

NO HARM, NO FOUL: RECONCEPTUALIZING FREE SPEECH VIA TORT LAW

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In deciding First Amendment cases, courts generally attempt to find distinctions between speech and nonspeech (or between speech and conduct) in order to determine whether government limitations on speech are appropriate. This analysis, however, is misguided, because whether such limitations are or are not upheld nearly always depends upon whether the conduct does or does not do harm. Recognizing this—and the inherent arbitrariness of speech-nonspeech line-drawing—this Note proposes that attempts at making such distinctions be abandoned. This Note addresses the impact of adopting the harm principle for the criminal law system, and further contends—given the principles underlying our system of civil law—that including so-called moral harms in the list of legitimate bases for state action is untenable.

INTRODUCTION

For many years now, free speech jurisprudence has been focused, albeit implicitly, on John Stuart Mill's "harm principle."¹ Yet the Supreme Court has avoided explicitly justifying speech restrictions on the basis of harm prevention. Rather, speech restrictions are evaluated in the context of judicial determinations about communicative or expressive value. This approach has enabled the Court to avoid the difficult question of the propriety of criminalizing moral harms.²

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¹ JOHN STUART MILL, ON LIBERTY 13 (Charles W. Elliot ed., Barnes & Noble 2004) (1859) ("[T]he appropriate region of human liberty [is] . . . doing as we like . . . without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish, perverse, or wrong."). Literature on Mill's philosophy, the harm principle, and freedom of expression includes Mark Strasser, *Lawrence, Mill and Same-Sex Relationships: On Values, Valuing, and the Constitution*, 15 S. CAL. INTERDISC. L.J. 285 (2006); Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POL. STUD. 410 (1987); and R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

² See *infra* notes 132–34 and accompanying text. Opinion is divided as to whether the Supreme Court, in *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003), ended an era in which exclusively moral justifications sufficed to permit government incursions upon individual

Cases thus far decided, however, suggest that no logical lines can reasonably be drawn to separate speech from nonspeech, content with a message from that without, and expressive acts from nonexpressive ones. If the reasoning of extant cases were followed to a logical end, the First Amendment's protections could extend to all acts with human volition at their root. Nearly all judges and legal theorists, however, reject this conclusion, maintaining that meaningful lines can, in fact, be drawn between expressive and nonexpressive conduct.³ This Note argues that no such lines can be drawn; rather, there should be an expansive definition of speech coextensive with the limits of (free) human agency.

Of course, even with such an expansive understanding, there are often sound reasons to limit speech with the law—for example, when it causes harm. However, most speech does not cause harm in the same way that fists or bullets or even thieves might. Jettisoning the distinction between speech and action thus necessitates an understanding of harm that can account both for those harms specifically arising from “pure” (i.e., verbal) speech and for the types of harm that might obtain from human behavior in general. Such a theory is essential to impose internally consistent limits within the expanded conception of speech-as-action proposed herein.

This Note argues that this theory can be found in our tort law causes of action. Under tort law, only certain types of injuries—typically intrusions upon bodily integrity and economic interests, as opposed to abstract harms to the emotions, ego, psyche, or sensibilities⁴—may properly form the basis for legislative sanction.⁵ Extending this approach to speech would prevent the state from abridging the First Amendment in order to regulate subjective or intangible harms.⁶

liberty. For those who believe that it did, one way to understand the Court's ruling is to posit that, in *Lawrence*, it adopted Mill's harm principle as the touchstone for whether legislation is or is not appropriate. See *infra* note 147 and accompanying text.

³ See *infra* notes 16–22 and accompanying text.

⁴ I do not mean to suggest that the tort of infliction of emotional distress (IED) does not exist. Nor do I mean to question its validity. Rather, as I argue below, for those limited instances in which intentional or negligent IED is found, proving the “emotional” harm done essentially demands a showing of physiological damage or an ongoing incapacity to be economically productive—harms to one's physical or economic dignity, caused by (and masquerading as) emotional harms. See *infra* notes 127–30.

⁵ This Note does not, by and large, attempt to balance the countervailing aims of preventing harm done by speech and allowing that speech to go unabridged. Rather, it seeks to critique determinations of what interests should and should not be allowed into that balance in the first place, and on what terms.

⁶ Derived as they are from an adversarial system pitting private parties against one another, tort law causes of action can be said to capture most accurately the state of affairs that would obtain absent governmentally imposed statutes. I have in mind here something

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This Note will proceed in four parts. Part I describes the existing free speech jurisprudence, highlighting cases in which courts have expanded the legal definition of speech beyond merely spoken words, in accordance, if only implicitly, with Mill's harm principle. I argue that this move away from pure speech and toward other kinds of expression reflects the impossibility of defining speech—or of distinguishing it from conduct—in a rational, meaningful, or predictable way. Part II addresses the proper limitations on speech, concluding that restrictions grounded in moral harms are neither descriptively nor prescriptively appropriate. It is my contention that a combination of Mill's libertarianism and the general categories of modern tort causes of action best describe—and best justify—what restrictions we should admit on speech-as-conduct. Part III considers the result of applying the harm principle to First Amendment cases. Part IV addresses counterarguments and concludes.

I

CURRENT FIRST AMENDMENT JURISPRUDENCE

“Congress shall make no law . . . abridging the freedom of speech”⁷

A. The Scope of the First Amendment's Protection of Speech

The First Amendment's protection of speech is not precisely what it appears to be. Understanding it as a blanket protection for verbal speech is at once overinclusive—because there is a legitimate need to ban certain harmful forms of speech—and underinclusive—because there is good reason to protect much expressive behavior to which the name “speech” might not typically apply. The Court's treatment of the First Amendment tends to be incoherent because it rests on flawed assumptions—most particularly, that expressive conduct can be distinguished from nonexpressive conduct and, consequently, that

akin to the Hobbesian state of nature prior to the creation of the Leviathan. See THOMAS HOBBS, *LEVIATHAN* 91–92 (Richard Tuck ed., Cambridge Univ. Press 1997) (1651) (“And because the condition of Man . . . is a condition of Warre of every one against every one . . . every man has a Right to every thing; even to one anothers body.”). In the criminal context, understanding the Leviathan as a proxy for the vengeance that private actors would otherwise inflict upon one another provides a satisfactory rationale for the mechanisms (and extent) of legal prohibitions and judicial punishment. See *id.* at 126 (“[T]o the Sovereign is committed the Power of Rewarding . . . and of Punishing with corporall, or pecuniary punishment, or with ignominy every Subject”). As the civil context most closely reflects the pregovernmental state of affairs, it seems logical that the harms therein recognizable are those which should inform the harms that our criminal system recognizes. See *infra* Part II.C.

⁷ U.S. CONST. amend. I.

speech can be distinguished from nonspeech. This section will describe the limits placed on speech, the expansion of the definition of speech, and some places in which the Court has refused to recognize certain behavior as speech.

1. *Unprotected Speech*

The text of the free speech clause suggests, first, that it was intended to apply to speaking and, second, that speaking was not meant to be abridged. Such a cramped reading has, however, been rejected. Though many have offered widely divergent interpretations of what speech does, should, or was originally intended to signify, all agree that its meaning is broader than the simple dictionary definition.⁸ Similarly, the few absolutist interpretations of “no law abridging” that have been offered⁹ have been rejected.¹⁰

In the absence of such categorical readings of the First Amendment, our courts have designated various forms of speech as subject to legal proscription. Just within the realm of what might be called pure speech—that is, vocalized words—constitutionally unproblematic laws prohibit conspiracy,¹¹ blackmail,¹² fraud,¹³ defamation,¹⁴ and per-

⁸ One dictionary defines “speech” as “the act of speaking” or “communication or expression of thoughts in spoken words.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2189 (3d ed. 1993). See *infra* Part I.A.2.

⁹ E.g., Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960) (“It is my belief that there *are* ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who . . . meant their prohibitions to be ‘absolutes.’”); Hugo L. Black & Edmond Cahn, *Justice Black and First Amendment “Absolutes”: A Public Interview*, 37 N.Y.U. L. REV. 549, 553–54 (1962) (“I understand that it is rather old-fashioned and shows a slight naivete to say that ‘no law’ means no law. . . . It says ‘no law,’ and that is what I believe it means.”).

¹⁰ The rejection of textual absolutism is evident in precedent from the Supreme Court and lower courts. As Justice Brandeis famously noted: “[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.” *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). For a discussion of First Amendment expressive liberties, see generally Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245 (1961); for a discussion of the positions of Meiklejohn and others, see generally Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1110–41 (1979).

¹¹ See, e.g., *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (affirming conspiracy conviction and noting that First Amendment “while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language” (citing *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897))).

¹² See, e.g., *State v. Robertson*, 649 P.2d 569, 588–89 (Or. 1982), *superseded by statute*, OR. REV. STAT. § 163.275(1)(a) (2007), *as recognized in* *Planned Parenthood, Inc. v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1381 (D. Or. 1996) (expressing “no doubt” that First Amendment did not proscribe laws against blackmail and other forms of extortion).

jury,¹⁵ to name but a few. Moreover, it seems intuitive that one could legally be held to account for damage that is the immediate result of audible speech—for instance, if a soprano broke a glass with a high note or if one person damaged another’s hearing by shouting in his ear.

2. Protected Speech

In *New York Times Co. v. Sullivan*, the Supreme Court declared the First Amendment’s central purpose to be the protection of political dissidence: “The constitutional safeguard . . . ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”¹⁶ To say that something is the “central purpose” of a law, however, should not logically demand that it be the only purpose.¹⁷ Indeed, “[a]lthough the authors

¹³ See, e.g., *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) (“[T]he First Amendment does not shield fraud.”).

¹⁴ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

¹⁵ See, e.g., *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 375 (7th Cir. 1987) (“So too with perjury and fraud in the conduct of litigation; no statute authorizes such tactics, and the first amendment does not protect efforts to defy (as opposed to change) the substantive rule of decision.”).

¹⁶ 376 U.S. 254, 269 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). *Roth*, in declaring obscenity to be “outside the protection intended for speech and press,” 354 U.S. at 483, notes that “[t]he guaranties of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.” *Id.* at 482–83. See generally Harry Kalven, Jr., *The New York Times Case: A Note On “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191 (1964) (discussing outcome and consequences of *New York Times Co. v. Sullivan*).

¹⁷ It is true that arguments have been made for a narrow understanding of the First Amendment’s parameters. Robert Bork argues that the First Amendment should be understood to protect only political speech, which he defines as “criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the conduct of any governmental unit in the country.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 29 (1971). Whether Bork and those partial to his understanding are correct, nearly forty years on, is something of a moot point. The empirical fact that there exists a well-developed body of jurisprudence expanding the free speech clause serves as a sufficient rejoinder to his narrow reading of it. See *infra* notes 20–34 and accompanying text. Alexander Meiklejohn similarly argues that the speech protected by the First Amendment is only political in nature, though his definition of “political” is much broader than Bork’s—it encompasses all “public” speech that enables a citizen-voter to participate adequately in democracy. Meiklejohn, *supra* note 10, at 255–57. As such, Meiklejohn’s conception of political speech comprises so much that would not typically be thought of as being political—“novels and dramas and paintings and poems,” philosophy, science, and the like—that one has to wonder why he feels compelled to hew to the “political speech” label, especially given the uncertain history of both the meaning of the First Amendment and the intent of its writers. *Id.* at 263.

of the First Amendment were concerned with protecting political rather than cultural expression . . . the modern view is different.”¹⁸ Courts have extended the First Amendment’s protective umbrella far beyond acts of political dissent to bring together a wide-ranging set of behaviors under the label “speech.”¹⁹

In contrast, I contend that attributing any purpose to the First Amendment’s protection of speech that is narrower than a defense of individual autonomy against governmental coercion is unsupported and, consequently, that governmental intervention is justifiable only to mediate between the autonomy interests of conflicting individuals. See *infra* Part I.B. C. Edwin Baker proposes a similarly expansive libertarian understanding, rejecting the traditional rationale for the First Amendment—that it protects speech within the “marketplace of ideas”—in favor of a “liberty model,” which “protects noncoercive uses of speech and forbids enforcement of general prohibitions on substantively valued behavior.” C. Edwin Baker, *The Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1028 (1978). Baker, however, remains faithful to Thomas Emerson’s duality of protected *expression* and unprotected *action*, concluding that “the category of protected speech [is] better described as ‘noncoercive’ expressive conduct.” *Id.* at 1040; see generally THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966) (distinguishing expression from action and attempting to formulate consistent approach to First Amendment doctrine based on importance of expression to modern democratic society). I contend that the expressive/nonexpressive distinction is irrelevant; moreover, any justification demanding that protected speech have an instrumental quality is problematic. See *infra* Part I.B. Martin Redish and Thomas Scanlon both provide compelling First Amendment theories grounded in nothing more instrumental than the protection of individual autonomy. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 594 (1982) (“All forms of expression that further the self-realization value, which justifies the democratic system as well as free speech’s role in it, are deserving of full constitutional protection.”); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 206 (1972) (“[By] ‘acts of expression’ . . . I mean to include any act that is intended by its agent to communicate to one or more persons some proposition or attitude. This is an extremely broad class.”); see also William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 112 n.13 (1982) (pointing out that, unlike Second Amendment, “[t]he first amendment does not link the protection it provides with any particular objective”). Explaining the free speech clause on the grounds of individual autonomy seems only more compelling when the guarantee is juxtaposed with the First Amendment’s similar sheltering of religious expression as a defense of individual “liberty of conscience.” See Baker, *supra*, at 1039 (“Because acting as required by conscience or religion is a form of self-expression or an attempt at self-realization it should not be surprising that this solution corresponds to the limits on government implied by the liberty interpretation of the free speech clause.”). See generally Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002) (arguing that freedom of religion was meant to protect liberty of conscience).

¹⁸ *Reed v. Vill. of Shorewood*, 704 F.2d 943, 949–50 (7th Cir. 1983) (internal citations omitted).

¹⁹ See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (“It is no doubt true that a central purpose of the First Amendment ‘was to protect the free discussion of governmental affairs.’ But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection.” (internal citations omitted) (quoting *Abood*, *Id.* at 259 (Powell, J., concurring))); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (“[T]he Constitution looks beyond written or spoken words as mediums of expression. . . . [I]f confined to expressions conveying a ‘particularized message,’ [the First Amendment] would never reach the unquestionably shielded painting of

At present, any absolute correlation that may have once existed between the word “speech” in the Amendment’s text and actual verbal speaking is no longer cognizable: “It is well settled that the First Amendment’s protections extend to nonverbal ‘expressive conduct’ or ‘symbolic speech.’”²⁰ The Court has defined “expressive conduct” as conduct “sufficiently imbued with elements of communication to fall within the scope” of the First Amendment.²¹ It would seem to follow logically that that which manifests “communication”—regardless of its content, quality, or comprehensibility—merits First Amendment protection as the law currently stands.²²

Indeed, the baseline First Amendment protection of speech—provided that such speech does not effect the sorts of harms described above²³—includes, and is not limited to books,²⁴ music,²⁵ movies,²⁶ painting, and sculpture.²⁷ The protection also shields actions that

Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.” (internal citations omitted)).

²⁰ Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108, 1114 n.18 (2005).

²¹ *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam) (emphasis added); Adler, *supra* note 20, at 1114 n.18. This definitional move may be legally cogent, but it is logically unnecessary. It is true that the need for an element of communication is what implicates the First Amendment for the simple reason that “communication” merely demands the presence of a listener, and without a listener, the speech presents no occasion for legal intervention. Without the specter of intervention, discussion of the need for limitations on such intervention is moot.

²² *See, e.g., Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.” (internal citations omitted)).

²³ *See supra* Part I.A.1.

²⁴ *See, e.g., Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (“Because of a profound commitment to protecting communication of ideas . . . both oral utterance and the printed word have First Amendment protection”); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Mass. (Memoirs v. Massachusetts)*, 383 U.S. 413, 428 (1966) (Douglas, J., concurring) (“Publications and utterances were made immune from majoritarian control by the First Amendment”).

²⁵ *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music, as a form of expression and communication, is protected under the First Amendment.”); *Reed v. Vill. of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983) (“If the defendants passed an ordinance forbidding the playing of rock and roll music . . . they would be infringing a First Amendment right even if the music had no political message—even if it had no words” (internal citations omitted)).

²⁶ *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (“[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”).

²⁷ *E.g., Kaplan*, 413 U.S. at 119–20 (noting that First Amendment protects “pictures, films, paintings, drawings, and engravings”); *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988) (“The District Court assumed, without deciding the issue, that [Serra’s sculpture] ‘Tilted Arc’ is expression protected to some extent by the First Amendment. . . . [W]e agree that artwork, like other non-verbal forms of expression, may under

embody *gestural* or *demonstrative* communication: flag burning,²⁸ wardrobe choices,²⁹ protests,³⁰ and both clothed and nude dance,³¹ for instance.³² Most consistently and confidently, courts assert that art of all shapes and sizes falls within the scope of the First Amendment.³³ For instance, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, Justice Souter—without attempting to take on the “What is art?” question—eagerly asserts that Lewis Carroll’s invented words, Arnold Schoenberg’s forays into atonality, and Jackson Pollock’s seemingly haphazard splatterings of paint are “unquestionably” examples of speech “shielded” by the First Amendment.³⁴

some circumstances constitute speech”), *superseded by statute*, 17 U.S.C. § 113(d) (2000).

²⁸ *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (“Johnson’s burning of the flag was conduct ‘sufficiently imbued with elements of communication’ to implicate the First Amendment.” (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam)); *see also* *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 385 (1992) (“[B]urning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.”).

²⁹ *See, e.g., Smith v. Goguen*, 415 U.S. 566, 588 (1973) (White, J., concurring) (“To convict [for sewing the flag onto the seat of one’s pants is] to punish for communicating ideas about the flag unacceptable to the controlling majority in the legislature.”).

³⁰ *See, e.g., Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966) (holding that First Amendment protects black sit-in in “whites only” area); *see also Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 292 (1984) (assuming, without deciding, “that overnight sleeping [in symbolic tent cities] in connection with the demonstration is expressive conduct”).

³¹ *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) (“[N]ude dancing is not without its First Amendment protections from official regulation.”); *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1085 (7th Cir. 1990) (en banc) (“While clearly not all conduct is expression, dance as entertainment is a form of conduct that is inherently expressive.”), *rev’d*, 501 U.S. 560 (1992); *see also infra* note 153. *See generally* Adler, *supra* note 20 (analyzing Supreme Court’s nude-dancing jurisprudence).

³² Cass Sunstein writes:

[C]onstitutional protection has been accorded to most commercial speech; to most sexually explicit speech; to many kinds of libel; to publication of the names of rape victims; to the advocacy of crime, even of violent overthrow of the government; to large expenditures on electoral campaigns; to corporate speech; in all likelihood to hate speech; and of course to flag burning.

Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 260–61 (1992).

³³ *See, e.g., Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (“[T]he Constitution looks beyond written or spoken words as mediums of expression.”); *see also Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 602 (1998) (Souter, J., dissenting) (“It goes without saying that artistic expression lies within . . . First Amendment protection.”); *Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045, 1048 (2d Cir. 1988) (“[W]e agree that artwork, like other non-verbal forms of expression, may under some circumstances constitute speech for First Amendment purposes”).

³⁴ *Hurley*, 515 U.S. at 569. Justice Souter’s conclusion seems to indicate one of two things: Either he is confident that he has deciphered the communicative message in abstract, nonrepresentational art forms or, more likely, he is content with the position that no such message need exist.

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3. *Nonspeech*

While the meaning of constitutionally protected speech has expanded over time, the Supreme Court has also imposed restrictions on certain forms of communication, the result of which has been to treat those messages as something less than speech. Though art, film, and literature are understood generally to fall within the scope of the First Amendment's protection, that which is deemed "obscene" is de facto "not within the area of constitutionally protected speech or press."³⁵ Expression that is judicially labeled "child pornography" is similarly unprotected under the First Amendment.³⁶

Other areas require more nuanced assessments. The Court's refusal to extend the First Amendment's protection to burning draft cards in protest of the Vietnam War,³⁷ for example, may seem to indicate the existence of a strict jurisprudential dividing line between action and speech. In practice, however, this line is not so clear. On one hand, the Court has invalidated laws that outlawed burning crosses and American flags;³⁸ on the other hand, courts have upheld laws limiting recreational dancing, "[c]asual chit-chat," and nude sunbathing.³⁹ In reaching their decisions, courts have utilized a combination of tests, described as follows by Justice Brennan:

We must first determine whether [an act] constitute[s] expressive conduct If [the] conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies [a law abridging the freedom of speech] under a more demanding standard.⁴⁰

³⁵ *Roth v. United States*, 354 U.S. 476, 485 (1957); *see also* *Miller v. California*, 413 U.S. 15, 25–27 (1973) (establishing criteria for what is and is not obscenity).

³⁶ *New York v. Ferber*, 458 U.S. 747, 756–64 (1982); *see also* *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (establishing six-part test for determining what is and is not child pornography).

³⁷ *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968).

³⁸ *Virginia v. Black*, 538 U.S. 343, 347–48 (2003) (crosses); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (flags).

³⁹ *See* *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (dancing); *Swank v. Smart*, 898 F.2d 1247, 1250–51 (7th Cir. 1990) ("[c]asual chit-chat"); *Chapin v. Town of Southampton*, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978) (nude sunbathing).

⁴⁰ *Johnson*, 491 U.S. at 403 (citing *O'Brien*, 391 U.S. at 377, and *Spence v. Washington*, 418 U.S. 405, 409–11, 414 n.8 (1974) (per curiam)). The standard from *O'Brien* is as follows:

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated

The subsequent section addresses the doctrinal muddle that has arisen from judicial usage of this set of tests.

B. *Challenging the Speech-Nonspeech Distinction*

In order to extend the First Amendment beyond pure speech while simultaneously limiting its reach, the Court has drawn various distinctions between protected and unprotected conduct. However, it has done so in large part by creating spurious distinctions along inconsistent lines between expressive and nonexpressive behavior.

Prior to Justice Souter's decision in *Hurley*, Supreme Court precedent dictated that an "activity" had to be "sufficiently imbued with elements of communication" to receive First Amendment protection.⁴¹ However, given Souter's statement that "a narrow, succinctly articulable message is not a condition of constitutional protection,"⁴² determining whether an individual's action has "elements of communication" would seem only to require ascertaining whether a second individual was present. This methodology would also negate any necessity of balancing speech and nonspeech elements.

Justice Souter's three examples—while relatively inoffensive and decidedly well-ensconced in the popular artistic canon—comprise but a tiny subset of forms of expressive conduct that we might call "speech" because we can call them "art." Indeed, the outer bounds of art have been extended far beyond mere rejections of the Queen's English, the eight-tone musical scale, and representational painting and sculpture. Just as the Court was making "serious artistic value" the touchstone for distinguishing obscenity from protected artistic expression,⁴³ art was moving from the Modernist to the Postmodernist era.⁴⁴ Increasingly, art and artists rejected any attempts to define

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.

O'Brien, 391 U.S. at 377 (emphasis added).

⁴¹ *Spence*, 418 U.S. at 409.

⁴² *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

⁴³ *Miller v. California*, 413 U.S. 15, 24 (1973).

⁴⁴ See, e.g., ART IN THEORY, 1900–1990: AN ANTHOLOGY OF CHANGING IDEAS 987 (Charles Harrison & Paul Wood eds., 1992) ("Inquiry into . . . the postmodern might well commence . . . in the later 1960s when the virtue and authority of Modernism itself first came under sustained examination from within the actual practice of modern art. The explicit theorization of the postmodern was a concern of the late 1970s and 1980s . . ."); see also Jean-François Lyotard, *What is Postmodernism?*, in ART IN THEORY, *supra*, at 1008, 1014–15 ("The postmodern would be that which, in the modern, puts forward the unrepresentable in presentation itself; . . . that which searches for new presentations, not in order to enjoy them but in order to impart a stronger sense of the unrepresentable.").

what “art” was, making it impossible for courts to distinguish protected “art” from “not-art.”⁴⁵ In the past half-century or so, the category of art has come to include a man being shot with a rifle in front of an audience or kicked down a flight of stairs;⁴⁶ a woman selling a sexual encounter (with herself) and the video recording thereof;⁴⁷ urban graffiti⁴⁸ and *détournement*;⁴⁹ and numerous people sitting silently at a piano for four minutes and thirty-three seconds at a time.⁵⁰ The terrorist attacks of September 11, 2001, were shortly

⁴⁵ See Amy M. Adler, Note, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1375–78 (1990) (rejecting possibility that courts can “distinguish art from obscenity in the Post-Modern era”); see also Joseph Kosuth, *Art After Philosophy* (1969), in ART IN THEORY, *supra* note 44, at 840, 847–49 (“[W]hat is important in art is what one brings to it [A]rt’s viability is not connected to the presentation of visual (or other) kinds of experience. That that may have been one of art’s extraneous functions in the preceding centuries is not unlikely. . . . Art is the definition of art.”); Ad Reinhardt, *Art as Art*, ART INT’L, Dec. 1962, reprinted in ART IN THEORY, *supra* note 44, at 806 (“The one object of fifty years of abstract art is to present art-as-art and as nothing else, . . . making it purer and emptier, more absolute and more exclusive The only and one way to say what abstract art or art-as-art is, is to say what it is not.”).

⁴⁶ In various performances in the 1970s, the artist Chris Burden spent five days in a small locker, with a bottle of water above and a bottle for urine below; slithered, nearly naked and with his hands held behind him, across fifty feet of broken glass in a parking lot; had his hands nailed to the roof of a Volkswagen; was kicked down a flight of stairs; and, on different occasions, incurred apparent risks of burning, drowning, and electrocution. Peter Schjeldahl, *Performance: Chris Burden and the Limits of Art*, NEW YORKER, May 14, 2007, at 152; see also *id.* (“Burden is the guy who . . . produced a classic, or an atrocity (both, to my mind), of conceptual art by getting shot.”).

⁴⁷ See, e.g., Guy Trebay, *Sex, Art and Videotape*, N.Y. TIMES, June 13, 2004, § 6 (Magazine), at 20 (describing Andrea Fraser’s 2003 videotape “Untitled”).

⁴⁸ See, e.g., Lauren Collins, *Banksy Was Here: The Invisible Man of Graffiti Art*, NEW YORKER, May 14, 2007, at 54–67 (profiling British graffitiist known as “Banksy”); *Graffiti on Canvas*, NEWSWEEK, Apr. 18, 1983, at 94 (describing “graffiti art” of Keith Haring, Jean-Michel Basquiat, and others).

⁴⁹ “In *détournement*, an artist reuses elements of well-known media to create a new work with a different message, often one opposed to the original.” *Détournement*, in WIKIPEDIA, <http://en.wikipedia.org/wiki/Detournement> (last visited Feb. 16, 2008); see also GREIL MARCUS, *LIPSTICK TRACES: A SECRET HISTORY OF THE TWENTIETH CENTURY* 168 (1989) (defining *détournement* as “[t]he theft of aesthetic artifacts from their own contexts and their diversion into contexts of one’s own devise”); *id.* at 167 (describing *détournement* as “[a] politics of subversive quotation, of cutting the vocal cords of every empowered speaker, social symbols yanked through the looking glass, misappropriated words and pictures diverted into familiar scripts and blowing them up”); Karen Elliot, *Situationism in a Nutshell*, BARBELITH WEBZINE, June 1, 2001, <http://www.barbelith.com/cgi-bin/articles/0000011.shtml> (describing history of Situationist International organization, which used *détournement* as their “method of artistic creation”).

⁵⁰ See, e.g., Stephen Pritchard, *A Quiet Night Out with Cage*, OBSERVER (London), Jan. 18, 2004, at 11 (describing performance of John Cage’s 1952 composition *4’33”*).

thereafter described—albeit tactlessly—as “the greatest work of art imaginable”⁵¹

The Supreme Court itself has effectively acknowledged the impossibility of distinguishing between art and not-art, albeit in a case in which it concluded that the conduct in question did not merit the First Amendment’s protection: In *City of Dallas v. Stanglin*,⁵² Chief Justice Rehnquist noted that it was “possible to find some kernel of expression in almost every activity a person undertakes.”⁵³ Despite this concession, the Court determined that recreational dancing did not “involve the sort of expressive association that the First Amendment has been held to protect.”⁵⁴ Such a holding is unsurprising—in general, courts and theorists have been unwilling to make the logical leap from identifying an expressive element in conduct⁵⁵ to naming all such conduct speech.⁵⁶

This Note, however, challenges the Court to go further. Using as a departure point Justice Souter’s recognition that the presence of an expressive message is not essential, I propose the elimination of any evaluation—much less any balancing—of speech and nonspeech elements. If the protection afforded to an expressed message cannot properly be contingent upon determinations of its quality or comprehensibility, only its existence should be relevant to determining whether it meets the threshold for the First Amendment’s protection.

⁵¹ Julia Spinola, *Monstrous Art*, FRANKFURTER ALLGEMEINE ZEITUNG (Frankfurt), Sept. 25, 2001, available at http://www.osborne-conant.org/documentation_stockhausen.htm. This statement was made by the composer Karlheinz Stockhausen in an interview on September 17 of that year. Stockhausen asserts that his meaning was misconstrued. See Karlheinz Stockhausen, Message from Professor Karlheinz Stockhausen (Sept. 19, 2001), http://www.stockhausen.org/message_from_karlheinz.html; see also Anthony Tommasini, *The Devil Made Him Do It*, N.Y. TIMES, Sept. 30, 2001, at 2.28 (describing Stockhausen’s statement and various attempts to “explain away the grotesque remarks”).

⁵² 490 U.S. 19 (1989).

⁵³ *Id.* at 25.

⁵⁴ *Id.* at 24.

⁵⁵ Cf. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 103–04 (1996) (noting failure of free speech theorists to address “the difficulty of explaining how a first amendment theory valuing speech for its rationally comprehensible ideas can comfortably accommodate the phenomenon of art.”); *id.* at 104 (“Art’s value in the First Amendment’s antityranny scheme is incompletely explained by a system that values speech only for its conceptual content.”).

⁵⁶ *E.g.*, *Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) (“No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct.”); see also *supra* note 17 (noting various authors who maintain some form of speech-conduct distinction); cf. Bork, *supra* note 17, at 27 (“If the dialectical progression is not to become an analogical stampede, the protection of the first amendment . . . must be cut off when it reaches the outer limits of political speech.”); Meiklejohn, *supra* note 10, at 261 (“The [First] Amendment . . . does not establish an unlimited right to talk.”).

Thus, there is no need to limit oneself to conceiving of expressive acts within what might typically be thought of as the arts (or, going back one step further, traditional political dissent). All acts of human agency can readily be seen as expressing one message or another, if nothing more than that the agent desires to undertake the act in question.⁵⁷ A “listener” is necessary not to make sense of the art, the “expressive conduct,” or the “symbolic speech,”⁵⁸ but rather to bring the behavior of the “speaker” out of the private realm and into the potential ambit of legal condemnation.⁵⁹

The Court’s stance—refusing to extend the First Amendment’s protection, prior to any balancing of harm and value, to certain forms of speech—is unnecessarily intransigent. It is rigidly formalistic to maintain that speech is definitively not an action and that conduct is not expressive. The next section will consider the methods that have been used to draw arbitrary lines between speech and nonspeech, arguing that what has emerged is a muddled and unprincipled jurisprudence.

⁵⁷ See, e.g., *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (“It is possible to find some kernel of expression in almost every activity a person undertakes”); see also STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 9–45 (1990) (criticizing distinction between “meaning effect” and “nonmeaning effect” of communicative acts as “fail[ing] as an organizing framework for first amendment law”). But see THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 17 (1970) (“The central idea of a system of freedom of expression is that a fundamental distinction must be drawn between conduct which consists of ‘expression’ and conduct which consists of ‘action.’”).

I mean to signify with the term “acts of human agency” those acts for which one would typically be culpable and subject to legal reproval. This would exclude, at a basic level, those acts undertaken by children, the insane, and those acting under coercion and duress. A discussion of the intricacies of free will is outside the scope of this Note. See generally *FREE WILL* (Gary Watson ed., 1982) (compiling essays on moral and metaphysical issues relating to human free will).

⁵⁸ Adler, *supra* note 20, at 1114 n.18.

⁵⁹ This is less of a statement of principle than one of practicality. The First Amendment need not protect what Mill calls “purely self-regarding” conduct, MILL, *supra* note 1, at 87—it will never need to, as the conduct will never be known, and consequently never proscribed. Much solitary conduct can nevertheless be quite the opposite of “self-regarding”—detonating a bomb a mile away while alone in one’s home presents an obvious case, as might blowing up one’s own home (for the harm it might do to the economic interests of other persons). Plainly, the point is about the necessary length of the law’s arm.

This is reflected, amongst other places, in the tort of defamation, which requires that a false and damaging statement be conveyed to a third party for it to be actionable. RESTATEMENT (SECOND) OF TORTS § 558 (1977) (“To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party”) (emphasis added).

C. *The Current Jurisprudence: A Critique*

The current state of the law makes clear the problems that arise when courts attempt to make categorizations and value judgments about what should or should not be speech. A look at existing doctrine, however, also reveals a common theme in First Amendment jurisprudence: general acceptance of restrictions on free speech where such restrictions represent the use of state power to prevent harm. Correspondingly, when this harm principle⁶⁰ is absent—or when the alleged harm is not objectively determinable—the most pronounced inconsistencies result.

Consider again the laws prohibiting those sorts of behavior that are most evidently considered speech—laws against conspiracy, blackmail, fraud, defamation, and perjury.⁶¹ The common denominator of these restrictions on pure speech is that each threatens a person's or social institution's physical or economic security. In other words, the interest in protecting the speech is outweighed by the harm, potential or otherwise, done to an individual or society (for example, by undermining the effective administration of a legitimate government).⁶² One might therefore expect that the jurisprudence justifying these and other restrictions would always explicitly invoke the concept of harm. It does not: Instead of simply defining "harm" and making it central to First Amendment analysis, free speech cases have interwoven various extraneous tests and standards into the language of the First Amendment itself.

1. *Low-Value Speech, Obscenity, and Child Pornography*

With *Chaplinsky v. New Hampshire*⁶³ in 1942, the Supreme Court began to develop and describe a previously unarticulated category of

⁶⁰ The idea of using harm to others as the demarcating line between acceptable and unacceptable behavior—ergo, between unacceptable and acceptable legislative restrictions—was perhaps most famously advocated by John Stuart Mill, see MILL, *supra* note 1, at 13. See also *infra* Part II.

⁶¹ See *supra* notes 11–15 and accompanying text.

⁶² As exemplified by the protection afforded seditious libel, courts distinguish between speech that criticizes government and speech that stands in the way of its functioning. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282–83 (1964) (“[A] privilege [for criticism of official conduct] is required by the First and Fourteenth Amendments.”); see also *United States v. O'Brien*, 391 U.S. 367, 386 (1968) (upholding legislation banning burning of draft cards and noting legislative history’s “apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System”); *Premier Elec. Constr. Co. v. Nat’l Elec. Contractors Ass’n*, 814 F.2d 358, 375 (7th Cir. 1987) (“[T]he first amendment does not protect efforts to defy (as opposed to change) the substantive rule of decision.”).

⁶³ 315 U.S. 568 (1942).

“low-value speech.”⁶⁴ In line with the jurisprudence of earlier cases concerning incitements to imminent violence,⁶⁵ *Chaplinsky* itself concerned the prohibition of so-called fighting words, declaring them to be of “slight social value.”⁶⁶ Whether explicit or not, the notion of low-value speech necessarily suggests a counterpoint: The value of the speech is low only when compared to the government’s—or society’s—higher interest in its prohibition.⁶⁷ The low-value category quickly expanded after *Chaplinsky*; not long thereafter, the Court deemed obscenity to be outside the scope of the First Amendment’s protection in *Roth v. United States*.⁶⁸

The *Roth* Court easily could have acknowledged that obscenity is speech of some minimal value and concluded that the harm done to public decency by its prohibition and distribution, on the balance, makes it unworthy of the First Amendment’s solicitude. Instead, the Court declared that obscenity is not speech at all:

All ideas having even the slightest redeeming social importance . . . have the full protection of the [First Amendment]. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . [O]bscenity is not within the area of constitutionally protected speech or press.⁶⁹

Theoretically, one could still call the obscenity prohibition a balancing test of harm against free expression—a balance in which one of the weights (the value of protecting expression) is always predetermined to be zero. In point of fact, however, the Court’s justification does not involve such a calculation. Rather, the concept of harm only surfaces after a judicial determination is made that the content in

⁶⁴ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194–97 (1983) (describing line of analysis derived from *Chaplinsky*).

⁶⁵ See, e.g., *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (upholding conviction of Communist Party leaders); *Whitney v. California*, 274 U.S. 357, 366, 371–72 (1927) (upholding conviction of member of Communist Labor Party of California under state Criminal Syndicalism Act), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Gitlow v. New York*, 268 U.S. 652, 655, 666–72 (1925) (upholding conviction for publication of Socialist Party manifesto); *Schenck v. United States*, 249 U.S. 47, 49, 52 (1919) (upholding conviction for distribution of antiwar leaflets).

⁶⁶ See *Chaplinsky*, 315 U.S. at 572 (“It has been well observed that such utterances 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.”).

⁶⁷ Cf. *supra* notes 4–5 and accompanying text (noting that tort law only compensates for objectively measurable harms to physical well-being or economic productivity, not subjective, intangible harms).

⁶⁸ 354 U.S. 476 (1957). The standard for judging obscenity was subsequently laid out in *Miller v. California*, 413 U.S. 15, 26 (1973): “At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection.” *Id.* at 26.

⁶⁹ *Roth*, 354 U.S. at 484–85.

question is obscene; the very fact of obscenity, then, is regarded as the relevant harm. Thus, to this day, the presumption is that speech appealing primarily to the prurient sensibility is obscene.

Justices Douglas and Brennan both sharply attacked this formulation in a series of opinions criticizing the Court's foray into limiting speech based solely upon its having insufficient value to merit protection. Concurring in the Court's opinion in *Memoirs v. Massachusetts*,⁷⁰ Justice Douglas wrote that "the First Amendment . . . deprives the States of any power to pass on the value, the propriety, or the morality of a particular expression."⁷¹ Likewise, dissenting from *Paris Adult Theatre I v. Slaton*,⁷² Justice Brennan concluded that when any speech with value remains per se unprotected, "'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice" to potential future actors as to whether their behavior will or will not be deemed speech.⁷³

In the 1982 case of *New York v. Ferber*,⁷⁴ the Court made the same move, in effect, that it had made in *Roth*. Rather than classifying child pornography as speech and then deciding that the government's regulatory interest justified the prohibition of such speech, the Court effectively deemed the creation and distribution of child pornography to be activities so devoid of potential worth that they did not even merit a cost-benefit assessment of value and harm.⁷⁵ These restrictions on child pornography seem equally misdirected in their logic. The *Ferber* Court refused to admit the potential for countervailing values and harms in the child pornography context, declaring that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."⁷⁶ The assumptions underlying this case, and those subsequent cases in which courts have defined child pornography,⁷⁷ have been sharply attacked.⁷⁸

⁷⁰ 383 U.S. 413 (1966).

⁷¹ *Id.* at 431 (Douglas, J., concurring).

⁷² 413 U.S. 49 (1973).

⁷³ *Id.* at 103 (Brennan, J., dissenting). The exclusion of obscenity from the scope of the First Amendment's protection has also been criticized by members of legal academia. See, e.g., Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1636 (2005) ("A sound understanding of obscenity law's ambitions reveals that the doctrine is unworkable and should be abandoned.").

⁷⁴ 458 U.S. 747 (1982).

⁷⁵ *Id.* at 763-64.

⁷⁶ *Id.* at 762.

⁷⁷ See, e.g., *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) (establishing six-part test for determining what is and is not child pornography).

⁷⁸ According to Amy Adler's discussion of the Court's child pornography jurisprudence, "[r]ecent developments in art, as well as recent prosecutions, suggest that the Court

Courts have also used the concept of low-value speech to justify limitations on expression in cases where pure speech was at issue—cases such as blackmail, libel, perjury, and the like.⁷⁹ Yet perhaps a more accurate and logical analysis would focus not on the minimal or nonexistent value of these various forms of expression, but instead would evaluate the quantum of harm that obtains in each. Fighting words ostensibly create the threat of harm to the listener, the speaker, and innocent bystanders.⁸⁰ So too do true threats and direct incitements to imminent violence.⁸¹ Blackmail and fraud each threaten or cause direct harm to the listener’s economic interests.⁸² Perjury harms the institution of government (and, therefore, the actual interests of its citizens).⁸³ Libel demands more than a mere affront; rather, there must be an actual harm to one’s reputation, justifiably cognizable because of the damage it threatens to do to one’s economic good standing.⁸⁴ In contrast, U.S. courts do not recognize the corresponding harm of seditious libel or libel of a public figure because of the value placed upon political dissent, which manifests as criticism of our government and societal institutions.⁸⁵ Finally, the restrictions

seriously underestimated the threat posed to artistic expression.” Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 966 (2001).

⁷⁹ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))). See *supra* notes 11–15.

⁸⁰ See *supra* note 66 and accompanying text.

⁸¹ See *supra* note 65 and accompanying text.

⁸² See *supra* notes 12–13 and accompanying text.

⁸³ Harming the government, unlike criticizing it, cannot be said to be the duty or prerogative of a citizen in a democracy. And just as private citizens cannot find relief in tort or in the criminal law for mere criticism, the government cannot demand relief when it is insulted by mere words. Thus, seditious libel cannot be obstructed, while perjury—which is more akin to threatening the government’s well-being and continued existence than it is to any form of political dissidence—can. Perjury threatens not the superstructure of government, but rather maligns the everyday workings of the system without undermining it entirely. Cf. *infra* note 85 and accompanying text (considering constitutional protections for libelous speech). But see, e.g., Bork, *supra* note 17, at 31 (“Speech advocating forcible overthrow . . . is not political speech because it violates constitutional truths about processes and because it is not aimed at a new definition of political truth by a legislative majority. . . . [T]here is no constitutional reason to protect speech advocating forcible overthrow.”).

⁸⁴ See, e.g., *Ollman v. Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc) (“[A]n individual’s interest in his or her reputation is of the highest order. . . . A defamatory statement may destroy an individual’s livelihood, wreck his standing in the community, and seriously impair his sense of dignity and self-esteem.”); Meiklejohn, *supra* note 10, at 259 (“In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages.”).

⁸⁵ “If . . . [a] verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen’s participation in govern-

placed upon the manufacture, distribution, and possession of child pornography⁸⁶ are explicitly grounded in the harms done to its juvenile victims.⁸⁷ The value of such content is adjudged de minimis at best, because those who are harmed are harmed not only in its production but also in its continued existence in circulation. Where content that appears to be child pornography is produced without the actual use of children, the harm is not extant; correspondingly, its prohibition has been held to be unjustified.⁸⁸

In a separate line of jurisprudence, the Court has concluded that otherwise constitutionally protected speech can be subject to so-called time, place, and manner restrictions, limiting not what may be said, but when, where, and how it may be expressed.⁸⁹ While the logic

ment. . . . Though private libel is subject to legislative control, political or seditious libel is not." Meiklejohn, *supra* note 10, at 259. Compare *Sullivan*, 376 U.S. at 282–83 (“[A] privilege [for criticism of official conduct] is required by the First and Fourteenth Amendments.”), with *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (“Libelous utterances [are not] within the area of constitutionally protected speech . . .”). Meiklejohn’s description, quoted above, captures the essential logic behind the “public figure” doctrine developed in the line of cases following *Sullivan*. See *Ollman*, 750 F.2d at 975 n.10 (“[T]he distinction between public and private figures is . . . that in order to prevail, public figures must prove . . . that the allegedly defamatory statements were made with knowledge of the statement’s falsity . . . whereas private figures are required to show only . . . that the statements were negligently made.”); *id.* at 993 (Bork, J., concurring) (“Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments.”).

⁸⁶ See, e.g., Child Pornography Prevention Act (CPPA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified in scattered sections of 18 U.S.C.) (criminalizing, inter alia, use of minors for creation of sexually explicit content); see also *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241–43 (2002) (discussing provisions of and legislative motivation for CPPA). See *supra* notes 74–75 and accompanying text.

⁸⁷ See *New York v. Ferber*, 458 U.S. 747, 759 (1982) (upholding law prohibiting child pornography against overbreadth challenge because, “[f]irst, the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation,” and “[s]econd, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled”).

⁸⁸ See *Ashcroft*, 535 U.S. at 250, 256 (striking down CPPA prohibition against virtual child pornography, 18 U.S.C. § 2256(8)(B) (2000), as unconstitutionally overbroad). However, one might contend that if part of the harm in child pornography is in the continued demand for its production, the existence of virtual child erotica is equally troublesome. See, e.g., *id.* at 262 (O’Connor, J., concurring in part and dissenting in part) (“The Government argues that, even if the production of such pornography does not directly harm children, this material aids and abets child abuse.”). This is, however, a justification neither supported by Justice O’Connor nor offered by the *Ferber* Court. See *id.* (“[T]he causal connection between pornographic images that ‘appear’ to include minors . . . is not strong enough to justify withdrawing First Amendment protection . . .”); *supra* note 87.

⁸⁹ See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) (“The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.”); *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (“Clearly, government has no power to restrict such activity because of its message. Our cases make equally clear,

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undergirding these restrictions is not explicitly harm-based, it is implicitly so. In such instances, speech is being restricted not for its content but for the harm it does in a particular context; in different circumstances, it would be permitted.

2. “Inflammatory” Speech: Burning Flags, Draft Cards, and Crosses

Cases involving the use of fire to make a political statement form a particularly rich subsection of First Amendment jurisprudence. The Court’s superficially contradictory holdings in *Texas v. Johnson*—deeming flag-burning to be constitutionally protected expression⁹⁰—and *United States v. O’Brien*—upholding a law prohibiting the burning of draft cards⁹¹—demonstrate how the extant jurisprudence in fact grafts the theory (if not the language) of the harm principle onto free speech law.

The *O’Brien* Court considered an appeal of a conviction for burning a draft card during the Vietnam War,⁹² assuming arguendo that O’Brien’s conduct might have elements of protected speech and analyzing the case under the standard described in Part I.⁹³ Accepting the government’s contention that the act of burning the card itself threatened the effective administration of the draft, the Court upheld O’Brien’s conviction.⁹⁴ In other words, the Court found this particular restriction on speech to be justified by the prevention of actual harm to the administration of government. Had the government explicitly banned draft-card burning in order to limit criticism of the war or the government’s prosecution of it, the law likely would have been constitutionally problematic.

The *Johnson* Court acknowledged the tests laid out in *O’Brien* and *Spence v. Washington*,⁹⁵ but nevertheless struck down a Texas law

however, that reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests, and are permitted.”); *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (“Since a municipality has authority to control the use of its public streets for parades or processions[,] . . . it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.”).

⁹⁰ 491 U.S. 397, 399 (1989).

⁹¹ 391 U.S. 367, 372 (1968).

⁹² *Id.* at 369–70.

⁹³ *Id.* at 376–82. See *supra* notes 40–41 and accompanying text.

⁹⁴ *Id.* at 372.

⁹⁵ See 418 U.S. 405, 409 (1974) (“[A]ppellant did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments”); *id.* at 414 n.8 (referencing *O’Brien* test).

prohibiting the burning of the American flag.⁹⁶ In doing so, the Court rejected the state's twofold asserted interest in proscribing flag-burning: preserving the flag as a national symbol and preventing breaches of the peace.⁹⁷ The Court found that the first justification violated the First Amendment, given the expression inherent in the act of flag-burning.⁹⁸ The second justification was deemed overbroad: The general prohibition, when applied to Johnson and those similarly situated, amounted to a limitation on expressive freedom.⁹⁹ While burning a flag near a gas station, in the middle of a forest, or in the midst of a dense mob could obviously create a harmful breach of peace,¹⁰⁰ Johnson's actions could only have harmed the flag's symbolic nature or the feelings of those who might have disagreed with his acts.¹⁰¹

In a coda of sorts to the *O'Brien* and *Johnson* decisions, the Court has found that "the burning of a cross is symbolic expression."¹⁰² Thus, a state law that banned cross-burning with intent to intimidate—but treated any cross-burning as prima facie evidence of such intent—was deemed unconstitutional.¹⁰³ Though repugnant, cross-burning alone fails to cause the sort of harm that would merit its outright prohibition.

3. Further Speech/Nonspeech Distinctions

In a variety of other cases, courts have insisted on categorizing various sorts of behavior as either speech or nonspeech, using that spurious distinction to decide whether an action challenging a law can or cannot lie in the First Amendment. One example already mentioned is *City of Dallas v. Stanglin*, in which the Supreme Court concluded that recreational dancing lacks the expressive content

⁹⁶ See *Texas v. Johnson*, 491 U.S. 397, 407, 410, 420 (1989) (finding *O'Brien* test inapplicable).

⁹⁷ *Id.* at 400.

⁹⁸ See *id.* at 415 (describing flag-burning as "expressive conduct" that cannot be prohibited to foster state's view of flag).

⁹⁹ See *id.* at 409 ("[W]e have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression . . .").

¹⁰⁰ See, e.g., *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 385 (1992) ("[B]urning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not.").

¹⁰¹ In dissent, Chief Justice Rehnquist argued that such harm ought to be considered a sufficient justification for state action. *Johnson*, 491 U.S. at 430–34 (Rehnquist, C.J., dissenting).

¹⁰² *Virginia v. Black*, 538 U.S. 343, 360 (2003).

¹⁰³ *Id.* at 347–48.

necessary to be considered First Amendment speech.¹⁰⁴ On the other hand, the Court has assumed that nude dancing in topless bars has the requisite *je ne sais quoi* to be expressive conduct, though it ultimately determined that the harms such conduct generated were substantial enough to allow for government regulation.¹⁰⁵

Certain cases bring into relief the often entirely arbitrary line between speech and nonspeech. The Seventh Circuit rejected a First Amendment challenge brought by a police officer who argued that his dismissal was unconstitutional because it had been based upon First Amendment-protected speech—the conversation he had had with a minor whom he had taken for a ride on his motorcycle.¹⁰⁶ Rather than finding that the government interest in enforcing police department policies outweighed the value of the speech, Judge Posner’s opinion for the court insisted that “[t]he conversation . . . was speech in the literal sense, but not speech protected by the free-speech clause of the First Amendment.”¹⁰⁷

Other cases have drawn similarly problematic lines. A federal judge in the Eastern District of New York rejected a First Amendment challenge to a law prohibiting nude sunbathing, noting that it “is not associated with dance, literature, or any other standard mode of expression”¹⁰⁸ and is “fundamentally individualistic and personal rather than expressive or communicative.”¹⁰⁹ Quoting that case six years later, the Eleventh Circuit noted in *South Florida Free Beaches, Inc. v. City of Miami* that “[n]udity is protected as speech *only when* combined with some mode of expression which itself is entitled to [F]irst [A]mendment protection”¹¹⁰ and denied plaintiffs’ challenge to

¹⁰⁴ 490 U.S. 19, 25 (1989). See *supra* notes 52–55.

¹⁰⁵ See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289, 291 (2000) (plurality opinion) (acknowledging that “nude dancing of the type at issue here is expressive conduct” but upholding ordinance prohibiting public nudity because it was “aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments”); *Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 565–66, 569–72 (1991) (plurality opinion) (finding that “nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment” yet upholding state’s public indecency law as “further[ing] a substantial government interest in protecting order and morality”); see also *infra* note 153.

¹⁰⁶ *Swank v. Smart*, 898 F.2d 1247, 1250 (7th Cir. 1990). In *Swank*, the police officer was discharged for “conduct unbecoming of an officer” due to a twenty-minute motorcycle ride with a seventeen-year-old girl. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Chapin v. Town of Southampton*, 457 F. Supp. 1170, 1173 (E.D.N.Y. 1978).

¹⁰⁹ *Id.* (quoting *Williams v. Hathaway*, 400 F. Supp. 122, 126 (D. Mass. 1975), *aff’d sub nom.* *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976)).

¹¹⁰ 734 F.2d 608, 610 (11th Cir. 1984) (quoting *Chapin*, 457 F. Supp. at 1174) (alteration in original) (emphasis added).

a similar anti-nude-sunbathing law.¹¹¹ And, in a subsequent case, the same court, though striking down a law prohibiting shirtless jogging as “irrational and arbitrary,”¹¹² rejected the plaintiff’s First Amendment challenge—“that his shirtless jogging communicate[d] his philosophy about health, fitness and the human body as an artistic medium”—because the precedent from *South Florida Free Beaches, Inc.* indicated that “such conduct has no First Amendment protection.”¹¹³

D. A Way Forward?

Consider again the test from *United States v. O’Brien*,¹¹⁴ the draft-card burning case: Where “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”¹¹⁵ I contend, in essence, that both the distinction between “‘speech’ and ‘nonspeech’” and the words “in regulating the nonspeech element” can be entirely stricken from the Court’s assertion without negative consequence. The result is a balancing test between the speaker-actor’s liberty and the listener’s autonomy. The difficulty of distinguishing speech from conduct would be mooted; too, the outliers in the Court’s First Amendment jurisprudence could be brought back into the logical fold.¹¹⁶ All action would be recognized for what it is—speech—and regulated (if at all) only after an evaluation of its harm-causing potential.

II

TOWARDS A FAIR DEFINITION OF HARM

The previous Part discussed why the Court’s attempts to limit the reach of the First Amendment using arbitrary measures of degrees of expressive conduct are unnecessary and confusing. Rather than engage in an abstract analysis of what constitutes expressive speech,

¹¹¹ See *id.* at 611 (maintaining, in declaring that “sunbathing . . . is not speech,” that events fall on spectrum between speech and conduct).

¹¹² *DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1369 (11th Cir. 1987).

¹¹³ *Id.* at 1366 n.4. Such cases fail to accord with other Supreme Court precedent indicating that wearing clothing can be expressive. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (upholding district court’s determination that “the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment”). Reconciling this discord requires the assumption that choosing not to wear a certain piece of clothing is somehow less expressive (or a less valid form of expression) than choosing to wear it.

¹¹⁴ 391 U.S. 367 (1968).

¹¹⁵ *Id.* at 376.

¹¹⁶ See *infra* Part III.

the Court should simply acknowledge that all such conduct is speech and balance its value against the harms that it causes (if any) to legitimate governmental interests. The next challenge, then, is determining the proper threshold above which a governmental interest in passing a law is sufficiently important to restrict speech. In other words, we arrive at the question of how to define harm.

A. *John Stuart Mill and the Harm Principle*

The essence of Mill's theory—as laid out most completely in his book *On Liberty*¹¹⁷—is neither complicated nor uniquely Mill's.¹¹⁸ It is a classic libertarian position—that is, it desires to protect individual liberty against the scourge of government intervention unless the exercise of that liberty threatens the corresponding liberty of others. In Mill's words, “the appropriate region of human liberty . . . [is] doing as we like . . . without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish, perverse, or wrong.”¹¹⁹

Applying Mill to First Amendment jurisprudence is particularly apt given this Note's contention that the only reasonable line that can be drawn vis-à-vis speech is one that separates solitary action from action with a second agent present or affected—a listener, so to speak. Mill writes:

But the strongest of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly [F]or in these cases public opinion means, at the best, some people's opinion of what is good or bad for other people . . . passing over the pleasure or convenience of those whose conduct they censure, and considering only their own preference.¹²⁰

¹¹⁷ MILL, *supra* note 1, at 13.

¹¹⁸ A similar position could be attributed to John Rawls, who wrote that “[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.” JOHN RAWLS, *POLITICAL LIBERALISM* 291 (1993). Justice Scalia, deriding the notion that this position should inform much of our jurisprudence, calls it “Thoreauvian.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 574–75 (1991) (Scalia, J., concurring) (“[O]ur society has [n]ever shared that Thoreauvian ‘you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else’ beau ideal [S]ociety prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, ‘*contra bonos mores*,’ *i.e.*, immoral.”). A recent look back at the life of the nineteenth-century liberal philosopher Herbert Spencer noted that “[f]or Spencer, the ‘fundamental law’ governing social life could not be more obvious: ‘Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man.’” Steven Shapin, *Man with a Plan: Herbert Spencer's Theory of Everything*, *NEW YORKER*, Aug. 13, 2007, at 77.

¹¹⁹ MILL, *supra* note 1, at 13.

¹²⁰ *Id.* at 89.

In effect, adherence to Mill's harm principle demands that government not interfere with the activities of its citizens except in those cases where one agent's free action threatens to harm the liberty of another. The next question, then, is how to establish when harm is (or is not) done.

B. *A Proposal*

Proceeding from Mill, this Note's proposal is that the contours of harm be defined by tort causes of action. This responds to the question that Mill left unanswered, which Professor C. Edwin Baker has accurately characterized as "the lack of criteria for determining when a person's behavior 'harms' others or when a person's manner of acting 'concerns others.'"¹²¹ Given this "lack of criteria" and the fact that "both one's private and public activities may cause frustration of others' desires (i.e., may 'harm' them)," Baker concludes that "harm to others can not be our touchstone" for evaluating restrictions of liberty.¹²² By contrast, this Part contends that we do not lack such criteria; rather, they can be borrowed from our common law of tort. My argument is this: If the harm suffered as a result of A's action is of a type traditionally recognized in tort law, then the prevention of such harm can be a proper target of legislative action.

In this Section, I will consider what tort law does and does not protect. The subsequent Section will address why this approach provides a useful map with which to chart a course for our criminal law¹²³—specifically, for those cases in which the law touches on the First Amendment, both in its narrower, more traditional description and in the fully expansive conception presented in Part I. This will allow us to resolve the dissonant First Amendment cases discussed above in a more consistent and intellectually honest way.¹²⁴

It is plain to see that tort law allows plaintiffs to recover for measurable harms to physical and economic dignity. The simplest and most basic causes of action—those familiar to any first-year law stu-

¹²¹ Baker, *supra* note 17, at 1013.

¹²² *Id.*

¹²³ It is perhaps not obvious that First Amendment cases typically emerge from the enforcement of the criminal law, as the Amendment's text does not specify criminal laws as its target. Such laws are, however, the predominant form that governmental restrictions on our behavior take. These laws are most frequently challenged by litigants who allege improper speech restrictions. However, this Note's proposal applies just as readily to regulatory action as it does to criminal law.

¹²⁴ See *infra* Part III.

dent—afford remedies for violations of an individual’s physical or economic (property-based) dignity. Typical examples include assault, battery, false imprisonment, trespass, nuisance, and breach of contract.¹²⁵

On the other hand, our tort system effectively excludes abstract harms to morals, communal decency, and the like. Tort plaintiffs, by and large, cannot recover for simple emotional injuries or injuries caused by being confronted with that which they deem to be immoral. “Courts . . . have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable.”¹²⁶ Where actions for intentional or negligent infliction of emotional distress (IED) do avail, they typically are cases of such extreme harm to a plaintiff’s mental well-being that there is, in effect, a physiological or economic harm.¹²⁷ In fact, “[m]any jurisdictions [in recognizing causes of action for IED] require that a plaintiff demonstrate a ‘physical manifestation’ of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover.”¹²⁸

Consequently, “[a]lthough they are today often pleaded, [intentional IED] claims appear *rarely to succeed*.”¹²⁹ Where they do, the injury suffered must far exceed the sort of moral harm endured by a plaintiff offended by the mere existence of nudity or sodomy in their midst. Given that “[c]omplete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people[, the] law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.”¹³⁰

¹²⁵ This is plain to see from the black-letter statements of the elements of these torts. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 13 (1965) (battery demands action from which “a harmful contact with the person of the other directly or indirectly results”); *id.* § 35 (false imprisonment requires that an agent “acts intending to confine the other or a third person” and that “the other is conscious of the confinement or is harmed by it”); *id.* § 822 (nuisance lies for “an invasion of another’s interest in the private use and enjoyment of land”).

¹²⁶ *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994).

¹²⁷ See *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 257 n.3 (Minn. 1993) (“Because emotional distress is highly subjective, often transient, and easily alleged, [Minnesota] tort law . . . requires physical manifestation of the distress as proof of the genuineness and gravity of the emotional suffering.”).

¹²⁸ *Gottshall*, 512 U.S. at 549 n.11.

¹²⁹ JOHN C.P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* 630–31 (2004).

¹³⁰ RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). The Restatement (Second) also notes the following: “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

For the time being, this is only a descriptive point: These are the causes of action that are and are not available in tort. The next step is to ask whether it makes sense for our civil law to shape the restrictions upon speech that our criminal law should impose.

C. The Logic and Implications of Using Tort Law Definitions of Harm to Shape the First Amendment

Let me now address one major ramification of my proposal, which may at first seem dramatic: Any criminal defendant could assert, as an affirmative defense, that he was engaged in expressive conduct protected by the First Amendment.¹³¹ Although many such claims could be raised, nearly all would fail.¹³² To rebut such a defense, the government need only show that the defendant's behavior objectively did physical or economic harm.

Another apparent objection is that the criminal law ought not be limited to reflecting the litigation posture of private parties as in tort actions; rather, since the state is charged with tasks beyond the capacity of mere individuals, it should have recourse to broader laws. One might argue that the state is worth nothing if it cannot keep order, maintain a certain level of public fisc, and provide for the common defense against threats both from within and without. Tradi-

decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." § 46 cmt. d.

¹³¹ This seems a logical place to address the concern that an actual application of this Note's proposal would open the floodgates, so to speak, making all criminal cases, in effect, "First Amendment cases." This concern is a red herring. It should be noted first that this argument is a somewhat confused way of looking at things. Individuals cannot violate the First Amendment; only the government can. Thus it is not the facts of cases that, per se, bring the First Amendment potentially into play. Rather, the First Amendment is implicated by laws that threaten to proscribe (and punish) certain action that would otherwise be acceptable—most centrally and obviously, verbal criticism of the government. Furthermore, it follows with equal logical force that all laws implicate the First Amendment—all laws implicate all of the amendments, and all of the rest of the Constitution, at that. It is only because of the obvious disjoint in subject matter that no one has brought, for instance, a lawsuit alleging that laws against murder violate the Nineteenth Amendment. Laws against murder plainly do not implicate the right of women's suffrage; but that is not the same as saying that a law against murder *could* constitutionally trample that right. The statement that "Congress shall make no law . . . abridging speech" applies equally to those laws that obviously threaten to impact speech as to those with no logical correlation.

¹³² The idea that one might claim an expressive intent or justification behind one's violence is not difficult to imagine, nor without precedent. A violent offender might well assert a comparable First Amendment claim—perhaps a colorable one—but there is no need to fear that such a claim would prevail in the balance against the harm caused by his actions. *See, e.g.*, *People v. Schmidt*, 110 N.E. 945, 950 (N.Y. 1915) ("The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law.").

tionally, the state has also been charged with maintaining something like public decency or public morals.¹³³ Thus, from this perspective, the free exercise of speech is “subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic *or moral*.”¹³⁴

Indeed, whether limiting the definition of speech to something more traditional or allowing it to be quite a bit more expansive, prohibitions predicated upon the state’s use of its police power to ensure public decency have historically been a part of the nation’s legal landscape.¹³⁵ Laws banning public nudity, public urination, and obscenity have long been on the books,¹³⁶ while practices that many find deeply offensive—such as assisted suicide, same-sex marriage, and private drug use—have only moved slowly, if at all, towards legitimacy. Just two decades ago, *Bowers v. Hardwick*¹³⁷ affirmed that the “belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” was a sufficient rationale for that state’s law criminalizing it.¹³⁸

Yet the overarching trend in American jurisprudence has been one of slow but clear movement away from countenancing the use of abstract, subjective, or moral harm as a justification for laws.¹³⁹ Thus,

¹³³ Cf. *Williams v. Morgan*, 478 F.3d 1316, 1323 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 77 (2007) (finding that “the State’s interest in the preservation of public morality remains a rational basis for the challenged statute” and noting that “[o]ne would expect the Supreme Court to be manifestly more specific and articulate than it [has been] if now such a traditional and significant jurisprudential [principle] has been jettisoned wholesale” (quoting *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1238 n.8 (11th Cir. 2004) (internal quotation marks omitted))).

¹³⁴ *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), *overruled* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (emphasis added); *see also supra* note 10.

¹³⁵ For instance, the New York Penal Code of 1881 made it a misdemeanor to “willfully and wrongfully commit[] any act . . . which openly outrages public decency or is injurious to public morals.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 573 (2d ed. 1985) (internal quotation marks omitted).

¹³⁶ “[T]he number of acts defined as criminal grew steadily from 1776 to 1850 There were great numbers of economic crimes, and laws defining public morality; and new ones were constantly added.” *Id.* at 292–93.

¹³⁷ 478 U.S. 186 (1986), *overruled* by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

¹³⁸ *Bowers*, 478 U.S. at 196.

¹³⁹ *See* FRIEDMAN, *supra* note 135, at 294 (“If crime was sin . . . before the Revolution, it gradually shifted to concern for protection of private property [There was a] rapid decline of prosecutions for victimless crime By 1800, more than forty percent of all prosecutions . . . studied were for theft, only seven percent for offenses against morality.” (citing William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 452–59 (1967))); *see also* *Virginia v. Black*, 538 U.S. 343, 358 (2003) (“[T]he First Amendment ‘ordinarily’ denies a State ‘the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.’” (quoting *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring))); Suzanne B. Goldberg, *Morals-Based*

incorporating into our criminal law a tort law regime that likewise refuses to admit such harms is a logical step in the same direction.

In 1989, *Texas v. Johnson* effectively held that the harm potentially done to those who were offended by the content of Johnson's behavior—burning an American flag—could not justify restricting such speech.¹⁴⁰ In 1996, the Court in *Romer v. Evans* invalidated an amendment to Colorado's constitution that would have prevented municipalities from protecting homosexuals on the basis of their sexual orientation; Justice Kennedy's majority opinion noted that the law in question “seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”¹⁴¹ The unacceptability of using morality as a justification for legislation was reified when the majority in *Lawrence v. Texas*—invalidating Texas's law criminalizing consensual sodomy (and thereby overruling *Bowers*¹⁴²)—quoted Justice Stevens's dissent from *Bowers* itself: “Our prior cases make [it] abundantly clear [that] the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹⁴³ Subsequently, the Supreme Court of Kansas struck down a state statute that effectively treated homosexuals and heterosexuals differently on the grounds that “[t]he *Lawrence* decision rejected a morality-based rationale as a legitimate State interest.”¹⁴⁴

One might then conclude that moral harm—the offense taken to “immorality”—is now a dead letter. Professor Suzanne Goldberg's research demonstrates that in Supreme Court cases decided since at least World War II, “*Bowers* stands alone in its endorsement and acceptance of a pure morals-based justification for lawmaking.”¹⁴⁵ Indeed, dissenting from *Lawrence*, Justice Scalia bemoaned the fact

Justifications for Lawmaking: Before and After Lawrence v. Texas, 88 MINN. L. REV. 1233, 1235–36 (2004) (“Notwithstanding its ubiquitous rhetorical endorsements of government's police power to promote morality, it turns out that . . . since the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law.”).

¹⁴⁰ 491 U.S. 397, 408 (1989).

¹⁴¹ 517 U.S. 620, 632 (1996); see also *Cohen v. California*, 403 U.S. 15, 21 (1971) (“The [government's] ability . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader . . . authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”).

¹⁴² 539 U.S. 558, 578 (2003) (“[*Bowers*] ought not to remain binding precedent. It . . . should be and now is overruled.”).

¹⁴³ *Id.* at 577.

¹⁴⁴ *State v. Limon*, 122 P.3d 22, 34 (Kan. 2005).

¹⁴⁵ Goldberg, *supra* note 139, at 1254.

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that the majority's instantiation of Justice Stevens's *Bowers* dissent into the positive law would "call[] into question" laws outlawing "bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."¹⁴⁶ Members of the academy have embraced the notion that *Lawrence* did precisely what Scalia feared:

[T]he Court rejected the idea that the state has the authority to enforce legislation that is spurred exclusively by the moral views of the majority of its citizens. Something else, namely a harm to some third party, is required for the state to engage in this form of morality legislation, where such legislation imposes harms on an individual's protected liberty interests. In so doing, the Court evidently embraced the "harm principle."¹⁴⁷

III

APPLYING THE HARM PRINCIPLE TO CURRENT FIRST AMENDMENT CASES

Though the law has not yet moved firmly in this direction, forcing First Amendment law into line with tort law would benefit the jurisprudence of free speech as a whole. This would be true both for cases understood as being "First Amendment cases" in the common parlance as well as for cases in which other prohibitions would be brought within the First Amendment's ambit by the expansive definition of speech outlined earlier in this Note.¹⁴⁸

Taking the latter variety first, consider those laws—outlawing bigamy, prostitution, bestiality, and the like—that Justice Scalia feared were nearing extinction due to *Lawrence*. Assuming the absence of coercive circumstances—that is, assuming that such acts were undertaken pursuant to the free will of all parties involved—

¹⁴⁶ *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

¹⁴⁷ Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DEPAUL L. REV. 671, 675 (2005); see Goldberg, *supra* note 139, at 1234–35 ("Rather than representing a break with tradition, *Lawrence* reflected the Court's long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking."); Alan J. Howard, *When Can the Moral Majority Rule?: The Real Dilemma at the Core of the Nude Dancing Cases*, 44 ST. LOUIS U. L.J. 897, 903 (2000) ("[T]he picture . . . painted [in Justice Scalia's *Lawrence* dissent] need not be seen as bleak at all. That is, there is not necessarily anything objectionable with courts requiring the state to offer in justification of any law restricting expressive conduct something more compelling than moral opposition."); Andrew Koppelman, *Lawrence's Penumbra*, 88 MINN. L. REV. 1171, 1174–76 (2004) ("[The *Lawrence* Court did not] hold that discrimination against gay people was an impermissible form of sex discrimination [The Court, however,] suggested that if a law has the effect of encouraging prejudice against gay people, it will diminish the weight that is given to the state's purposes").

¹⁴⁸ See *supra* Part I.D.

adherence both to Mill's harm principle and to our current tort law framework would demand that laws punishing such acts be stricken from the books. This might sound drastic, and to some degree it is perhaps only a rhetorical point—or a quixotic prescription. The likelihood that all such laws will disappear anytime soon is slim due to any number of concurrent factors;¹⁴⁹ still, the theory upon which such laws are based has already begun to be discredited.¹⁵⁰

Next, consider once more the twin cases of *United States v. O'Brien*¹⁵¹ and *Texas v. Johnson*.¹⁵² The outcomes of these cases would not change under my approach—but the analysis would.¹⁵³

¹⁴⁹ As a practical matter, this could well be because the number of people interested in partaking in such behavior is small, because the public scorn attached to such behavior keeps its practitioners from lobbying (or self-identifying) publicly, and because the overwhelming majority of society either (1) thinks their own moral disapproval is a sufficient basis for the maintenance of such laws or (2) does not care (or have cause) to consider whether the logic underpinning such laws is consistent or cogent. As a matter of convenience and governance, wholly invalidating morality as a proper basis for legislation would require reconsideration, repeal, or redrafting of innumerable laws at the state and local levels.

¹⁵⁰ See *supra* notes 145–47 and accompanying text.

¹⁵¹ 391 U.S. 367 (1968).

¹⁵² 491 U.S. 397 (1989).

¹⁵³ Another set of cases that would result in the same outcome under this Note's proposal are those involving the prohibition of topless dancing establishments from certain zoning blocks. The Court sidestepped the issue of harm-versus-expression when it first heard a striptease case, holding that the Indiana public indecency statute in question “further a substantial government interest in protecting order and morality [that] is unrelated to the suppression of free expression.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569–70 (1991) (plurality opinion). Subsequently, the Court took a different tack, relying upon the secondary harms caused by nude-dancing-qua-expressive-conduct. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 291 (2000) (plurality opinion) (“[T]he ordinance does not attempt to regulate the primary effects of the expression, i.e., the effect on the audience of watching nude erotic dancing, but rather the secondary effects, such as the impacts on public health, safety, and welfare . . . ‘caused by the presence of even one such’ establishment.” (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986))). Apart from the Court's unnecessary discussion of whether nude dancing is or is not expressive conduct, *Pap's*, 529 U.S. at 289, this harm-balancing is precisely the way that a court would analyze such a case under this Note's proposed methodology. Cf. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515–16 (4th Cir. 2002) (suggesting that law restricting topless dancing is likely unconstitutional where state “produced no evidence—either current or otherwise—of harmful secondary effects in North Carolina”). But see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558 (2001) (citing *Pap's*, 529 U.S. at 296, for notion that “cities and localities may rely on evidence from other jurisdictions to demonstrate harmful secondary effects of adult entertainment and to justify regulation”).

Two caveats should be noted. First, *Barnes* and *Pap's* were both plurality decisions. Though not binding, they have proven to be the foundation for decisions in numerous cases since. *E.g.*, *Wirzburger v. Galvin*, 412 F.3d 271, 275 (1st Cir. 2005) (citing *Pap's*, 529 U.S. at 291, for proposition that “regulations that aim at preventing some harm independent of speech . . . are not presumed unconstitutional”); see also *Pap's*, 529 U.S. at 297 (noting that *City of Erie* was right to have “expressly relied on *Barnes* and its discussion of secondary effects”). Second, cases in which the Court has relied on “secondary effects”

Freed from the need to adhere to the test established in *O'Brien* and followed in *Johnson*, courts would have no need to assess whether burning a draft card or a flag is expressive or nonexpressive, speech or nonspeech. Rather, such acts would either be allowed or proscribed based upon whether the law in question legitimately prevented a harm recognizable in tort law. The Texas law in *Johnson* would still be invalidated because the harms caused by burning a flag in protest are neither physical nor economic in nature; the law at issue in *O'Brien* would be upheld because it sought to prevent the threat of an objectively demonstrable harm to the government.¹⁵⁴

Finally, consider another of Scalia's bogeymen: obscenity laws. Rather than needing to look at allegedly obscene content and attempt to make a judgment of its "literary, artistic, political, or scientific" value in order to determine whether it falls within the scope of the First Amendment's protections,¹⁵⁵ courts could recognize obscene content for what it plainly is—speech—and limit it only if a legislature could articulate a tangible harm that the law in question was enacted to combat. This Note has previously argued that moral offense and emotional distress neither are nor should be legitimate grounds for recovery between private plaintiffs; so too should such harms fall short as justifications undergirding laws that ban obscenity. By way of comparison, laws outlawing child pornography would remain on the books—the asserted harm in that instance is more apparently tangible—but the conceit that such content is not speech could happily be abandoned.¹⁵⁶

suggest the sort of masquerading that is possible when the harm principle is brought into play. See *infra* note 154.

¹⁵⁴ *O'Brien* makes clear a prime drawback of using harm as the touchstone for First Amendment protection: It can be easily manipulated. For example, if the government replaces its actual (nefarious) intent with an acceptable one (based in a clear statement of harm), an unwitting court that takes the bait will end up approving a law that inappropriately abridges speech. Though the *O'Brien* Court failed to notice any improper motive behind the law—or, more likely, was sympathetic to the government and thus unwilling to do so—courts are frequently entrusted with uncovering improper motives in facially unproblematic laws. However, cases like *O'Brien* should be seen as cautionary tales rather than as proof that the harm principle is unworkable. Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."); Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1230 (2002) ("[S]trict scrutiny is the Court's way of operationalizing 'skepticism' about the state's purposes. It offers a way of telling whether the state's purported legitimate purpose in using a racial classification is a pretext for an invidious purpose.").

¹⁵⁵ See *supra* note 68 (describing standard for judging obscenity).

¹⁵⁶ See *supra* notes 74–78 and accompanying text.

IV COUNTERARGUMENTS AND CONCLUSION

I have already addressed certain objections to my proposals in the course of this Note. I recognize that some elements of what I am suggesting may also be difficult and that some of my premises may be disagreeable; I will try, therefore, to briefly address some of these concerns.

For instance, the idea that the First Amendment's protection should not be limited to the traditional understanding of speech is bound to strike a dissonant note with some readers. There is value, to be sure, in having a First Amendment that is understood by the general citizenry to be the defender of a positive conception of free speech rather than the guarantor of a nebula of substantive rights limited by the harm principle. Arguments like this are difficult to contradict without making empty claims, such as, "Having an internally consistent jurisprudence of free speech is more important than having people be certain that they know what the First Amendment stands for." But the definition of speech is already far more expansive than one might expect,¹⁵⁷ and my proposal would not necessitate changing the First Amendment's text; hence "speech" would simply be removed one step further from its lay definition.

A further objection is that jurisdictions desiring to legislate against behavior that causes subjective harms could, under this Note's framework, simply incorporate such harms into their tort law. Criminal provisions, then, would be legitimate because they would merely replicate that which was actionable as a tort. My proposal, however, should not be taken to say that the fact that the civil law can limit some action is a sufficient condition for that action's prohibition via criminal law; rather, the tort law restriction is only a necessary prerequisite. The gap between the baseline of having the necessity met and reaching sufficiency would be mediated by other forces: Supreme Court decisions, for instance, or the Constitution.¹⁵⁸

Finally, it can be said that universalizing the First Amendment—and limiting it only by the conception of the harm principle set out above—would have the effect of instantiating something like substantive due process, creating a new level of judicial scrutiny for all legisla-

¹⁵⁷ See *supra* notes 20–34 and accompanying text.

¹⁵⁸ Imagine that this Note's proposal were to be made part of the positive law. A legislator wanting to reintroduce a criminal law proscribing homosexual sodomy (because of his moral opposition to the practice) would not be able to do so simply by getting a majority of his locality together to create a civil cause of action allowing suits to be brought by third parties claiming to be distressed by homosexual conduct in their midst. The Supreme Court's holding in *Lawrence* would preclude such a result.

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tion.¹⁵⁹ In one respect, this objection is far too big for me to address within the confines of this Note, and is one that I would like to put aside for another day. But in another respect, it is a point that I willingly concede. Both prudentially and jurisprudentially, it would be advisable if neither our common law nor our statutes could prohibit behavior that does not threaten to do objective, tangible harms to material interests of an individual or government entity,¹⁶⁰ lest our baser prejudices be written into our laws under the guise of legitimate exercises of the state's police power.

¹⁵⁹ Dimitri Portnoi called this issue to my attention, for which I thank him.

¹⁶⁰ See Goldberg, *supra* note 139, at 1304–11 (calling for “factual grounding,” rather than morals-based justifications, for lawmaking).