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Know Your Audience: Risky Speech At The Intersection Of Meaning And Value In First Amendment Jurisprudence

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KNOW YOUR AUDIENCE: RISKY SPEECH AT THE INTERSECTION OF MEANING AND VALUE IN FIRST AMENDMENT JURISPRUDENCE

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Using the U.S. Supreme Court's 2014 decision in *Air Wisconsin Airlines Corp. v. Hoeper* as an analytical springboard, this article examines the vast burdens placed on speakers in four realms of First Amendment law to correctly know their audiences, in advance of communication, if they want to receive constitutional protection. Specifically, the article asserts that speakers are freighted with accurately understanding both the meaning and the value audiences will ascribe to their messages, *ex ante*, in the areas of obscenity, intentional infliction of emotional distress, student speech, and true threats. A speaker's inability to effectively predict a recipient's reaction to his message could result in a loss of speech rights and, in turn, lead to either criminal punishment or civil liability. Dangerous disconnects and chasms between speakers and audiences can arise, negating free expression when a message's meaning or its value is lost in translation. Ultimately, speakers should not be forced to engage in complicated guesswork and multiple layers of abstraction in order to safely exercise their First Amendment rights.

INTRODUCTION

Know your audience. It is a seemingly ancient principle, described in

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the *Yale Law Review* as a "time-tested adage."[1] Indeed, the maxim is a meaningful proposition for all attorneys when it comes to telling their clients' stories.[2]

For example, Professor Jonathan Van Patten recently observed that "[k]nowing your audience and the situation that the story is intended to address will shape your decision about what story to tell and how to tell it."[3] He added that "[k]nowing your audience is especially important in figuring out how a story will resonate (or not)" and that "[f]inding shared values and telling the story in a way that affirms those values is great if you can do it."[4]

But perhaps far more important than successfully telling and selling a story in court is knowing one's audience in exercising constitutional rights.[5] Specifically, this article asserts that the ability to lawfully use the First Amendment right of free speech[6] hinges, in numerous situations, on the ability of speakers to sufficiently know their audience and, in turn, to know in advance of communication the meaning and the value an audience will ascribe to their messages. Meaning and value are subjective however, and the risk of not knowing one's audience and thereby forfeiting the right of free speech is immense.

Bluntly put, we argue here that speakers of all ages and intellects gamble with their First Amendment rights when they roll the dice of meaning and value on a slanted craps table where imagined audiences and distant courts serve as boxmen.[7] The table is slanted, in part, because the

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1. Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 552 n.73 (1999) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)).

2. Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 252–53 (2012).

3. *Id.* at 252.

4. *Id.* at 253.

5. *Id.*

6. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

7. Craps is a casino game of chance played by throwing dice on a wool-surfaced oval table with surrounding edges, during which a player hopes to roll the right combination. DANIEL VROMAN, SIMPLY CRAPS: CRAPS MADE SIMPLE 5 (2008). Boxmen are akin to the law in a game of craps, ensuring through their own perspective at the end of the table that no one cheats.

subjective intent of speakers about the meaning of their messages may simply be irrelevant in the eyes of the law[8] and, therefore, their First Amendment fate hangs on their ability to successfully know, *a priori*, how their audiences will interpret them.

Consider, for instance, the U.S. Supreme Court's 2014 opinion in *Air Wisconsin Airlines Corp. v. Hoeper*.[9] There, the Court examined in the context of a defamation lawsuit the meaning of several words and phrases, including "unstable" and "mental stability."[10] It considered the effect the words would have on both the *mind* and *behavior* of a hypothetically reasonable Transportation Security Administration (TSA) official.[11] Furthermore, it analyzed their possible falsity by asking whether such falsity would have "affected a reasonable security officer's assessment of the supposed threat."[12] The immunity of the speaker and his employer— in this case, a manager for defendant Air Wisconsin[13]—from civil liability for defamation under the Aviation and Transportation Security Act (ATSA)[14] thus hinged on the interpretation of a hypothetical, unseen person at the end of a telephone line.[15] The absence of face-to-face communication results in enhanced difficulties in decoding the intended meaning of speech, further

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They "will only get involved when changing you in or out, unless you breach casino etiquette or do something illegal." *Id.* at 5–6.

8. For instance, as described in Part III, the U.S. Court of Appeals for the Third Circuit held in a 2013 student-speech case that "the subjective intent of the speaker is irrelevant" in interpreting the meaning of student expression. B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293, 309 (3d Cir. 2013). Similarly, as addressed in Part IV, the majority of courts today hold that the speaker's subjective intent regarding the meaning of a message is irrelevant in determining whether it constitutes an unprotected true threat of violence. *See generally id.* (discussing the relevance, or lack thereof, of a speaker's intent under the true threats doctrine).

9. *See generally* Air Wis. Airlines Corp. v. Hoeper, 134 S. Ct. 852 (2014).

10. *Id.* at 865–66.

11. *Id.* at 864.

12. *Id.* at 858.

13. *Id.* at 858–59.

14. 49 U.S.C. § 44901(b) (2012).

15. The statements central to the defamation claim were made by Patrick Doyle, an Air Wisconsin aircraft fleet manager, during a telephone call. *Air Wis. Airlines Corp.*, 134 S. Ct. at 859.

jeopardizing the speaker's liberty.[16]

Under *Hoeper*, a speaker must understand the perspective not of a general audience, but rather a niche one.[17] As media defense attorney Charles Tobin recently wrote, "[i]n *Hoeper*, the Court shifted the inquiry from the reaction of the reasonable person to the reaction of the reasonable TSA security officer—an adjustment in orientation that arguably makes all the difference in the outcome of the case."[18] A defendant-speaker therefore must, prior to communicating, metaphorically climb inside the head of a hypothetically reasonable TSA agent and consider, as Tobin writes, "what reasonable members of the *niche target audience* would think."[19]

Significantly, ATSA immunity turns not only on the *meaning* of the statements, but also on their *value* to the TSA—whether they might be acted upon to save lives. Specifically, a defendant-speaker is granted immunity under the ATSA and, in turn, provided legal leeway for the imprecision of his speech because of concerns about human safety and security.[20] Parsed differently, allegedly defamatory statements are protected due to their value in preventing harm and disaster.[21] As Justice Sonia Sotomayor wrote for the *Hoeper* Court, the purpose of ATSA immunity is:

> [T]o encourage air carriers and their employees, often in fast-

16. *See* JOHN B. THOMPSON, MEDIA AND MODERNITY: A SOCIAL THEORY OF THE MEDIA 83–84 (1995) (asserting that "[c]ommunication by means of telephone deprives the participants of the visual cues associated with face-to-face interaction while preserving and accentuating the oral cues. By narrowing the range of symbolic cues, mediated interaction provides participants with fewer symbolic devices for the reduction of ambiguity.").

17. *See* Charles D. Tobin & Len Niehoff, *Material Falsity in Defamation Cases: The Supreme Court's Call for Contextual Analysis*, COMMUNICATIONS LAWYER (June 2014), http://www.americanbar.org/publications/communications_lawyer/2014/june/material_falsity_defamation_cases_supreme_courts_call_contextual_analysis.html.

18. *Id.*

19. *Id.*

20. Under its terms, the immunity statute shields "a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism." 49 U.S.C. § 44941 (2012).

21. *Hoeper*, 134 S. Ct. at 862 (asserting that "Congress wanted to ensure that air carriers and their employees would not hesitate to provide the TSA with the information it needed. This is the purpose of the immunity provision . . . .").

> moving situations and with little time to fine-tune their diction, to provide the TSA immediately with information about potential threats. Baggage handlers, flight attendants, gate agents, and other airline employees who report suspicious behavior to the TSA should not face financial ruin if, in the heat of a potential threat, they fail to choose their words with exacting care.[22]

Adding that "[a]ll of us from time to time use words that, on reflection, we might modify[,]"[23] Justice Sotomayor reasoned that "[i]f such slips of the tongue could give rise to major financial liability, no airline would contact the TSA (or permit its employees to do so) without running by its lawyers the text of its proposed disclosure—exactly the kind of hesitation Congress aimed to avoid."[24] When these observations about speakers fine-tuning their diction, choosing words with exacting care and making slips of the tongue are considered collectively, it becomes plain that Justice Sotomayor recognizes the vast burdens speakers face on issues of meaning and interpretation and how dependent they are on the perspective of others.[25] In brief, concern for providing speaker immunity in *Hoeper* is driven by the life-saving *value* of the statements made to the TSA, even if there is slipperiness on the issue of their precise meaning.[26] The value of the statements is what provides speakers with breathing room on their sometimes imprecise meaning.[27]

The overarching problem, then, with the know-your-audience approach is that a speaker's failure to adequately comprehend and forecast the characteristics of the niche audience for whom speech is targeted, or to whom speech is addressed, could result in a loss of free speech rights and, in turn, lead to either criminal punishment or civil liability.[28] Dangerous

22. *Id.* at 865.

23. *Id.* at 866.

24. *Id.*

25. *See id.*

26. *See id.* at 867.

27. *See Hoeper*, 134 S. Ct. at 867.

28. *See id.* at 866–67.

disconnects and chasms between speakers and audiences can arise, negating free expression when a message's meaning or its value is lost in translation.[29]

The speaker-oriented problems addressed in this Article differ from the hazards of judicial reliance on a hypothetical and supposedly "rational" audience, an issue Professor Lyrissa Lidsky recently and thoroughly critiqued.[30] As she notes, "there certainly is no such thing as a rational audience, though one can always hope that citizens are more often rational than not."[31] The role of the audience is pivotal in speech cases. As Lidsky points out, "different audience members bring different experiences and backgrounds to the text and will therefore interpret the same text quite differently."[32]

Professor David Han also recently addressed the role of audience analysis in First Amendment jurisprudence.[33] Han's focus, however, is the judgments that *courts* must make about audience reactions to speech.[34] In fact, Han defines audience analysis in terms of "*courts' determinations* of how an audience might process speech."[35]

The focus of this Article, in contrast, is on neither the audience—rational or otherwise—nor the courts. Rather, this Article pivots directly on the perspective of the *speaker* and what might be considered a *speaker-centric analysis* of the burdens of accurately gauging both message meaning and message value. Why take this view? Because before a message ever reaches an audience or is evaluated in court, there necessarily is a speaker behind it. And that speaker, it follows, is freighted with making some difficult choices about the message's ultimate content, especially if she seeks First Amendment shelter and wants to escape legal

29. *See id.*

30. *See generally* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799 (2010).

31. *Id.* at 849.

32. *Id.* at 806.

33. *See generally* David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647 (2014).

34. *See id.* at 1654 (focusing on "the question of how *courts* should conduct audience analysis" and "the ways in which *courts* currently conduct audience analysis") (emphases added).

35. *Id.* at 1652 (emphasis added).

liability. Those choices about what to say, and how to say it, can be heavily influenced by the speaker's talent and skill in deciphering his or her audience's ability to accurately interpret not only the meaning of a message, but also its value or lack thereof.

Specifically, this Article analyzes multiple burdens imposed by the law on risk-averse speakers[36] and, in turn, the daunting decisions—if not pure guesswork—they must make about the potential reactions to their messages in order to reduce the odds of legal liability. This is exceedingly important because a risk-averse speaker needs to make judgment calls about an audience's potential understanding of, and reaction to, his speech long before a court ever, if at all, becomes involved. In fact, courts may never even enter the equation.

For instance, a prospective speaker, fearful of communicating a message because it may be misunderstood and lead to judicial punishment, might engage in self-censorship[37] and, concomitantly, never utter the message. In such situations, the harm is already done, taking the form of a chilling effect[38] on speech without the courts ever entering the picture.

Compounding the problem is another level of guesswork imposed on speakers. Specifically, while speakers ostensibly are attempting to figure out a real-world audience's potential reaction to their messages, what they must be concerned with is not, in fact, the response of an actual empirical audience. Rather, speakers must worry about an audience construct—a surrogate, as it were, for a living-and-breathing one—that is created, *post hoc*, by a judge or jury for purposes of legal analysis. Speakers therefore must try to make an informed guess about an audience's likely response to

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36. The author uses the term "risk-averse speakers" simply to refer to individuals who want their speech to receive First Amendment protection from legal liability.

37. Benham v. City of Charlotte, 635 F.3d 129, 135 (4th Cir. 2011) (observing that a "cognizable injury under the First Amendment is self-censorship, which occurs when a claimant 'is chilled from exercising her right to free expression'") (quoting Harrell v. Fla. Bar, 608 F.3d 1241, 1254 (11th Cir. 2010)).

38. *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect*," 58 B.U. L. REV. 685, 693 (1978) (contending that "a chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity"); *see also* Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481 (2013) (asserting that "[a] chilling effect occurs where one is deterred from undertaking a certain action X as a result of some possible consequence Y," and adding that "a chilling effect is an indirect effect: it occurs when the deterrence does not stem from the direct restriction, but as an indirect consequence of the restriction's application").

speech as filtered through judicial and/or juror imagination in a sterile courtroom setting far removed from the real-world context in which the speech actually transpired.[39]

For instance, Justice Antonin Scalia, joined by Justices Clarence Thomas and Elena Kagan, wrote in partial dissent in *Hoeper* that "we must ask whether *a reasonable jury* could find the remaining historical facts to be such that those statements were not only false, but [materially] false from the perspective of a *reasonable TSA agent*."[40] In other words, there are two layers of abstraction with which a speaker must contend—not only what a fictional reasonable TSA agent might believe, but also what a reasonable jury speculating about what a reasonable TSA agent might believe.

Furthermore, even if a speaker assumes his audience is rational, the speaker still must make complicated determinations regarding what a rational audience would understand about, for example, different conventions of writing, such as parody and satire,[41] or a complex genre of music, such as rap.[42] In many ways, as this Article suggests, the law typically demands far more than just a speaker simply be rational or reasonable, what Han refers to as a "reasonable speaker framework"[43] and what a minority of courts deploy in true threats cases,[44] but that he or she

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39. *See infra* notes 72–74 (describing this situation in the context of obscenity law).

40. *Hoeper*, 134 S. Ct. at 868 (Scalia, Thomas & Kagan, JJ., concurring in part and dissenting in part) (alteration in original omitted) (emphases added).

41. *See infra* notes 198–226 and accompanying text.

42. *See infra* notes 362–440 and accompanying text.

43. Han, *supra* note 33, at 1699. Under this framework, Han asserts that "when courts seek to measure the social harm associated with particular speech, the standard they use to measure the harms that count in this calculus should focus on what the speaker should reasonably be able to predict in light of the overall factual context, including the characteristics of the actual targeted audience. As long as the harms in question are reasonably foreseeable to the speaker, they should be relevant to the court's overall calculus, even if they might ultimately be outweighed by the value of the speech or other factors." *Id.*

44. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 288 (2001) (observing that "to determine when speech is protected by the First Amendment, and therefore not punishable as a threat, most circuits have adopted either a reasonable speaker or a reasonable listener test," and adding that both "tests essentially amount to an evaluation of whether or not a reasonable recipient of the statement would believe it constituted a true threat").

be almost clairvoyant or, at the very least, an expert in audience analysis and a master of perspective taking. Mismatches between speaker intuition and audience understanding—or, perhaps more accurately, a judge's or jury's assumptions about an audience's probable understanding—can result in liability.[45] Importantly, the hurdles that speakers must clear are raised in areas of free expression, where not only the meaning of a message is at stake, but also its value and utility, as in *Hoeper*.[46]

To examine the complex burdens of meaning and value facing speakers in First Amendment jurisprudence, this article concentrates on four domains of law. Initially, Part I explores questions of meaning and issues of value that speakers confront regarding sexually-explicit expression in order to avoid obscenity[47] convictions.[48] Part II then turns to the tort of intentional infliction of emotional distress (IIED),[49] using the U.S. Supreme Court's decisions in both *Snyder v. Phelps*[50] and *Hustler Magazine, Inc. v. Falwell*,[51] along with a 2013 federal appellate court ruling in a defamation case involving satire, *Farah v. Esquire Magazine*,[52] to illustrate weighty risks taken by speakers on questions of both meaning and value in the face of potential tort liability.[53] The Article then shifts in Part III to student speech rights, deploying the U.S. Supreme Court's 2007

45. *See* Han, *supra* note 33, at 1699.

46. *See supra* notes 21–27 and accompanying text (describing the importance of the value of the speech in *Hoeper* as the basis for providing immunity from liability).

47. Obscenity is one of the few categories of speech not protected by the First Amendment. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (holding that "obscenity is not within the area of constitutionally protected speech or press").

48. *See infra* notes 64–136 and accompanying text.

49. Intentional infliction of emotional distress generally involves "four elements: (1) the defendant's conduct must be intentional or reckless, (2) the conduct must be outrageous and intolerable, (3) the defendant's conduct must cause the plaintiff emotional distress, and (4) the distress must be severe." Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000).

50. *See generally* Snyder v. Phelps, 562 U.S. 443 (2011).

51. *See generally* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

52. *See generally* Farah v. Esquire Magazine, 736 F.3d 528 (D.C. Cir. 2013).

53. *See infra* notes 137–279 and accompanying text.

opinion in *Morse v. Frederick*[54] and the 2013 *en banc* appellate court ruling in *B.H. ex rel. Hawk v. Easton Area School District*[55] to analyze mismatches in both meaning and value of messages that can arise when youthful speakers engage in speech deciphered by authoritarian adults.[56]

The Article moves in Part IV to the tangled true threats doctrine[57] and in particular, to the September 2013 ruling by U.S. Court of Appeals for the Third Circuit in *United States v. Elonis*[58] to explore burdens faced by speakers on both the meaning and value fronts.[59] *Elonis* is timely because, in mid-June 2014, the U.S. Supreme Court granted a petition for a writ of certiorari specifically to focus on whether both the First Amendment and a provision of the federal threats statute[60] require "proof of the defendant's subjective intent to threaten."[61] In other words, the Court in *Elonis* will address whether the meaning intended by the speaker is at all relevant in protecting or punishing the speech.

While there are other areas of First Amendment jurisprudence in which a speaker's liberty and liability depends on the meaning and value

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54. *See generally* Morse v. Frederick, 551 U.S. 393 (2007).

55. *See generally* B.H. *ex rel.* Hawk v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013).

56. *See infra* notes 280–360 and accompanying text.

57. Like obscenity addressed in Part I of this Article, true threats is another category of content not protected by the First Amendment. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (asserting that "the First Amendment also permits a State to ban a 'true threat'").

58. *See generally* United States v. Elonis, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014).

59. *See infra* notes 361–442 and accompanying text.

60. 18 U.S.C. § 875(c) (2012). In granting the petition for a writ of certiorari in *Elonis*, the Supreme Court specified that the federal statutory issue it chose to address was "[i]n addition to the question presented by the petition." Elonis v. United States, 134 S. Ct. 2819, 2819 (2014). The issue in the petition, as framed by counsel for Anthony Elonis, is "[w]hether, consistent with the First Amendment and *Virginia v. Black*, 538 U.S. 343 (2003), conviction of threatening another person requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a 'reasonable person' would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort." Petition for Writ of Certiorari at 1, Elonis v. United States, 134 S. Ct. 2819 (2014) (No. 13-983).

61. *Elonis*, 134 S. Ct. at 2819.

assigned by hypothetical audiences,[62] the four fields examined here—obscenity, IIED, student speech and true threats—are chosen because they: 1) cut across both criminal law and tort law; 2) involve the speech rights of both adults and minors; 3) entail analysis of literary devices including parody, satire, and rap music; and 4) stretch from sexual expression to violent speech. In other words, this quartet of subjects covers a wide swath of variables and scenarios that affect meaning and value.

Ultimately, the Article concludes in Part V by synthesizing the problems addressed in the Article and by suggesting possible remedies.[63]

I. OBSCENITY

The U.S. Supreme Court has identified several categories of speech that receive no First Amendment protection.[64] More than fifty-five years ago, the Court made it clear in *Roth v. United States*[65] that one of these unprotected classes of expression is obscenity. The *Roth* Court opined that obscenity "is not within the area of constitutionally protected speech or

62. Meaning is particularly important in defamation law. *See, e.g.*, C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237, 237 (1993) (writing that "cases purporting to assert claims for 'implied libel' can be traced to the ambiguity of meaning and the differing perceptions of readers, viewers, and listeners. Words can have different meanings in distinct contexts and the perceived meaning can vary for different people."); Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333, 407 (1999) (asserting that "[m]eaning is essential to defamation. Without meaning, a statement would not harm a person's reputation, and, therefore, would not require any compensation. The common law has long recognized a doctrinal role for meaning in defamation law.").

63. *See infra* notes 443–480 and accompanying text.

64. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (listing, as unprotected categories of speech, "advocacy intended, and likely, to incite imminent lawless action," obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, and "speech presenting some grave and imminent threat the government has the power to prevent"); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (identifying obscenity, incitement, and fighting words as categories of speech falling outside the ambit of First Amendment protection); United States v. Stevens, 559 U.S. 460, 468–69 (2010) (identifying obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as types of speech not protected by the First Amendment); Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002) (opining that "[t]he freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children").

65. Roth v. United States, 354 U.S. 476, 485 (1957).

press."[66] The Court has since explained that for speech to be obscene, at a minimum, it "must be, in some significant way, erotic,"[67] and be comprised of "sexually explicit material that violates fundamental notions of decency."[68]

In accord with such subjective, value-laden notions of decency, obscene speech "is restricted due to its offensiveness."[69] Judge Richard Posner stressed this point when he observed in 2001 that "[t]he main worry about obscenity, the main reason for its proscription, is not that it is harmful . . . but that it is offensive."[70] Posner added that "[n]o proof that obscenity is harmful is required either to defend an obscenity statute against being invalidated on constitutional grounds or to uphold a prosecution for obscenity. Offensiveness is the offense."[71]

That observation is important for this article's thesis because offense and what offends are always subjective and subject to the eyes and ears of the beholder.[72] In turn, an audience's reaction to a sexually-explicit message, or whether they are offended, is pivotal for determining whether or not it will be protected under obscenity law.[73] A wise speaker seeking First Amendment shelter thus should know his audience and, in advance of communication, anticipate whether his sexually-explicit message will elicit offense from that audience.[74]

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66. *Id.*

67. Cohen v. California, 403 U.S. 15, 20 (1971).

68. United States v. Williams, 553 U.S. 285, 288 (2008).

69. Joel Timmer, *Violence as Obscenity: Offensiveness and the First Amendment*, 15 COMM. L. & POL'Y 25, 26 (2010). *Contra* Andrew Koppelman, *Essay: Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1638 (2005) (arguing that "[m]odern First Amendment theory typically either ignores or misunderstands the state interests that underlie obscenity law. *Neither offense* nor incitement to violence against women *are the doctrine's core concerns*, and so the doctrine is not effectively attacked by showing that obscenity does not cause these evils.") (emphasis added).

70. Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 574 (7th Cir. 2001).

71. *Id.* at 575.

72. *See Cohen*, 403 U.S. at 25 (observing that it is "often true that one man's vulgarity is another's lyric").

73. *See Kendrick*, 244 F.3d at 574–75.

74. *See id.*

The Court's current definition of obscenity, which is imbued with several terms tied to notions of offense,[75] was fashioned more than forty years ago in *Miller v. California*.[76] In *Miller*, after observing that it "has been categorically settled by the Court that obscene material is unprotected by the First Amendment,"[77] the Court articulated a three-part standard for deciding if speech is obscene. This "conjunctive" test[78] entails consideration of whether: 1) an average person, applying local[79] "'contemporary community standards,' would find that the work, taken as a whole, appeals to a prurient interest;" 2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and 3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[80]

Miller has been criticized as "unworkable."[81] The late Justice William Brennan encapsulated the condemnations well in 1973, writing that the test "resort[s] to such indefinite concepts as 'prurient interest,' 'patent offensiveness,' 'serious literary value,' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them."[82]

Importantly, the person who does, in fact, get to define those concepts

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75. For example, the second prong of the current test for obscenity specifically considers whether the speech is considered *patently offensive* under state law. Miller v. California, 413 U.S. 15, 24 (1973).

76. *See generally id.*

77. *Id.* at 23.

78. Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1397 (2008) (describing "*Miller*'s conjunctive prongs").

79. *See Miller*, 413 U.S. at 30 (asserting that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists," and reasoning that, "[t]o require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility.") (emphases added).

80. *Id.* at 24.

81. Clay Calvert & Robert D. Richards, *Alan Isaacman and the First Amendment: A Candid Interview with Larry Flynt's Attorney*, 19 CARDOZO ARTS & ENT. L.J. 313, 323 (2001) (quoting attorney Alan Isaacman).

82. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting).

is *not* the speaker.[83] Rather, a risk-averse speaker faces the burden of guessing how others—potentially multiple jurors and judges, scattered about in different hamlets, cities and states throughout the nation and applying their own local standard—will define and implement them *after* the speech is transmitted and distributed.[84]

Jeffrey Douglas, an adult-entertainment defense attorney, describes the crime of obscenity under *Miller* from a speaker's perspective by saying, "[y]ou don't know that it's a crime until the jury tells you whether it is."[85] The only things, in fact, with which obscenity law are concerned when it comes to the speaker's understanding of the content in question are that he "had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials."[86] Everything else depends on the viewpoints and interpretations of juries and judges.[87]

The bottom line, as described in detail below, is that in perhaps no other area of free-speech jurisprudence is a speaker more subjected to the vagaries of interpretation on both meaning and value than in obscenity jurisprudence. Communicators of sexually-explicit expression face a Herculean burden in trying to divine both where and whether their speech will be protected. Geographically distant juries and judges hold the keys to First Amendment protection when they sort out meaning and value.

A. Questions of Meaning

To avoid possible prosecution and conviction for obscenity, producers of sexually-explicit content must successfully know—more accurately, guess—how their content will be understood not just by one potential audience, but also by many. That is because the *Miller* test embraces local community standards, not a nationwide measuring stick,[88] and, in turn, "jurors in different regions of the country or a state may come to different

83. *See* Clay Calvert & Robert Richards, *The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, Its Leading Advocate & the First Amendment*, 22 CARDOZO ARTS & ENT. L.J. 247, 284 (2004).

84. *See id.*

85. *Id.*

86. Hamling v. United States, 418 U.S. 87, 123 (1974).

87. *See id.*

88. *Miller*, 413 U.S. at 30.

conclusions on whether the same material is obscene."[89] Speakers—particularly those who distribute their content on the Internet—are subject to obscenity prosecutions anywhere in the country their material is downloaded or transported,[90] as federal prosecutors go forum shopping for communities with the most conservative standards.[91] Speakers' problems are compounded when guessing how communities will interpret their works because, while sometimes the "community" might be an entire state, it may also be "a sub-community, or a city within a specific state."[92] Community standards come into play on both the first and second prongs of *Miller*.[93]

What does all of this mean for speakers? As Larry Flynt, the septuagenarian publisher of *Hustler* magazine, explains it: "you're asking filmmakers in San Francisco or L.A. or in New York to second-guess what viewing habits are in Biloxi, Mississippi. It's just the most ridiculous thing you can think of."[94] The conundrum is clear: knowing one's audience is vital to receive First Amendment protection under *Miller*, but knowing one's audience—multiple audiences, in fact—also is impractical, if not impossible.

When sexual content is uploaded and posted on the Internet, anyone can access it from anywhere in the country, exacerbating problems for

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89. Iowa v. Canal, 773 N.W.2d 528, 531 (Iowa 2009).

90. *See* United States v. Stagliano, 693 F. Supp. 2d 25, 31 (D.D.C. 2010) (noting that "because Internet publishers, unlike those who use mail or telephone, cannot limit the geographic reach of the materials they post on the Internet, those materials are subject to the community standards of the most conservative jurisdictions in the country.").

91. *See* Clay Calvert, *The End of Forum Shopping in Internet Obscenity Cases? The Ramifications of the Ninth Circuit's Groundbreaking Understanding of Community Standards in Cyberspace*, 89 NEB. L. REV. 47, 55–61 (2010) (providing an overview of forum shopping in obscenity cases).

92. Yuval Karniel & Haim Wismonsky, *Pornography, Community and the Internet—Freedom of Speech and Obscenity on the Internet*, 30 RUTGERS COMPUTER & TECH. L.J. 105, 113 (2004).

93. *See* Smith v. United States, 431 U.S. 291, 302 (1977) (observing that "community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness.").

94. Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMMLAW CONSPECTUS 159, 170 (2001).

speakers.[95] Only the U.S. Court of Appeals for the Ninth Circuit has held that "a national community standard must be applied in regulating obscene speech on the Internet, including obscenity disseminated via email."[96] Other courts continue to reject a national community standard when material is transmitted via the Internet, with one court noting in 2010 that "the *Miller* contemporary community standard remains the standard by which the Supreme Court has directed us to judge obscenity, on the Internet and elsewhere."[97]

The speaker clearly bears the burden of tailoring and adjusting his sexual messages to suit what he can only imagine are the local community standards. As the U.S. Supreme Court explained in upholding such responsibilities imposed by a federal statute on a dial-a-porn operator called Sable Communications, "Sable is free to tailor its messages, on a selective basis, if it so chooses, to the communities it chooses to serve."[98] The Court reasoned:

> There is no constitutional barrier under *Miller* prohibiting communications that are obscene in some communities under local standards even though they are not obscene in others. If Sable's audience is comprised of different communities with different local standards, Sable ultimately bears the burden of complying with the prohibition on obscene messages.[99]

Local community standards, in fact, are filtered through another layer of abstraction. That is because, as Professor Mark Cenite writes, "[j]urors are *not* to apply their own standards when they apply local community standards. Jurors essentially role-play, applying the standards of the 'average person' in their community."[100] The Supreme Court of Nebraska, for instance, wrote "triers of fact may not use their own views as

95. *See Stagliano*, 693 F. Supp. 2d at 31.

96. United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009).

97. United States v. Little, 365 Fed. App'x 159, 164 (11th Cir. 2010).

98. Sable Commc'ns Cal. v. Fed. Commc'ns Comm'n, 492 U.S. 115, 125 (1989).

99. *Id.* at 125–26.

100. Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL'Y 25, 35 (2004) (emphasis added).

appropriate local norms, but may use their knowledge of the views of average people in their own community as an appropriate norm."[101]

The Supreme Court made it evident in *Jenkins v. Georgia*[102] that, under *Miller*, it is "constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards."[103] Three years after *Jenkins*, the Court observed that "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community."[104]

The problem with this, as Judge Joseph T. Clark writes, is "how can the typical juror know what the average person believes regarding obscene material, when the average person is really a mythical person? The average person is one who possesses all the demographic characteristics of the community."[105] If, in turn, "the typical juror" cannot make such judgments, then how can a speaker of sexual expression—in advance of communication—possibly make an informed judgment about how the typical juror would judge the mythical average person? Professor Clay Calvert asserts:

> [M]ost jurors probably do not ask or poll their neighbors, querying them about their private sexual practices or what adult content they watch; instead, they guess at what the average person might think, taking into account every single adult in the community that they have never even met, which could number into the millions in large metropolitan areas.[106]

Jurors may engage in all of this guesswork without the benefit of

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101. Nebraska v. Harrold, 593 N.W.2d 299, 309 (Neb. 1999).

102. *See generally* Jenkins v. Georgia, 418 U.S. 153 (1974).

103. *Id.* at 157.

104. *Smith*, 431 U.S. at 305.

105. Joseph T. Clark, *The "Community Standard" in the Trial of Obscenity Cases—A Mandate for Empirical Evidence in Search of the Truth*, 20 OHIO N.U. L. REV. 13, 17 (1993).

106. Clay Calvert, *Personalizing First Amendment Jurisprudence: Shifting Audiences & Imagined Communities to Determine Message Protection in Obscenity, Fighting Words, and Defamation*, 20 U. FLA. J.L. & PUB. POL'Y 439, 473 (2009).

expert testimony, as the Supreme Court has held that "expert testimony is not necessary to enable the jury to judge the obscenity of material which . . . has been placed into evidence."[107] Even when expert testimony is permitted regarding the adjudicated content, "[t]he jury is free to reject the expert testimony when deliberating on obscenity *vel non*."[108]

Miller also uses terms that blend questions of meaning with issues of value. For instance, the phrase "prurient interest" in the first prong of *Miller* means that the content is understood to "appeal to a morbid, degrading, and unhealthy interest in sex, not just an ordinary interest."[109] As the Supreme Court wrote in 1985, "prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex."[110] In contrast stands protected material that produces "only normal, healthy sexual desires."[111] Fathoming what is shameful, morbid, normal or healthy seemingly involves, from a speaker's viewpoint, complex and normative value judgments regarding sexual practices. A speaker who regularly practices anal sex, for instance, may overestimate its normalness and prevalence as compared with a person—an audience member like a juror or judge, perhaps—who has never engaged in it and who thus might underestimate it. Speakers are left to speculate about whether the meaning of a message is so sexually extreme that viewers will assign to it a negative value, breaching the fuzzy fence-line of normality and crossing into the realm of morbidity.

Additionally, the second prong of *Miller* involves message interpretation and, specifically, whether a sexually-explicit message will be interpreted as "patently offensive."[112] Here, however, a speaker may at least have some guidance in advance of communicating a message whether jurors will find a message patently offensive. That's because: 1) the second prong of *Miller* allows states to specifically define the underlying sexual conduct that could be depicted in patently offensive ways;[113] and 2)

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107. *Hamling*, 418 U.S. at 100.

108. United States v. Ragsdale, 426 F.3d 765, 772 (5th Cir. 2005).

109. United States v. McCoy, 937 F. Supp. 2d 1374, 1379 (M.D. Ga. 2013).

110. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504 (1985).

111. *Id.* at 498.

112. *Miller*, 413 U.S. at 24.

113. As the Court in *Miller* wrote, the second prong addresses "whether the work depicts

the Supreme Court in *Miller* provided what it called "a few plain examples" of the underlying sexual conduct that could be deemed patently offensive, depending on its depiction.[114]

Regarding the former point, some states now identify by statute the underlying sexual conduct that might be depicted in a patently offensive manner.[115] For instance, Florida's obscenity statute tracks *Miller's* second prong by providing that an obscene work is one that "depicts or describes, in a patently offensive way, *sexual conduct* as specifically defined herein."[116] In turn, it provides a laundry list of acts and portrayals constituting "sexual conduct."[117] Yet, there still is no definition of what is "patently offensive," thus leaving the speaker to guess at the audience's sense of offensiveness.

Regarding the latter point, the Supreme Court wrote in *Miller* that "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals,"[118] as well as "ultimate sexual acts, normal or perverted, actual or simulated,"[119] might be depicted in patently offensive ways. Yet this still leaves a speaker guessing because it only describes the *underlying sexual acts* that might be depicted in patently offensive ways, *not* what constitutes a patently offensive depiction of them. In other words, not all depictions of these enumerated acts are necessarily patently offensive.

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or describes, in a patently offensive way, sexual conduct *specifically defined by the applicable state law*." *Id.* (emphasis added).

114. *Id.* at 25.

115. *See, e.g.*, ALASKA ADMIN. CODE tit. 22, § 05.660 (2014) (identifying "ultimate sexual acts, masturbation, excretory functions, lewd exhibition of the genitals or sexual sado-masochistic activity" as the type of sexual conduct that might be depicted in a patently offensive way).

116. FLA. STAT. § 847.001(10)(b) (2014) (emphasis added).

117. Florida's obscenity statute defines sexual conduct as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed." § 847.001(16).

118. *Miller*, 413 U.S. at 25.

119. *Id.*

With these interpretive difficulties facing a risk-averse speaker in mind, the next section illustrates the ways in which *Miller* explicitly requires judges and juries to make value judgments about the speech in question.

B. Questions of Value

Speakers seeking to avoid obscenity convictions may try to infuse their content with value beyond pure sexual appeal, but they remain at the mercy of juries and judges to determine, post-publication, whether in fact there is sufficient value to safeguard the content under the strictures of the First Amendment. Specifically, the *Miller* test protects sexually-explicit speech if, taken as a whole, it possesses "serious literary, artistic, political, or scientific value."[120] As Justice Antonin Scalia explained in 2008, "to protect explicit material that has *social value*, we have limited the scope of the obscenity exception."[121]

Unlike the first two prongs of *Miller*, local contemporary community standards are not important for the final serious-value prong.[122] Rather, the determination "focuses on the 'worth' of allegedly obscene speech."[123] Appellate courts, in turn, "examine decisions on this third prong more closely in order to ensure that First Amendment protection of ideas, however unpopular, is maintained."[124]

A speaker's less-than-noble motive of including a value-added component to sexual expression in order to avoid an obscenity conviction is not relevant. As one federal court observed in a 2001 case targeting an issue of *Hustler* magazine:

> Whether *Hustler* magazine only publishes articles, editorials, and fiction with literary, artistic, scientific, or political value in order to avoid an obscenity determination or whether it has a

120. *Id.* at 24.

121. *Williams*, 553 U.S. at 288 (emphasis added) (citing *Miller*, 413 U.S. at 23–24; *Jenkins*, 418 U.S. at 161).

122. *See Smith*, 431 U.S. at 301 ("Literary, artistic, political, or scientific value . . . is not discussed in *Miller* in terms of contemporary community standards.").

123. Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1199 (9th Cir. 1989).

124. *Harrold*, 593 N.W.2d at 310 (citing *Smith*, 431 U.S. 291).

> sincere interest in expressing these views or exposing certain issues is of no consequence. The constitutional standard does not inquire about the motive of the publisher. It only requires the determination of whether the publication taken as a whole lacks serious artistic, literary, political or scientific value.[125]

A speaker's ability to predict how a jury or judge will gauge the value component thus is a very important skill for those who produce sexually-explicit content, but determining what constitutes sufficient value sometimes seems rather random. For instance, the January 1978 issue of *Playboy* magazine was deemed by a federal appellate court *not* to be obscene because it featured "significant content of literary matter including short stories, interviews, and panel discussions of great merit."[126] Specifically, this particular *Playboy* issue included, in addition to "several features and pictorials dealing with sex or beautiful women,"[127] the following:

> [T]wo short stories dealing with sport themes, a panel discussion on unidentified flying objects, an interview with philosopher Jean-Paul Sartre, an interview with Alex Haley, a series of articles about movie making, reviews of records, books, and movies, an advice column, features on menswear, grooming, food and drink, [and] gift selections.[128]

Yet, the same court in the very same case held that the January 1978 issue of rival adult magazine *Penthouse* lacked sufficient serious literary value to protect it,[129] despite the fact that it included:

> [A]n article about Foreign Affairs Advisor Brzezenski, an

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125. Broulette v. Starns, 161 F. Supp. 2d 1021, 1026 (D. Ariz. 2001).

126. Penthouse Int'l, Ltd. v. McAuliffe, 610 F.2d 1353, 1372 (5th Cir. 1980).

127. *Id.* at 1371.

128. *Id.*

129. *Id.* at 1372 (reasoning, with regard to the issue of *Penthouse*, that "the numerous pictorials and obscene letters were not saved by the articles possessing some literary merit," and concluding that, "[t]aken as a whole, 'Penthouse' appears to lack serious value.").

> article entitled "Africa, Jimmy Carter's Vietnam," reviews of books, movies, music, theatre, films, and television, men's grooming aids, several short stories (fiction and non-fiction), as well as stories dealing with sex-related subjects and photographs of nude women including a detachable color photograph measuring 21 inches by 32 inches entitled "Pet Poster" that was included in the magazine.[130]

As this real-world example suggests, a risk-averse speaker is free to sprinkle in non-sexual, value-added content into his communications, but there is no precise formula to guide him as to just how much of such content is sufficient to garner First Amendment security.

Yet another problem for speakers is trying to determine what constitutes "serious" value under *Miller*, as the Supreme Court has never provided a definition of this crucial word as it is used in obscenity cases.[131] A California appellate court recently even questioned:

> [W]hether we should judge the superior or inferior literary merit of the book at all. We suspect it is the *nature* of the work rather than its *quality* that lends it "serious literary value." In other words, we attempt to determine whether the book is *serious* literature, not whether it is *good* literature.[132]

Risk-averse speakers thus must speculate about whether their works will not only possess value in the eyes of juries and judges, but whether that value will rise to some undefined and indeterminate level of seriousness. For example, musical artists must consider if jurors and courts untrained in heavily stigmatized musical genres will be able to decipher serious value in their compositions,[133] museum curators must engage in

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130. *Id.* at 1371.

131. *See In re* Martinez, 157 Cal. Rptr. 3d 701, 715–16 (Ct. App. 2013) (addressing problems with the meaning of "serious" under *Miller*).

132. *Id.* at 715.

133. *See e.g.*, Luke Records, Inc. v. Navarro, 960 F.2d 134 (11th Cir. 1992) (examining whether a rap musical composition possessed serious artistic value). The mainstream press frequently connects both violence and crime with rap music. Scott Appelrouth & Crystal Kelly, *Rap, Race and the (Re)Production of Boundaries*, 56 SOC. PERSP. 301, 310 (2013). Indeed, criminality has "become sedimented in the popular lexicon as the key or trademark term for the subgenre" of rap known as gangsta rap. Murray Forman, *'Represent': Race, Space and Place in*

conjecture regarding whether jurors lacking in any photographic expertise will perceive serious value in sexually-explicit photos,[134] and comedians must take risks as to whether the jokes they tell on stage—jokes they perceive as having serious political or serious literary value—will not be interpreted that same way by unknown but legal fate-determining audiences.[135]

C. Summary of Meaning and Value Issues

What burdens of deciphering meaning and value must risk-averse speakers of sexually-explicit message ultimately bear, in advance of communicating, if they seek to avoid obscenity convictions? As Sections A and B above illustrate, speakers must successfully be able to navigate and understand the sexual mores and values of hypothetical average adults, as filtered through the minds of jurors whom they have never met—jurors potentially scattered in multiple communities across the nation that the speakers may never have visited. Sexually-explicit speakers must be able to accurately forecast whether those previously unknown jurors will feel that mythical "average" adults in their local communities would deem the speech pruriently appealing and patently offensive. On top of this, speakers must try to determine if those same jurors will find some undefined level of "serious" value in the speech sufficient to protect it, even if those same jurors deem it prurient and patently offensive.

Rap Music, 19 POPULAR MUSIC 65, 78 (2000).

134. *See* Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CALIF. L. REV. 1499, 1535–38 (1996) (discussing Robert Mapplethorpe's photographs and noting that prosecutors in Cincinnati "issued obscenity indictments against the host museum and its director for displaying several of the photographs"); *see generally* City of Cincinnati v. Contemporary Arts Ctr., 57 Ohio Misc. 2d 9 (Mun. Ct., 1990) (involving the obscenity prosecution of an arts center and its director for an exhibit of Robert Mapplethorpe photographs).

135. *See* Illinois v. Bruce, 202 N.E.2d 497, 497 (Ill. 1964) (reversing the obscenity conviction of comedian Lenny Bruce in a pre-*Miller* case based upon a 55-minute monologue that addressed, among other things, "numerous socially controversial subjects interspersed with such unrelated topics as the meeting of a psychotic rapist and a nymphomaniac who have both escaped from their respective institutions, [and] defendant's intimacies with three married women."). Bruce also was convicted of obscenity for a performance in New York City and later was posthumously pardoned. *See* John Kifner, *No Joke! 37 Years After Death Lenny Bruce Receives Pardon*, N.Y. TIMES (Dec. 24, 2003), http://www.nytimes.com/2003/12/24/nyregion/no-joke-37-years-after-death-lenny-bruce-receives-pardon.html (reporting that Bruce was given a four-month sentence at Rikers Island for a 1964 performance at the Cafe au Go Go in Greenwich Village and, decades later, was posthumously pardoned by then-New York Gov. George E. Pataki).

In summary, the First Amendment rights of sexually-explicit communicators pivot on their ability to accurately forecast, across many variables, the meanings and values that surrogate audiences of juries and judges will ascribe to their messages. Because truly knowing multiple audiences across the country is a practical impossibility, a risk-averse speaker in this area is forced to tailor his content to what he can only imagine is the most conservative community in the nation and add in heaping amounts of what he can only guess is serious value across the domains of literature, art, politics and science.[136] Only through such self-censorship and message contortion, or by foregoing speech entirely in some communities, can a risk-averse speaker be assured of First Amendment protection.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort of intentional infliction of emotional distress (IIED) evolved against a common-law backdrop deeply suspicious of providing a legal remedy for mental distress.[137] As Dean William Prosser noted, "[t]he early cases refused all remedy for mental injury, unless it could be brought within the scope of some already recognized tort."[138] Gradually, courts came to accept IIED as a legitimate, stand-alone cause of action,[139] even if today it still is condescendingly considered "a gap-filler tort."[140]

By the 1960s, the *Restatement (Second) of Torts* acknowledged that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such

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136. *See* Lawrence G. Walters & Clyde DeWitt, *Obscenity in the Digital Age: The Re-Evaluation of Community Standards*, 10 NEXUS 59, 65 (2005) (observing that "[i]n order to offer erotic materials online, those materials must be compliant with the lowest common denominator—the most conservative community's standards—given that all online materials are contemporaneously available in every community," and adding that "[i]n order to avoid liability under a law based on local community standards, the Internet publisher would need to severely censor its publications to comply with the most conservative of communities.").

137. *See* Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1331 (1998) (asserting that "[a]s with other rights of personality, the common law was slow to protect the interest in emotional tranquility as such.").

138. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 51 (1971).

139. *Id.* at 56.

140. Childers v. Geile, 367 S.W.3d 576, 582 (Ky. 2012).

emotional distress."[141] The conduct or speech necessary for IIED must be so extreme as to "go beyond all possible bounds of decency," and be "utterly intolerable in a civilized community."[142] The typical four elements of IIED "are that the defendant (1) engages in extreme and outrageous conduct (2) which intentionally or recklessly (3) causes (4) severe emotional distress to another."[143]

Most jurisdictions now recognize IIED in some form, with many employing the *Restatement (Second) of Tort*'s articulation.[144] IIED in speech contexts, as discussed below, raises extremely difficult dilemmas for speakers attempting to predict audience and judicial reaction in terms of both the meaning and value of messages. Two high-profile IIED rulings by the U.S. Supreme Court illustrate some of these problems.

Specifically, the most recent high court confrontation pitting protection of emotional tranquility against the First Amendment freedom of speech came in 2011 in *Snyder v. Phelps*.[145] It featured decidedly unpopular defendants: Fred Phelps, Sr., leader of the Westboro Baptist Church (WBC) of Topeka, Kansas, along with his daughters and the church itself.[146] Phelps, who died at age 84 in March 2014,[147] and WBC members had long picketed military funerals and other public events, based on their theological stance that "God hates and punishes the United States for its

141. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

142. *Id.* at § 46(1) cmt. d.

143. Johnson *ex rel.* Ind. Dep't of Child Services v. Marion Cnty. Coroner's Office, 971 N.E.2d 151, 162 (Ind. Ct. App. 2012). As the Supreme Court of Oklahoma recently wrote "[i]n order to prove the tort of intentional infliction of emotional distress or outrage, a plaintiff must prove each of the following elements: 1) the alleged tortfeasor acted intentionally or recklessly; 2) the alleged tortfeasor's conduct was extreme and outrageous; 3) the conduct caused the plaintiff emotional distress; and 4) the emotional distress was severe." Durham v. McDonald's Rests. of Okla., Inc., 256 P.3d 64, 66 (Okla. 2011).

144. Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 113 (2003).

145. *See generally* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

146. *Id.*

147. *See* Michael Paulson, *Fred Phelps, Anti-Gay Preacher Who Targeted Military Funerals, Dies at 84*, N.Y. TIMES (Mar. 20, 2014), http://www.nytimes.com/2014/03/21/us/fred-phelps-founder-of-westboro-baptist-church-dies-at-84.html?_r=0.

tolerance of homosexuality, particularly in America's military."[148]

The genesis of *Snyder* was the WBC's protest at the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq.[149] Phelps's followers picketed on land approved by local police about 1,000 feet from the church-held funeral.[150] They carried signs with messages such as "God Hates the USA/Thank God for 9/11," "Thank God for IEDs," "Thank God for Dead Soldiers," "Priests Rape Boys," and "God Hates Fags."[151] The protesters displayed the messages shortly before the funeral began, but did not enter church property.[152] Matthew Snyder's father, Albert (hereinafter "Snyder"), saw the tops of the signs as he drove to the funeral, but did not read them until he watched a later news broadcast.[153]

Snyder sued for, among other things, IIED.[154] A jury awarded him $2.9 million in compensatory damages and a whopping $8 million in punitive damages.[155] The latter sum was later reduced to $2.1 million.[156] The U.S. Court of Appeals for the Fourth Circuit reversed the entire judgment on First Amendment grounds,[157] which the Supreme Court later affirmed.[158]

The nation's high court made short work of the First Amendment analysis, finding that the WBC's placards constituted speech about matters

148. *Snyder*, 131 S. Ct. at 1213.

149. *Id.*

150. *Id.*

151. *Id.* (internal quotation marks omitted).

152. *Id.*

153. *Id.* at 1213–14.

154. *Snyder*, 131 S. Ct. at 1214.

155. *Id.* The damages in the lower court reflected emotional distress from both the funeral picketing and from a later internet posting described as the "epic," a work that denounced the Snyder family. However, the Supreme Court did not consider the "epic" in its decision, but focused exclusively on the picketing activities. *Id.* at 1214 n.1.

156. *Id.* at 1214.

157. Snyder v. Phelps, 580 F.3d 206, 221 (4th Cir. 2009).

158. *Snyder*, 131 S. Ct. at 1212.

of public concern—expression "at the heart of the First Amendment's protection."[159] Chief Justice John Roberts's majority opinion found that the WBC's signs, although not "refined social or political commentary,"[160] spoke to broad public issues, rather than to purely private matters, which are treated less rigorously under the First Amendment. Speech about matters of public concern, as the Court makes clear in multiple cases, "occupies the highest rung of the hierarchy of First Amendment values."[161] Both the meaning of the WBC's speech and its value were evident to the eight-justice majority.[162] From an *ex post* perspective, after the Court's majority spoke, the case did in fact seem like a relatively easy call. However, for a potential speaker operating *ex ante*, both the meaning and value questions are anything but simple.

Indeed, to underscore that point, in his dissent, Justice Samuel Alito challenged the majority's assumptions as to both the meaning and the value of the WBC's speech.[163] Alito argued, as addressed below, that the speech could be interpreted as primarily aimed at individuals rather than constituting valuable social commentary.[164]

The second landmark bout between the First Amendment and IIED occurred more than a quarter-century ago in *Hustler Magazine, Inc. v. Falwell*.[165] As in *Snyder*, questions about meaning and value were at the core of the case before the Supreme Court.

In *Falwell*, evangelist and political activist Jerry Falwell sued Hustler Magazine and its publisher, Larry Claxton Flynt, after the magazine published a parody of a liquor advertisement featuring a fictional interview with the Rev. Falwell.[166] In the interview, which was structured like an

159. *Id.* at 1215 (2011) (internal quotation marks omitted) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–759 (1985)).

160. *Id.* at 1217.

161. *Id.* at 1215 (internal quotation marks omitted) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

162. *Id.* at 1220.

163. *Id.* at 1222–26 (Alito, J., dissenting).

164. *Snyder*, 131 S. Ct. at 1225–26 (Alito, J., dissenting).

165. *See generally* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

166. *Id.* at 48.

actual ad campaign of the era for Campari Liqueur, Falwell admits to drunken sex with his mother in an outhouse and to delivering sermons while intoxicated.[167] The content, which was not an actual interview with the real Falwell,[168] also featured a small disclaimer reading "ad parody—not to be taken seriously."[169] Falwell did not find it funny, and he filed suit for IIED along with claims for defamation and invasion of privacy.[170] The IIED claim netted him compensatory damages of $100,000 and an equal sum in punitive damages.[171]

The U.S. Court of Appeals for the Fourth Circuit affirmed Falwell's IIED victory and rejected Hustler's contention that the court should apply the *New York Times* actual malice[172] rule from the defamation doctrine to the IIED issue.[173] The Fourth Circuit reasoned that the First Amendment speech interests were adequately accounted for "by the state-law requirement, and the jury's finding, that the defendants have acted intentionally or recklessly."[174]

The Supreme Court reversed, holding that actual malice was the proper standard for evaluating Jerry Falwell's claim, given his status as a

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167. *Id.*

168. The district court jury found that the alleged interview "could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'" *Id.* at 57 (quoting App. to Pet. for Cert. C1).

169. *Id.* at 48.

170. *Id.* at 48–49.

171. *Falwell*, 485 U.S. at 49.

172. The Court concluded in *N.Y. Times Co. v. Sullivan* that "[t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). The Court later made clear that "[a]ctual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991). Instead, actual malice means "publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." *Id.* at 511.

173. *Falwell*, 485 U.S. at 49 (citing *N.Y. Times Co.*, 376 U.S. 254).

174. *Id.* at 49–50.

public figure for defamation purposes.[175] Actual malice under the *New York Times* standard requires that a false statement be made "with knowledge that it was false or with reckless disregard of whether it was false or not."[176] Because the statements in the ad parody were not of a factual nature—and thus could not be false—the IIED claim failed under the actual malice test.[177]

With this background on both IIED and the decisions of *Snyder* and *Falwell* in mind, the next sections explore in greater detail the sometimes knotty issues of meaning and value that this pair of cases illustrates in IIED disputes.

A. *Questions of Meaning*

1. *Snyder v. Phelps*

For speakers such as the WBC, *Snyder* creates a challenging *ex ante* determination as to the meaning of speech that may or may not receive First Amendment protection and that may, if misunderstood, result in a protracted and costly lawsuit.[178] Indeed, the plaintiff in *Snyder* misinterpreted the signs as "a personal attack on [himself] and his family,"[179] thus leading to his suit, while the majority of the Supreme Court rejected this understanding.[180] In fact, the precise meaning of signs like those hoisted by WBC members is anything but clear on first, or even second glance.

Stripped of context, the individual meaning of bumper sticker-like messages such as "Fag Troops," "Pope in Hell," and "Thank God for IEDs"[181] is unclear, at best. The pope is not literally in hell and, even if

175. *Id.* at 56–57.

176. *N.Y. Times Co.*, 376 U.S. at 279–280.

177. *Falwell*, 485 U.S. at 57.

178. *Snyder*, 131 S. Ct. at 1207.

179. *Id.* at 1217.

180. *See id.* (noting that "[t]here was no pre-existing relationship or conflict between Westboro and Snyder that might suggest Westboro's speech on public matters was intended to mask an attack on Snyder over a private matter.").

181. *Id.* at 1216–17.

there is such a place, what does it mean to say that the pope is there? And why is he ostensibly there in the first place? Why, in turn, is one to thank God for improvised explosive devices that harm U.S. soldiers? Even assuming if one sadistically wants to see U.S. soldiers harmed by IEDs, why is one to thank God, rather than thank the terrorists who actually assemble and plant IEDs? And if one takes the derisive "Fag Troops" to mean the descriptive "Homosexual Troops," what does this two-word phrase mean: that military troops are gay? That they should be gay? That they should not be gay? And why should it matter if they are or are not gay?

Even for a reasonable observer, then, particularly one not previously attuned to the odd Westboro *Weltanschauung*, the messages emblazoned on the signs could be extremely puzzling. Without bringing to them some background knowledge of the WBC's bizarre belief system—the group perceives, as it states today on its website, "the modern militant homosexual movement to pose a clear and present danger to the survival of America, exposing our nation to the wrath of God as in 1898 B.C. at Sodom and Gomorrah"[182]—the signs' meanings are cryptic.

And while the meaning of the individual signs may make a little bit more sense when viewed collectively at a WBC gathering, even then their meanings might stretch from a theological argument to a vicious personal attack on the deceased.[183]

Controversial speakers such as the WBC that deliver obscure or esoteric messages take significant risks—namely, that those messages may be lost in translation and, as they apparently were by Albert Snyder, misunderstood as a direct personal attack,[184] thus leading to an expensive and time-consuming lawsuit. Without advance knowledge of the WBC's theology, audiences may be unable to decipher a sign's intended meaning and, perhaps, believe the WBC was expressing animus toward the deceased. At trial, the district court erroneously instructed the jury to

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182. Westboro Baptist Church, *About Us*, GOD HATES FAGS, http://www.godhatesfags.com/wbcinfo/aboutwbc.html (last visited Feb. 3, 2015).

183. When it comes to "Fag Troops," for example, the false suggestion that a person is gay may or may not be actionable under current defamation law, depending on the jurisdiction. Matthew D. Bunker et al., *Not That There's Anything Wrong With That: Imputations of Homosexuality and the Normative Structure of Defamation Law*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 581, 587–88 (2011).

184. *Snyder*, 131 S. Ct. at 1217 (Plaintiff in *Snyder* misinterpreted signs as "a personal attack on [himself] and his family").

determine whether certain signs were aimed specifically at the Snyder family.[185] The jury did, in fact, find that some signs were directed toward the Snyders.[186]

Indeed, Justice Samuel Alito concluded in his dissent that a reasonable observer—even one familiar with the WBC's odd beliefs—"would have assumed that there was a connection between the messages on the placards and the deceased."[187]

For example, Alito asserted that the slogans "Semper Fi Fags" and "Fag Troops" could lead a reasonable observer to believe "they were meant to suggest that the deceased was a homosexual."[188]

Similarly, messages declaring "God Hates You" and "You're Going to Hell"[189] would "have likely been interpreted as referring to God's judgment of the deceased."[190] For Alito, the meaning that a "reasonable person"[191] would ascribe to the signs is seemingly central in determining the level of First Amendment protection they receive. Where actionable speech was intertwined with protected speech, the latter could not necessarily immunize the former.[192] For Alito, it is the audience that determines where the line between protected and actionable speech should be drawn based upon a reasonable audience member's interpretation of the intended message.[193] Speakers like the WBC, in turn, face huge risks on meaning and liability issues if they do not know their audiences' interpretive skills and abilities. Put bluntly, what exactly is a hypothetical, reasonable person to know and understand, going into a message, about the WBC's belief system? How much should the WBC expect funeral

185. *Snyder*, 580 F.3d at 221.

186. *Id.*

187. *Snyder*, 131 S. Ct. at 1225 (Alito, J., dissenting).

188. *Id.* (internal quotation marks omitted).

189. *Id.* (internal quotation marks omitted).

190. *Id.*

191. *Id.*

192. *See id.* at 1227.

193. *Snyder*, 131 S. Ct. at 1225.

audiences to know about its views? A risk-averse speaker can only guess the answers.

2. *Hustler Magazine, Inc. v. Falwell*

A critical meaning issue in *Falwell* was whether or not the statements about the plaintiff in the "interview" were to be understood as factual—whether or not, that is, Jerry Falwell really did fornicate with his mom and preach while drunk.[194] To properly understand the meaning of the message in *Falwell*—to get the joke, as it were—a person reading the content must first understand the conventions of satire and parody, which, as this section illustrates, is not always so easy.[195] Speakers like *Hustler* face legal liability if audiences, including judges and justices, do not understand such literary devices.

The *Falwell* court had to make an implicit judgment that a reasonable audience would understand that the interview was not literally true.[196] Although the Court left the details of that conclusion largely unexplored, since it simply accepted the jury's decision below,[197] the determination of whether something is an assertion of fact is a complex and often uncertain judgment call. For a speaker in this position, the gamble as to what a hypothetical audience would understand about a work is, in reality, a potentially expensive risk.

Although *Hustler* and the Court both branded the *Falwell* "interview" a parody,[198] the work actually combined elements of both parody and satire. Satire and parody constitute sophisticated literary genres that are challenging for some readers and viewers to grasp.[199] Indeed, "satire is

194. *See Falwell*, 485 U.S. at 48.

195. *See generally id.*

196. *Id.* at 49.

197. *Id.*

198. *Id.* at 48, 57.

199. Mari A. Johnson, *Satire*, 2 ENCYCLOPEDIA OF IDENTITY 654, 654 (Ronald L. Jackson II & Michael A. Hogg eds., 2010) (describing satire as "a literary genre; it is often used in the performing arts; and it is used to highlight human folly, vice, abuse, or shortcomings to affect a change in attitude, action, or belief. Thus, satire refers to ridicule or criticism with a moral intention. Commonly, satire is comical although it is not always humorous because the intention is to encourage serious improvement in the lives of the audience.").

often misunderstood,"[200] and, "[f]or a parody to be successful, the audience must readily recognize the original work which is being mocked."[201] Thus, from a speaker's perspective, there is often considerable uncertainty in producing works of this type, because their meanings may not be perceived correctly, either by the intended target or by a down-the-road audience of judges.

One literary scholar explains that, "[t]raditionally, *parody* has been defined as a subspecies of satire, the genre of making-fun-of. A parody—one in the class of what Gerard Genette calls 'hypertexts'—typically ridicules another text—the 'hypotext.'"[202] Satire *qua* satire, on the other hand, is defined "as the ridicule of a subject to point out its faults,"[203] and "as a form that holds up human vices and follies to ridicule and scorn."[204] Satire's subjects typically are social conditions and specific individuals.[205] Viewed together, parody "provides the satirist with another mechanism to make his larger critique within the wider context of the satire itself."[206]

With these definitions in mind, the *faux* interview in *Hustler* featured elements of both parody and satire.[207] Specifically, it parodied a particular advertising genre (namely, the Campari ads of the era) and satirically mocked Jerry Falwell, suggesting not that the Reverend engaged in the

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200. *Id.* at 657.

201. George M. Zinkhan, *From the Editor: The Use of Parody in Advertising*, 23 J. ADVERTISING 3, 3 (1994).

202. Seymour Chatman, *Parody and Style*, 22 POETICS TODAY 25, 28 (2001).

203. Roger J. Kreuz & Richard M. Roberts, *On Satire and Parody: The Importance of Being Ironic*, 8 METAPHOR & SYMBOLIC ACTIVITY 97, 100 (1993).

204. Lisa Colletta, *Political Satire and Postmodern Irony in the Age of Stephen Colbert and Jon Stewart*, 42 J. POPULAR CULTURE 856, 859 (2009).

205. Conal Condren, *Satire and Definition*, 25 HUMOR: INT'L J. HUMOR RES. 375, 377–78 (2012).

206. G. D. Kiremidjian, *The Aesthetics of Parody*, 28 J. AESTHETICS & ART CRITICISM 231, 232 (1969).

207. *See Falwell*, 485 U.S. at 48; *see also* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580–81 (1994) (describing the distinction between satire and parody as particularly crucial in fair use cases in copyright law because unlike satire, parody critiques the borrowed work, and therefore has a greater claim to fair use).

particular acts described, but rather that he was a hypocrite.[208]

The larger point is that grasping these subtleties is anything but simple, which, in turn, exposes a speaker to considerable risk. While the jury—and by extension, the Court—seems to have reached the correct result in *Falwell*, there certainly is no guarantee that future courts and juries will do so.

The meaning determination in *Falwell* was based on the same basic jurisprudence used in defamation cases when dealing with works of parody and satire. In defamation law, the standards for separating assertions of fact from protected opinion (or non-facts), including parody and satire, are, as Professor Joseph King notes, "dynamic," and "still a work in progress."[209] King points out that these questions are driven by developments in state tort law, First Amendment jurisprudence, and other factors.[210] Ultimately, courts generally decide whether a "reasonable recipient of the communication could interpret it as representing that the events depicted actually occurred."[211] For the potential parodist or satirist, such a standard requires a determination of what sort of person that reasonable recipient might be, what background or general cultural knowledge could be attributed to that sort of person, and how a judge might imagine all of that.

Consider, for example, the 2013 defamation decision regarding an *Esquire* satire aimed at a book disputing President Barack Obama's U.S. citizenship.[212] In *Farah v. Esquire Magazine*,[213] journalist Mark Warren posted a satirical piece on *Esquire's* politics blog shortly after publication of *Where's the Birth Certificate? The Case that Barack Obama is not Eligible to be President*.[214] The tome, written by Jerome Corsi and published by WND Books, owned by Joseph Farah, appeared a few weeks

208. *Falwell*, 485 U.S. at 48.

209. Joseph H. King, *Defamation Claims Based on Parody and Other Fanciful Communications Not Intended to Be Understood as Fact*, 2008 UTAH L. REV. 875, 882 (2008).

210. *Id.*

211. *Id.* at 911.

212. *See generally* Farah v. Esquire Magazine, 736 F.3d 528 (D.C. Cir. 2013).

213. *See generally id.*

214. *Id.* at 530.

after Obama released a long-form birth certificate, essentially ending the debate.[215] Warren's *Esquire* post bore the title "BREAKING: Jerome Corsi's Birther Book Pulled from the Shelves!"[216] It claimed that Farah, one day after the book's release, planned to "recall and pulp the entire 200,000 first printing run of the book, as well as announc[e] an offer to refund the purchase price," to those who had already bought the book.[217] The post also purported to quote an unnamed source from the publishing house stating that Obama's eligibility to serve was resolved for "anybody with a brain," and asserting "we don't want to look like fucking idiots, you know?"[218]

Ninety minutes after uploading this facetious post, *Esquire* added an update, assuring its audience that the post was satire intended to "point out the problems with selling and marketing a book that has had its core premise . . . gutted by the news cycle, several weeks in advance of publication."[219] The update, at the very least, gave the appearance that *Esquire* was somewhat uncertain whether its audience got the joke and had grasped the fact that the original post was not real news.[220] This is because the update explains in detail the nature and purpose of the post for the benefit of "those who didn't figure it out yet, and the many on Twitter for whom it took a while."[221]

In evaluating the defamation claim, the D.C. Circuit explored whether the statements in the original post could reasonably be understood to state actual facts.[222] In making this determination, the court reasoned, it must consider both the context of the speech— including, "not only the immediate context of the disputed statements, but also the type of publication, the genre of writing, and the publication's history of similar

215. *Id.*

216. *Id.*

217. *Id.* (internal quotation marks omitted).

218. *Farah*, 736 F.3d at 532 (internal quotation marks omitted).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 535.

works,"[223] —and the broader social context.

After surveying rhetorical hyperbole cases decided by the Supreme Court,[224] as well as *Falwell*, the appellate court described satire as a complex genre that might require time for a reader to grasp: "In light of the special characteristics of satire, of course, 'what a reasonable reader would have understood' is more informed by an assessment of her well-considered view than by her immediate yet transitory reaction."[225] Moreover, the test, "is not whether some actual readers were misled, but whether the hypothetical reasonable reader could be (after time for reflection)."[226]

These sorts of mental gymnastics and levels of audience abstraction may be challenging for a court to perform, but for a speaker, *ex ante*, they pose tremendous difficulties. What could a reasonable reader be presumed to decode from the original post? *Esquire* itself, in the moment, seemed to lack faith that actual, flesh-and-blood readers were adequately interpreting the seemingly straight-faced post, given the ponderous explanation contained in the update.

And what exactly was the universe of readers from which to draw the hypothetical reasonable reader? For the D.C. Circuit, that universe was not comprised of general news consumers or general online habitués, but rather regular readers of *Esquire*'s political blog. This is in accord with the niche audience concept endorsed by the Supreme Court's 2014 decision in *Hoeper*, as described in the Introduction.[227] The regular readers of *Esquire*'s political blog, according to the court in *Farah*, were familiar with *Esquire*'s past satirical posts and were, "politically informed."[228] Furthermore, that audience would have been familiar with the "birther"

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223. *Id.*

224. *See Farah*, 736 F.3d at 534–35, 539; *see e.g.*, Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264 (1974).

225. *Farah*, 736 F.3d at 536.

226. *Id.* at 537.

227. Charles D. Tobin & Len Niehoff, *Material Falsity in Defamation Cases: The Supreme Court's Call for Contextual Analysis*, COMMUNICATIONS LAWYER (June 2014), http://www.americanbar.org/publications/communications_lawyer/2014/june/material_falsity_defamation_cases_supreme_courts_call_contextual_analysis.html.

228. *Farah*, 736 F.3d at 537.

movement, as well as with Farah and Corsi serving as its leaders.[229]

Thus, regular readers of the blog supposedly would have identified the initial post as satire, given the improbability that a prominent birther would, just one day after publication, suddenly decide to recall and destroy all copies of the book.[230] The court noted that Farah, even after the release of the Obama long-form birth certificate, continued to appear in the press and to write articles on his website promoting the book.[231] Oddly, the court seemed to attribute virtual omniscience even to presumed political junkies when it assumed the reasonable reader might well have knowledge of Farah's press releases for Corsi's book or be aware of Farah's recent appearance on MSNBC.[232]

Unquestionably, as the court noted, the post contained, "humorous or outlandish details that . . . betray its satirical nature," as well as other elements that suggested it was not reporting actual facts.[233] And while the D.C. Circuit seemed to reach the intuitively correct result in this particular case, this sort of gestalt-like, totality-of-the-circumstances approach is cold comfort for the next speaker who must determine not only some future court's view of the reasonable audience for the speech, but the cultural and epistemological milieu from which a judge might choose to paint his or her portrait. If one is not a speaker like *Esquire* with a well-established, savvy audience whom a judge could easily imagine and stereotype as perceptive and culturally and politically aware, such a determination can quickly become problematic. Moreover, if a speaker has no history of past satiric expression–unlike *Esquire*–he loses the benefits such history provides for contextual evaluation of the speech. In sum, *Esquire*, arguably, was ideally positioned to frame and tilt the reasonable reader to construct in its favor, while a lesser-known speaker, lacking an expressive track record, might be at a decided disadvantage in that determination.

229. *Id.*

230. *Id.* at 538.

231. *Id.*

232. *Id.*

233. *Id.*

B. *Questions of Value*

1. *Snyder v. Phelps*

The value component in IIED cases following the *Snyder* approach is also fraught with difficulty for potential speakers. The *Snyder* Court explained that the prime locus of First Amendment value in such speech concerns the question of whether the speech addresses a matter of public concern.[234] Such speech is, "at the heart of the First Amendment's protection."[235] If the speech does not address a matter of public concern, it may be of lesser First Amendment value when compared to state tort interests embodied in, for example, IIED.[236]

The "public concern" standard was originally applied in *Connick v. Myers*, a public employee speech case,[237] and later in *Dun & Bradstreet, Inc. v. Greenmoss Builders*, a defamation case.[238] As Professor Cynthia Estlund points out, "*Connick* and *Dun & Bradstreet* introduced, for the first time in the history of modern First Amendment jurisprudence, an explicitly content-based category of privileged 'public issue' speech that alone is entitled to certain important protections."[239] Later incarnations of the doctrine have become, in the hands of some justices, increasingly Byzantine, as Professor Eugene Volokh makes clear in an insightful article.[240] Volokh notes that Justices Stephen Breyer and Sandra Day

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234. It has been observed that the *Snyder* Court's distinction between matters of public and private concern "proved crucial" in the case. James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 495 (2011); *see* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 823 (2013) (noting that the Court in *Snyder* "emphasized that Westboro's speech related to topics of public concern").

235. *Snyder*, 131 S. Ct. at 1215 (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 758–59 (1985)) (internal quotation marks omitted).

236. *See Snyder*, 131 S. Ct. at 1215.

237. *See Connick*, 461 U.S. at 154.

238. *See Dun & Bradstreet, Inc.*, 472 U.S. at 749.

239. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 2 (1990).

240. *See generally* Eugene Volokh, *The Trouble with 'Public Discourse' as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567 (2011).

O'Connor, concurring in *Bartnicki v. Vopper*[241] involving illegally intercepted conversations, did not simply draw a distinction between "public concern" and private speech, but drew, "the line . . . between speech on matters of 'unusual public concern' (protected) and speech on matters of merely usual public concern (unprotected)."[242] Volokh argues, "It is hard to see where or how such a line would be drawn and how speakers could predict where or how it would be drawn."[243]

Indeed, even the less esoteric version of the *Snyder* doctrine creates significant difficulties for speakers attempting to predict its outcome. Some justices refer to the public concern test as an "amorphous concept."[244] The *Snyder* majority even acknowledged that, "the boundaries of the public concern test are not well defined."[245] Indeed, the Court's explanation of the test makes this lack of definition manifest.[246] The majority explained that speech, "deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"[247] Speech is also a matter of public concern when it focuses on "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[248] The Court then introduced even greater uncertainty to its already vague two-pronged standard by stating that the test of public concern speech examines the "content, form and context" of the speech "as revealed by the whole record."[249] Such fact-intensive, ad hoc decision-making creates clear problems as would-be speakers attempt to evaluate the potential value of

241. *See generally* Bartnicki v. Vopper, 532 U.S. 514 (2001).

242. Volokh, *supra* note 240, at 580.

243. *Id.*

244. *Bartnicki*, 532 U.S. at 542 (Rehnquist, C.J., dissenting).

245. *Snyder*, 131 S. Ct. at 1216 (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004) (*per curiam*)).

246. *See id.*

247. *Id.* (quoting *Connick*, 461 U.S. at 146).

248. *Id.* (quoting *Roe*, 543 U.S. at 83–84).

249. *Id.* (quoting *Dun & Bradstreet, Inc.*, 472 U.S. at 761).

their expression to a later, unknown court.[250] As one commentator suggests, "these principles do little more than restate the proposition that the First Amendment protects speech regarding a matter of public concern, and they will likely provide little guidance, especially in close cases."[251]

Additionally, the *Snyder* majority found that even if some of the WBC's signs could be interpreted as directed at the Snyders, nevertheless, "the overall thrust and dominant theme of Westboro's demonstrations spoke to broader public issues."[252] A standardless evaluation of the "overall thrust" of speech in emotionally charged cases seems a slender thread on which to hang constitutional protection—particularly since there is a notable lack of precision as to when otherwise actionable speech is protected when set in a context of broader public issues.[253]

Moreover, *Snyder* creates considerable ambiguity as to whether even speech on a matter of public concern is always protected.[254] As Justice Breyer's concurrence notes, the majority does not definitively state that speech on matters of public concern can *never* cross the line into tortious expression.[255] The majority leaves open the possibility of future case-by-case evaluations with the fact-intensive inquiry it conducted. Breyer argues that even if the expression is determined to possess public concern value, the constitutionally protected status of the expression—given a defendant's

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250. *See* Volokh, *supra* note 240 at 580.

251. Andrew Meerkins, Note, *Distressing Speech After Snyder—What's Left of IIED?*, 107 NW. U. L. REV. 999, 1023 (2013).

252. *Snyder*, 131 S. Ct. at 1217.

253. The "overall thrust" formulation bears some similarity to the "predominant use test" used by the Supreme Court of Missouri in a confrontation between the First Amendment and the right of publicity. *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003). That test, which purports to identify whether the use of a celebrity's persona by a third party is predominantly expressive in nature or predominantly designed to exploit the commercial value of the person's identity, has been described by the Third Circuit as "subjective at best, arbitrary at worst." Hart v. Elec. Arts, Inc., 717 F.3d 141, 154 (3d Cir. 2013). The *Snyder* majority does not provide any specifics as to how the "overall thrust" analysis identifies the dominant theme of speech like that of Westboro as between public concern speech and personal attack, but it seems likely that any such methodology would be subject to some of the same concerns as those expressed by the Third Circuit.

254. *See generally* Clay Calvert, *Too Narrow of a Holding? How—and Perhaps Why—Chief Justice John Roberts Turned Snyder v. Phelps into an Easy Case*, 64 OKLA. L. REV. 111 (2012) (analyzing how the *Snyder* majority generally avoided the hard questions in the case).

255. *Snyder*, 131 S. Ct. at 1221 (Breyer, J., concurring).

attempts to attack an individual in order to draw media attention to the speech—does not necessarily limit the power of state tort law to remedy uses of that speech to inflict severe emotional harm.[256] Here, Justice Breyer notes the fact that the WBC protested lawfully in a designated area and did not approach the funeral ceremony itself, plus the fact that Snyder did not actually encounter the offending slogans at the funeral, supports the sort of fact-intensive inquiry the majority performed and essentially limits *Snyder* to its facts.[257] If Breyer's reading of *Snyder* is correct, then speakers have little additional certainty about how future courts will treat the value of their speech vis-à-vis state tort interests than before *Snyder* was decided.

2. *Hustler Magazine v. Falwell*

Not only was the meaning of speech (was it factual or not) a key issue in *Falwell*, but so too was its value and contribution to public discourse. Indeed, the Supreme Court in *Falwell* emphasized in protecting the ad parody that, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on *matters of public interest and concern*."[258] The ad parody itself was, as Chief Justice William Rehnquist wrote, a type of political cartoon, albeit, "at best a distant cousin,"[259] and, "a rather poor relation at that."[260] It is precisely because the satirical speech of *Hustler* had value in the "area of political and social discourse"[261] that the Court rejected a constitutional standard for outrageousness to measure whether or not it should be protected.[262]

That value-based inquiry into the speech in *Falwell*, in turn, ultimately stemmed from another value-based decision in the case—namely, Jerry Falwell's status as a public figure.[263] In other words, *Falwell*

256. *Id.*

257. *Id.* at 1221.

258. *Falwell*, 485 U.S. at 50.

259. *Id.* at 55.

260. *Id.*

261. *Id.*

262. *See id.*

263. *See id.*

demonstrates the intersection in IIED cases between the *value of speech and the value of the person* at whom the speech is targeted.[264] But as this section later illustrates, the importance of that intersection post-*Snyder* is unclear.

Specifically, as a public figure, Jerry Falwell needed to establish, "a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true."[265] It was the public-figure determination that exposed him to a higher bar on the issue of culpability given the First Amendment's solicitude toward speech about public figures and public officials articulated in *New York Times Co. v. Sullivan*.[266]

For a potential speaker in the *Hustler* scenario, however, the status determination is fraught with uncertainty. While there are certainly recognized categories of public figures established by *Sullivan*'s progeny,[267] precisely which plaintiffs fit within those categories is subject to considerable interpretation. Judge Robert D. Sack has noted that, "the lack of a comprehensive definition or description of the term 'public figure' in the Supreme Court and the divergent case law in state and lower federal courts make the determination of a defamation plaintiff's status an uncertain process, differing from state to state and court to court."[268] Sack, in a moment of understatement, calls the methods used to make such determinations "inexact."[269] One federal judge famously noted that,

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264. *See Falwell*, 485 U.S. at 56.

265. *Id.* As one recent analysis stated, "[c]ommentators have noted the imprecise fit of the actual malice standard for IIED claims—the Court in *Hustler* did not explain why it was adopting it." Meerkins, *supra* note 251 at 1009.

266. *See N.Y. Times Co.*, 376 U.S. at 254.

267. In *Gertz v. Robert Welch, Inc.*, the Court discussed both limited-purpose public figures, who inject themselves into public controversies, and all-purpose public figures, who have acquired "pervasive fame and notoriety." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The Court also mentioned the "exceedingly rare" possibility of someone becoming a public figure involuntarily. *Id.*

268. ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 5.3.6, at 5-43, 5-44 (3d ed., vol. 1 1999).

269. *Id.* For an analysis of the tests to determine a libel plaintiff's status as a public or private figure as well as an acknowledgement of the ambiguity created by such formulations, see Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. ILL. U. L. REV. 141 (1995); *see also* W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO

"[d]efining public figures is much like trying to nail a jellyfish to the wall."[270]

Aside from the issue of an IIED plaintiff's status, a potential speaker evaluating the risk of liability must confront the legal uncertainty surrounding the *Hustler* standard post-*Snyder*. Although the *Snyder* majority cited *Hustler* with approval and did not suggest that *Hustler* was no longer good law, *Hustler* in the post-*Snyder* era creates certain doctrinal anomalies.

In *Hustler*, as previously noted, the plaintiff's status was critical in the process of balancing First Amendment interests with state tort interests, just as it is in current defamation doctrine.[271] This is so because tort law that affects speech has less justification for punishing speech that deals with public figures. *Snyder*, however, completely ignores the status determination and focuses exclusively on the category of speech at issue.[272] As one scholar put it, "the *Snyder* Court never once mentioned the nature of Mr. Snyder, who clearly is a private figure."[273]

Snyder, in fact, evokes a certain sense of déjà vu when one considers that it almost suggests a return to *Rosenbloom v. Metromedia, Inc.*,[274] at least in the context of IIED. In the now-discredited 1971 *Rosenbloom* opinion, a plurality of the Court, led by Justice William Brennan, held that the actual malice standard in defamation should apply to private figures as well as public figures if the statement is about a matter of "public or general concern."[275] The parallels with *Snyder* are, of course, notable. Nonetheless, *Snyder* differs from *Rosenbloom* because it does not employ actual malice—instead, as noted earlier, the analysis is quite murky once

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ARTS & ENT. L. J. 1 (2003).

270. Rosanova v. Playboy Enters., Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976).

271. *See Falwell*, 485 U.S. at 56.

272. *Snyder*, 131 S. Ct. at 1207.

273. Max David Hellman, *The Protest Heard Around the World: Why the Supreme Court's Decision in* Snyder v. Phelps *Protects Too Much Speech, Challenges the Court's Historical Balance Between Free Speech and State Tort Claims, and Leaves Tort Victims with Little Remedy*, 49 CAL. W. L. REV. 51, 94 (2013). Justice Alito, in dissent, did note that Albert Snyder was not a public figure. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

274. *See generally* Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971).

275. *Id. Rosenbloom* was abrogated by *Gertz*, 418 U.S. at 346–47.

the status of the expression as relating to a matter of public concern is identified.[276]

Where all this leaves a potential speaker contemplating the continuing vitality and validity of the *Hustler* rule is anyone's guess. Does *Hustler* still control in a certain class of IIED cases post-*Snyder* (such as those involving public figures),[277] or does the *Snyder* public-concern test trump all considerations of the plaintiff's status?[278] As one commentator put it, "the Court may have recast *Hustler Magazine, Inc. v. Falwell*—albeit without being explicit— as a case depending more on the status of the speech at issue therein . . . than on Falwell's status as a public figure."[279] Ultimately, the Court must address those issues. For now, speakers attempting to evaluate the "value" part of the legal landscape in IIED are likely left befuddled.

C. *Summary of Meaning and Value Issues*

As Sections A and B made clear, a potential speaker faced with unpacking the meaning and value inquiries at the point where IIED intersects with the First Amendment is in an unenviable position. The mysteries of hypothetical reasonable audiences, along with vague standards for identifying the presence of speech on matters of public concern or public figure status make legal predictions extremely challenging for trained lawyers, much less for the average uninitiated speaker. The murky doctrinal status of *Hustler* post-*Snyder* adds yet another significant layer of complexity and burden on speakers.

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276. *See Snyder*, 131 S. Ct. at 1219 ("'[O]utrageousness' [] is a highly malleable standard with 'an inherent subjectiveness.'").

277. At least one commentator has made this suggestion. Mark Strasser, *Funeral Protests, Privacy, and the Constitution: What is Next After Phelps?* 61 AM. U. L. REV. 279, 309 (2012) (pointing out that the holding in *Falwell*, "seemed designed to preclude an end run around First Amendment protections [for defamation]," and that, "because Snyder was a private individual rather than a public figure and because damages would be imposed because of the outrageousness of where the protest took place rather than solely what was said, *Falwell* would seem distinguishable.").

278. *See, e.g.*, Douglas B. McKechnie, *The Death of the Public Figure Doctrine: How the Internet and Westboro Baptist Church Spawned a Killer*, 64 HASTINGS L.J. 469, 497 (2013) (predicting "*Gertz*'s demise").

279. Paul E. Salamanca, *Snyder v. Phelps: A Hard Case that Did Not Make Bad Law*, 2010-11 CATO SUP. CT. REV. 57, 59 (2010-11).

III. STUDENT SPEECH RIGHTS

Public school students possess First Amendment speech rights,[280] albeit rights less broad in scope than those of adults.[281] As illustrated in part by the Supreme Court's 2007 opinion in *Morse v. Frederick*[282] and the Third Circuit's 2013 *en banc* decision in *B.H. v. Easton Area Sch. Dist.*, which the Supreme Court declined to disturb in March 2014,[283] student speakers face difficult judgments and risks regarding how their sometimes polysemic and silly messages will be interpreted by adults—be those adults, at least initially, school administrators or, later, judges and justices—as to both meaning and value.[284]

The meaning of the messages at issue in both *Morse* and *B.H.* were not readily transparent.[285] For instance, Chief Justice Roberts observed that the message in *Morse*, "Bong Hits 4 Jesus," was "cryptic,"[286] while the bracelet-worn message addressed by the Third Circuit in *B.H.*, "I ♥ boobies! (KEEP A BREAST)," is ambiguously vulgar and does not literally mean that its wearer loves breasts.[287]

Furthermore, in both cases the question of message value was pivotal.[288] In *Morse*, Justice Alito and Justice Kennedy joined in a critical

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280. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

281. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (observing that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

282. *See generally* Morse v. Frederick, 551 U.S. 393 (2007).

283. *See generally* B.H. v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014).

284. *See generally id*; *Morse*, 551 U.S. at 393.

285. *See B.H.*, 725 F.3d at 298; *Morse*, 551 U.S. at 401.

286. *Morse*, 551 U.S. at 397, 401.

287. *B.H.*, 725 F.3d at 297–98 (explaining that the message in question is "part of a nationally recognized breast-cancer-awareness campaign").

288. *See id*; *Morse*, 551 U.S. at 422 (Alito, J., concurring).

concurring opinion that would protect student speech, "that can plausibly be interpreted as commenting on any political or social issue."[289] In *B.H.*, the Third Circuit majority embraced Justice Alito's logic and concluded that the message could not be banned under the Supreme Court's 1986 decision in *Bethel Sch. Dist. v. Fraser*[290] because "I ♥ boobies!" "is plausibly interpreted as commenting on a social issue."[291] In other words, savvy student speakers would be wise to add a healthy dose of social or political value to their mixed-meaning messages in order to safeguard them under the First Amendment. Yet, those same students ultimately are dependent on an adult audience of jurists to find such value only after the messages are communicated.

Significant age and maturity differences as well as discrepancies in cultural reference points between the speaker and audience in student-speech cases arguably exacerbate the likelihood that intended meanings may be lost in translation and that, in turn, minor speakers may, at least from their perspective, be unfairly punished. Compounding the problems for minor speakers is the often vast deference given to the interpretation of adults in positions of power when it comes to questions of meaning.[292] In brief, risk-averse student speakers sometimes must be experts in adult perspective-taking in order to safely exercise their First Amendment speech rights. These are not easy burdens for minors to bear.

A. *Questions of Meaning*

Debate over the meaning of the messages in both *Morse* and *B.H.* was paramount to the outcome of the cases, as Sections 1 and 2 below illustrate.

1. *Morse v. Frederick*

Morse v. Frederick involved a battle over meaning.[293] While the majority in *Morse* noted student-speaker Joseph Frederick's contention that his message was mere nonsense and intended only to attract attention from

289. *Morse*, 551 U.S. at 422 (Alito, J., concurring).

290. *See Fraser*, 478 U.S. at 675.

291. *B.H.*, 725 F.3d at 320 n.22.

292. *Infra* note 351 and accompanying text.

293. *See Morse*, 551 U.S. at 393.

television cameras,[294] the speaker's subjective intent ultimately was given short shrift. Instead, the majority focused on the audience's interpretation – specifically, the understanding of principal Deborah Morse – and accepted it so long as it was a "plainly a reasonable one."[295] Thus, the principal's view that "Bong Hits 4 Jesus" "would be interpreted by those viewing it as promoting illegal drug use"[296] carried the legal day. A reasonableness standard for meaning was essential, the majority intimated, because the principal "had to decide to act – or not act – on the spot."[297]

Justice John Paul Stevens, in a dissent joined by Justices David Souter and Ruth Bader Ginsburg, seemed especially bothered by this deference-to-administrators approach to meaning, at least when student messages are obscure and difficult to understand and when the student-speaker expressly disavows an administrator's interpretation of such a message.[298] Specifically, he opined that a school's interest in protecting students from speech that reasonably can be regarded as advocating illegal drug use "cannot justify disciplining Frederick for his attempt to make an *ambiguous statement* to a television audience simply because it contained an *oblique reference* to drugs. The First Amendment demands more, indeed, much more."[299] Stevens went so far as to label as "indefensible"[300] the majority's approach of "deferring to the principal's 'reasonable' judgment that Frederick's sign qualified as drug advocacy."[301]

For Stevens, a student speaker's intent is important.[302] In his view, Frederick's "speech that was never *meant* to persuade anyone to do

294. *Id.* at 401.

295. *Id.*

296. *Id.*

297. *Id.* at 409.

298. *See id.* (Stevens, J., dissenting) (observing that student Joseph Frederick "disavowed" principal Deborah Morse's understanding of his banner).

299. *Morse*, 551 U.S. at 434 (Stevens, J., dissenting) (emphasis added).

300. *Id.* at 441.

301. *Id.*

302. *Id.*at 435.

anything."[303] The word "meant" suggests intent.[304]

Perhaps even more significant, Stevens' dissent explores the problems with adopting the supposedly objective standard of allowing a "reasonable" audience interpretation to control questions of meaning.[305] While the *Morse* majority found the principal's interpretation reasonable, the three-justice dissent openly questioned that conclusion.[306] As Stevens wrote, "it is one thing to restrict speech that *advocates* drug use. It is another thing entirely to prohibit an obscure message with a drug theme that a third party subjectively – *and not very reasonably* – thinks is tantamount to express advocacy."[307]

Characterizing principal Morse's interpretation of the banner as a "strained reading,"[308] the dissent emphasized that "to the extent the Court defers to the principal's ostensibly reasonable judgment, it abdicates its constitutional responsibility."[309] For the dissent, the dangers of this deferential, reasonableness approach to message interpretation could well lead to speaker self-censorship: "If Frederick's stupid reference to marijuana can in the Court's view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some 'reasonable' observer censor and then punish them for promoting drugs."[310] As if the use of quotes around the word "reasonable" were not sufficient to deride this standard, Stevens buttressed the point by remarking that:

> Although this case began with a silly, nonsensical banner, it ends with the Court inventing out of whole cloth a special First Amendment rule permitting the censorship of any student

303. *Id.* (emphasis added).

304. *Id.*at 435.

305. *See Morse*, 551 U.S. at 441.

306. *Id.* at 434.

307. *Id.* at 439 (second emphasis added).

308. *Id.* at 445.

309. *Id.* at 441.

310. *Id.* at 445–46.

> speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message.[311]

In sum, *Morse* illustrates problems that minor-speakers face in First Amendment jurisprudence when the Supreme Court adopts a reasonable-interpretation standard that requires them to try to think like adults in positions of power.[312] Asking a minor to know his adult audience, to know how it will interpret a polysemic message, is an extremely difficult burden to impose on youths seeking to exercise their constitutional rights.[313]

2. *B.H. v. Easton Area School District*

To determine if the message "I ♥ boobies! (KEEP A BREAST)" at issue in *B.H.* would garner First Amendment protection, the U.S. Court of Appeals for the Third Circuit articulated a three-step test that heavily depends on both the meaning and value of student speech.[314] Specifically, the Third Circuit majority wrote that:

> (1) plainly lewd speech, which offends for the same reasons obscenity offends, may be categorically restricted regardless of whether it comments on political or social issues, (2) speech that does not rise to the level of plainly lewd but that a reasonable observer could interpret as lewd may be categorically restricted as long as it cannot plausibly be interpreted as commenting on political or social issues, and (3) speech that does not rise to the level of plainly lewd and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted.[315]

Unpacking the first step of this test, if the meaning is interpreted as

311. *Morse*, 551 U.S. at 446.

312. *Id.* at 402–03.

313. *Id.*

314. *B.H.*, 725 F.3d at 298.

315. *Id.*

plainly lewd,[316] then the students lose. This part of the test in *B.H.* is derived from the U.S. Supreme Court's 1986 decision in *Bethel School District v. Fraser*.[317] In *Fraser*, the nation's high court held that a school could punish a student for making a speech to a captive audience of fellow minors that was "offensively lewd and indecent."[318] The Court labeled the student's speech in *Fraser* as filled with "pervasive sexual innuendo"[319] that "was plainly offensive to both teachers and students."[320]

Likewise, on the second step of the *B.H.* framework, even if a message is not interpreted as plainly lewd in meaning, but rather is reasonably interpreted as "ambiguously lewd"[321] and as lacking in political or social value, then the students also lose.[322] The value component here represents a grafting of Justice Alito's concurrence from *Morse*[323] to the *Fraser* test.[324]

Finally, speech that is not interpreted as plainly lewd in meaning but that plausibly can be interpreted as conveying political or social value cannot be categorically restricted and the students might prevail.

The meaning of the message "I ♥ boobies! (KEEP A BREAST)" at issue in *B.H.*, of course, is not readily transparent; it requires a substantial degree of cultural and contextual background. In order to understand it as

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316. *Id.* at 306 (by "plainly lewd," the Third Circuit apparently meant unambiguously lewd such that a lewd meaning is the only possible interpretation); *id.* (observing that the U.S. Supreme Court in Bethel School District v. Fraser, 478 U.S. 675 (1986) "addressed only a school's power over speech that was plainly lewd—not speech that a reasonable observer could interpret as either lewd or non-lewd").

317. *See generally Fraser*, 478 U.S. 675 (1986).

318. *Id.* at 685.

319. *Id.* at 683.

320. *Id.*

321. *B.H.*, 725 F.3d at 315.

322. *Id.*

323. *Morse*, 551 U.S. at 422.

324. *See* J.A. v. Fort Wayne Cmty. Sch., 2013 U.S. Dist. LEXIS 117667, *10 (N.D. Ind. Aug. 20, 2013) (observing that "[t]he Third Circuit crafted this rule by grafting Justice Alito's concurring opinion from *Morse v. Frederick* . . . onto the *Fraser* standard.").

the minor-speakers in *B.H.* apparently intended it to be understood,[325] one must initially know, as the Third Circuit majority put it, that "the term 'boobie' is no more than a sophomoric synonym for 'breast.'"[326] Next, one must be able to understand that the "♥" symbol means love, but not in the sense that the wearer of the message means to convey that he or she literally loves breasts.[327] Ultimately, to understand the message of the bracelets in *B.H.*, one must know that their maker, the Keep A Breast Foundation, "tries to educate thirteen- to thirty-year-old women about breast cancer."[328] Thus, just as one seeking to understand the signs of the Westboro Baptist Church must have some familiarity with and background about the WBC's belief system, so too must one seeking to understand "I ♥ boobies! (KEEP A BREAST)" understand that the message is "part of a nationally recognized breast-cancer-awareness campaign."[329]

Critically, the First Amendment fate of the minor-speakers in *B.H.* was completely taken out of their control. How so? Because the Third Circuit found that "the subjective intent of the speaker is irrelevant."[330] Instead, the Third Circuit embraced a "reasonable observer" perspective.[331] This means that risk-averse middle-schoolers are tasked with predicting how "reasonable" adult administrators and, later, "reasonable" adult jurists will interpret their messages if they want to ensure themselves of First Amendment protection when delivering ambiguous messages.[332] Not only do age differences make this task difficult for minors, but so do a multitude

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325. *B.H.*, 725 F.3d at 297 (the minor-speakers in *B.H.* were two middle-school students).

326. *Id.* at 320.

327. *Id.* at 301.

328. *Id.* at 298.

329. *Id.*

330. *Id.* at 309.

331. *See B.H.*, 725 F.3d at 308 (writing that "it remains the job of judges, nonetheless, to determine whether *a reasonable observer* could interpret student speech as lewd, profane, vulgar, or offensive") (emphasis added).

332. *Id.* (emphasis added) (as the Third Circuit wrote, school administrators may "categorically restrict *ambiguous speech* that a *reasonable observer* could interpret as lewd, vulgar, profane, or offensive—unless, as explained below, the speech could also plausibly be interpreted as commenting on a political or social issue.").

of variables.[333] As the Third Circuit wrote, "[w]hether a reasonable observer could interpret student speech as lewd, profane, vulgar, or offensive depends on the plausibility of the school's interpretation in light of competing meanings; the context, content, and form of the speech; and the age and maturity of the students."[334]

Ultimately, the students in *B.H.* prevailed because the majority concluded that the speech was "not plainly lewd"[335] and that "a reasonable observer would plausibly interpret the bracelets as part of a national breast-cancer awareness campaign, an undeniably important social issue."[336] The Third Circuit thus was able to dodge the issue of whether a reasonable observer could interpret the message as lewd (as opposed to plainly lewd).[337] With the meaning and value questions resolved in favor of the students, the school officials in *B.H.* could only prevail if they demonstrated the bracelets caused or were reasonably likely to cause a substantial and material disruption of the educational atmosphere, as required by the U.S. Supreme Court's seminal decision in *Tinker v. Des Moines Independent Community School District*.[338] The Third Circuit quickly dismissed the school's argument here, observing that the two isolated incidents of supposed disruptions to which they pointed "hardly bespeak a substantial disruption caused by the bracelets."[339]

As applied in *B.H.*, students in such cases must become experts in meaning and interpretation, able to predict how adults in positions of power will reasonably interpret them.[340] The three-part framework fashioned in the case may make intuitive sense, but when viewed from the position of

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333. *Id.* at 309.

334. *Id.*

335. *Id.* at 320.

336. *Id.* at 320, n.22 (The majority wrote that "we conclude that the slogan is not plainly lewd and is plausibly interpreted as commenting on a social issue.").

337. *See B.H.*, 725 F.3d at 320, n.22 (noting that "we need not determine whether a reasonable observer could interpret the bracelets' slogan as lewd.").

338. *Id.* at 321 (citing Tinker v. Des Moines Indep. Cmty. Sch., 393 U.S. 503, 504 (1969)).

339. *Id.*

340. *Id.*

minor-speakers, it unnecessarily charges them with making difficult judgment calls about how to fashion their messages in ways that will receive First Amendment protection.[341]

In addition to *B.H.*, the August 20, 2013 federal district court decision in *J.A. v. Fort Wayne Community Schools* proves the difficulty that student-speakers face in knowing how their messages will be interpreted.[342] How does *J.A.*, decided a mere fifteen days after *B.H.*, prove this? Because it involved precisely the same bracelet-borne message, "I ♥ boobies (Keep a Breast)," at issue in *B.H.*[343] In *J.A.*, U.S. District Judge Joseph S. Van Bokkelen held that this message was "ambiguously vulgar" and he granted vast deference to the interpretation of school authorities.[344] As he wrote, the school officials acted "on a reasonable belief that it was lewd, vulgar, obscene or plainly offensive"[345] and "this Court must defer"[346] to their judgment. Judge Van Bokkelen emphasized that "[g]iving appropriate deference to schools requires courts to review school determinations by asking whether an objective observer could reasonably interpret the slogan as lewd, vulgar, obscene, or plainly offensive."[347]

Unlike the Third Circuit in *B.H.*, Judge Van Bokkelen failed to weigh or balance the alleged social value of the bracelets, rejecting the idea that Justice Alito's concurrence in *Morse* was controlling.[348] As he wrote, "the majority's opinion in *Morse* did *not* establish new limits on a school's ability to regulate student speech commenting on political or social

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341. *Id.*

342. *See generally* J.A. v. Fort Wayne Cmty. Sch., 2013 U.S. Dist. LEXIS 117667 (N.D. Ind. Aug. 20, 2013).

343. *B.H.*, 725 F.3d at 297.

344. *J.A.*, 2013 U.S. Dist. LEXIS 117667 at *20 (the judge stated "[s]chool officials, who know the age, maturity, and other characteristics of their students better than federal judges, are in a better position to decide whether to allow these products into their schools. Issuing an injunction would take away the deference courts owe to schools and make their job that much harder.").

345. *Id.*

346. *Id.*

347. *Id.* at *8.

348. *Id.* at *11.

issues."[349] He thus reasoned that "the bracelet's commentary on social or political issues does not provide additional protection under the First Amendment. This Court will ask solely whether the school made an objectively reasonable decision in determining that the bracelet was lewd, vulgar, obscene or plainly offensive."[350] The substantial deference granted to school authorities on questions of meaning thus further enhances the risks that student-speakers engage in when their own intent on message meaning is stripped away as irrelevant in the judicial analysis.[351]

B. *Questions of Value*

1. *Morse v. Frederick*

Beyond the questions of meaning in *Morse* addressed above, the case also illustrates how minor-speakers sometimes must, if they seek First Amendment shelter, attempt to add value to their messages that an audience of adults will understand and appreciate.[352] That is because Justice Alito, joined by Justice Kennedy, authored a concurring opinion making it clear that they joined the *Morse* majority only to the extent that the opinion "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[353] This is of paramount importance because some federal appellate courts[354] recognize Justice Alito's opinion "as the controlling opinion in *Morse*."[355] As the U.S. Court of Appeals for the Third Circuit opined in 2013, "the limitations that

349. *Id.* at *11–12.

350. *J.A.*, 2013 U.S. Dist. LEXIS 117667 at *12.

351. *Id.* at *8 (Judge Van Bokkelen wrote that the subjective intent of the student-speakers was irrelevant).

352. *See generally Morse*, 551 U.S. 393.

353. *Id.* at 422 (Alito, J., concurring).

354. The U.S. Circuit Court of Appeals for the Seventh Circuit, however, rejects the notion that Justice Alito's *Morse* concurrence controls the case. Nuxoll v. Indian Prairie Sch. Dist., 523 F.3d 668, 673 (7th Cir. 2008).

355. Morgan v. Swanson, 659 F.3d 359, 374 n.46 (5th Cir. 2011).

Justice Alito's concurrence places on the majority's opinion in *Morse* are controlling."[356]

Under this view, then, minor-speakers must not only be able to predict how their messages will be interpreted in terms of meaning, but also whether judges and justices will find them to contain political or social value. The generational gap between what minors and adults may consider to be of political or social value makes it very different for students to accurately know their adults audiences.

2. *B.H. v. Easton Area School District*

As explained above, the Third Circuit in *B.H.* adopted Justice Alito's concurring opinion in *Morse* and, in doing so, incorporated a consideration of whether speech has political or social value into its analysis.[357] Whether other courts do the same remains to be seen. The court in *J.A.*, in considering the same message as was at issue in *B.H.*, rejected this approach.[358]

C. Summary of Meaning and Value Issues

In both *Morse* and *B.H.*, unclear and/or ambiguous messages by minors were censored by adults in positions of power who interpreted them in ways different from those the minors allegedly intended.[359] In both cases, however, the minors' intended meanings were considered irrelevant, thus stacking the deck against student speakers, particularly when deference is accorded to adult administrators who serve as the initial arbiters of meaning.[360] And after *Morse*, if one accepts Justice Alito's concurrence as controlling, questions of value also come into play in student-speech cases where such ambiguous meanings are in play. Student speakers thus must know adult audiences—know how they will interpret and understand opaque message—in order to safely exercise their First Amendment right of free speech.

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356. *B.H.*, 725 F.3d at 304 n.10.

357. Rosanova v. Playboy Enters. Inc., 411 F. Supp. 440, 443 (S.D. Ga. 1976); *see generally* Snyder v. Phelps, 131 S. Ct. 1207 (2011).

358. *See supra* notes 342–347 and accompanying text.

359. *See generally Morse*, 551 U.S. 393; *B.H.*, 725 F.3d. 293.

360. *Id.*

IV. TRUE THREATS

In addition to obscenity, which was described in Part I, one of the few categories of speech not protected by the First Amendment[361] is true threats.[362] True threats were most recently defined by the U.S. Supreme Court in 2003 as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[363] There is, however, a "fine line between what is a true threat and what is protected speech,"[364] and true threats have been described as "an incoherent doctrine."[365]

The Court launched its true threats doctrine in 1969 in *Watts v. United States*.[366] That's when it opined that "a threat must be distinguished from what is constitutionally protected speech."[367] *Watts* centered on a statement made by 18-year-old Robert Watts at a rally near the Washington Monument in August 1966: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[368] Watts was convicted of threatening President Lyndon Baines Johnson under a federal statute,[369] but the nation's high court reversed, holding that the "only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.'"[370]

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361. *See generally* B.H. v. Easton Area Sch. Dist., 725 F.3d 293 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1515 (2014).

362. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (observing that the First Amendment permits states to ban true threats of violence).

363. *See id.*

364. Jake Romney, Note, *Eliminating the Subjective Intent Requirement for True Threats in United States v. Bagdasarian*, 2012 BYU L. REV. 639, 639 (2012).

365. Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 828 (2011).

366. *See generally* Watts v. United States, 394 U.S. 705 (1969).

367. *Id.* at 707.

368. *Id.* at 706.

369. 18 U.S.C. § 871 (2012).

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

Watts is disparaged by multiple scholars, including Frederick Schauer, who contends the case "provides virtually no information on just what a threat *is* other than that what *Watts* said was not one."[371] Although *Watts* did not provide a clear definition of true threats,[372] the opinion made it evident that "political hyperbole"[373] of the kind used by Robert Watts does not amount to a true threat.[374] This is especially true when the statements, which must be "[t]aken in context,"[375] are "expressly conditional"[376] upon the occurrence of future events and when the reaction of the audience is considered.[377] *Watts* therefore "lays the foundation on which the Court builds its understanding of how to distinguish protected speech or expressive conduct from unprotected threats."[378] In particular, "content and context[] were central to the Court's analysis."[379] Other courts concur that content and context are crucial variables in separating true threats from protected expression.[380] Along with the audience's

371. Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 211 (2003).

372. Lauren Gilbert, *Mocking George: Political Satire as "True Threat" in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843, 868 (2004) (observing "the Supreme Court's failure to articulate a clear standard in [*Watts*] . . . .").

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

374. *Id.*

375. *Id.*

376. *Id.*

377. *See* Jeannine Bell, *O Say, Can You See: Free Expression by the Light of Fiery Crosses*, 39 HARV. C.R.-C.L. L. REV. 335, 340 (2004) (asserting that, in *Watts*, "[t]he context of the words used, their conditional nature, and the reaction of the listeners all suggested to the Court that the defendant meant only to be critical of the government, rather than actually to threaten the President's life.").

378. G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 932 (2002).

379. Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 559 (2004).

380. *See, e.g.*, Citizen Publ'g Co. v. Miller, 115 P.3d 107, 114–15 (Ariz. 2005) (opining that "the presence of a true threat can be determined only by looking at the challenged statement in *context*," and adding that "[g]iven both *the content and the context* of the statement at issue here, we conclude that it is not a constitutionally proscribable true threat." (emphasis added)).

reaction, the content and context sometimes are known as "the three *Watts* factors."[381]

Just as in obscenity law, a prospective speaker under the true threats doctrine has no way to know, in advance of communicating, whether or not his message will be protected. His fate generally depends on how his words are interpreted, post hoc, by a jury estimating, in turn, how a mythical reasonable person might understand them.

Importantly, lower courts are divided on the question of whether or not the speaker's intended meaning should even be considered in deciding what constitutes an unprotected threat.[382] The majority of courts, in fact, hold that the speaker's subjective intent is completely irrelevant under the First Amendment.[383] The U.S. Court of Appeals for the Ninth Circuit stands in the minority by holding that the subjective intent of the speaker must be considered.[384] The Court held that it is "not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death."[385]

The disagreements stem from the U.S. Supreme Court's use of the phrase "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence"[386] in its 2003 true threats decision in *Virginia v. Black*.[387] The U.S. Court of Appeals for the Third Circuit, like the majority of courts, interpreted this "to mean that the speaker must intend to make the communication."[388] In other words, all

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381. Nina Petraro, Note, *Harmful Speech and True Threats:* Virginia v. Black *and the First Amendment in an Age of Terrorism*, 20 ST. JOHN'S J.L. COMM. 531, 546 (2006).

382. *See* United States v. Clemens, 738 F.3d 1, 2–3 (1st Cir. 2013) (reiterating that "there is a circuit split on the question of intent in the aftermath of *Virginia v. Black*.").

383. *See id.* at 11 (observing that "[o]f the courts of appeals to consider a subjective intent argument … most have rejected it.").

384. United States v. Bagdasarian, 652 F.3d 1113, 1117, n.14 (9th Cir. 2011) (holding that "*Black* requires that the subjective test must be met under the First Amendment whether or not the statute requires it, an objective test is not an alternative but an additional requirement over-and-above the subjective standard.").

385. *Id.* at 1116.

386. *Virginia*, 538 U.S. at 359.

387. *Id.*

388. United States v. Elonis, 730 F.3d 321, 329 (3d Cir. 2013), *cert. granted*, 134 S.Ct. 2819 (2014).

that is needed under *Black* on the part of the speaker is the knowing transmission of the message, not a subjective intent to actually threaten.[389] As the U.S. Court of Appeals for the First Circuit wrote in December 2013, most courts that have read the key passage from *Black* "have concluded that the sentence only requires the speaker to 'intend to make the communication,' not the threat."[390]

In June 2014, the U.S. Supreme Court granted a petition for writ of certiorari in *Elonis v. United States*[391] to resolve the issue of whether the subjective intent of the speaker must be considered in order for speech to constitute an unprotected threat under both the First Amendment and federal statute.[392] The case provides an excellent vehicle for considering questions of both meaning and value from the speaker's perspective in true threats cases. Namely, the alleged threats in *Elonis* are conveyed in the form of rap lyrics,[393] and rap might be considered a type of restricted code[394] that is needed for the understanding and meaning "on a background of common assumptions, shared interests, shared experience, identifications, and expectations."[395] However, a key problem is that there may be major disconnects in the assumptions, experiences and interests between a rap-literate speaker and rap-illiterate audience that causes a message's intended meaning to be lost in translation and, in turn, wrongly misinterpreted as a true threat.

In particular, *Elonis* pivots on the jury conviction under a federal statute[396] of Anthony Douglas Elonis on multiple counts of communicating threats via Facebook postings allegedly targeting his estranged wife and an

389. United States v. Martinez, 736 F.3d 981, 987–88 (11th Cir. 2013).

390. *See Clemens*, 738 F.3d at 11.

391. Elonis v. United States, 134 S. Ct. 2819, 2819 (2014).

392. *See generally* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Farah v. Esquire Magazine, 736 F.3d 528 (D.C. Cir. 2013).

393. *B.H.*, 725 F.3d. at 320.

394. *Elonis*, 134 S. Ct. at 2819.

395. JOHN FISKE, INTRODUCTION TO COMMUNICATION STUDIES 71 (Routledge 2d ed. 1990).

396. *See* 18 U.S.C. § 875(c) (2012).

FBI agent.[397] Elonis asserted that the postings were merely rap lyrics, partly inspired by Eminem, and had therapeutic value for him.[398] He testified during trial "that he was influenced by the rap artist Eminem's songs *Guilty Conscience*, *Kill You*, *Criminal*, and *97 Bonnie and Clyde* as influences,"[399] in which the artist fantasizes about killing his wife.[400] Anthony Elonis' estranged wife, however, testified "that the lyric form of the statements did not make her take the threats any less seriously."[401]

In affirming Elonis's convictions under 18 U.S.C. § 875(c), the U.S. Court of Appeals for the Third Circuit rejected his argument that, under the true threats doctrine, a "speaker must *both* intend to communicate and intend for the language to threaten the victim."[402] More precisely, Elonis argued "that the Supreme Court decision in *Virginia v. Black* requires that a defendant subjectively intend to threaten,"[403] not just intend to convey the message.

The Third Circuit rebuffed this contention, reasoning that "[l]imiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from 'the fear of violence' and the 'disruption that fear engenders,' because it would protect speech that a reasonable speaker would understand to be threatening."[404] The appellate court added that "[t]he majority of circuits that have considered this question have not found the Supreme Court decision in *Black* to require a subjective intent to threaten."[405] The only aspect of the speaker's state of mind under the true threats doctrine relevant

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397. *See Elonis*, 730 F.3d at 323–27.

398. Petition for Writ of Certiorari at 5, Elonis v. United States, 134 S. Ct. 2819 (2014) (No. 13-983).

399. *Id.*

400. *Id.*

401. *Id.*

402. *Elonis*, 730 F.3d at 329 (emphasis added).

403. *Id.* at 327.

404. *Id.* at 330 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

405. *Id.*

for the Third Circuit in *Elonis* was "a finding of intent to communicate."[406] What the speaker, Anthony Elonis, actually intended his words to mean was simply irrelevant. His freedom and fate rested, instead, on an objective standard—whether a hypothetical reasonable person would foresee that the statements would be interpreted by those to whom they were communicated as a serious expression of an intent to inflict violent injury.[407]

With this background on both the true threats doctrine and *Elonis* in mind, the next sections examine how *Elonis* illustrates, from a speaker's perspective, the problems of meaning and value in this contested area of the law. It should be noted that *Elonis* is far from the only recent true threats case involving rap music,[408] and thus its deployment here makes it even more relevant as an analytical springboard for the know-your-audience problems facing speakers.

A. *Questions of Meaning*

The burdens placed on speakers when it comes to clarifying message meaning[409] are enormous under the true threats doctrine, as illustrated by

406. *Id.* at 332 (quoting *R.A.V.*, 505 U.S. at 388).

407. *Id.*

408. *See, e.g.*, United States v. Jeffries, 692 F.3d 473, 475–82 (6th Cir. 2013) (centering on a song done in a style that was "part country, part rap, sometimes on key, and surely therapeutic;" describing it as "unusual or at least a sign of the times that the vehicle for this threat was a music video," and concluding that the defendant "cannot insulate his menacing speech from proscription by conveying it in a music video"); Baumgartner v. Eppinger, 2013 U.S. Dist. LEXIS 139639, at *15–19 (N.D. Ohio Sept. 27, 2013) (rejecting a challenge to a "conviction and sentence for intimidation and retaliation related to the posting of a modified version of a rap song on the Internet," and noting that "[t]he victims in the underlying case at bar fled the State of Ohio for a period of time after Petitioner posted the altered rap song on the Internet"); TC v. Valley Cent. Sch. Dist., 777 F. Supp. 2d 577, 590–92 (S.D.N.Y. 2011) (alleging that public school defendants violated a student's First Amendment right of free speech "when he was punished for possessing his rap song," in which he "talks about shooting 'niggas' and makes other racial references," and refusing to dismiss the student's claim because, in part, there was no indication the student "shared the lyrics, that they were viewable on his desk or otherwise published to [his] classmates or teachers"); *In re* S.W., 45 A.3d 151 (D.C. App. 2012) (addressing whether the defendant's modified version of a Lil Wayne song constituted a true threat); Holcomb v. Virginia, 709 S.E.2d 711 (Va. Ct. App. 2011) (considering whether lyrics posted on MySpace by the defendant, who considered himself something of a rap lyricist, constituted a true threat).

409. Computer-mediated expression can include anything from social media, to blogging and cellphone texting. Professor David Jacobson of Brandeis University writes in his study on instant messaging communication that the type of relationship shared between two people (friend, acquaintance, or stranger) will always influence the way the receiver interprets the message based

Elonis, because: 1) the messages are conveyed via online, social media in which contextual cues about meaning that might be present during in-person, face-to-face communication are utterly absent;[410] and 2) the messages are conveyed in an artistic genre of music that is heavily stigmatized and that features narrative conventions that might not be understood by a reasonable jury serving as a surrogate for a reasonable person.[411]

On the first point, it is important to recall that context is key in sorting out what constitutes a true threat.[412] Yet, with online communications, the crucial context of co-presence and a shared spatial-temporal reference system featuring a multiplicity of symbolic cues[413] that facilitate meaning and understanding are absent. Furthermore, as the Thomas Jefferson Center for the Protection of Free Expression argued in a friend-of-the-court brief to the U.S. Supreme Court in support of Anthony Elonis's petition to hear his case, online speakers lose control over the audience that receives their messages.[414] In other words, speakers bear the risk of losing control over both context and audience when they communicate online. They cannot even predict who the audience might be that ultimately receives the

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on the limited cues provided. David Jacobson, *Interpreting Instant Messaging: Context and Meaning in Computer-Mediated Communication*, 63 J. ANTHROPOLOGICAL RESEARCH 359, 376 (2007).

410. Computer-mediated communication ("CMC") lacks face-to-face visual and symbolic cues that would aid heavily in the interpretation of a message. CRISPIN THURLOW ET AL., COMPUTER MEDIATED COMMUNICATION 50 (Sage, 1st ed. 2004) (asserting that "no communication, whether mediated or not, is perfect. Nonetheless, the problems with the [CMC] models don't just end there.").

411. *See, e.g.*, *United States v. Herron*, No. 10-CR-0615 (NGG), 2014 WL 1871909, at *7 (E.D.N.Y. May 8, 2014).

412. Morse v. Frederick, 551 U.S. 393, 445–46 (2007); *B.H.*, 725 F.3d. at 298, 306 (observing that the U.S. Supreme Court in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), "addressed only a school's power over speech that was plainly lewd—not speech that a reasonable observer could interpret as either lewd or non-lewd." By "plainly lewd," the Third Circuit apparently meant unambiguously lewd such that a lewd meaning is the only possible interpretation.); *see generally Fraser*, 478 U.S. 675.

413. JOHN B. THOMPSON, MEDIA AND MODERNITY: A SOCIAL THEORY OF THE MEDIA 85 (Stanford Univ. Press, 11th ed. 2011).

414. Brief for Thomas Jefferson Center for the Protection of Free Expression, The Marion B. Brechner First Amendment Project, et al. as Amici Curiae Supporting Petitioner at 5–6, Elonis v. U.S., 730 F.3d 321 (3rd Cir. 2013), *cert. granted*, 134 S.Ct. 2819 (2014) (No. 13-983).

message and considers it a threat. The conundrum thus is that it may practically be impossible for a speaker to know his audience at all in advance of communication, but knowing how an audience will interpret a message is essential for risk-averse speakers under the true threats doctrine.

On the second point, a speaker who engages in violent-themed communications via an artistic genre like rap risks that his audience will not understand conventions associated with it and, in turn, will misunderstand it as a threat. That's partly because rap is a complex genre,[415] one providing multiple opportunities for a speaker to lose control of meaning when confronted by an audience unfamiliar with it. Professor and philosopher Richard Shusterman describes the intricate, multifaceted nature of meaning in rap music and, in turn, why it is not easy to determine if any specific instance of it amounts to a true threat.[416] He contends that an analysis of rap lyrics "will reveal in many rap songs not only the cleverly potent vernacular expression of keen insights but also forms of linguistic subtlety and multiple levels of meaning whose polysemic complexity, ambiguity, and intertextuality can sometimes rival that of high art's so-called 'open work.'"[417] Someone not familiar with gangsta rap, for instance, may not understand the self-reflexive references that often pervade it—references "that to be appreciated require specific knowledge of the text's production history, the character's previous credits, or popular reviews."[418]

As the Thomas Jefferson Center for the Protection of Free Expression asserted on petition to the nation's high court in *Elonis*, "[t]hose familiar with rap music understand . . . that it often involves posturing and hyperbole, with rappers boasting and taking on personas to impress others."[419] Put differently, rap lyrics often are not always meant or intended to be taken seriously, but the speaker is at the mercy of the audience to understand this key point.[420] The Thomas Jefferson Center

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415. *See generally* Richard Shusterman, *The Fine Art of Rap*, 22 NEW LITERARY HIST. 613 (1991).

416. *Id.*

417. *See id.* at 615.

418. Brian Ott & Cameron Walter, *Intertextuality: Interpretive Practice and Textual Strategy*, 17 CRITICAL STUD. MASS COMM. 429, 439 (2000).

419. Brief for the Petitioner, *supra* note 414, at 8.

420. *Id.*

added:

> Rap is complex. It involves political, violent, racial, artistic and cultural components, all of which affect the meaning and interpretation of any given instance of rap. This Court is encouraged to consider the implications of such complex genres of artistic expression for future true threat cases, as well as what assumptions, if any, might be necessary regarding a reasonable listener's understanding of specific genres in order to ensure that protected speech is neither improperly punished nor chilled.[421]

On this point, University of Richmond Professor Erik Nielson asserts that "[i]f juries don't understand the narrative traditions of boasting and exaggeration on which rap is based—or the industry conditions that push aspiring rappers to adopt a criminal persona—then they find it easy to convict."[422] In a separate article, Nielson and Professor Charis Kubrin of the University of California, Irvine add that "prosecutors misrepresent rap music to judges and juries, who rarely understand the genre conventions of gangsta rap or the industry forces that drive aspiring rappers to adopt this style."[423]

How might this be relevant in *Elonis*? Anthony Elonis asserts in some of the lyrics that landed him trouble that he is "*just a crazy sociopath* that gets off playin' you stupid fucks."[424] Should a reasonable person take it seriously that Elonis is a crazy sociopath? Probably not. Professor Kubrin elucidates that rappers frequently deploy lyrics to foster identities and reputations—or simply "reps," in rap nomenclature.[425] "At the top of the hierarchy is the 'crazy' or 'wild' social identity,"[426] Kubrin writes. She

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421. *Id.* at 8–9.

422. Erik Nielson, *Prosecuting Rap Music*, HUFFINGTON POST (May 26, 2013, 4:41 PM), http://www.huffingtonpost.com/erik-nielson/prosecuting-rap-music_b_2956658.html.

423. Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, N.Y. TIMES (Jan. 13, 2014), http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html.

424. Petition for Writ of Certiorari, *supra* note 398, at 13 (emphasis added).

425. Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 370 (2005).

426. *Id.* at 370.

elaborates:

As a way to display a certain predisposition to violence, rappers often characterize themselves and others as "mentally unstable" and therefore extremely dangerous. Consider Snoop Dogg and DMX, both of whom had murder charges brought against them in the 1990s: "Here's a little something about a nigga like me / I never should have been let out the penitentiary / Snoop Dogg would like to say / That *I'm a crazy motherfucker* when I'm playing with my AK [AK-47 assault rifle]."[427]

In other words, a reasonable person who understands the nature of rap music arguably would suspect, if not outright know, that Elonis was merely posing to develop what Kubrin categorizes as "the 'crazy' persona."[428] In fact, much of rap is about managing images—*not* necessarily realities—of rappers "as assassins, hustlers, gangstas, madmen, mercenary soldiers, killas, thugs, and outlaws."[429]

Even if the fiction of a reasonable audience is deployed as the legal benchmark in cases such as *Elonis*, precisely what level of knowledge about rap and its conventions is considered reasonable? What level of rap literacy, in other words, is a speaker to assume that a jury would find a reasonable person would possess? These tasks clearly are difficult for a speaker to determine.

In brief, *Elonis* illustrates multiple meaning problems that arise for speakers under the true threats doctrine when they engage not only in online communication, but also when they use controversial and often-misunderstood forms of expression to do so.[430] Mismatches between the speaker and audience in understanding and knowledge of a genre of expression—in *Elonis*, rap music—can leave a speaker held criminally accountable for a message he did not intend to be taken seriously as a threat.

B. *Questions of Value*

Questions regarding the value of speech are key in true threats jurisprudence. The true threats doctrine, as Professor Lauren Gilbert points

427. *Id.* (emphasis added).

428. *Id.*

429. *Id.* at 369.

430. Brief for the Petitioner, *supra* note 414, at 5–6.

out, requires "the government to distinguish between an actual threat and mere political hyperbole."[431] She emphasizes the danger that political satire, which "has been a powerful vehicle for social criticism"[432] and is "designed to ridicule or censure social and political abuses,"[433] may be labeled as a true threat by the government seeking to suppress views with which it disagrees.[434] In brief, speech with value to a democratic society—political speech at the core of the First Amendment protection[435]—may be unnecessarily punished by an expansive view of the true threats doctrine.

Elonis is useful here too because rap itself often is a political genre of music. An article in *Black Music Research Journal* posits that rap may "be the most political medium in the country."[436] Another article explains that "[i]n 1988, two albums in particular—Public Enemy's 'It Takes a Nation of Millions to Hold Us Back' and NWA's 'Straight Outta Compton'—marked an important shift whereby rap became a vehicle for political discourse. Both albums fearlessly attacked law enforcement in particular."[437] To the extent a political meaning is understood in rap lyrics, it is more likely to be protected under *Watts* with its protection for political hyperbole.

Political messages thus may be closely intertwined with violent themes in rap music, complicating the task of sorting out political hyperbole of the kind that *Watts* said was safeguarded[438] from unprotected true threats. Rappers who engage in such speech are burdened with making strategic calculations before they sing about whether an unknown audience

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431. Gilbert, *supra* note 372, at 866.

432. *Id.* at 886.

433. *Id.*

434. *See id.* ("The government's response to Glenn Given's editorial in the Stonybrook Press would seem to indicate an attempt by the government to label this form of political satire as a true threat.").

435. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010) (opining that political speech "is central to the meaning and purpose of the First Amendment").

436. Elizabeth A. Wheeler, *"Most of My Heroes Don't Appear on No Stamps": The Dialogics of Rap Music*, 11 BLACK MUSIC RES. J. 193, 194 (1991).

437. Erik Nielson, *"Can't C Me": Surveillance and Rap Music*, 40 J. BLACK STUD. 1254, 1257 (2010).

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

of jurors will understand and value the political components to their compositions—jurors who may not be familiar with rap music and who may hold negative, pre-conceived bias against it and those who engage in it.[439]

Furthermore, it will be recalled that Anthony Elonis argued that his speech had therapeutic value for himself.[440] Should a court consider such self-centered value, as it were, under the true threats doctrine? Courts have yet to address this issue.

C. *Summary of Meaning and Value Issues*

Today, under the true threats doctrine and in the vast majority of jurisdictions, speakers who wish to avoid prosecution and conviction for violent-themed expression are left to the interpretive mercy of the jurors and judges who serve as surrogate audiences for their speech.[441] These speakers must be able to successfully predict what amount of violent speech is permissible, what level of understanding audience members possess regarding genres of expressions like rap through which violent-themed messages are transmitted, and what amount of political value, if any, will be understood.[442] Viewed collectively, these mental tasks create a steep burden on speakers when it comes to knowing their audiences under the true threats doctrine.

V. CONCLUSION

Professor Randall P. Bezanson asserted in a 2002 law journal article that First Amendment jurisprudence:

> [R]elies on the notion of intent for the purposes of making legal determinations of authorship and meaning. Traditional free speech jurisprudence assumes that meaning can be stabilized and determinate, that speakers either intend or do not intend certain meanings, and that the constitutionality of a

439. Nielson, *supra* note 422.

440. *Elonis*, 730 F.3d at 327.

441. Nielson, *supra* note 422.

442. Brief for the Petitioner, *supra* note 414, at 5–6.

given message should be assessed using that intent.[443]

University of Virginia Professor Leslie Kendrick seconds this view, asserting in a 2014 article that "throughout First Amendment law, protection for speech often depends on the speaker's state of mind, or, as this Essay will call it, the speaker's intent."[444]

Yet, in stark contrast to the observations of both Bezanson and Kendrick, our article illustrated multiple areas of First Amendment law in which the speaker's intent, particularly with regard to a message's meaning and value, stands for precious little. Instead, the speaker is forced to guess at the meaning and value that will be assigned to his message by jurors and judges who serve as surrogates for actual audiences. Hence, the importance of knowing one's audience: the liberty of the speaker rests in the hands—more accurately, the minds—of others. The burden is on savvy, risk-averse speakers to, in essence, read those jurors' and judges' minds.

This is an extremely difficult task for speakers given, as Justice Oliver Wendell Holmes Jr. observed nearly a century ago, that "a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[445] And when the meaning of images becomes the issue, as is typically the case in obscenity law, additional problems are present,[446] often because "we tend to read images using naive theories of realism and representation."[447]

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443. Randall P. Bezanson & Michele Choe, Commentary, *Speaking Out of Thin Air: A Comment on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 25 HASTINGS COMM. & ENT. L.J. 149, 167 (2002).

444. Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1256–57 (2014).

445. Towne v. Eisner, 245 U.S. 418, 425 (1918).

446. Mark Tushnet, *Art and the First Amendment*, 35 COLUM. J.L. & ARTS 169, 196 (2012) ("Sometimes images without words will convey meaning because the images have so often been associated with specific words that they become the equivalent of words. Think of the donkey and elephant as symbols of the Democratic and Republican parties. The images have no intrinsic meanings, and there surely are depictions of donkeys and elephants that have no political content. But, deployed in political cartoons, the images have propositional content.").

447. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 689 (2012).

The analysis in Part I illustrated multiple problems facing communicators of sexual expression when it comes to knowing their audiences' tastes and values in order to avoid obscenity prosecutions. Given the fact that local community standards apply in obscenity law, a risk-averse speaker must understand literally dozens of audiences dispersed across the country—a nearly impossible feat, the difficulties of which are only compounded because local jurors themselves must speculate about how hypothetical average adults in their communities would interpret the speaker's message.

The discussion of IIED in Part II illustrated the difficulties faced by speakers, such as the members of the Westboro Baptist Church who traffic in relatively obtuse messages, in making sure their intended meanings, as well as the political values embodied therein, are properly understood. Similarly, speakers who use relatively complex literary mechanisms such as parody a satire gamble that audiences will understand them in sorting out meaning.

In the public-school speech cases addressed in Part III, significant differences not only in both age and maturity between minor-speakers and adult-audiences, but also in terms of cultural frames of reference and understanding, make the burden of a speaker knowing his audience exceedingly difficult to successfully operationalize. And as is the case in the student speech disputes discussed in this article, Part IV illustrated how the majority of courts consider the speaker's intended meaning irrelevant in under the true threat doctrine.

It is not enough for courts to add just another layer of legal fiction—namely, a reasonable or rational speaker standard—on top of an already hypothetical rational audience test to adequately shield First Amendment interests in the areas of law addressed in this article. Instead, and because courts only become involved after a message is communicated and thus engage in arm-chair quarterbacking about meaning, the law must consider in some combination: 1) the actual knowledge of the speaker about the mode, manner and content of his message at the time it was communicated; 2) the actual knowledge of the speaker about the characteristics of his intended audience at the time the message was communicated; and 3) the speaker's actual intended meaning of the message when it was communicated. Only by taking into account this trio of speaker-centric variables can speech interests be sufficiently balanced against the vagaries and vicissitudes of a rational audience approach.[448] This is not to say that

448. To borrow from sociologist Erving Goffman's theatre-derived metaphor, courts must become involved in a "backstage" focus on the speaker, not simply the "frontstage" where the

these factors are controlling of meaning and value issues, but that they must be factored into judicial analysis.

Of course, a speaker-centric approach such as that described above certainly is no panacea. Problems of proof present themselves when courts attempt to plumb the subjective knowledge and intent of speakers prior to message conveyance. These difficulties, however, are not insurmountable. Just as judges developed objective criteria to determine whether speakers possess the subjective state of mind necessary for actual malice in libel law,[449] so too can courts establish evidentiary standards for gauging the speaker-centric criteria mentioned above. This may not be an easy process, but, as this article demonstrated, maintaining the status quo has significant downsides for speakers.

Ultimately, as Duke University Professor Joseph Blocher recently observed, "the concept of meaning operates like a rogue boundary surveyor, erratically charting the First Amendment's territory without judicial or scholarly accountability."[450] Our article, in turn, has explored the difficulties that speakers face in safeguarding their constitutional right to free expression when not only questions of meaning, but also disputes over value, are dictated by multiple audiences, real and imagined. The bottom line is that speakers should not be forced to engage in complicated guesswork and multiple layers of abstraction in order to safely exercise their First Amendment rights.

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message is actually presented to the audience. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 106–128 (1959).

449. Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 255–335 (1985) (discussing various objective evidentiary indicators of the presence of actual malice).

450. Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1425 (2014).