter, as Holmes says, “[of] whatever . . . convention has attached to them.”<sup>770</sup> No one should be able, in short, to assert a Lewis Carroll Defense.<sup>771</sup> Because this approach is hearer-based, it makes this second element more protective of the hearer’s interests, as opposed to the subjective intent element, which primarily protects the speaker’s constitutional rights. But because it is objective, it ensures that no speaker will be penalized simply because of heightened sensitivity on the part of the recipients of his message.<sup>772</sup>

*C. A Proposed Standard for “True Threats”*

In sum, to protect freedom of speech under the First Amendment and the basic principles of federal criminal jurisprudence while at the same time protecting an individual’s right to freedom from threats, the courts should adopt a hybrid standard for determining the existence of a “true threat.” A “true threat” may be found, if and only if:

- (i) a person speaks or engages in expressive conduct, intending it to be taken as a threat of unlawful result that would place the listener in fear of his or her injury (to a protected interest)—regardless of whether the speaker intends to carry out the threat; and

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770. *Trimble v. City of Seattle*, 231 U.S. 683, 688 (1914).

771. CHARLES L. DODGSON (LEWIS CARROLL), *THROUGH THE LOOKING GLASS* 186 (Signet Classic ed. 1960) (“‘When I use a word,’ Humpty Dumpty said, in a rather scornful tone, ‘it means just what I choose it to mean—neither more nor less.’ ‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’”). See generally R.L. TRASK, *KEY CONCEPTS IN LANGUAGE AND LINGUISTICS* 285–300 (1999).

772. Analogizing to the law of torts, an exception to the objective standard could, of course, be made when a speaker knows of his hearer’s heightened sensitivities. See, e.g., RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (defining the tort of intentional infliction of emotional distress: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . .”); *id.* cmt. f (“The extreme and outrageous character of the conduct may arise from the actor’s knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.”); see also *Emery v. Am. Gen. Fin., Inc.*, 71 F.3d 1343, 1346 (7th Cir. 1995) (targeting a vulnerable population with fraud affects the equation of “ordinary prudence,” a limitation on what constitutes a fraudulent misrepresentation); cf. *ITT Cont’l Bakery Co. v. F.T.C.*, 532 F.2d 207, 218 (2d Cir. 1976) (factor of children affects lawfulness of trade practice).

- (ii) a reasonable listener, in context, would interpret the speech or expressive conduct as communicating a serious expression of an intent to harm unlawfully the listener.

Only on a showing of (1) an intent to threaten unlawful conduct and (2) objectively threatening speech or expressive conduct should courts be free to act to suppress speech or expressive conduct. Unless these basic showings are made, fundamental principles of the First Amendment and federal criminal jurisprudence would be compromised by the imposition of criminal or other sanctions.<sup>773</sup>

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773. We turn here to the question: “Why?” See *supra* note 17. Our answer is not singular. Jacques Maritain, the French philosopher, recognized a crucial point when he came to see that practical people did not need to obtain agreement on ultimate questions. See Appendix A (Definition) ¶ 24. We believe that here, too, those who hold various positions on the ultimate questions can come together and agree that pervasive reform is needed of the jurisprudence of threats, particularly in the context of free speech values and the fundamental presuppositions of our traditional criminal and civil laws.

The various proposals we make in these materials can, of course, be supported, in whole or in part, out of the Judeo-Christian heritage that gave rise to our concepts of freedom in the context of a society where dissent literally meant martyrdom. See *supra* note 181 ¶¶ 5–6. We are made in the image and likeness of God; we can know right from wrong; we can freely choose to do what is right or what is wrong, a freedom that carries with it a responsibility for the consequences of our actions. That we squarely affirm. From that perspective, we also believe that the central case for responsibility ought to be put as a matter of subjective choice, intent, or purpose; it should not be imposed on another for mere reasons of public policy on a purely objective standard, certainly not through the criminal process. Accordingly, we ought to be treated as “ends” and not as “means” for another’s purposes. But we do not expect—and have no right to expect—that all will agree with our fundamental positions.

Our proposals may also be supported by those who no longer see themselves as connected with any religious heritage or come at these issues from a religious heritage new to America. They can be supported as reflecting the most cherished secular values of our society that stem from the Enlightenment: the individual dignity of the human person and a free society in which free speech and individual responsibility are central values. See *supra* note 654. ¶ 11. We have in the modern world faced great challenges to our values. Some who decided that they could no longer accept the values of our traditional society remain in their beliefs. But others in the face of the stark consequences of turning away from these values have returned to belief in their core significance. See *supra* note 647 ¶¶ 18–21. Members of either group can find their values reflected in our proposals.

Those among us who are participants in our legal system may find a presumption in favor of keeping our legal traditions either because they believe they reflect the values they believe in or because no one is coming up with alternatives that can be assured would work better. See *supra* note 644.

We also point out that whatever those who pride themselves on things of the mind must temper their judgments by the frank recognition that whatever values the law reflects must be intelligible to those to whom it is to be applied. See *supra* note 644 ¶ 18. Most people in our society, for religious or other reasons, still believe in the value of human

*D. The Problem of Context*

The panel opinion in *American Coalition* squarely faced the issue of context evidence, emphatically arrived at the correct result, but failed to articulate workable standards for the proper role for evidence of context; the en banc opinion not only reached the wrong result but placed no meaningful limitations on evidence of context. Accordingly, the issue of context evidence is another crucial shortcoming of the current effort by the circuits to define and apply their doctrines of “true threat.”<sup>774</sup> In light of the en banc court’s

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dignity, the freedom of the individual, and the central value of individual praise and blame. Those beliefs should be respected and reflected in the law under which they live out their lives.

We are now a diverse society undergoing, as all modern societies undergo, persuasive cultural change. In fact, we are in the midst of a “culture war” over the meaning of America that is, or should be, a matter of argument among fellow citizens. *See supra* note 130. But it is also a live war between those who share the values of Western society and those who share the values of very different traditions. *See supra* note 53. Various sides of the various battles of the culture war seek to carry the day by delegitimizing the other by the use of labels; if these efforts are confined to public and private forums, they are the stuff of any culture struggle, but when efforts are made to enlist the power of government to coerce a victory, they trespass on what ought to be the neutral character of the judiciary. *See supra* note 130 ¶¶ 7–8. The victors will win in name only. Persuasion is the only way to create a new society in which all, or at least most of us, learn to live together in peace. Even then, some will remain out of the main stream. They should be respected in their right to choose their own way of life, not because we agree with them, but because we respect the right of individuals to work out such matters for themselves. Freedom includes, in short, the right to be wrong. Thus, we should respect each person, not his or her various positions. In brief, the culture war must be a matter of struggle in which persuasion carried the day without enlisting judicial degrees. All sides in these matters have the same stake in seeing that the process is neutral among contenders.

Accordingly, our answer to the question “Why?” is no answer at all, but a series of answers that can be connected to various aspects of the sort of people we are or strive to be. We only seek to secure agreement on the practical proposals that we make. Anything else, we put off into the indefinite future as beyond our competence or ability. *Compare* Appendix A (Definition) ¶14, *with infra* note 795.

774. The admission of “context evidence” is a troubling flaw. The courts generally do a good job in dealing with other kinds of evidence, despite what one author suggests. In a Comment in the *Harvard Law Review*, the author concludes that in determining whether a communication constitutes a true threat, courts should exclude *all* evidence of the hearer’s subjective reaction. *See* Recent Case, 111 HARV. L. REV. 1110, 1113–14 (1998) (arguing that “[t]he court should have created a blanket rule . . . that all subjective reaction testimony is unduly prejudicial”). While the author’s concerns are well-taken, the author’s proposal is too restrictive. First, such a rule would be inconsistent with *Watts*, where the Court found it important, in analyzing whether a speaker’s statement constituted a true threat, that the statement’s hearers laughed. *See Watts v. United States*, 394 U.S. 705, 707 (1969). Second, the author insufficiently credits the court’s ability to admit or bar such evidence—whether by a trial judge’s correct rulings or an appellate court’s cure—on a case-by-case basis using the FEDERAL RULES OF EVIDENCE. *See* FED. R. EVID. 403 (providing that relevant evidence “may

revolutionary holding on the admissibility of evidence of context, the need for proper analysis of this issue is all the more urgent.

Following *Watts*, the circuit courts of appeal uniformly find context evidence relevant and important. How to treat it, however, is critical. Under the approach to “true threats” we advocate in these materials, the proper place for consideration of context evidence is in the second, objective element—whether a reasonable listener would interpret the speech or expressive conduct as communicating a serious expression of an intent to inflict or cause unlawful harm to the listener.

Consideration of this kind of context evidence is envisioned by the Court’s decision in *Watts*, which found it important that Watts’s statements were made during a political debate, were made conditional on an event that he said would never happen, and provoked laughter as a response from the crowd to which he spoke. Nevertheless, despite the holding of the en banc opinion in *American Coalition* that found *it* to be inapposite,<sup>775</sup> *Claiborne*, in fact, qualified the appropriate use of context evidence when threats of violence “occur[] in the context of constitutionally protected

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be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”). Indeed, this ability is exemplified by the case the author reviews. See *United States v. Fulmer*, 108 F.3d 1486, 1496–1502 (1st Cir. 1997) (discussed *supra* Part V.A.1.a).

In *Fulmer*, the defendant was prosecuted for threatening an FBI agent. At trial, the district court admitted a veritable panoply of contextual evidence of the hearer’s reaction, much of which was prejudicial. The evidence included testimony by the agent regarding the Oklahoma City bombing and subsequent bomb threats; several of the agents’ bullets; testimony by the agent regarding the agent’s reactions to the “threats,” including that he felt more safe because there was an extra magazine of ammunition in his car on the night he received the “threat”; and testimony by the agent’s supervisor regarding the agent’s reactions to the “threats.” *Id.* On appeal, the First Circuit correctly recognized that “a trial court’s on-the-spot weighing under Rule 403” may be reviewed only “for abuse of discretion,” and it would reverse that judgment “only in extraordinarily compelling circumstances.” *Id.* at 1497. Accordingly, the circuit properly upheld the admission of evidence of the agent’s subjective reactions to the threats (e.g., that he “felt threatened”). *Id.* at 1499–1501. Nevertheless, it found that the district court abused its discretion and overturned the conviction since the prejudicial effects of some of the admitted evidence far outweighed its probative value. *Id.* at 1503. In particular, it found that “the district court erred in admitting into evidence: actual bullets; testimony regarding ammunition in [the agent’s] car on the night he received the alleged threat; and testimony regarding the Oklahoma City bombing.” *Id.* The work of the First Circuit stands in sharp and unfavorable contrast to the approach of the majority in *American Coalition*. See *supra* Part V.a.1.d.

775. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1072–75 (9th Cir. 2002).

activity . . . .”<sup>776</sup> There, the Court held, “‘precision of regulation’ is demanded. . . . [T]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.”<sup>777</sup> Under basic principles of federal criminal law, individual liability must be based on individual conduct.<sup>778</sup>

Indeed, the facts of *Claiborne* paint a vivid picture of the kind of “context of violence” evidence that the en banc opinion in *American Coalition* finds may permissibly convert facially non-threatening speech into a “true threat.”<sup>779</sup> At an NAACP meeting, Charles Evers specifically threatened that any black citizen who violated the boycott of white merchants would have his neck broken by members of the group.<sup>780</sup> The boycott was enforced by “deacons” who stood outside of white merchants’ stores and recorded the names of boycott violators. In fact, harm did befall several violators: a brick was thrown through a windshield, a flower garden was destroyed, and gunshots were fired into at least two homes.<sup>781</sup>

Nevertheless, in analyzing Evers’s possible liability for his inflammatory speeches, the Court pointedly observed:

Petitioners were engaged openly and vigorously in making the public aware of respondent’s . . . practices. Those practices were offensive to them, as the view and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.<sup>782</sup>

Commenting on the speeches themselves, the Court observed:

While many of the comments in Evers’ speeches might have contemplated “discipline” in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner

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776. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

777. *Id.* at 916–17 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

778. *Id.* at 919 (finding that “guilt by association alone, without [establishing] that an individual’s association poses the threat feared by the Government, is an impermissible basis upon which to deny First Amendment rights” (quoting Healy v. James, 408 U.S. 169, 186 (1972) (internal quotation marks omitted))).

779. *See, e.g., Am. Coalition*, 290 F.3d at 1082–83.

780. *See infra* Appendix C (The Speech of Charles Evers).

781. *Claiborne*, 458 U.S. at 904.

782. *Id.* at 911 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.<sup>783</sup>

Significantly, however, the Court found that the First Amendment *fully protected* Evers's speeches.<sup>784</sup> It held that "there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence."<sup>785</sup> In sharp contrast with the en banc opinion in *American Coalition*, the Court refused to permit a "context of violence" to convert Evers's speeches—which themselves *did* arguably contain explicit threats of unlawful violence to an identifiable class of individuals (recalcitrant Blacks whose names were recorded by the deacons)—into unprotected activity. Under its "precision of regulation" approach, liability could *not* attach to Evers's speeches unless Evers himself created the context of violence (i.e., by authorizing violent activities, etc.). Apart from the speeches themselves, such evidence was not presented. That ended the matter.

Under *Claiborne*, the expansive notion of "evidence of context" permitted under the Ninth Circuit's majority opinion in *American Coalition* cannot be squared with First Amendment freedoms or basic notions of individual responsibility that are the foundations of the federal criminal law. "Precision of regulation," which *Claiborne* requires, demands that individual liability be based on individual conduct. Assessing liability for one person's speech on the basis of another person's conduct is improper. Unless a speaker authorized, directed, or ratified the context of violence himself, evidence of a "context of violence" ought not be used to convert his speech into a "true threat."<sup>786</sup> Reform here is not required in the jurisprudence of

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783. *Id.* at 927.

784. *Id.* at 929 (concluding "that Evers's addresses did not exceed the bounds of protected speech").

785. *Id.*

786. 18 U.S.C. § 842 (1994), which prohibits loansharking, is illuminating on "context." Section 842 adopts an approach that is similar to the approach we advocate:

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is *prima facie* evidence that the extension of credit was extortionate, but this

the First Amendment or of the federal criminal law. Courts should apply the law.

### VIII. CONCLUSION

The panel opinion in *American Coalition* went a long way toward securing Americans' First Amendment freedoms. While it did not look to basic principles of the federal criminal law in reaching its result, that result was consistent with those principles. Sadly, it no longer states the law, at least in the nine western states covered by the Ninth Circuit. Nevertheless, even under the panel opinion,

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subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

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(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

*Id.* Thus, context is relevant in this statute only when the accused himself created the context (§ 842(b)(3)(B)) or specifically intended to exploit it (§ 842(b)(3)(A)). *See, e.g.*, *United States v. DiSalvo*, 34 F.3d 1204, 1212–13 (3d Cir. 1994) (lawyer connected to organized crime family convicted of an extortionate collection of credit, where he used the reputation for violence of a family member to put debtor in fear); *United States v. Annoreno*, 460 F.3d 1303, 1309 (7th Cir. 1972) (conviction for extortionate extension of credit upheld; threats need not be explicit; fact that loans were thirty times commercial rates and made on street corners, taverns, pool halls, and closed barber shops “would inform the average borrower in metropolitan Chicago that loans were extortionate in nature”) (citing *United States v. Prochaska*, 222 F.2d 1, 1–2 (7th Cir. 1955) (“words or phrases take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published”), *cert. denied*, 350 U.S. 836 (1955)). For a comprehensive analysis of the law of loan sharking, see Ronald Goldstock & Dan Coenen, *Controlling the Contemporary Loanshark: The Law of Illicit Lending and the Problem of Witness Fear*, 65 CORNELL L. REV. 127 (1980).

The law of “fear” within the Hobbs Act, 18 U.S.C. § 1951 (1994), is also well-developed beyond the most blatant “or else.” *See, e.g.*, *United States v. Blanton*, 793 F.2d 1553, 1558 (11th Cir. 1986) (Hobbs Act violation may be shown “even if the threats used to extort are merely subtle and indirect.”); *United States v. Lisinski*, 728 F.2d 887, 891 (7th Cir. 1984) (threats need only be “implicit”); *United States v. Glasser*, 443 F.2d 994, 1006–07 (2d Cir. 1971) (pouring acid on windows; “actions speak louder than words”). State law is similar. *See, e.g.*, *Iowa v. Crone*, 545 N.W.2d 267, 271 (Iowa 1996) (threats “need not be explicit”).

Needless to say, extortionate speech is *not* protected by the First Amendment. *See, e.g.*, *United States v. Quinn*, 514 F.2d 1250, 1268 (5th Cir. 1975) (“It may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which is no protection at all.”); *accord* *United States v. Hutson*, 843 F.2d 1232, 1235 (8th Cir. 1988) (18 U.S.C. § 876).

defendants are forced to expend the substantial sums of time and money associated with discovery, trial, and appeal and undergo the anxiety that necessarily stems from the entry of an enormous jury verdict and draconian injunction against them before it can be reversed on appeal. That kind of victory is truly called “Pyrrhic.”<sup>787</sup> But the panel opinion no longer obtains; the jury verdict and the injunction were upheld. Accordingly, First Amendment freedoms are in peril, and our sacrosanct notions of individual responsibility are in jeopardy.

Outside of the Ninth Circuit, too, the current state of the “true threats” jurisprudence is similarly inconsistent with Supreme Court teachings under the First Amendment and basic principles of federal criminal law. The law today *everywhere* poses a significant threat to constitutionally protected freedom of speech and fundamental notions of individual responsibility. By imposing liability on individuals on the basis of a negligence standard, it penalizes protected speech and expressive conduct and cultivates an atmosphere of self-censorship in which free speech and expressive conduct are necessarily chilled. Objective responsibility, too, is imposed where subjective culpability ought to be required. That the district court’s decision in the *American Coalition* litigation was largely consistent with Ninth Circuit law prior to an appeal that is now affirmed—and with the law of most other circuits—demonstrates in stark fashion how far the circuit courts of appeal are straying from the vigorous protection of free speech that is guaranteed in America by the First Amendment. Nor should the basic principles of federal criminal law be distorted because of the push and pull of political, social, and other controversies.<sup>788</sup> That

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787. See 12 THE OXFORD ENGLISH DICTIONARY 945 (2d ed. 1989) (“Pyrrhic Victory: a victory gained at too great a cost; in allusion to the exclamation attributed to Pyrrhus after the battle of Asculum in Apulia (in which he routed the Romans, but with the loss of the flower of his army), ‘One more such victory and we are lost.’”). Compare 9 PLUTARCH’S LIVES 417 (Bernadotte Perrin trans., Harvard Univ. Press 1920) (“Pyrrhus said to one who was congratulating him on his victory, ‘If we are victorious in one more battle with the Romans, we shall be utterly ruined.’”), with JACOB ABBOTT, PYRRHUS 139 (Werner Co. n.d.) (“One of Pyrrhus’s generals congratulated him on his victory [after the battle of Asculum in 279 B.C.]. ‘Yes,’ said Pyrrhus; ‘another such victory and I shall be undone.’”).

788. While obvious to us, this point bears making. The Supreme Court in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), held that the imposition of capital punishment on mentally handicapped individuals violated the Eighth Amendment. The majority opinion canvassed public opinion polls. *Id.* at 2249 n.21. The dissents by Chief Justice Rehnquist and Justice Scalia took great pains in expressing their disagreement with letting public opinion shape the



resolution of constitutional decisions. Chief Justice Rehnquist wrote, "I write separately . . . to call attention to the defects in the Court's decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion." *Id.* at 2252–53 (Rehnquist, C.J., dissenting). He commented further, "The Court's uncritical acceptance of the opinion poll data brought to our attention, moreover, warrants additional comment, because we lack sufficient information to conclude that the surveys were conducted in accordance with generally accepted scientific principles or are capable of supporting valid empirical inferences about the issue before us." *Id.* at 2253.

While we agree with the dissents that the "uncritical acceptance" of these sorts of polls by the majority is troubling, it is just as troubling that the Chief Justice may be suggesting how to make public opinion polls more useful rather than reminding the Court such polls ought not be used at all. Indeed, he explicitly recognizes in other decisions that the duty of the Court is not to be swayed by public opinion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 958–59 (1992), Chief Justice Rehnquist observed, "[B]ecause the Court's duty is to ignore public opinion and criticism on issues that come before it, its Members are in perhaps the worst position to judge whether a decision divides the Nation deeply enough to justify such uncommon protection."

The Constitution attempts to *protect* judges from being swayed by public opinion; it does not recommend that Courts utilize national and international opinion polls to support their constitutional decisions. *See, e.g.*, U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour [sic], and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."). The most likely reason the Founders included this particular language can be found in the Declaration of Independence: "He [King George] has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776), in 43 GREAT BOOKS, *supra* note 130, at 2. Alexander Hamilton, in THE FEDERALIST NO. 78, also explained the reason for granting the federal judiciary tenure subject only to good behavior:

That inflexible and uniform adherence to the rights of the constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission . . . . If the judiciary was selected by the people there would be *too great a disposition to consult popularity*, to justify a reliance that nothing would be consulted but the constitution and the laws.

THE FEDERALIST NO. 78 (Alexander Hamilton), in 43 GREAT BOOKS, *supra* note 130, at 232–33 (emphasis added).

Justice Scalia argues in his dissent in *Atkins*, as he argues elsewhere, that referencing foreign viewpoints on American constitutional issues is not proper. ("We must never forget that it is a Constitution for the United States of America that we are expounding. . . . Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans though the Constitution." *Atkins*, 122 S. Ct. at 2264–65 (Scalia, J., dissenting) (citing *Thompson v. Oklahoma*, 487 U.S. 815, 868–69 (Scalia, J., dissenting))). Justice Scalia aptly made this point again while awarding "accolades" to the majority: "But the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called 'world community,' and respondents to opinion polls." *Id.* at 2264 (Scalia, J., dissenting).

Justice Stevens himself wrote in *Republican Party v. White*, 122 S. Ct. 2528, 2547 (2002) (Stevens, J., dissenting) (emphasis added):

There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, *issues of law or fact should not be determined by popular vote*; it is the business of judges to be indifferent to unpopularity.

He added:

Nevertheless, the elected judge, like the lifetime appointee, does not serve a constituency while holding that office. He has a duty to uphold the law and to follow the dictates of the Constitution. If he *is not a judge on the highest court* in the State, he has an obligation to follow the precedent of that court, not his personal views or *public opinion polls*.

*Id.* (emphasis added). We agree with Justice Stevens that issues of law or fact should not be determined by popular vote, but we, like Justice Scalia, wonder if Justice Stevens believes that if he *were* a judge on the highest court of the State, his obligation to follow precedent, not personal views or public opinion polls, would cease to exist. *See id.* 2540 n.12 (providing Justice Scalia's discussion on this point). Referencing Justice Stevens's decision in *Atkins*, the answer is not mysterious.

Under First Amendment jurisprudence, a bedrock principle requires ignoring the opinions of the people. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). By the time the current Court majority gets to the Eighth Amendment, the bedrock principle is paradoxically restated in *Atkins*: "[The Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 122 S. Ct. at 2247 (citing *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)). In contrast, Justice Blackmun used *Trop* in his dissent to the decision in *Furman v. Georgia*, 408 U.S. 238, 409 n.7 (Blackmun, J., dissenting) (1972):

The Court has recognized, and I certainly subscribe to the proposition, that the Cruel and Unusual Punishments Clause "may acquire meaning as public opinion becomes enlightened by a humane justice." And Mr. Chief Justice Warren, for a plurality of the Court, referred to "the evolving standards of decency that mark the progress of a maturing society." Mr. [Thomas] Jefferson expressed the same thought well. "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. . . . I know . . . that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. . . . Let us follow no such examples, nor weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs. Let us, as our sister States have done, avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning councils. And lastly, let us provide in our Constitution for its revision at stated periods."

*Id.* (Blackmun, J., dissenting) (citations omitted).

push and pull, moreover, may only be expected to become more hardened when anti-war demonstrations come before the courts, as they surely will in the years ahead. Here, too, Justice Holmes's point needs to be recalled: "Great cases like hard cases make bad law."<sup>789</sup>

It will happen again if we are not vigilant in our efforts to protect freedom as we make efforts to protect security. This country, too, does not have an attractive track record on civil liberties in war time. Reference need only be made to the infamous Sedition Laws<sup>790</sup>

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Justice Blackmun used *Trop* and Jefferson to make a different point. The Constitution itself allows for constitutional and legislative change, but that process of change should take place through actions detailed in Articles I and V, not Article III. Compare U.S. CONST. art. I (dealing with the legislative power), and *id.* art. V (detailing the constitutional amendment process), with U.S. CONST. art. III (creating the federal judiciary).

While the Court shows few signs of retreat from using "the evolution of society's standards of decency," this "evolution" ought not mutate into an endorsement of a theory of "context of evidence" within the First Amendment threats area. In the spheres most affected by "true threat" litigation, the Court ought not allow a reliance upon "public opinion" to determine the level of First Amendment protections or distort basic principles of federal criminal law, which people can change, if they so desire, by legislation.

789. N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

790. The Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964) (citations and footnotes omitted) reviewed the sordid history:

[T]he great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment . . . . That statute made it a crime, punishable by a \$5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either of any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress . . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of

following the Revolutionary War or to the Palmer raids during the Red Scare of the First World War period.<sup>791</sup> Wisely, George Santayana

power itself at all levels. This form of government was “altogether different” from the British form, under which the Crown was sovereign and the people were subjects. “Is it not natural and necessary, under such different circumstances,” he asked, “that a different degree of freedom in the use of the press should be contemplated?” Earlier, in a debate in the House of Representatives, Madison had said: “If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.” Of the exercise of that power by the press, his Report said: “In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . .” The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of government.

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Acts of Congress on the ground that it was unconstitutional. Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter “which no one now doubts.” Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: “I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.” The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616, 630; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288–89 . . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

See generally Andrew Lenner, *Separate Spheres: Republic Constitutionalism in the Federalist Era*, 41 AM. J. LEGAL HIST. 250 (1997).

791. See DAVID A. SHANNON, *BETWEEN THE WARS: AMERICA, 1919–1941*, at 28–29 (1965). Shannon observes:

When [Thomas W.] Gregory left the office [of Attorney General,] Wilson replaced him with his floor manager at the 1912 Democratic convention, A. Mitchell Palmer of Pennsylvania. This war-like Quaker instituted an unprecedented reign of federal repression. Secretary of Labor William B. Wilson, given the administration of the immigration laws, rounded up a large number of alien radicals during 1919, charged them with being illegally in the United States, and had them deported. The aliens, among them the famous anarchist Emma Goldman, left on a ship popularly known as the “Soviet Ark.” Palmer, who had ambitions for the 1920 Democratic presidential nomination and thought a reputation as a vigorous antiradical would help him politically, soon made Secretary Wilson seem a model of restraint. On the night of January 2, 1920, and again three nights later, Department of Justice agents in thirty-three American cities conducted raids on known local radicals. More than five thousand people were arrested. Whether there was an arrest warrant or not, whether the person arrested was an alien or not, made no difference. In some communities even those who came to jail to visit relatives and friends were thrown behind bars.

*Id.*

observed, “Those who cannot remember the past are condemned to repeat it.”<sup>792</sup> We are masters of our fate, if only we will learn from our experience.<sup>793</sup> As Justice Brandeis so eloquently observed:

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The parallels between this country’s reaction to communism during the Red Scare and to today’s reaction to the terrorism of September 11, 2002, are haunting. *See supra* note 53; *see generally* CHARLES H. MCCORMICK, *SEEING REDS* 145–87 (1997); CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 74–84 (1991).

792. GEORGE SANTAYANA, *THE LIFE OF REASON* 82 (1998). Justice Holmes makes a related point: “[H]istoric continuity . . . is not a duty, it is only a necessity.” Holmes, *supra* note 178 ¶ 7, at 139.

793. Shaw, on the other hand, commented, that the only thing history teaches is that history does not teach. GEORGE BENARD SHAW, *HEARTBREAK HOUSE* 45 (6th ed. 1927); *see also* GEORGE HEGEL, *PHILOSOPHY OF HISTORY* 6 (J. Sibree trans., rev. ed. 1900) (“[W]hat experience and history teach is this,—that peoples and governments never have learned anything from history . . .”).

One of our colleagues commented on an earlier draft of these materials that while our analysis was “within the range of plausibility,” it was “not much more persuasive than this sort of legal analysis usually is—which is to say, not very persuasive.” The original meaning of the First Amendment did not “compel” our conclusions, nor did any of the current theories of the First Amendment’s purpose or scope. While *Watts* and *Claiborne* supported our thesis, they were “old” cases, and the circuit courts of appeal did not read them as we did. In brief, our colleague thought that while our “argumentation is what lawyers do,” and “are supposed to do,” the “argument isn’t—probably can’t be—very compelling.” Here, significantly, our colleague was, we frankly acknowledge, in light of the en banc opinion in *American Coalition*, prescient in his reading of *Watts* and *Claiborne*. We trusted in the force of legal precedent and proffered rationale; as it turned out, he had a better grasp of the fluid character of the law.

With all due respect, our colleague (and the misguided author of the en banc opinion), however, forgets his Aristotle: “[P]recision is not to be sought for alike in all discussions, any more than in all the products of the crafts. . . . [We can only] look for precision in each class of things just so far as the nature of the subject matter admits . . .” Aristotle, *Nicomachean Ethics*, in *GREAT BOOKS*, *supra* note 130, at 339–40. Our colleague is, of course, in esteemed company. *See, e.g.*, RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 63 (2001) (“Like other moral theories, it seems to me . . . spongy and arbitrary.”); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 348 (1990) (“I am skeptical that moral philosophy has much to offer in the way of answers to specific legal questions or even in the way of general bearings . . . . [Moral philosophy] reinforces the lesson of skepticism, a leitmotif of this book. . . . [W]hen it comes to specific cases, it lets us down.”) (footnote omitted). Nevertheless, JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 77 (1983) (emphasis in original) aptly observes:

Here, as elsewhere, the skeptic is a disappointed absolutist, and we must reject the sophistical dilemma, “all or nothing.” In particular, we must beware of the (often unconscious) legalism which supposes that if there is no *uniquely correct* solution to a moral problem, no solution to that problem is objectively right (or wrong). The language of “right” and “wrong” must not lure us into assuming that for every problem or situation there is one solution or choice which is *the* right one.

Neither moral nor legal reasoning necessarily moves, in each instance, by way of deduction from demonstrated premises to demonstrated conclusions. Legal reasoning is, after all, a form of “moral” reasoning, which is, as Cicero says, about “wisdom,” the “art of living.” CICERO, *ON MORAL ENDS* 17 (Julia Annas ed. 2001). St. Thomas Aquinas, in his *Summa*

[The] freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . without free speech and assembly discussion would be futile; . . . with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; . . . the greatest menace to freedom is an inert people; . . . public discussion is a political duty; and . . . this should be a fundamental principle of the American government.<sup>794</sup>

Thoughtful Americans ought to accept no less.<sup>795</sup>

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*Theologica*, in 20 GREAT BOOKS, *supra* note 130, at 227–28, draws a helpful distinction between the ways in which moral reasoning proceeds. The first is “as a conclusion from premises” (*conclusiones ex principiis*); the second is as “by way of determination of certain generalities” (*sicut determinationes quaedam aliquorum communium*). Aquinas’s Latin *determinatio* is usually translated “determination.” Its primary meaning, however, is “fixing of a boundary.” OXFORD LATIN DICTIONARY 530 (1982). In a legal context, it might also easily be translated “to make a judgment.” Aquinas calls the first way as “like to that by which, *in science*, demonstrated conclusions are drawn from principles.” Aquinas, *supra*, at 228 (emphasis added). He calls the second as “likened to that whereby, *in the arts*, common forms are determined as to details: thus, the craftsman needs to determine the common form of a house to the shape of this or that house.” *Id.* (emphasis added); *see also id.* (“the judgment[s] of expert and prudent men [who] see . . . what is the *best* thing to decide”) (citing Aristotle, *Nicomachean Ethics*, in 20 GREAT BOOKS, *supra* note 130, at 227–28 (“[W]e ought to attend to the undemonstrated sayings and opinions of experienced and older people or of people of practical wisdom not less than to demonstrations; for because experience has given them an eye they see *aright*.” (emphasis added))). Accordingly, our analysis here is not offered as a “compelling conclusion” in the first sense, that is, as in science but as “a judgment,” in the second sense, that is, as in art. Whether we are either “expert” or “prudent,” as Aquinas says, or have “practical wisdom,” as Aristotle says, is shown (or not shown) by the quality (or lack of quality) of our analysis. That judgment rests with others.

794. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring). We would only add that fundamental principles of the federal criminal law must also be kept sacrosanct.

795. When a “committee of twelve distinguished attorneys and law professors criticized Attorney General Palmer . . . the excesses subsided even if the mood of intolerance was to linger for years.” SHANNON, *supra* note 791, at 29. Sadly, we doubt that we can expect a similar group to speak out against the *American Coalition* litigation and its outcome to date in the courts.

APPENDIX A  
DEFINITION

¶1. Broadly, four tendencies in the various views about “definition” may be distinguished: essentialist, prescriptive, linguistic, and pragmatic.<sup>796</sup> These tendencies are not necessarily mutually exclusive, and individual thinkers often manifest one or more together. According to the essentialist tendency, definitions convey more exact and certain information than empirical descriptions. That information is obtained from things by a process of conception, different from sensation, variously described as intellectual vision or abstraction; but in either case, essentialist definitions are an act of reason, not an act of the will. Such definitions may be true or false, that is, accurate or inaccurate in their relationship to things themselves; they may be roughly assimilated to declaratory sentences. According to the prescriptive tendency, definitions do not convey information; instead, they are nominal, not real, and an act of the will. Such definitions are not true or false; instead, they are consistent or inconsistent, that is, coherent in their relationship among themselves; they may be roughly assimilated to imperative sentences. According to the linguistic tendency, definitions are descriptions obtained from an empirical observation of linguistic use. Such definitions are true or false, that is, accurate or inaccurate in their relationship to linguistic use; if stipulations, they may also be consistent or inconsistent, that is, coherent in their relationship among themselves; they may be assimilated to declaratory or imperative sentences, and they are an act of reason or an act of the will. According to the pragmatic tendency, definitions are, in one respect, stipulated an act of the will; they are consistent or inconsistent, that is, coherent in their relationship among themselves; they may be roughly assimilated to imperative sentences. Nevertheless, such definitions are, in another respect, descriptions obtained from an empirical observation of the way things work. They are good or bad, that is, useful or not useful, in relation to a

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796. See generally Abelson, *supra* note 233, for an elaboration of these distinctions. Other treatments of “definition” include JUAN C. SAGER, *ESSAYS ON DEFINITION* (2000); ANNABEL CORMACK, *DEFINITIONS: IMPLICATIONS FOR SYNTAX, SEMANTICS AND THE LANGUAGE OF THOUGHT* (1998); JAMES H. FETZER ET AL., *DEFINITIONS AND DEFINABILITY: PHILOSOPHICAL PERSPECTIVES* (1991). The classic treatment remains RICHARD D. ROBINSON, *DEFINITION* (1954).

particular purpose; they are an act of the will; they are also a description obtained from an empirical observation of the way things work. For a particular purpose to be achieved in the context of the way things work, the definition, while it may be a stipulation, must also be an adequate reflection of an empirical description of how things work. Such definitions are prescriptive, descriptive, *and* predictive.

¶2. These various tendencies may be well-illustrated by the examination of the thought of twelve thinkers. St. Thomas Aquinas makes the point: “The study of philosophy does not mean to learn what others have thought but to learn what is the truth of things.”<sup>797</sup>

¶3. Western philosophy begins in Greece, in the fifth century B.C. at the end of the Golden Age of Pericles (480–399 B.C.), a historical context that illuminates that beginning.<sup>798</sup> As a result of a long struggle between an aristocracy of land-owning families and an urban poor, Athens was a democracy by the middle of the century. Elected annually as the first citizen, Pericles not only extended the empire of the Athenian city-state throughout Greece, but he also skillfully balanced the interests of all classes. Athens flourished; domestic industry and widespread trade gained for the people great material prosperity; vast building projects were undertaken; and most important, literature, arts, and intellectual life reached unparalleled heights. Greece itself was, however, split between the Athenian Empire (which was democratic, commercial, and industrial) and Sparta (which was authoritarian, militaristic, and agricultural). Tragically, war broke out in the spring of 431 B.C., and Sparta defeated Athens, in part because of an uncontrollable plague in the city, but also because of the floundering of the democratic government in its conduct of the war, a war that impoverished the old aristocracy. At its conclusion, the noble families, now alienated from democracy, instigated a revolution, which brought about a reign of terror. Ultimately, though, democracy reasserted itself.

797. JOSEF PIEPER, *THE SILENCE OF ST. THOMAS* 35 (1957) (citing THOMAS AQUINAS, COMMENTARY TO ARISTOTLE’S *DE CAELO ET MUNDO*, bk. 1, lec. 22, § 229, at 92 (*Studium philosophiae non est ad hoc quod sciatur quid homines senserint, sed qualiter se habet veritas rerum*)). John Finnis offers an alternative translation: “[P]hilosophy’s concern is not to find out what people have thought but what is the truth of the matters in question.” JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY*, 18–19 (1998).

798. See generally T.Z. LAVINE, *FROM SOCRATES TO SARTRE: THE PHILOSOPHIC QUEST* 10–13 (1984).



¶4. One of the first acts of those who restored the rule of the people was to put on trial and execute, on a charge of corrupting the youth of the city, Socrates (c. 470–399 B.C.), the philosopher who rightly ranks as the father of the Western tradition in philosophy. The trial and execution of Socrates profoundly influenced Plato (c. 429–347 B.C.). Plato was one of Socrates' young students. He was also the son of an aristocratic family that suffered notably during the war. Arguably, Plato's opposition to the democratic party grew, in part, out of his family's troubles. We know that from Plato's brilliant pen Socrates' teachings were either preserved or developed. Socrates observed in the *Apology*, one of Plato's dialogues, that "the unexamined life is not worth living . . . ." <sup>799</sup> For Socrates, that examination begins in a dialogue, in which a seeker after the truth or the goodness of things asks a question such as, what is piety? In the *Euthyphro*, a dialogue on the propriety, consistent with piety, of a son prosecuting a father for murder, Socrates, brushing aside answers to his questions given by the knowledgeable theologian Euthyphro, who gave examples, but did not provide a definition of piety, explained the sort of definition he sought: one that gives the "general idea" that "makes all pious things . . . pious," that is, "a standard to which I may look and by which I may measure actions." <sup>800</sup> In short, Socrates sought the "essence" of the thing. Subsequently, to refute the simplistic creed of a businessman, Cephalus, and the cynical creed of a Sophist, Thrasymachus, one of a group of the first Greek skeptics, <sup>801</sup> Plato <sup>802</sup> reported Socrates distinguishing between two objects of knowledge: (1) sensible things, that is, "appearances," and (2) abstract forms, that is, "essences." He also distinguished between two modes of knowledge: (1) sense perception, and (2) intellectual vision, each of which corresponds to our objects of knowledge. Sense perception, the product of empirical observation, gives rise to "opinion," which is more or less, an approximation of "essences." Intellectual vision, attained by the power of dialectic, however, gives rise to "essences," that is, certain knowledge of the truth of things or the goodness of actions. "Essences" alone may be properly embodied in

799. Plato, *Apology*, in 7 GREAT BOOKS, *supra* note 130, at 210.

800. *Id.* at 193.

801. BLACKBURN, *supra* note 233, at 349.

802. Plato, *Republic*, in 7 GREAT BOOKS, *supra* note 130, at 373–88.

“definitions.”<sup>803</sup> For example, as a subject (David) is modeled in a sculpture (Michelangelo’s David), so piety ought to be instantiated in the action of a son in the prosecution his father for murder. A proper “definition” of “piety” ought, therefore, to capture the “essence” of piety. When a “definition” of “piety” is derived by dialectic, it gives a reliable and certain standard against which particular actions may be judged as “pious” or “impious”—precisely the sort of “definition” Socrates sought in the *Euthyphro*. Thus, Plato, in the voice of Socrates, articulated for a disenchanted, intellectual elite—as against a broader mass of people, including tradesmen and Sophists—a philosophical standard for the true and the good, and he occupies in the history of Western philosophy, the position of, as Raphael portrays him in his *School of Athens*, a thinker whose hand is raised upwards, pointing to the super-sensual world of the mind and the eternal abode of ideas.<sup>804</sup>

¶5. “The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato.”<sup>805</sup> Whitehead’s point is not that Plato himself said it all, but that the general positions of most subsequent thinkers were represented, or at least adumbrated, in Plato’s dialogues. As Plato was the voice of the defeated aristocracy, Aristotle (384–322 B.C.), a pupil of Plato, was the voice of a prosperous middle class; his philosophical *oeuvre* and subsequent impact was to prove as formidable as that of his master.<sup>806</sup> Aristotle articulated the basic axiom of logic: the principles of contradiction.<sup>807</sup> His ideal form of reasoning was deductive, though “he recognize[d] that a syllogism, to avoid begging the question, must presuppose a wide induction to

803. See also Plato, *Theaetetus*, in 7 GREAT BOOKS, *supra* note 130, at 535 (“mind, by power of her own, contemplates the universals in all things”).

804. For a view of this history with more nuance, see generally KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 75–93, 399–401 (3d ed. 1968); David K. O’Connor, *Socrates and the Socratics*, in THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY 23 (Richard H. Popkin ed., 1999); Gerald A. Press, *Plato*, in THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY, *supra*, at 32.

805. ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 53 (1957).

806. See generally Richard Boeus, *Aristotle*, in THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY, *supra* note 804, at 52.

807. Aristotle, *Metaphysics*, in 8 GREAT BOOKS, *supra* note 130, at 524 (“the same attribute cannot at the same time belong and not belong to the same subject and in the same respect”); see also BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY 72 (1970) (law of identity: “Whatever is, is”; the law of contradiction: “Nothing can both be and not be”; the law of the excluded middle: “Everything must either be or not be”).

make its major premise probable.”<sup>808</sup> He systematically catalogued and attempted to refute the fallacies of the Sophists.<sup>809</sup> He wrote treatises on the criteria for the good of life for an individual<sup>810</sup> and for the good of life for a community.<sup>811</sup> He wrote, “Great then is the good fortune of a state in which the citizens have a moderate and sufficient property; for where some possess much, and the others nothing, there may arise an extreme democracy, or a pure oligarchy; or a tyranny may grow out of either extreme . . . .”<sup>812</sup>

He also said:

[H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast, for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. Law is reason unaffected by desire.<sup>813</sup>

Disagreeing with Plato’s concept of intellectual vision, and seeking a middle way between Plato’s theory of certain knowledge and the rejection of any certain knowledge by Greek Sophists, Aristotle, in the *Physics*, distinguished four “causes” (*aitia*) in things: the material (bronze in a statue), that *out of which* it is made; the formal (the shape of the finished statue), the expression of *what* it is; the efficient (the sculptor), the means *by which* it is made; and the final end or *telos* (the purpose for which the statue was sculptured), the end *for which* it is made.<sup>814</sup> Aristotle’s word *aitia*, which is usually translated as “cause,” is misleading to modern minds, since we understand “cause” not as Aristotle did, “purpose,” but in the sense that it is used in modern physics “mechanical.”<sup>815</sup> The word that Aristotle used, *aition*, is the neuter nominative singular form (*aitia* its plural form) of the adjective *aitios*, which is best translated as “blame, charge, [or] accusation.”<sup>816</sup> For lawyers, the best translation is “cause

808. WILL DURANT, *THE LIFE OF GREECE* 527 (1939).

809. Aristotle, *On Sophistical Refutations*, in 8 GREAT BOOKS, *supra* note 130, at 227.

810. Aristotle, *Nicomachean Ethics*, in 9 GREAT BOOKS, *supra* note 130, at 339.

811. Aristotle, *Politics*, in 9 GREAT BOOKS, *supra* note 130, at 445.

812. *Id.* at 496.

813. *Id.* at 485.

814. Aristotle, *Physics*, in 8 GREAT BOOKS, *supra* note 130, at 271 (hence “teleology,” the study of ends or the purpose of things); BLACKBURN, *supra* note 233, at 374.

815. See generally Richard Taylor, *Causation*, 2 THE ENCYCLOPEDIA OF PHILOSOPHY 56 (Paul Edwards ed., 1967).

816. JAMES DONNEGAN, A NEW GREEK AND ENGLISH LEXICON 40 (1846).

of action” or “claim for relief,” that is, the who, what, where, when, how, and, in particular, the *why* of a thing in a court proceeding.<sup>817</sup> Aristotle’s key concept, however, was final cause, or *telos*, which is best translated as “end, purpose, or perfection.”<sup>818</sup> For Aristotle, the essence of a thing was its end, purpose, or perfection, which was abstracted by a person through conception from particular things, which, in turn, were apparent to the person through their sensible attributes.<sup>819</sup> In contrast, for Plato, definition was articulating the genius, species, and differentia of things.<sup>820</sup> Aristotle went further. In the *Topics*, Aristotle developed six rules for testing definitions from an essentialist perspective: (1) give essential, not accidental properties, (2) give genus and differentia, (3) do not define by synonyms, (4) be concise, (5) do not define by metaphors, and (6) do not define by negative terms or the opposites of correlatives.<sup>821</sup> These rules are still widely quoted, though essentialism is hardly the way of modern thought.<sup>822</sup>

¶6. Aristotle was more than just a pupil of Plato; he was a master in his own right. He was also a tutor to Alexander the Great (356–325 B.C.), whose Macedonian army conquered Greece and most of the known world at that time, spreading Greek culture and Greek philosophy in the wake of its victories. On the death of Alexander, however, Aristotle left Athens because of an anti-Macedonian feeling, which resulted in his indictment for impiety. Unlike Socrates, who stayed for his trial and execution, Aristotle fled, saying that he would not give Athens a second chance to sin against philosophy.<sup>823</sup> Thus, Aristotle, Plato’s pupil, occupies a position in Western philosophy of, as Raphael portrays him in his *School of*

817. See Aristotle, *supra* note 814, at 275 (“the number [of causes is answered by] the question ‘why[?]’”); Aristotle, *supra* note 807, at 501 (“[T]he ‘why’ is reducible finally to the definition, and the ultimate ‘why’ is a cause and a principle.”).

818. DONNEGAN, *supra* note 816, at 755. See generally Alan Gotthelf, *Aristotle’s Conception of Final Causality*, in PHILOSOPHICAL ISSUES IN ARISTOTLE’S BIOLOGY 204 (Allan Gotthelf et al. eds., 1987).

819. See Aristotle, *supra* note 814, at 271 (“men do not think they know a thing til they have grasped the ‘why’ of it”).

820. See Plato, *supra* note 803, at 548–49.

821. Aristotle, *Topics*, in 7 GREAT BOOKS, *supra* note 130, at 192–206.

822. See Abeleson, *supra* note 233, at 320–22, for a withering and persuasive critique of Aristotle’s rules from a pragmatic perspective.

823. GEORGE GROTE, ARISTOTLE 23 (Alexander Bain & G. Croom Robertson eds., 1872).

*Athens*, a thinker whose hand is held out, even with the sky and the ground, taking a middle course. While Plato and Aristotle disagreed on how an essence was realized by the mind—dialectic or abstraction—Plato and Aristotle were in agreement that definition sought to express the essence of a thing. For this reason, each of these thinkers (from his own perspective) is a classic example of the essentialist tendency.

¶7. Plato and Aristotle represent one tendency in Greek thought, though not the only one to develop in Greece. Skepticism preceded Plato and Aristotle, and it succeeded them. Pyrrho (c.365–275 B.C.), a Greek skeptic, said that Plato and Aristotle disagreed about everything—except the possibility of attaining knowledge, and of that he was sure they were in error.<sup>824</sup> Unfortunately, that line of thought leads into a cul-de-sac in any analysis of definition.<sup>825</sup>

¶8. Western philosophy took an empirical turn in England, away from the Aristotelian Scholasticism of the late Middle Ages and the Christian Platonism of the Renaissance, in 1573 when Francis Bacon (1561–1626 A.D.) entered Trinity College, Cambridge. There, he tells us, “he first fell into the dislike of the philosophy of Aristotle.”<sup>826</sup> He judged it “a philosophy . . . strong for disputations . . . but barren of the production of works for the benefit of the life of man . . . .”<sup>827</sup> Bacon published his alternative to Aristotle’s logical treatises, *The Organum*, forty-seven years later in *Novum Organum*, in which he sought to establish a “prudent mean” between “the arrogance of dogmatism and the despair of scepticism [sic].”<sup>828</sup> Bacon thought that when thinkers followed Aristotle, “notions” were “confused and carelessly abstracted from thing[s] . . . .”<sup>829</sup> Hope lay, he thought, only in “genuine induction.”<sup>830</sup> Nevertheless, Bacon identified four “idols of the mind” that stood in the way of human progress: those of “The Tribe” (human nature itself, e.g., a

824. DURANT, *supra* note 808, at 642.

825. See 2 SEXTUS EMPIRICIUS: OUTLINES OF SCEPTICISM 123–24 (Julia Annas & Jonathan Barnes trans., 1994) (“[D]ogmatists think . . . [that] definitions [are] indispensable . . . for apprehension or for teaching. If, then, we suggest that they are useful for neither of these things, we shall . . . turn about all the vain effort which the Dogmatists have bestowed on them.”).

826. 1 THE WORKS OF FRANCIS BACON 4 (James Spedding et al. eds., 1858).

827. *Id.*

828. Francis Bacon, *Novum Organum*, in 30 GREAT BOOKS, *supra* note 130, at 105.

829. *Id.* at 107–08.

830. *Id.*

tendency, for the sake of tidiness, towards supposing more order in a field of inquiry than is actually present), those of “The Den” (individual peculiarities, e.g., one person sees likeness, another difference; one may focus on detail, another totality), those of “The Market” (defects for which language itself is responsible), and those of “The Theater” (prior philosophical dogmas).<sup>831</sup> In particular, Bacon was troubled by “The Idols of the Market.” The words of our language are formed, he wrote, in “a popular sense,” but when a “more diligent observation is [made], and [an effort is taken] to adapt them more accurately to nature,” the “words [themselves] oppose it.”<sup>832</sup> Controversies ensue, therefore, “about words,”<sup>833</sup> not things. “[I]t would be better,” he thought, to imitate “the caution of mathematicians . . . [and] to proceed more advisedly in the first instance . . . [framing] definitions.”<sup>834</sup> For Bacon, definitions did not reflect essences, but merely clarified the sense of words, one of the first steps required before systematic observation.<sup>835</sup> Nevertheless, Bacon observed that definitions “consist themselves of words . . . so that we must necessarily have recourse to particular instances, and their regular series and arrangement . . . .”<sup>836</sup> Knowledge was corrupted by the “logic . . . of Aristotle” and the “natural theology . . . of Plato.”<sup>837</sup> “Nothing is rightly inquired into, or verified, noted, weighed, or measured [for] indefinite and vague observation produces fallacious and uncertain information.”<sup>838</sup> Speculation, he thought, gave “offense” when “wasted on words, or, at least common notions,” when the mind “ought to be fixed on things . . . .”<sup>839</sup> Build, Bacon observed, “a real model of the world in the understanding, such as it is found to be, not such as man’s reason” alone distorts it.<sup>840</sup> “Truth . . . and utility are . . . ,” he

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831. *Id.* at 109–10.

832. *Id.* at 112.

833. *Id.*

834. *Id.*

835. See also Thomas Hobbes, *Leviathan*, in 23 GREAT BOOKS, *supra* note 130, at 56 (“Seeing that truth consisteth in the right ordering of names . . . , a man that seeketh precise truth . . . [as] in geometry . . . [ought to begin by] settling the significance of the words . . . by definitions and place them in the beginning of their reckoning.”).

836. See Bacon, *supra* note 828, at 112.

837. *Id.* at 126.

838. *Id.* at 126–27.

839. *Id.*

840. *Id.* at 133.

thought, “perfectly identical, and effects are . . . pledges of truth.”<sup>841</sup> For Bacon, therefore, that “which is most useful in practice is most correct in theory.”<sup>842</sup> Here, Bacon, a believing Christian, followed scripture.<sup>843</sup>

¶9. The step from Bacon’s empirical turn to John Locke’s (1632–1704 A.D.) nominalism was not inevitable, but it was soon taken. Bacon wrote at the height of the English Renaissance, the age of Shakespeare (1564–1616 A.D.) and Elizabeth I (1533–1603 A.D.), who reigned from 1558–1603 A.D. Locke wrote at the time of the Glorious Revolution of 1688, which ended the restored Stuart Monarchy and assured the dominance of the outlook of the English middle class in literature, arts, and the intellectual life. In particular, Locke was the voice of that new order of things. But Locke straddled two worlds: that of the character of the Puritan Christianity that formed the climate in which he lived, and that of the emerging scientific revolution, which was to replace it. Like Bacon in an earlier time, he was a believer *and* an empiricist. Famously, in his *Essay Concerning Human Understanding*,<sup>844</sup> Locke rooted his perspective on human understanding in “experience.” Rejecting the classic notion of conception, independent of sensation, Locke thought instead that reflection on sensation gave rise to ideas, but that man, contrary to Plato and Aristotle, did not know “real essences.”<sup>845</sup> Locke observed, “Nature makes many particular things, which do agree one with another in many sensible qualities . . . but it is not . . . [an] essence that distinguishes them into species; it is men . . . [who set the boundaries of the species] . . . .”<sup>846</sup> In short, men distinguish things by “nominal, . . . not by their real essences[; such essences, as they are,] are made by the mind, and not by nature . . . .”<sup>847</sup> Because “real essences” are “utterly unknown to us,” they cannot furnish us “standards” against which “ideas” and

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841. *Id.*

842. *Id.* at 138.

843. See *Sirach* 27:5–6 (“the test of what the potter molds is in the furnace”; “the fruit of the tree shows the care it has had”); *Luke* 6:44 (“For every tree is known by its own fruit.”).

844. John Locke, *An Essay Concerning Human Understanding*, in 35 GREAT BOOKS, *supra* note 130, at 85.

845. *Id.* at 258–59.

846. *Id.* at 279.

847. *Id.* at 274.

“words” may be “adjusted,” “established,” or “rectified.”<sup>848</sup> Mortimer J. Adler, a modern student of Aristotle, thought that Locke’s nominalist turn was disastrous; it led, as Hume was to see, inexorably to skepticism or solipsism.<sup>849</sup> Adler’s argument (as St. Thomas Aquinas’s) retains the distinction between conception and sensation—that ideas are “that by which” we know, not “that which” is known.<sup>850</sup>

¶10. Locke applied his insight in the first instance to natural entities. The question, for example, whether “a bat be a bird” was for Locke “merely verbal,” and it should be resolved, he thought, by agreement on the “signification” of the “two names.”<sup>851</sup> Locke thought, too, that this insight possessed particularly sharp force for “moral words,” that is, those words that could not be reduced to “sensible objects,” as, for instance, “murder.”<sup>852</sup> “What the word murder . . . signifies can never be known from things themselves . . . ; the intention of the mind . . . which make a part of murder [has] no necessary connexion [sic] with the . . . visible action of him that commits . . . [it].”<sup>853</sup> For Locke, “moral words” were “assemblages of ideas put together at the pleasure of the mind, pursuing its own ends of discourse, and suit[ed] to its own notions, whereby it designs not to copy anything really existing . . . .”<sup>854</sup>

¶11. While Locke drew a distinction between the nominal and the real, he was too much the levelheaded Englishman to divorce entirely the nominal from the real. For Locke, “virtue and vice” were “moral words” that could not be reduced to sensible objects; they were, instead, rooted in “praise or blame.”<sup>855</sup> Nevertheless, he thought, the “advanc[ing]” of the “general good of mankind” generally focused “praise” and “blame” “on the side of that [which] really deserved it . . . .”<sup>856</sup>

848. *Id.* at 288.

849. MORTIMER J. ADLER, TEN PHILOSOPHICAL MISTAKES 13–24 (1985).

850. *Id.* at 14 (citing Thomas Aquinas, *Summa Theologica*, in 19 GREAT BOOKS, *supra* note 130, at 454).

851. See Locke, *supra* note 844, at 301.

852. *Id.* at 304.

853. *Id.* at 286.

854. *Id.*

855. *Id.* at 230.

856. *Id.* at 231; see also *id.* at 305 (“must agree with the truth of things as well as with men’s ideas”).



¶12. Like Bacon—and following him—Locke gave due attention to language and its uses and its imperfections as well as its abuses and their remedies.<sup>857</sup> Like Bacon, Locke thought little of abstract Aristotelian disputes; instead, he focused on the practical. Locke believed that the “unscholastic statesman” gave men “peace, defenses and liberties,” while the “condemned mechanic” gave men the “improvements of useful arts.”<sup>858</sup> Locke observed:

Nor hath this mischief stopped in logical niceties, or curious empty speculations; it hath invaded the great concernments of human life and society; obscured and perplexed the material truths of law . . . ; brought confusion, disorder and uncertainty into the affairs of mankind; and if not destroyed, yet in a great measure rendered useless . . . justice.<sup>859</sup>

“[D]oth it not often happen,” Locke noted, that a man “of ordinary capacity very well understands a . . . law, that he reads, till he consults an expositor, or goes to counsel; who, by that time he hath done explaining . . . [he] makes words signify either nothing at all or what he pleases.”<sup>860</sup>

¶13. “Common use regulates the meaning of words pretty well,” Locke observed, “for common conversation . . . .”<sup>861</sup> Common usage, however, does not serve so well for more complex matters. Locke observed: “[I]n the interpretation of laws . . . there is no end; comments beget comments, and explications make new matter for explications; and of limiting, distinguishing, varying the signification of . . . moral words there is no end. These ideas of men’s making are, by men still having the same power, multiplied in infinitum.”<sup>862</sup> But Locke added: “I say not this that I think commentaries needless; but to show how uncertain . . . [moral words] naturally are, even in the mouths of those who had both the intention and the faculty of speaking as clearly as language was capable to express their thoughts.”<sup>863</sup>

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857. *See id.* at 285–306.

858. *Id.* at 293.

859. *Id.* at 294.

860. *Id.*

861. *Id.* at 286.

862. *Id.* at 287 (emphasis omitted).

863. *Id.*

¶14. Locke also thought that definitions had an important role to play in clearing up mere verbal disputes. “Definition . . . was nothing but making another understand what the names of simple ideas . . . stand for . . .”<sup>864</sup> If “men would tell what ideas they make their words stand for, there could not be half . . . [such] obscurity or wrangling in the search or support of truth . . .”<sup>865</sup>

¶15. The turn in Western philosophy away from the essentialism of Plato and Aristotle in the period following Locke eventually forked in three not necessarily alternative directions: the linguistic, the stipulative, and the pragmatic. John Stuart Mill (1806–1873 A.D.), one of the most influential liberal thinkers of nineteenth century England, illustrates the complexity of the directions taken. The son of James Mill, he was given a private education at home by his father, beginning with Greek at three (including six of Plato’s dialogues) and Latin at eight.<sup>866</sup> Mill himself reported that the *Theaetetus* might have been too much for him at that early age.<sup>867</sup> An empiricist, Mill sought to construct a theory of knowledge for social and scientific affairs. Mill devoted to “definition,” chapter VIII, book I of his *A System of Logic*.<sup>868</sup> In *Logic*, Mill defined “definition” as “a proposition declaratory of the meaning of a word; namely, either the meaning which it bears in common acceptance, or that which the speaker or writer . . . intends to annex to it.”<sup>869</sup> Mill rejected the Aristotelian concept that definition is of things, rather than ideas:

All definitions are of names, and of names only; but, in some definitions, it is clearly apparent that nothing is intended except to explain the meaning of the word; while in others . . . it is intended to be implied that there exists a thing, corresponding to the word . . . This [last] assertion is not a definition, but a postulate [of fact].<sup>870</sup>

Mill also distinguished definition by “connotation” from definition by “denotation”; “connotation” defines by attributes; “denotation”

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864. *Id.*

865. *Id.* at 295.

866. JOHN STUART MILL, AUTOBIOGRAPHY 5–6 (1957).

867. *Id.* at 6.

868. JOHN STUART MILL, A SYSTEM OF LOGIC (8th ed. 1879).

869. *Id.* at 105.

870. *Id.* at 112–13.

defines by designating members of the class defined.<sup>871</sup> Nevertheless, Mill considered definition by denotation “imperfect.”<sup>872</sup> “All definitions are,” he thought, “of names,” but names “can neither be true nor false; the only character . . . [they are] susceptible of is that of conformity or disconformity to usage . . . .”<sup>873</sup> On the other hand, Mill added, “A name . . . admits of definition . . . [if] we are able to analyze, that is, to distinguish into parts, . . . the attributes . . . which constitute the meaning both of the . . . name and of . . . [its] corresponding [idea] . . . .”<sup>874</sup> “Definitions are properly of names only, and not of things,” Mill continued, but “it does not follow from this that definitions are arbitrary. How to define a name . . . may involve consideration . . . into the nature of the things which are denoted by the name.”<sup>875</sup> “[I]nquires which form the subjects of the most important of Plato’s Dialogues” go, Mill observed, beyond “ascertaining the conventional meaning of a name. They are inquires not so much to determine what is, as what *should* be, the meaning of a name . . . .”<sup>876</sup> “[L]ike other practical questions,” they “require[] for [their] solution[s], . . . [inquiry] into the properties not merely of names but of the things named.”<sup>877</sup> As Abelson commented, Mill’s shift in reference in his various discussions of his idea of definition represents differences in focus; at times he “identified the meaning of a term with the object it ‘names,’ at other times with the customary usage of the word, and at still other times with an abstract object or ‘idea’ capable of being divided into simpler parts.”<sup>878</sup> For Mill, therefore, “a definition . . . [could be] the stipulation of a name [including reference to the nature of the thing named], a report of linguistic usage, or the analysis of a complex idea into its constituent parts.”<sup>879</sup>

¶16. The thought of Bertrand Russell (1872–1970 A.D.) and Alfred North Whitehead (1861–1947 A.D.) in their monumental

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871. *Id.* at 34–41.

872. *Id.* at 108.

873. *Id.* at 112–13.

874. *Id.* at 107.

875. *Id.* at 117.

876. *Id.* (emphasis added).

877. *Id.*

878. Abelson, *supra* note 233, at 320–21.

879. MILL, *supra* note 868, at 98.

*Principia Mathematica*<sup>880</sup> also illustrates a concept of definition that is stipulative:

A definition is a declaration that a certain newly-introduced symbol . . . is to mean the same as . . . other . . . symbols of which the meaning is already known . . . . For a definition is concerned wholly with the symbols, not with what they symbolise. Moreover, it is not true or false, being the expression of a volition.<sup>881</sup>

Like Mill, they also expressed a less than unalloyed concept of definition. The purely stipulative character of their concept lost much of its force when they added that “when what is defined is . . . something already familiar, . . . the definition contains an analysis of a common idea.”<sup>882</sup>

¶17. The pragmatic turn in modern philosophy is well-illustrated by the thought of Willard van Orman Quine (1908–2000 A.D.)<sup>883</sup> Following Bacon, Locke, and Mill, Quine stands squarely in the empiricist tradition. In his classic, the *Web of Belief*,<sup>884</sup> Quine rested “our whole system of beliefs . . . [on] our own direct observations.”<sup>885</sup> But Quine parted company with Locke (and others) when he did not limit our observations to “sensory events.”<sup>886</sup> “What we ordinarily notice and testify to are rather the objects and events out in the world.”<sup>887</sup> Those observations are then embodied in language, in the form of an “observation sentence,” which, he said, any “second witness would be bound to agree with me on all points then and there, granted merely an understanding of my language.”<sup>888</sup>

¶18. According to Quine, language is learned primarily “ostensively,” not by definition, but by “learning to associate the heard words with things” or “the circumstances that [an

880. 1 ALFRED NORTH WHITEHEAD & BERTRAND RUSSELL, *PRINCIPIA MATHEMATICA* (2d ed. 1957).

881. *Id.* at 11.

882. *Id.* at 12.

883. Compare ROGER F. GIBSON, JR., *THE PHILOSOPHY OF W.V. QUINE* (1982) (approving forward by W.V. Quine), with CHRISTOPHER HOOKWAY, *QUINE: LANGUAGE, EXPERIENCE AND REALITY* (1988) (expository review, but critical questions raised).

884. W.V. QUINE & J.S. ULLIAN, *THE WEB OF BELIEF* (2d ed. 1978).

885. *Id.* at 21 (including other people’s reports).

886. *Id.* at 22 (that “way lies frustration”).

887. *Id.*

888. *Id.* at 23.

observation] sentence reports.”<sup>889</sup> Quine’s insight, at this point, reflects a long tradition that extends back to figures as diverse as St. Augustine (a Platonist) and Locke (an empiricist), and it represents an aspect of the consensus of modern child psychologists who examine language empirically, not philosophically.<sup>890</sup>

¶19. Nevertheless, Quine believed that ostension “accounts for . . . only a modest part of our language.”<sup>891</sup> Other elaborate, but largely unconscious, processes are at work, including observed use and “definition,” the simplest form of which “is that in which the new expression is equated outright to some expression that is presumed to have been already intelligible.”<sup>892</sup> Other kinds of definition do not draw on usage or synonymy. An expression is simply made synonymous with another expression for a particular purpose.<sup>893</sup> Still another kind of definition is contextual, that is, words are not equated with each other, but criteria are given in the definition for its application.<sup>894</sup>

¶20. “[E]veryday terms are mainly suited for everyday affairs, where lax talk is rife.”<sup>895</sup> Accordingly, another “variant type of definitional activity . . . does not limit itself to reporting” or artificially creating synonymy; its “purpose” is “to improve” upon

889. *Id.* at 24.

890. Compare Augustine, *Confessions*, in 18 GREAT BOOKS, *supra* note 130, at 287, and Locke, *supra* note 844, at 255, with DAVID CRYSTAL, *Child Language Acquisition*, in THE CAMBRIDGE ENCYCLOPEDIA OF THE ENGLISH LANGUAGE 242–47 (1987) (ostensive learning is not thought, however, to account fully for the learning of various grammatical constructions or for all of the functions of all kinds of words). See also LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 83e (G.E.M. Anscombe trans., 1953) (examples and practices, that is, rules of usage, account for language learning); POPPER, *supra* note 804, at 42–59 (Popper analyzes and refutes David Hume’s (1771–1776) skeptical position in A TREATISE OF HUMAN NATURE 155–76 (L.A. Selby-Bigge ed., 1958)). According to Popper, Hume argues that experience begins with the observation of a series of discrete facts; these facts give rise to theory that cannot be justified save on the basis of psychological habit. Popper then shows, on the contrary, that theory is first required to make an observation of a fact. Theories must then be at least corroborated or refuted by a process of falsification through which human knowledge, that is, an approximation of truth, can not only be attained, but also can progress. See *infra* note 903 (discussion of Popper’s theories).

891. QUINE & ULLIAN, *supra* note 884, at 27.

892. *Id.*

893. WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 26 (1953) (“created expressly for the purpose of being synonymous”).

894. QUINE & ULLIAN, *supra* note 884, at 27 (“brother of *x*” means “male other than *x* whose parents are the parents of *x*”).

895. *Id.* at 100.

the expression by “refining or supplementing its meaning.”<sup>896</sup> Quine observed, “Any word worth explicating has some contexts which, as wholes, are clear and precise enough to be useful; and the purpose of explication is to preserve the usage of these favored contexts while sharpening the usage of other contexts.”<sup>897</sup>

¶21. For Quine, the function of explications is to introduce precision as a “step toward clarity.”<sup>898</sup> Illustrating the concept, he observed:

[J]udicial decisions contribut[e] to the sharpening of legal concepts even without recourse to explicit definitions. Decisions . . . may give new guidelines for determining the range of . . . concepts. . . . [O]ld decisions [may be used] as criteria as long as possible, and then, when old lines fail, . . . finer lines [are drawn] through fresh decisions.<sup>899</sup>

Out of this complex, but not fully understood, process learners build a “coherent system” of beliefs.<sup>900</sup> That system of beliefs, however, is a “man-made fabric which impinges on experience only along the edges.”<sup>901</sup> “Observation sentences are [merely] the bottom edge of language, where it touches experience.”<sup>902</sup> Over time, inconsistent observations may create a crisis for the web of belief. But “[e]ven when observations persist in conflicting,” the web of belief “will not necessarily be abandoned forthwith” until a “plausible substitute is found.”<sup>903</sup>

896. QUINE, *supra* note 893, at 25 (“explication”).

897. *Id.*

898. QUINE & ULLIAN, *supra* note 884, at 100.

899. *Id.*

900. *Id.* at 29.

901. QUINE, *supra* note 893, at 42.

902. QUINE & ULLIAN, *supra* note 884, at 28.

903. *Id.* at 30 (citing THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 67–68 (1962)). Compare WILLIAM JAMES, *PRAGMATISM* 77–78 (Bruce Kucklick ed., 1981) (“[O]ur knowledge grows *in spots*. The spots may be large or small, but the knowledge never grows all over: some old knowledge always remains what it was . . . [W]e patch and tinker more than we renew.”), and WILLIAM JAMES, *THE MEANING OF TRUTH* 266–67 (1909) (“Truth absolute” is “an ideal set of formulations toward which all opinions may be expected to converge in the long run of experience.”), with CHARLES SANDERS PEIRCE, *COLLECTED PAPERS* 565–66 (Charles Hartshorne & Paul Weeks eds., 1934) (“Truth is that concordance of an abstract statement with the ideal limit towards which endless investigation would tend . . .”). Their definitions of truth are similar, but James and Peirce are different kinds of pragmatists; Peirce is “logical” and “realist”; James is “psychological” and “nominalist.” SUSAN HAACK, *MANIFESTO OF A PASSIONATE MODERATE* 25 (1998); see also POPPER, *supra*

¶22. As he did with Locke, Quine departed company with other empiricists, including Alfred Jules Ayer (1910–1989 A.D.), a logical positivist who argued that knowledge is either analytic (known to be true from an understanding of the terms employed, e.g., “All bachelors are unmarried”), synthetic (known to be true by observation, e.g., “Eric is a bachelor”), a subjective reaction (ethics), or nonsense (metaphysics or theology), and that the meaning of a synthetic statement lies in its verification (the verifiability principle, that is, no statement is “meaningful” without the possibility of verification or falsification).<sup>904</sup> Quine rejected the analytic/synthetic distinction.<sup>905</sup> He rejected, too, the verification principle, at least in so far as it was applied to statements; he believed that “the unit of empirical significance” was the web of belief itself.<sup>906</sup>

¶23. Quine believed that we can improve our web of belief, bit by bit, like a mariner who rebuilds his ship on the open sea.<sup>907</sup> But “we cannot detach ourselves from it and compare it objectively . . . .”<sup>908</sup> Accordingly, “[o]ur standard for appraising basic changes . . . must be, not a realistic standard of correspondence to reality but a pragmatic standard.”<sup>909</sup> “Concepts are language, and the purpose of . . . language is efficacy in communication and in prediction. Such is the ultimate duty of language . . . , and it is in

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note 804, at 28, 129 (“Knowledge cannot start from nothing—from a *tabula rasa*—nor yet from [pure] observation [without theory]. The advance of knowledge consists, mainly, in the modification of earlier knowledge. . . . Pessimistic and optimistic epistemologies are about equally mistaken.” He continues, “[W]e cannot start afresh . . . . We must carry on a certain tradition. . . . It tells us that people have already constructed in this world a kind of theoretical framework—not perhaps a very good one, but one which works more or less; it serves us as a kind of network . . . . We use it by checking it over, and by criticizing it. In this way we make progress.”)

904. See generally ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* 5–26 (1952).

905. QUINE, *supra* note 893, at 46.

906. QUINE & ULLIAN, *supra* note 884, at 42 (“The whole of science”). But see POPPER, *supra* note 804, at 238–39 (criticizing Quine’s “holistic” view of empirical testing and arguing that all criticism must be “piecemeal”).

907. QUINE, *supra* note 893, at 79 (referring to Otto Neurath’s famous ship metaphor). See Otto Neurath, *Protocol Sentences*, in *LOGICAL POSITIVISM* 199, 201 (A.J. Ayer ed., 1959); OTTO VON NEURATH, *ANTI-SPENGLER* 75–76 (1921) (translated from German by Eva M. Steinberger, visiting scholar, Notre Dame Law School, 2001) (“Sailors may try to reconstruct their boat on the open sea, but they cannot work on the whole boat at the same time. When one piece is taken apart, a new one is needed immediately. The boat can be reconstructed completely, but only step by step.”).

908. QUINE, *supra* note 893, at 79.

909. *Id.*; see also *id.* at 46.

relation to that duty that . . . [our web of belief] has . . . to be appraised.”<sup>910</sup>

¶24. For lawyers with a legal, not a philosophical bent, resolving which combination of these tendencies to adopt is not difficult. The resolution of difficult issues of epistemology and metaphysics may be put off to another day. Whatever is true of natural entities, strictly legal concepts do not have an “essence,” at least, not in the essentialist’s sense; they do not have a standard outside themselves against which they may be adjusted, established, or rectified on an objective basis.<sup>911</sup> In addition, (Plato, Bacon, Hobbes, and Locke to the contrary) lawyers ought not “expect mathematical certainty from . . . language.”<sup>912</sup> Seeking an essentialist definition—the *every* and *only* of mathematics—is like seeking water at a mirage in a desert. In fact, “[p]hilosophy has been misled by the example of mathematics; . . . even in mathematics . . . ultimate . . . principles . . . [are] beset with difficulties, as yet insuperable.”<sup>913</sup> Human purpose and linguistic function are the only practical keys. Whatever the case with natural entities, assuming that they exist and the human mind is capable of knowing them, law is sculptured by human hands, which have, or ought to reflect, a human purpose in an Aristotelian sense of final cause, an answer to the question “why?”; law is, at least for lawyers, made, not found.<sup>914</sup> “[A]lthough we may welcome the fact

910. *Id.* at 46; *see also id.* at 44 (“a tool . . . for predicting future experience in the light of past experience”). *But see* POPPER, *supra* note 804, at 107–14 (describing and critiquing instrumentalism) (“[I]nstrumentalism is unable to account for the importance to pure science of testing severely even the most remote implications of its theories, since it is unable to account for the pure scientist’s interest in truth and falsity. . . . [T]he attitude of instrumentalism (like that of applied science) is one of complacency at the success of applications.”). *See* SANTAYANA, *supra* note 178 ¶ 10, at 218–19.

911. *See* F.R. PALMER, SEMANTICS 21 (2d ed. 1981) (“[T]he problem of semantics is to establish what classes there are. . . . [In fact, the] words of a language often reflect not so much the reality of the world, but the interest of the people who speak it.”).

912. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see also* Aristotle, *supra* note 807, at 513 (“The minute accuracy of mathematics is not to be demanded in all cases . . .”).

913. WHITEHEAD, *supra* note 805, at 12.

914. The law is made primarily, but it is also found, as Fuller notes:

[A judge ought to realize] his responsibility to see that his decision was *right*—right for the group, right the in light of the group’s purposes and things that its members sought to achieve through common effort. Such a judge would find himself driven into an attempt to discover the natural principles underlying group life, so that his decision might conform to them. He would properly feel that he, no less than . . . engineers . . . [c]arpenters, and cooks . . . was faced with the task of mastering a



that Aristotle's substance has disappeared from *physics*, there is nothing wrong . . . in thinking anthropomorphically about *man*; and there is no philosophical or *a priori* reason why it should disappear from psychology."<sup>915</sup> Bacon also recognized the utility of the Aristotelian concept of "final cause" or "purpose" in the "intercourse of man with man."<sup>916</sup> Rightly, Justice Holmes, a skeptic about objective truth from an essentialist's perspective, thought "general purpose . . . more important . . . than . . . grammar or formal logic" in fixing a meaning.<sup>917</sup> To be sure, as Mill observed, definition, though guided by human purpose, must reflect not only things as they are (at least as known by persons) but also as they "should be."<sup>918</sup> Law is, however, practical, not speculative; it concerns action, not belief. At the time of the founding of the United Nations, Jacques Maritain, a convinced Thomist, put it well: "The ideological agreement which is necessary between those who work . . . [for] peace . . . is restricted to a certain body of *practical* points and principles of *action*. . . . [No one] is . . . entitled to demand that others subscribe to his own [ultimate] justification of the *practical* principles . . . ."<sup>919</sup>

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segment of reality and of discovering and utilizing its regularities for the benefit of the group.

[Law] is a combination of reason and fiat . . . ; in part the discovery of an order and in part the imposition of an order. In the language of legal philosophy . . . it [is] . . . a system of "positive law" that approaches to an indefinite degree "natural law."

Fuller, *supra* note 15, at 378–79 (alteration in original).

915. POPPER, *supra* note 804, at 81 n.26.

916. Bacon, *supra* note 828, at 137; *see also* LON L. FULLER, *THE MORALITY OF LAW* 145 (2d ed. 1969) ("[L]aw [is] . . . a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals."); POPPER, *supra* note 804, at 105–06 n.17 ("[O]ne might adopt the view that certain *things of our own making*—such as clocks—may well be said to have 'essences,' viz. these 'purposes' (and what makes them serve these 'purposes'). And science . . . *might* . . . be claimed by some to have an 'essence,' even if they deny that natural objects have essences.").

917. *United States v. Whitridge*, 197 U.S. 135, 143 (1905). Similarly, Judge Learned Hand, a skeptic about objective truth from an essentialist's perspective, thought "purpose . . . [was] the surest guide to . . . meaning . . . ." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945); *see* LEARNED HAND, *THE SPIRIT OF LIBERTY* 24 (1959) (skepticism is the teaching of "experience"). *But see* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539–43 (1947) ("That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statute as read in the light of other external manifestations of purpose. . . . While courts are no longer confined to the language, they are still confined by it.").

918. MILL, *supra* note 868, at 117.

919. Jacques Maritain, *Inaugural Address to the Second International Conference of UNESCO*, in *THE SOCIAL & POLITICAL PHILOSOPHY OF JACQUES MARITAIN* 144, 154

¶25. Technically, definitions serve several linguistic functions for the lawyer.<sup>920</sup> They reflect linguistic usage or seek to create it.<sup>921</sup> “Usage” is “the collective speaking and writing habits of a particular group of people, or a particular one of these habits.”<sup>922</sup> Lexical definitions “assert a meaning corresponding to actual usage in the given speech community.”<sup>923</sup> “Speech community” is a “group of people who regularly interact by speaking.”<sup>924</sup> Stipulative definitions differ from actual usage; they attempt to shape language usage.<sup>925</sup>

¶26. Definitions are of several types. Definition may be by a synonym or a paraphrase that is thought presumably to be more clear to the speech community for whom the definition is drafted. “Fracture,” for example, means “break.”<sup>926</sup> Such definitions are not, however, often employed in legal materials.<sup>927</sup> Definition may be by analysis; that is, a set is identified and the expression is defined by set and subset and the features that distinguish the set and the subset.<sup>928</sup> Definitions may also be by synthesis; the expression is defined by its

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(Joseph W. Evans & Leo R. Ward eds., 1956) (emphasis added). See generally MARY ANN GLENDON, *A WORLD MADE NEW* 51, 77–78, 147, 230 (2001) (Glendon describes Maritain’s pivotal role in the adoption of the Universal Declaration of Human Rights and quotes him explaining how people with violently opposed ideologies could agree on a list of fundamental human rights: “Yes, we agree about the rights but on condition no one asks us why.”); RALPH MCINERNEY, *AQUINAS ON HUMAN ACTION* 207–19 (1992) (arguing (1) that Maritain’s point, if valid, shows that “embedded in everyone’s practical knowledge are certain truths, and they have bubbled to the surface in the declaration, despite the wild and various theoretical constructs that might be brought forward to justify them” and (2) that “human rights,” as articulated today are subject famously to the criticism, as in the case of Edmund Burke, because they are “abstract,” that is, unrelated to concrete human experience, “not adapted to the real world” where judicial decisions are made. Since human rights must be so adapted, they are illusory, and they are “impostures.” They pretend to be “universal,” but, as Karl Marx showed, they were used by the bourgeoisie to triumph over the nobles and the poor in France after 1789. Human rights conflict one with another (men with women, parents with children, etc.); accordingly, the classical doctrine of *ius naturale* is superior to the articulation of “human rights” today.) (relying, in particular, on MICHEL VILLEY, *LE DROIT ET LES DROITS DE L’HOMME* (1983) and Michel Villey, *Critique des Droits de l’Homme*, 12 *ANNALES DE LA CATEDRA FRANCISCO SUAREZ*, at 9–16 (1972)). See also *Romans* 2:15 (“the demands of the law are written in their hearts”).

920. See generally DICKERSON, *supra* note 233, at 98–111.

921. See *id.*

922. R.L. TRASK, *KEY CONCEPTS IN LANGUAGE AND LINGUISTICS* 330 (1999).

923. DICKERSON, *supra* note 233, at 99.

924. TRASK, *supra* note 922, at 285.

925. DICKERSON, *supra* note 233, at 99.

926. *Id.*; see PALMER, *supra* note 911, at 3–4.

927. DICKERSON, *supra* note 233, at 99.

928. *Id.*; see, e.g., 18 U.S.C. § 1961(6) (1994) (definition of “debt” within RICO).

relation to something of which it is a part.<sup>929</sup> “Carburetor,” for example, “means a part of a motor vehicle.”<sup>930</sup>

¶27. As illustrated, these two definitions by analysis or synthesis are “connotative.”<sup>931</sup> They are also “exhaustive” (that is, the definition gives the full sweep of the expression).<sup>932</sup> A definition may also be “denotative”; it may define, not by set and subset and particular characteristics, but by listing all or some of the things to which the expression refers.<sup>933</sup> The logical distinction between “connotative” and “denotative” is also sometimes put as “sense” and “reference” or “intentional” and “extensional.”<sup>934</sup> Denotative definitions, too, may be exhaustive “means” or partial or illustrative “includes.”<sup>935</sup>

¶28. Finally, a definition may also be an explication; while the definition retains the core meaning of the expression, it extends or restricts it to achieve a particular objective in the context in which it is used.<sup>936</sup>

929. DICKERSON, *supra* note 233, at 99–100.

930. *Id.* at 100.

931. *Id.* (definition by “significant characteristics”); see MILL, *supra* note 868, at 36–37 (“attributes”).

932. DICKERSON, *supra* note 233, at 99–100; see *Helvering v. Morgan’s, Inc.*, 293 U.S. 121, 125 n.1 (1934) (distinguishing “means” from “includes”).

933. DICKERSON, *supra* note 233, at 100; see MILL, *supra* note 868, at 108 (“imperfect” definition).

934. PALMER, *supra* note 911, at 29, 190–92.

935. *Helvering*, 293 U.S. at 125 n.1; DICKERSON, *supra* note 233, at 100. Compare 18 U.S.C. § 1961(1) (1994) (definition of “racketeering activity” as “means” within RICO, 18 U.S.C. § 248(e)(3) (1994); definition of “intimidate” as “means” within Extortionate Extension of Credit Act (“ECT”)), and 18 U.S.C. § 891(6) (1994) (definition of “extortionate extension of credit” as “is” within ECT), with 18 U.S.C. § 1961(4) (1994) (definition of “enterprise” as “includes” within RICO); 18 U.S.C. § 248(e)(1) (1994) (definition of “facility” as “includes” within ECT), and 18 U.S.C. § 891(4) (1994) (“repayment of any extension of credit” as “includes” within ECT).

936. See, e.g., 18 U.S.C. § 1961(5) (definition of “pattern of racketeering activity” within RICO as not, “means,” or “includes,” but “requires”); see MILL, *supra* note 868, at 90 (“What would otherwise be a mere description may be raised to the rank of a real definition by the peculiar purpose which the . . . writer has in view . . . [I]t may . . . be advisable to give some general name, without altering its denotation, a special connotation, different from its ordinary one.”). But see PALMER, *supra* note 911, at 205 (Control of definition lies with technical speakers, but the “ordinary speakers of a language cannot do this, for the definition of a word is not within the individual’s power.”).

## APPENDIX B

## NATURAL LANGUAGE: GENERALITY, AMBIGUITY, AND VAGUENESS

¶1. Natural language is adequate for most forms of communication. Typically, oral speech between a speaker and a listener who are face to face is occasioned by the constant give and take of question and answer that makes most oral speech an effective form of communication. Only when precision, not essential in most everyday matters, is required do the inherent defects of natural language come to the forefront. These defects are also compounded when the form of the communication is written and when the writer and the reader are separated by time and space, since the separation makes it difficult, if not impossible, to ask clarifying questions. But since the limitations of writing, including the separation of time and space, are characteristic of most forms of legal communication, an appreciation of the major defects of natural language facilitates legal analysis and communication.

¶2. Reed Dickerson in his classic *The Fundamentals of Legal Drafting* identifies for the lawyer the major defects of natural language: generality, ambiguity, and vagueness.<sup>937</sup> A term is “general” when it is not limited to a unique referent; that is, it can denote more than one member of a class. “President George Washington” refers, for example, to the first president of the United States; the phrase is singular.<sup>938</sup> “President of the United States” refers to *all* of presidents past and future; the phrase is general.<sup>939</sup> It may be indefinite in meaning, but it is not uncertain in reference.<sup>940</sup>

937. DICKERSON, *supra* note 233, at 22–23; *see also* REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 43–53 (1975).

938. I. JOHN LYONS, *SEMANTICS* 178 (1971); *see also* Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 (1989) (citing *Raffles v. Wichelhaous*, H. & C. 906, 159 Eng. Rep. 375 (1864)). Holmes noted:

By the theory of our language, while other words may mean different things, a proper name means one person or thing and no other. . . . In theory of speech your name means you and my name means me [even if we have the same name], and the two names are different. [We admit parol evidence of the use of the same words to refer to two different things to] inquire what . . . [a person] meant in order to find out what he has said. It is on this ground that there is no contract when the proper name used by one party means one ship, and that used by the other means another.

*Id.*

939. LYONS, *supra* note 938, at 178.

940. *Id.*

Lawyers are wont, however, to confuse generality with vagueness or ambiguity.<sup>941</sup> Thus, the key distinction is that generality alone is not uncertain in meaning, while ambiguity and vagueness are always characterized by uncertainty of meaning.

¶3. Ambiguity is equivocation; that which is ambiguous possesses two or more appropriate referents. Ambiguity is of three types: (1) semantic or verbal ambiguity, (2) syntactical ambiguity and (3) contextual ambiguity.<sup>942</sup> Semantic or verbal ambiguity is present where one word or phrase possesses two or more equally appropriate referents. “Willfully” is, for example, hopelessly ambiguous until disambiguated by authoritative construction.<sup>943</sup>

¶4. Syntactical ambiguity is present when it is not certain which word or words a word or phrase modifies.<sup>944</sup> For example, “[w]hat . . . does ‘knowingly’ modify in a sentence from a ‘blue sky’ law criminal statute punishing one who ‘knowingly sells a security without a permit’ . . . [?]”<sup>945</sup> As a matter of grammar, the sentence is, at least arguably, ambiguous; the uncertainty rests in which terms, if any, beyond the verb (“sell”) in the predicate “knowingly” modifies (to “security,” “without a permit,” both, or neither).<sup>946</sup>

941. *See, e.g.*, *Sedima, S.P.R.L. v. Imrex, Inc.*, 473 U.S. 479, 499 (1985) (“The fact that RICO has been applied in situations not expressly anticipated by Congress[, that is, beyond organized crime to legitimate businesses,] does not demonstrate ambiguity. It demonstrates breadth.” (quoting *Haroco, Inc. v. American Nat’l Bank and Trust Co. of Chi.*, 747 F.2d 384, 398 (7th Cir.), *aff’d*, 473 U.S. 606 (1984))).

942. DICKERSON, *supra* note 233, at 22–27; F.R. PALMER, SEMANTICS 38, 106–08 (2d ed. 1981).

943. *Compare* *Browder v. United States*, 312 U.S. 335, 341–42 (1941) (“willfully” construed to mean “intentionally” instead of “accidentally”), *with* *United States v. Murdock*, 290 U.S. 389, 394–96 (1933) (“willfully” construed to mean “done with a bad purpose”). *See generally* *United States v. Bryan*, 524 U.S. 184, 191 (1999) (“The word ‘willfully’ is . . . ‘a word of many meanings’ whose construction is . . . dependent on the context in which it appears.” (citation omitted)). *Bryan* surveys the various meanings of “willfully,” including deliberately, not accidentally, but in the criminal law, typically with a culpable state of mind, usually with a bad purpose, that is, knowing the conduct was unlawful; without justifiable excuse; stubbornly, obstinately, or perversely; without ground for believing the conduct is lawful or at least in a careless disregard whether or not the person has the right to act. *See also* AMERICAN LAW INSTITUTE PROCEEDING 160 (1955) (“Judge [Learned] Hand: [‘Willfully’] is an awful word! It is one of the most troublesome words in a statute that I know. If I were to have [an index of words to be] purged, ‘willfully’ would lead all the rest in spite of its being at the end of the alphabet.”).

944. DICKERSON, *supra* note 233, at 25.

945. LAFAVE, *supra* note 56, at 227.

946. *Id.* But see Michael Vitiello, *Does Culpability Matter?: Statutory Construction Under*

Unfortunately, courts and judges do not always acknowledge the presence of this sort of syntactical ambiguity nor do they consistently act upon it.<sup>947</sup>

Other examples may be given.<sup>948</sup> “Squinting modifiers” are common: “The trustee shall require him *promptly* to repay the loan.” Does “promptly” modify “require” or “repay”? Even more common are modifiers that precede or follow a series: “charitable corporations

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42 U.S.C. Sec. 6928, 6 TUL. ENVTL. L.J. 187, 220 n.207 (1993) (Vitiello discusses “adjuncts,” or adverbial phrases, and concludes that in a semantically parallel sentence, transposed to the LaFave illustration, in normal grammar, the adverb (“knowingly”) is a “predication adjunct” composed of the adverb and *all* of the elements of the predication. In other words, the sentence could be rewritten without changing the meaning: “Knowing that he is acting without a permit and is selling a security, the person sells the security.” Briefly, the adverb modifies *all* elements of the elements of the predication. (citing RANDOLPH QUIRK ET AL., A COMPREHENSIVE GRAMMAR OF THE ENGLISH LANGUAGE 504–14 (1985))). Vitiello’s reading of the grammar of the sentences involving state of mind and predication concludes that they would not be syntactically ambiguous, but contextually ambiguous. That is, such sentences would be ambiguous until they were disambiguated by relevant background assumptions of the federal criminal law on state of mind and elements that serve grading, jurisdictional, and legal functions in the statement of the elements of federal offenses. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 72 n.3 (1996) (elements of an offense that serve solely to enhance an offense (e.g., making an assault an aggravated assault in light of the *official* character of the person assaulted), create federal jurisdiction over an offense (e.g., the person assaulted was a *federal* official), and constitutes a legal element (e.g., not the factual character of a work, but that such character is *legally* obscene) need not be encompassed by the offender’s state of mind) (citing United States v. Feola, 420 U.S. 671 (1975) (assaulting a federal officer) and Hamling v. United States, 418 U.S. 87 (1974) (legal character of obscene material))).

947. Compare United States v. Yermian, 468 U.S. 63, 68–75 (1984) (Powell, J., for the Court) (“knowingly” makes statement within the jurisdiction of the United States”; “knowingly” “clearly” does not modify “within the jurisdiction of the United States”); *id.* (Rehnquist, J., dissenting) (because the sentence is ambiguous, it must be disambiguated in light of the principle of lenity that resolves ambiguity in favor of defendants); *and* United States v. X-Citement Video, Inc. 513 U.S. 64, 67–79 (1994) (Rehnquist, C.J., for the Court) (“knowingly” transports “visual depiction of minor in sexually explicit conduct”; despite “most natural reading” limiting “knowingly” to modifying “transports”; “knowingly” modifies “minor” in light of otherwise anomalous results, background assumption of state of mind for offenses, and First Amendment considerations); *id.* (Scalia, J., dissenting) (applying “knowingly” solely to “transports,” and finding that this is “*the only grammatical reading*”); *with* Liparota v. United States, 471 U.S. 419, 425–28 (1985) (Brennan, J., for the Court) (“knowingly” uses coupons “in any unauthorized manner”; “knowingly” modifies “in any unauthorized manner” in light of background assumption of state of mind for offenses and principle of lenity that resolves ambiguity in favor of defendants.); *id.* (White, J., dissenting) (the issue is how far down the sentence “knowingly” runs, and in light of the background assumption that knowledge of the law is not required, it need not be read to modify “in any [*legally*] *unauthorized* manner.” (emphasis added))).

948. See DICKERSON, *supra* note 233, at 25.

or institutions performing educational functions.”<sup>949</sup> Does “charitable” modify both “corporations” and “institutions,” and does “performing educational functions” modify both “institutions” and “corporations”?<sup>950</sup> Criminality often turns on the recognition and resolution of such ambiguities.<sup>951</sup>

¶5. Contextual ambiguities come in two forms: (1) internal ambiguities that arise from an effort to read two words or passages in a document in a coherent fashion, (2) external ambiguities that arise from an effort to read a sentence in light of the context of the situation within which it is written.<sup>952</sup> Internal contextual ambiguities are the usual stuff of legal interpretation.<sup>953</sup> External contextual ambiguities are not so easily resolved. Defining the limits of the context, if any, is crucial, since “the world of experience must of necessity include the sum of human knowledge.”<sup>954</sup> If meaning includes external context, its scope might well be “infinite.”<sup>955</sup> That prospect made some eminent linguists “despair” of determining meaning where external context is included in the equation.<sup>956</sup> In

949. *Id.*

950. See also FRANK PALMER, GRAMMAR 127 (Pelican ed. 1971) (“old men and women”; does “old” modify both “men” and “women?”); GEOFFREY LEECH, PRINCIPLES OF PRAGMATICS 47 (1983) (“we need more public schools”; does “more” modify “public,” as in more open schools, or “schools,” as in more public as opposed to private schools?).

951. See, e.g., *People v. Marrero*, 507 N.E.2d 1068 (N.Y. 1987) (mistake of law defense not available to *federal* correction officer charged with carrying a gun in a social club who argued that he was *legally* authorized to carry it because of exception to the prohibition for a “peace officer” defined as a “correction officers of any *state* correction facility or of *any* penal correctional institution” (emphasis added)). Does “state” modify both “corrections facility” and “any penal institution”? On the identification and resolution of syntactical ambiguities, see Layman Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 833 (1957).

952. DICKERSON, *supra* note 233, at 25.

953. See, e.g., *Reves v. Ernst & Young*, 507 U.S. 170, 177–79 (1993) (Blackmun, J., for the Court) (In interpreting the phrase “to conduct . . . the conduct of such enterprise’s affairs,” the verb “to conduct” and the noun “conduct” should be read similarly. Since “to conduct” normally means “to manage or operate,” so, too, “conduct” means “to manage or operate.”). But see *id.* (Souter, J., dissenting) (the usage is ambiguous; the liberal construction clause of the statute, a “tie breaker,” requires that the broader reading—which defines “to conduct” and “conduct” as behavior—should be adopted). See also TEUN A. VAN DIJK, TEXT AND CONTEXT: EXPLORATIONS IN THE SEMANTICS AND PRAGMATICS OF DISCOURSE 3 (1971) (“the meaning of sentences may depend on the meaning of other sentences . . . in terms of a larger unit, viz that of TEXT”).

954. PALMER, *supra* note 950, at 48.

955. *Id.*

956. *Id.* (referring to Leonard Bloomfield); see LEONARD BLOOMFIELD, LANGUAGE 513 (1933) (“to study the universe in general”).

practice, many linguists working in the field of semantics deal with sentence meaning with “maximally decontextualized systems-sentence.”<sup>957</sup> Nevertheless, linguists also suggest that a distinction can be drawn between “sentence meaning” and “utterance meaning,” that is, “sentence meaning” consists of word meaning plus the grammar of the sentence, while utterance meaning adds to sentence meaning all of the various features of the context of the situation.<sup>958</sup> Thus, the linguistic field of “semantics” is confined to “sentence meaning,” while the linguistic field of “pragmatics” extends to “utterance meaning.”<sup>959</sup> The change in emphasis is from the abstract analysis of words and grammar to the examination of speaking as *purposeful* action in a particular context.<sup>960</sup> Lawyers have

957. LYONS, *supra* note 938, at 590.

958. *Id.* at 643.

959. See LEECH, *supra* note 950, at 14 (“we can correctly describe pragmatics as dealing with utterance meaning, and semantics as dealing with sentence meaning”); see generally VAN DIJK, *supra* note 953, at 167–246.

960. ¶1. See LEECH, *supra* note 950, at 1, 4 (“how language is used in communication,” that is, “to meaning in use, rather than meaning in the abstract”). Different purposes in different contexts, too, give rise to different meanings. *Id.* at 2; see also VAN DIJK, *supra* note 953, at 191 (“A context is not just one possible world-state, but at least a sequence of world-states.”).

¶2. Unfortunately, [“w]e cannot ultimately be *certain* of what a speaker means by an utterance.” LEECH, *supra* note 950, at 30 (emphasis added). A listener must try to identify the pragmatic meaning “of an utterance by forming hypotheses and checking them against available evidence.” *Id.* at 41. He begins with a “default” interpretation, that is, “the interpretation that is accepted *in default of* any evidence to the contrary.” *Id.* at 43. “The observable conditions, the utterance and the context, are determinants of what [a speaker] means by [an utterance]; it is the task of [the hearer] to diagnose the most likely interpretation.” *Id.* at 30. The process is “probabilistic.” *Id.* at 30. “Not all speech acts are performed by uttering sentences whose literal meaning expresses the intended speaker meaning.” JOHN SEARLE, *MIND, LANGUAGE AND SOCIETY* 150 (1999).

¶3. Literal meaning will often be filtered through social conventions other than those of the language itself. The meaning, for example, of “Can you pass me the salt?” will vary depending on the purpose of who is speaking to whom and time and place. *Id.* at 150–51. If it is spoken by a physical therapist to his patient in the therapist’s office, and he seeks to ascertain how well the patient moves his arm at this point in the treatment process, it will be an interrogatory inquiring about ability; its semantic form and its pragmatic meaning will be isomorphic. But if you change the purpose and context, you will change the pragmatic, if not the semantic, meaning of the sentence. If it is spoken at a dinner party, and a guest is seeking to have the host pass the salt shaker so that he may salt his food, its semantic form will be the same, but its pragmatic meaning will be different: “Pass me the salt.” It will be spoken as an interrogatory, but uttered indirectly as an imperative because of considerations of politeness between guest and host. Thus, the “rules” of pragmatics, like the rules of statutory interpretation, are not “constitutive,” but “regulative.” That is, “pragmatic rules” of speech, often called “principles and maxims,” “can be contravened without abnegation of the kind of



activity which they control.” LEECH, *supra* note 950, at 8. In brief, if you do not follow the “rules of politeness” (you tell the host: “Pass the salt.”), you will be impolite, but you will not have failed to speak the English language or to convey intentional meaning. *See also* ALASDAIR MACINTYRE, *AGAINST THE SELF-IMAGES OF THE AGE* 128 (1971):

If I advise, warn, or threaten you, I back up my imperative implicitly or explicitly by giving you reasons for action; and it is the character of the reasons that makes of the imperative a piece of advice rather than a warning or a warning rather than a threat. The tone of voice or the choice of words may convey that what is being uttered is a threat, but what makes a threat a threat is the implicit or explicit answers offered to the questions “And what if I do not?” and “And what if I do?” addressed to the utterer of the imperative.

¶4. *See also* SEARLE, *supra* ¶ 2, at 122–24 (discussion of distinction between constitutive and regulative rules); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947) (“[R]ules of construction are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called axioms of experience.”) (citing *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (“axioms of experience”)).

¶5. Similarly, and more to the point of these materials, “‘If I were you, I’d leave town straight away’ can be interpreted *according to context* as a piece of advice, a warning, or a threat.” LEECH, *supra* note 950, at 24 (emphasis added); *see also supra* note 17 (analytical overview of the materials). The interpretation will vary with who is talking to whom and when and where the speech occurs. The semantic meaning will be the same, but the pragmatic meaning will vary from context to context. But as in the interpretation of legislation, “purpose” will be the key. Meaning is both speaker-relative *and* hearer-relative. When it is speaker-relative, it is the “purpose” of the speaker that determines “intentional” meaning, but no responsible speaker can ignore with whom he is speaking and the context within which he will be heard; thus, meaning is ultimately not “intentional,” but “conventional,” that is, it is hearer-relative; that which the hearer hears determines what is, in fact, said, so long as the listener listens using the usual conventions of the relative speech community. *See* SEARLE, *supra* ¶ 2, at 140 (“The meaning of a sentence is determined by the meaning of the words and the syntactical arrangement of the words in the sentence. But what the speaker means by the utterance of the sentence is, within certain limits, entirely a matter of his or her intentions. I have to say ‘within certain limits’ because you can’t just say anything and mean anything. . . . [s]ince t]he meaning of the sentence is entirely a matter of the convention of the language.”).

¶6. For other authorities, see LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND & THOUGH THE LOOKING GLASS* 67 (Signet ed. 1960) (“‘Then you should say what you mean,’ the March Hare went on. ‘I do.’ Alice hastily replied; ‘at least—at least I mean what I say—that’s the same thing, you know.’ ‘Not the same thing a bit!’ said the Hatter. ‘Why you might just as well say that “I see what I eat” is the same thing as “I eat what I see!”’”), *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, J.) (“purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down”), and *Cabell v. Markham*, 146 F.2d 737, 739 (2d Cir. 1945) (Hand, J.) (“purpose . . . is the surest guide to . . . meaning”), *aff’d*, 326 U.S. 404 (1945). *But see* Frankfurter, *supra* ¶ 4, at 539–43 (“[Purpose] is not drawn, like nitrogen out of the air; it is evidenced in the language . . . as read in light of the external manifestations of purpose. . . . While courts are no longer confined to the language, they are still confined by it.”); *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) (“[Words are not “transparent and unchang[ing]. . . . [They] may vary greatly in color and content according to the circumstances and time in which . . . [they are] used.”); Holmes, *supra* note 938, at 417–20 (“[W]e ask, not what . . . [was] meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used. . . . [to interpret a written contract.] . . . [Similarly,

no choice but to deal with both types of meanings.<sup>961</sup> Indeed, in the federal criminal law, a number of background assumptions act to disambiguate natural language for the purpose of defining criminal offenses. State of mind is, for example, implied in sentences defining serious federal offenses stated in terms of conduct, result, and sanction without expressly indicating a culpable state of mind.<sup>962</sup>

¶6. Understanding the legal concept of “vagueness” is facilitated by looking at two features of natural language: the concept of vagueness itself and the Law of the Excluded Middle. The classic paradox of the “heap” or the “bald man” illustrates the concept of vagueness in natural language. “Each grain of corn makes no sound when dropped, but a *heap* of them does: plucking one hair from a man’s head doesn’t make him bald but continuing the process long enough turns him bald.”<sup>963</sup> Cicero in his classic, *Academica*, puts it well:

[I]n any matter whatsoever—if we are asked by gradual states, is such and such a person a rich man or a poor man, famous or undistinguished, are yonder objects many or few, great or small, long or short, broad or narrow, we do not know at what point in the addition or subtraction to give a definite answer.<sup>964</sup>

In short, natural language is characterized by an irreducible element of “vagueness” in any concept, not in the core but on the edge, where it becomes fuzzy, as day shades into night, and none can mark with certainty the distinctions between day and night at dusk or dawn (unless a measure of time over a set period is agreed

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we] do not inquire what the legislature meant; we ask only what the statute means . . . So in the case of a will . . . [;] that means that [the testator’s written] words must be sufficient for the purpose when taken in the sense in which they would be used by the normal speaker of English under his circumstances.”).

961. See, e.g., E. ALLEN FARNSWORTH, *CONTRACTS* 465–91 (2d ed. 1990) (discussing the various rule of law dealing with written contracts, including the integration of the agreement into written language, determining the meaning of contract terms, the merger of separate agreements into a single agreement, collateral agreements, invalidity, misrepresentation, reformation for mistake or fraud, and the requirements of burdens of coming forward with evidence and persuasion when parol evidence is offered in the context of a written agreement).

962. *Morrisette v. United States*, 342 U.S. 246, 250–63 (1952); see also, *supra* note 644 (discussion of *Morrisette* applying the background assumption of state of mind for serious federal offenses); see *supra* note 90 ¶ 8 (principle of lenity and background assumptions of state of mind in serious federal criminal offenses and that knowledge of the law is not required).

963. MAX BLACK, *THE LABYRINTH OF LANGUAGE* 135 n.35 (1968).

964. CICERO, *ACADEMICA* 93 (Loeb 1951).

upon (24hours)). No amount of hand ringing over its presence will banish “vagueness” from the way we speak with each other in light of our ability to slice off with the concepts of natural language but a piece of the complex reality that we experience in common. We must learn to live with the sort of “vagueness” that is characteristic of natural language.

¶7. Second, the Law of The Excluded Middle must be examined. It is well-illustrated by the classic Paradox of the Liar.<sup>965</sup> Assume that someone says, “I am now lying.” Is he speaking the truth, or not? If his statement is true, then he is lying and thus it is false; but if his statement is false, then he is not lying and hence it is true. If we suppose that the statement is either true or false, then we are forced to conclude that it is both true and false. But it cannot be both, for that would conflict with the Law of The Excluded Middle (between A (true) and -A (not true), no third area can be sandwiched). This law is one of the foundations of all thought, at least according to Aristotle.<sup>966</sup>

¶8. The legal concept of “vagueness” is reflected in our earliest legal materials. At common law, the practice of courts was to refuse to enforce legislative acts that were “too uncertain.”<sup>967</sup> Today, the concept of “vagueness” is embodied in various clauses of the Constitution. If a legislative enactment is “vague,” not in the sense of natural language “vagueness” (fuzzy edges), but in the constitutional sense (no core of meaning at all), it cannot be enforced. The doctrine is rooted in constitutional considerations relating to separations of powers under Article III<sup>968</sup> and fair notice-

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965. See generally ANDRES WEDBERG, A HISTORY OF PHILOSOPHY 131–32 (1982).

966. Aristotle, in 8 GREAT BOOKS, *supra* note 130, at 531 (“There cannot be an intermediate between contradictories.”).

967. LAFAVE, *supra* note 56, at 97. The English Privy Council also voided colonial “laws because they were carelessly written or so garbled as to be absurd.” LAWRENCE M. FRIEMAN, A HISTORY OF AMERICAN LAW 44 (1973).

The classic analysis of the functions of the void-for-vagueness doctrine in the Supreme Court is Anthony Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960), which was an initialed student piece written by now Professor Anthony G. Amsterdam. It is typically cited by name by the Supreme Court, whose subsequent decisions reflect Professor Amsterdam’s brilliant work. See, e.g., *Interstate Circuit Inc. v. Dallas*, 390 U.S. 676, 685 n.11 (1968) (“not suitable for young person” not definitely defined under First Amendment for crime; “vague standards, unless narrowed by interpretation, encourage erratic administration . . .” (citing Amsterdam, *supra*)).

968. U.S. CONST. art. III. In the nineteenth century, the issue tended to be put as a matter of kind; in the twentieth century, the issue is generally seen as a matter of degree.

adequate guidelines under the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>969</sup>

¶19. Vagueness may infect the class of persons within the statute,<sup>970</sup> to the conduct that is made unlawful,<sup>971</sup> or to the sanction to be imposed for a violation.<sup>972</sup> Conduct may not be made criminal, the Court holds, under a “statute sweeping in a great variety of conduct under a general and indefinite characterization and leaving to the executive and judicial branches too wide a discretion in its application.”<sup>973</sup> “[A]scertainable standards of guilt” are,

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*Compare* United States v. Reese, 92 U.S. 214, 220–21 (1875), *with* United States v. Evans, 333 U.S. 483, 468–87 (1948). Justice Holmes put it well for the modern mind: “Most differences are [only one of degree] when nicely analyzed.” *Rideout v. Knou*, 19 N.E. 390, 392 (Mass. 1889). Justice Cardozo’s point needs to be made, too. *See Sweeting v. America Knife Co.*, 123 N.E. 82, 83 (N.Y. 1919) (Cardozo, J.) (“Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy.”), *aff’d*, 250 U.S. 596 (1919).

969. *See, e.g.*, *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1951) (The Court found that a “crime involving moral turpitude” within immigration act for deportation definite under criminal standard as applied to conspiracy to defraud. “The essential purpose of the ‘void-for-vagueness’ doctrine is to warn individuals of the criminal consequences of their conduct. . . . [C]riminal statutes which fail to give due notice that an act has been made criminal before it is done are . . . deprivations of due process of law.” (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939))). The corollary of fair notice to the defendant is the requirement of a guiding standard for law enforcement. Indeed, “the more important aspect of the vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.’” *Kolender v. Lawson*, 461 U.S. 352, 358–59 (1983). *See generally*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (The Court held that the human rights act prohibiting exclusion of women was not vague or over broad. “The void-for-vagueness doctrine . . . requires that the government articulate its aims with a reasonable degree of clarity[,] ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination of the administration of the laws, enable[s] individuals to conform their conduct to the requirements of law, and permits meaningful judicial review.” (citations omitted)).

970. *Lanzetta*, 306 U.S. at 453.

971. *Winters v. New York*, 333 U.S. 507, 509, 519 (1948).

972. *United States v. Evans*, 333 U.S. 435, 486–87 (1948). *But see* *United States v. Batchelder*, 442 U.S. 114, 124–25 (1979) (vagueness not present where two statutes—each with a different penalty—apply, since defendant knows the maximum, and no more doubt is present than when a statute permits alternative punishments).

973. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (common law offense of breach of peace void for vagueness under First Amendment as applied to peaceful distribution of religious tracts). A broad statute is not made vague, however, merely because conduct not previously adjudicated to be within it—an unresolved possible interpretation—is held to violate it, absent some previous indication the conduct might be outside its scope, since the defendant had notice his conduct might be within the statute. *Rose v. Locke*, 423 U.S. 48, 50–53 (1975) (“crime against nature” definite as applied for crime of forcible cunnilingus). But an

therefore, required.<sup>974</sup>

¶10. Nevertheless, constitutional vagueness is, like natural language vagueness, a question of degree. “Condemned to the use of words, we can never expect mathematical certainty from our language.”<sup>975</sup> Accordingly, “the Constitution does not require impossible standards.”<sup>976</sup> “[T]he law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.”<sup>977</sup> Vagueness is not established simply because it is difficult to determine if certain marginal<sup>978</sup> or hypothetical<sup>979</sup> cases fall within a statute.

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unforeseeable judicial enlargement, which raises the specter of retroactive lawmaking, of a criminal statute, narrow and precise on its face, violates the Due Process Clause. *Bowie v. Columbia*, 378 U.S. 347, 352 (1964).

974. *Winters*, 333 U.S. at 515; *Connally v. General Const. Co.*, 269 U.S. 385, 392 (1926).

975. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

976. *United States v. Petrillo*, 332 U.S. 1, 7–8 (1948). The constitutional doctrine of vagueness “is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” *Colten v. Kentucky*, 407 U.S. 104, 110 (1972); *see United States v. Lanier*, 520 U.S. 259, 267–71 (1997) (“constitution” in civil rights statute is not impermissibly vague where applied in criminal prosecution for assault and coerced sexual battery by state judge; particulars may be defined by court of appeal; permissible application if distinctions give reasonable warning; no conflict between prosecution to uphold one right that presses on the domain of another right).

977. *Nash v. United States*, 229 U.S. 373, 377 (1913) (Holmes, J.) (parallels to criminal homicide and its various decrees support unduly restricting competition under judicial construction of Sherman Act definite for crime).

The mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct.

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[S]tatutory provision [for willful tax evasion is not] . . . a trap for those who act in good faith. A mind intent upon willful evasion is inconsistent with surprised innocence.

*United States v. Ragen*, 314 U.S. 513, 523–24 (1942) (not “reasonable” allowance for salaries definite for crime of “willfully,” i.e., in bad faith, engaging in tax evasion (citing *Nash*, 229 U.S. 373)).

978. *United States v. Powell*, 423 U.S. 87, 92, 93–94 (1975) (Rehnquist, J.) (The Court ruled that mailing “firearms capable of being concealed on the person” applied to sawed-off shotgun definite for crime. “[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts’ . . . . While doubts as to the applicability of the language in marginal fact situations may be conceived . . . the statute gave respondent adequate warning [about the shotgun] . . . .” (quoting *United States v. Mazurie*, 419 U.S. 544, 550 (1975) and citing *Nash*, 229 U.S. 373 (matter of degree permissible) and *Petrillo*, 332 U.S. 1 (could have drafted clearer not determinative))).

¶11. Aspects of the constitutional vagueness jurisprudence produce intellectual conundrums like the Liar's Paradox.<sup>980</sup> No statute may, of course, be read in isolation. Gloss is a crucial part of it.<sup>981</sup> Gloss includes constitutional doctrine.<sup>982</sup> Accordingly, all statutes must be read in light of the void-for-vagueness doctrine. A statute's validity also depends on the application of the doctrine to the statute. But the void-for-vagueness doctrine, which determines the statute's validity, is itself "indefinite."<sup>983</sup> Accordingly, all statutes, like the doctrine itself, are "indefinite." As such, the doctrine is self-contradictory.

¶12. Obviously, "nonsense" is to be avoided in resolving both the classic Liar's Paradox and in applying the void-for-vagueness doctrine. In short, legal language, like natural language, contains an irreducible degree of vagueness.<sup>984</sup> But lines must be drawn.<sup>985</sup> As Justice Holmes noted, only a "tyro thinks to puzzle you by asking where you are going to draw the line," as if the question itself were a valid objection to the need to draw a line or to the possibility of drawing it.<sup>986</sup> Despite vagueness, communication occurs—at least for most practical purposes, legal and otherwise. "The law is administered," as Justice Holmes said, "by able and experienced men, who know too much to sacrifice good sense to a syllogism."<sup>987</sup>

[W]e [are] entitled to incorporate, in a language containing vague terms . . . the Law of the Excluded Middle . . . [but s]ince vague terms occur in all regions of speech, with the possible exception of pure logic and mathematics . . . when we do it we [are justified only if we recognize that] we anticipate a precise formulation of the

979. *United States v. Harris*, 347 U.S. 612, 618 (1954).

980. WEDBERG, *supra* note 965, at 132.

981. *Winters v. New York*, 333 U.S. 507, 514–15 (1948) ("construction fixes meaning").

982. *Dennis v. United States*, 314 U.S. 494, 508–09 (1954) (clear and present danger test read into Smith Act).

983. *Winters*, 333 U.S. at 524 (Frankfurter, J., dissenting)

984. See generally Max Black, *Reasoning with Loose Concepts*, 1 DIALOGUE 1–2 (1963–64).

985. *Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J.) ("[T]he great body of the law consists in drawing such lines . . ."); *Dominion Hotel v. Arizona*, 249 U.S. 265, 269 (1919) (Holmes, J.) ("If . . . the distinction is justifiable, . . . the fact that some cases . . . are very near to the line, makes it none the worse.").

986. Holmes, *supra* note 178 ¶ 7, at 232–33 (1921).

987. *Id.* at 32.

terms of our language which has not yet been, and most probably never will be, carried out.<sup>988</sup>

To avoid nonsense, therefore, the void-for-vagueness doctrine must be applied only in a principled fashion.

¶13. The question, of course, is always which principle. One principle—at least—ought to be beyond the pale: individual expediency.<sup>989</sup> The application of the void-for-vagueness doctrine ought to turn on more than either dry logic or expediency. Neutral principles are required.<sup>990</sup> A particular result must not be merely pleasing to “those . . . among us who, vouching no philosophy to warrant, frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interest or the values they support.”<sup>991</sup>

¶14. The test for constitutional vagueness is usually framed in terms of the perspective of “men of common intelligence,”<sup>992</sup> person of “ordinary intelligence,”<sup>993</sup> or the “average man.”<sup>994</sup> On the other hand, “such language cannot be accepted at face value.”<sup>995</sup> In fact, words may be definite if they have well-settled common law

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988. WEDBERG, *supra* note 965, at 135.

989. *Terminiello v. City of Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J. dissenting) (The Supreme Court ought not “sit like a kadi under a tree dispensing justice according to considerations of individual expediency.”).

990. Wechsler, *supra* note 7, at 11 (“criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will”).

991. *Id.*

992. *See, e.g., Connally v. Gen. Constr. Co.*, 269 U.S. 386, 391 (1926).

993. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982).

994. *Cline v. Frank Dairy Co.*, 274 U.S. 445, 464 (1972). The test for vagueness is, of course, different in a purely civil context, where conduct inconsistent with the standard of the statute does not warrant the imposition of a criminal penalty. *See, e.g., National Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998) (Awards of financial support may be limited by “considerations of decency” and the “diverse beliefs and values of the American people”; facial challenge on First Amendment ground rejected without a showing of a substantial risk of suppression of free expression; “although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake.”); *see also Reno v. ACLU*, 521 U.S. 844, 864–69 (1997) (Communications Decency Act of 1996 designed to protect children under eighteen from “indecent transmissions” and “patently offensive display” over the Internet abridges First Amendment freedoms; the vagueness of undefined terms in content-based regulations enforced with criminal penalties raises First Amendment concerns because of the chilling effect on free speech).

995. LAFAVE, *supra* note 56, at 92.

meaning<sup>996</sup> or if they would be clear to any of a more narrow class of persons to whom they are directed.<sup>997</sup> Statutes are read not merely on their face, but in light of “limiting construction.”<sup>998</sup> Less clear notice is required when the person engages in commercial activity<sup>999</sup> or acts with mens rea.<sup>1000</sup>

¶15. Apart from First Amendment considerations,<sup>1001</sup> statutes are judged in light of the defendant’s conduct.<sup>1002</sup> If he “engages in some conduct that is clearly proscribed[, he] cannot complain of the vagueness of the law as applied to the conduct of others.”<sup>1003</sup> “The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague . . . ‘in the sense that no standard of conduct is specified at all.’ . . . Such a provision simply

996. *Connally*, 269 U.S. at 391 (citing *Nash v. United States*, 229 U.S. 373 (1913)).

997. *Id.* (citing *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925) (“Kosher” meat)).

998. *Kolender v. Lawson*, 461 U.S. 352, 355 (citing *Village of Hoffman Estates*, 455 U.S. 489 (1982)).

999. *Id.* at 359 n.8 (citing *Village of Hoffman Estates*, 455 U.S. 489); *Hygrade Provision Co.*, 266 U.S. at 502. To be sure, commercial speech may be protected by the First Amendment, but the “State may deal effectively with false, deceptive, or misleading sales techniques. The State may also prohibit commercial speech related to illegal behavior.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (prohibition of mailing contraceptive advertisement contravenes First Amendment).

1000. *Village of Hoffman Estates*, 455 U.S. at 499 (“a scienter requirement may mitigate a law’s vagueness”); *United States v. Ragen*, 314 U.S. 513, 523–24 (1942); *Hygrade Provision Co.*, 266 U.S. at 501 (intent to defraud) (“not required to act at their peril, but only to exercise their judgment in food faith”). Vagueness is thus compounded by strict liability. *Colaotti v. Franklin*, 439 U.S. 379, 392–97 (1979).

1001. *Village of Hoffman Estates*, 455 U.S. at 495 (citing *United States v. Mazurie*, 419 U.S. 544 (1975)); see *supra* note 137 (discussing different standards in different areas of the law, including the First Amendment).

1002. *Village of Hoffman Estates*, 455 U.S. at 495 (citing *Mazurie*, 419 U.S. 544); see *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (Absent First Amendment considerations, statutes are judged “in light of the facts of the case at hand; the statute is judged on an as applied basis.” (citing *United States v. Powell*, 423 U.S. 87 (1975)); *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984) (“outside the limited First Amendment context, a criminal statute may not be attacked as overbroad”).

While facial attacks under the First Amendment may be entertained, they do not necessarily result in holdings of facial unconstitutionality; the “normal rule . . . [of] partial, rather than facial . . . [invalidity] is the required course.” *Brockett v. Spokane Arcades Inc.*, 472 U.S. 491, 503–04 (1985).

1003. *Village of Hoffman Estates*, 455 U.S. at 495 (citing *Mazurie*, 419 U.S. at 550) (“Indian” and “community” definite for crime in context of liquor distribution. “It is well-established that vagueness challenges to statutes which do not involve First Amendment freedom must be examined in light of the facts of the case at hand.”).



has *no* core.”<sup>1004</sup> Accordingly, for example, statutes are upheld prohibiting the coercion of employers to hire “unneeded” employees,<sup>1005</sup> forbidding undue or unreasonable “restraint of trade,”<sup>1006</sup> making it unlawful to build fires “near” any forest or inflammable material,<sup>1007</sup> banning the receipt of contributions by members of Congress from federal employees for any “political purpose,”<sup>1008</sup> copying of documents connected with “national defense,”<sup>1009</sup> excessive charges in connection with loans except for “ordinary fees,”<sup>1010</sup> and misstatement of the contents of packages, subject to “reasonable variations.”<sup>1011</sup>

¶16. Today the void-for-vagueness doctrine’s scope, rationale, and function in Supreme Court jurisprudence are well-settled. Once it was used along with now-discredited Substantive Due Process reasoning to strike down economic regulation.<sup>1012</sup> Now the Supreme

1004. *Village of Hoffman Estates*, 455 U.S. at 495 n.7 (quoting *Smith v. Goguen*, 415 U.S. 566 (1974)) (citations omitted).

1005. *United States v. Petrillo*, 332 U.S. 1 (1947).

1006. *Nash v. United States*, 229 U.S. 373 (1913).

1007. *United States v. Alford*, 274 U.S. 264 (1927).

1008. *United States v. Wurzbach*, 280 U.S. 396 (1930).

1009. *Corin v. United States*, 312 U.S. 19 (1941) (with intent to injure United States or advantage a foreign nation).

1010. *Kay v. United States*, 303 U.S. 1 (1938).

1011. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932). Four basic assumptions are integral in any principled effort to interpret a statute:

- (1) legislative supremacy within the constitutional framework;
- (2) the use of the statutory vehicle to exercise that supremacy;
- (3) reliance on accepted means of communication; and
- (4) reasonable availability of the statutory vehicle to those to be governed by it, not only its text, but any other part of its legislative context that serves to give it meaning.

DICKERSON, *supra* note 937, at 7–12.

More than one hundred years ago, the Supreme Court noted, “It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed . . . [By] such a construction [it is possible to annul it and render] it superfluous and useless.” *Pillow v. Roberts*, 54 U.S. (13 How.) 472, 476 (1851) (Grier, J.). Such an approach to statutory construction, however, carries with it a heavy price. After a lifetime of study of the law, Dean Roscoe Pound concluded that such construction (1) “tend[ed] to bring law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invit[e]d an arbitrary personal element in judicial administration.” 3 ROSCOE POUND, *JURISPRUDENCE* 488 (1959). It threatened, he found, to make all “law . . . worth little” and to “break down” the “legal order” itself. *Id.* at 490.

1012. *Amsterdam*, *supra* note 967, at 74 n.38 (“The void-for-vagueness doctrine was born in the reign of substantive due process and throughout that epoch was successfully urged exclusively in cases in regulatory or economic-control legislation.”). John Austin argues in his

Court uses it principally to protect First Amendment freedoms and to circumscribe police discretion in the enforcement of legislation designed to give to the police the power to control the public streets.<sup>1013</sup> It is not often used to strike down general criminal legislation, particularly in the economic area, or where such legislation applies only to those who have to act with an appropriate state of mind and whose conduct is judged on an “as applied” basis.

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HOW TO DO THINGS WITH WORDS 94–108 (2d ed. 1975) that “statements” may be analyzed as “acts”: what is *said* (“locutionary” act), *meant* (“illocutionary” act), and *done* (“perlocutionary” act), or “say,” “mean,” and “do.” These early Supreme Court decisions *said* they were about “vagueness,” but they were in fact about other issues, which are what they *meant*, and that which was *done*. Decisions ought to be more candid about their holdings and their rationales. “Say,” “mean,” and “do” should be isomorphic.

1013. See generally Anthony Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crime of Status Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 CRIM. L. BULL. 205, 216–33 (1967); *City of Chicago v. Morales*, 527 U.S. 41 (1998) (Gang Congregation Ordinance of Chicago too broad and fails to provide minimal guidelines to enforcement personnel; it may be attacked on its face, since it covers the “liberty interest” of the “freedom to loiter”; it does not attack a business interest with a provision for scienter, nor does it have a mens rea requirement).

APPENDIX C  
THE SPEECH OF CHARLES EVERS<sup>1014</sup>

Thank you very much. We want our white friends here to know what we tell them happens to be so. Thank you for having the courage to walk down those streets with us. We thank you for letting our white brethren know that guns and bullets ain't gonna stop us. (No) (No) We thank you for letting our white brothers know that Port Gibson ain't none of their town. (Amen) (Applause) That Port Gibson is all of our town. (Applause) That black folks, red folks, Chinese and Japanese alike (Yeah) (That's right.), that we are going to have our share. (Yeah, we are.) . . .

We are going to beat you because we know you can't trick us no more. (yea) You are not going to be able to fool us by getting somebody to give us a drink of whiskey no more. (Applause) You ain't gonna be able to fool us by somebody giving us a few dollars no more. (Applause) We are gonna take your money and drink with you and then we're gonna (Applause) vote against you. Then we are going to elect a sheriff in this county and a sheriff that is responsible, that won't have to run and grab the telephone and call up the blood-thirsty highway patrol when he gets ready (Yeah) to come in and beat innocent folks down to the ground for no cause. (That's right) (Applause) (Boo) We are going to elect a sheriff that can call his deputies and represent black leaders in the community and stop whatever problem there is. (Yeah) (That's right.)

Then we are going to do more than that. The white merchants of this town are so wrapped up in the power structure here, since you love your Police Department so well, since you support them so well (Yeah), we are going to let them buy your dirty clothes and your filthy, rotten groceries.

Oh, no, white folks, we ain't going to shoot you with no bullet. (That's right.) We are going to shoot you with our ballots and with our bucks. (Yea) (That's right.) We are going to take away from you the thing that you have had over us all these years. (Yeah) Political power and economic power. While you kill our brothers and our sisters and rape our wives and our friends. (Yeah) You're guilty.

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1014. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934-40 (1982) (portions of Charles Evers's speech given on April 19, 1969, quoted in the appendix to the Court's opinion).

You're guilty because you don't care a thing about anybody. (Yes.) And when you go and let a big, black burly nigger like you get on the police force (Yea) go down and grab another black brother's arm and hold it while a white racist stole him from us, and he's a liar if he says he didn't hold him. . . .

We mean what we are saying. We are not playing. (Right) We better not even think one of us is black. You better not even be caught near one of these stores. (Applause)

We don't want you caught in Piggly-Wiggly. You remember how he grinned at us four years ago? (Yeah) You know how when he took office he grinned at us? (Yeah) He ain't hired nobody yet. (That's right) (No) And you know old Jitney Jungle down there with those funny letters down on the end? (That's right) (Applause) He haven't hired nobody in there yet. (No) Do you know poor ole M & M or whatever it stands for, mud and mush, I guess. (Applause) They're out here on the highway and they haven't hired none of us yet.

Do you know Ellis who had a part-time boy all his life? He ain't hired nobody, is he, yet? (No) Then we got ole Stampley, and ninety-nine and three-fourths of his sales are black folks business. He got the nerve to tell me he ain't gonna put no nigger ringing his cash register. I got news for you, Brother Stampley. You can ring it your damn self. (Extra loud applause.) I want some of you fat cats after this meeting who wants three of our young boys who ain't a'scar'd of white folks (Applause) (Me) and we want you that's willing to follow the rules now to go down by Brother Stampley's and serve notice on him with our placards that we ain't coming no more.

Then we are going to tell all the young men that drive Piggly-Wiggly trucks now (Yeah) (Be careful, Son.) because the soul brothers and the spirit is watching you. (Extra loud applause.)

All right, Brother Wolf, you're next. (Applause) We got a couple of 'em to come down by Brother Wolf's. We mean business, white folks. We ain't gonna shoot you all, we are going to hit you where it hurts most. (In the pocketbook) (Applause) In the pocketbook and in the ballot box. (Applause) We may as well tell our friends at Alcorn to stay away from up here. (Yea) Now, you say, 'What's wrong with you niggers?' I'll tell you what is wrong with us niggers; We are tired of you white folks, you racists and you bigots mistreating us. (Yeah) We are tired of paying you to deny us the right to even exist. (Tell'em about it.) And we ain't coming back, white folks. (We ain't.)

You all put a curfew on us at eight o'clock tonight. We are going to do you better than that. We are going to leave at one-thirty. (Loud applause) We are going to leave at one-thirty and we ain't coming back, white folks. . . .

We are going to have Brother McCay; we are going to have our newly elected mayor who we elected, we are going to have him around here, too. Come on back, my dear friend. He say, "Naw, brother, we ain't coming." "Have you got rid of all those bigots you got on your police force?" "No." "Have you hired Negroes in all them stores?" "No." "Well, we ain't coming back." (Right) That's all we gonna do. You know, what they don't realize is you put on this curfew, that is all we needed. Let me just give them some instructions. We are going to buy gas only from the Negro-owned service stations. We agreed on it, remember? Now, don't back upon your agreement. (Yea) I don't care how many Negroes working on it, that's too bad. We are going only to Negro-owned service stations. And we are going only—the only time you will see us around on this street, now listen good, you are going to Lee's Grocery and other stores on this end. Is that clear? (Yeah) (Applause)

We don't want to go to none of them drugstores. They get us confused. Now, who am I going to get my medicine from? Let us know in time and we will be glad to furnish a car free to carry you anywhere you have to go to get a prescription filled. You can't beat this. (No) It won't cost you a dime. You go to any of the local black businessmen and tell them you have got to go to Vicksburg to get your stuff. And then if they don't carry you, let us know. We'll take care of them later. (Applause) Now, you know, we have got a little song that says, "This is your thing, do what you want to do." (Applause) This is our thing, let's do what we want to do with it. Let's make sure now—if you be disobedient now you are going to be in trouble. Remember that, now, listen. Listen good. They are going to start saying, "You know what, Evers is down there with his goon squad, . . ." Now, we know Claiborne County,—“with his goon squad harassing poor ole niggers.”

Well, good white folks you have been harassing us all our lives. (Applause) And if we decided to harass you that's our business. (That's right) They are our children and we are going to discipline them the way we want to. Now, be sure you get all this right on all these tape recorders. Whatever I say on this trip I will say it in

Jackson. (Amen) (Glory) And I will say it in Washington and New York. White folks ain't gonna never control us no more. (Applause) . . .

Now, my dear friends, the white folks have got the message. I hope you have got the message and tell every one of our black brothers until all these people are gone, you voted on this in the church, don't let me down, and don't let yourself down. We agreed in the church that we would vacate this town until they have met those requests, the white folks don't demand nothing out of us. All right, white folks, we are just saying until you decide when you want to do these little things we beg of you, we are not coming back. (No way)

None of us better not be caught up here. (Yea) I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. (Applause)

Now, let's get together. Are you for this or against it? (Applause) (For it.) Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here . . .

Let's go to the funeral of our young son whenever the funeral is. I don't want you to come with hate because that is not going to solve our problems. (No hate.) We don't want you to hate the white folks here in Port Gibson. That is not going to solve it. If you hate what they have done, I hate to get personal, I hate what they did so much to Medgar, (I know.) I ain't going to ever stop hating them for that. But I am going to chase them in the way what I know is right and just. I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. (No) That's not right. But I am going to do everything in my power to take away all the power, political power, legal power that they possess anywhere I live. We are going to compete against them. When we blacks learn to support and respect each other, then and not until then, will white folks respect us. (Applause)

Now, you know I trust white folks and I mean every word I say. But it comes a time when we got to make up in our mind

individually, are we going to make those persons worthwhile. We done talked and raised all kind of sand all day here, now, what is really going to prove it, are we going to live up to what we have said? (Applause) Now if there is any one of us breaks what we agreed upon, you are just as guilty as that little trigger-happy, blood-thirsty rascal. (Tell 'em about it.) . . .

I go all over this country, and I ought not to tell you white folks this, and I tell other white folks that some day we are going to get together in Mississippi, black and white, and work out our problems. And we are ready to start whenever you are. If you are ready to start, we are. We ain't going to let you push us, not one inch. (That's right.) If you come on beating us, we are going to fight back. (Right) We got our understanding. We are all God's children. The same man that brought you all here brought us. You could have been black just like we are. We could have been white and baldheaded just like you are. (Laughter) (Inaudible) We are going to work hard at this, Dan. We are going to be organized this time. We ain't going to be bought off and talked off. We are going to elect the county sheriff here this next time that don't need the highway patrol. Now, you see, Dan had a good chance to set himself up right, but he goofed it. He goofed. (Yeah) He blew it. (Laughter) Don't forget that, heah. (Right) It brings back memories like you know you remember things we do.

Now, if you don't think it is necessary, we don't have to go back to the church. If you want to go back there, we can. I want you to make sure here that we are going to leave this town to our white brothers and we ain't coming back no more until all our requests have been met. Is that the common consent of all of you here? (Applause) (Let's go back to the church.) All right. Are we willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our . . . (Yea) We are all saying it now. Let's not say it now so much on my part. You know, I'm just sort of leading, you know, how these lawyers are, leading our folks on to say what has to be said. And that's the case. Let's make us a white town. We would like for you to start it. Be courteous now. Don't mistreat nobody. Tell them, in a nice forceful way, the curfew is going to be on until they do what we ask them.