Notes

CONSPIRACY AND THE FANTASY DEFENSE: THE STRANGE CASE OF THE CANNIBAL COP

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ABSTRACT

In the notorious "Cannibal Cop" case, New York police officer Gilberto Valle was accused of conspiring to kidnap, kill, and eat various women of his acquaintance. Valle claimed a "fantasy defense," arguing that his expression represented not conspiracy agreement, but fantasy role-play. His conviction and subsequent acquittal raised questions about the freedom of speech, thoughtcrime, and the nature of conspiracy law. Because the essence of conspiracy is agreement, it falls into the category of crimes in which pure speech is the actus reus of the offense. This Note argues that as a result, conspiracy cases in which the fantasy defense is implicated pose special due-process and First Amendment dangers, and concludes that these dangers can be mitigated by a strengthened overt-act requirement.

INTRODUCTION

"Gil Valle's fantasy is about seeing women executed. The fantasies that he is engaging in are about seeing women sexually assaulted, executed and left for dead. That's not a fantasy that is OK."

– Randall W. Jackson, Assistant United States Attorney, in closing argument.[1]

The headlines sound like something out of a schlocky slasher flick: "'Cannibal' Cop Plotted to Eat 100 Women: Feds,"[2] "NYPD

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1. Transcript of Record at 1581, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

Stew as Cannibal Cop Plots To Cook and Eat Women,"[3] "'Cannibal Cop' Planned To Cook 'Girl-Meat' for Thanksgiving."[4] In late 2012, federal prosecutors in the Southern District of New York charged the so-called "Cannibal Cop," twenty-eight-year-old New York police officer Gilberto Valle, with conspiracy to commit kidnapping.[5] He was arrested after his wife discovered an extensive log of emails and chats in which Valle discussed in graphic detail his desire to kidnap, rape, kill, and eat a number of women, including his wife, friends and acquaintances.[6]

But although the emails and chats were real, Valle argued that the alleged conspiracy was not—rather, he contended that he was merely engaging in fantasy role-play, with no intention of carrying out the gruesome deeds he discussed online.[7] He was a member of Dark Fetish Net, a social-networking website where users with unusual sexual predilections tell stories, role-play, and discuss sexual fantasies considered unacceptable in mainstream culture.[8] He argued at trial, as he wrote in his online profile, "I like to press the envelope, but no matter what I say, it is all fantasy."[9]

But although prosecutors conceded that Valle was heavily involved in fantasy role-play, they maintained that some of the chats had moved beyond the realm of fantasy to become actual preparation

2. Richard Esposito, *'Cannibal' Cop Plotted To Eat 100 Women: Feds*, ABC NEWS (Oct. 25, 2012), http://abcnews.go.com/Blotter/cannibal-cop-plotted-eat-100-women-feds/story?id=17562584.

3. Josh Margolin, *NYPD Stew as Cannibal Cop Plots To Cook and Eat Women: Feds*, N.Y. POST, Oct. 26, 2012, at 8, *available at* http://nypost.com/2012/10/26/nypd-stew-as-cannibal-cop-plots-to-cook-and-eat-women-feds.

4. Jen Chung, *"Cannibal Cop" Planned To Cook "Girl Meat" for Thanksgiving*, GOTHAMIST (Nov. 21, 2012, 8:02 AM), http://gothamist.com/2012/11/21/cannibal_cop_planned_to_cook_girl_m.php.

5. Complaint at 1, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Oct. 24, 2012), *available at* http://www.nytimes.com/interactive/2012/10/25/nyregion/Valle-Gilberto-Criminal-Complaint.html.

6. Transcript of Record at 422, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 26, 2013).

7. *See* Transcript of Record at 130, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 25, 2013).

8. Transcript of Record at 1547–48, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

9. Transcript of Record at 1409, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 5, 2013).

and agreement to gratify aberrant desires.[10] The prosecution dismissed Valle's fantasy defense, branding as ridiculous "this idea that you should somehow not be disturbed by the fact that this man, a police officer, walking around New York City every single day with a loaded weapon has a . . . primary sexual fantasy of seeing women mutilated and harmed in horrific ways."[11]

After twelve days of trial, the jury found Gilberto Valle guilty.[12] However, in a "stunning reversal"[13] in June 2014, Judge Paul G. Gardephe granted the defense's motion for acquittal on the conspiracy charge, and Gilberto Valle walked free after more than a year of incarceration.[14]

Valle's case garnered widespread media coverage, most of it focused on the grim details of the chats, emails, images, and videos found on Valle's computer.[15] The case even inspired an episode of *Law and Order: Special Victims Unit*.[16] However, a small but vocal minority of commentators criticized the jury verdict as a thoughtcrime conviction that punished Valle for his fantasies rather than his acts.[17] As one columnist argued, "It's time to defend the 'cannibal cop': He's a weirdo, not a monster, and the U.S. attorney's office means to roast him on the spit of prudery and overcaution. Gilberto Valle's fantasies

10. *See* Transcript of Record at 1586, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013) ("The reason is, he realizes that what he is doing is part of a plan that goes far beyond fantasy.").

11. *Id.* at 1578.

12. *See* Transcript of Record at 1695, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 12, 2013).

13. Daniel Beekman & Dareh Gregorian, '*Cannibal Cop' Released into Custody of His Mother After Conviction Overturned in Stunning Reversal*, N.Y. DAILY NEWS (July 1, 2014, 7:03 AM), http://www.nydailynews.com/new-york/nyc-crime/conviction-cannibal-nypd-overturned-article-1.1850334#ixzz3BswPYruK.

14. Benjamin Weiser, *Ruling in Cannibal Case Revives Debate over When a Fantasy Crosses a Criminal Line*, N.Y. TIMES, July 2, 2014, at A20, *available at* http://www.nytimes.com/2014/07/02/nyregion/officer-gilberto-valle-freed-after-conviction-overturned-in-cannibal-case.html.

15. *See, e.g.*, Margolin, *supra* note 3.

16. *Law and Order: Special Victims Unit*: *Thought Criminal* (NBC television broadcast May 14, 2014). For a comparison of the episode and Valle's case, see Allison Leotta, *SVU's "Thought Criminal"*, HUFFINGTON POST (May 15, 2014, 5:47 PM), http://www.huffingtonpost.com/allison-leotta/svus-thought-criminal_b_5327940.html.

17. *See, e.g.*, *Fantasy Is Not a Crime*, FREE GIL VALLE.NET, http://freegilvalle.net (last visited Jan. 20, 2015); Daniel Jennings, *Can the Government Use Your Thoughts Against You?*, OFF THE GRID NEWS (June 17, 2013), http://www.offthegridnews.com/2013/06/17/can-government-use-your-thoughts-against-you.

are sick. His real-life prosecution may be even sicker."[18] Valle's conviction and subsequent acquittal engendered a spirited debate encompassing fantasy, the First Amendment, sex, public safety, and the role of the judge and jury in negotiating the boundary lines between them.[19]

This Note examines how the freedom to have and express fantasies interacts with the law of criminal conspiracy in cases like Valle's. Although Valle's case was perhaps singularly gruesome, it is one of a growing swell of cases in which criminal defendants claim a "fantasy defense."[20] Using Valle's trial as an exemplar of the fantasy defense in practice, this Note argues that conspiracy law, as it stands today, is too formless and flexible to adequately safeguard against the risk that a jury will convict a defendant for expressing his fantasies rather than acting on them. This Note proposes that, contrary to the Supreme Court's decision in *United States v. Shabani*,[21] not only does the Constitution require that conspiracy include an overt-act element; it requires a more rigorous overt-act element than the version currently accepted in statutory or common law.

Part I describes the Gilberto Valle case and other fantasy-defense cases. Part II sketches the contours of the right to express fantasies under the First Amendment. Part III examines the implications of the actus reus requirement of criminal law for the fantasy defense. Part IV explores the theoretical underpinnings of conspiracy law, and explains how current conspiracy law allows for guilty verdicts on the basis of both improper reasoning and insufficient evidence. Finally, Part V proposes that conspiracy's overt-act requirement should be strengthened to avoid wrongful convictions and infringement on the right to expression.

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18. Daniel Engber, *Free the Cannibal Cop*, SLATE (Feb. 6, 2013, 2:40 PM), http://www.slate.com/articles/news_and_politics/crime/2013/02/cannibal_cop_trial_gilberto_valle_faces_life_in_prison_for_his_violent_fantasies.html.

19. *See, e.g.*, Tracy Clark-Flory, *The "Cannibal Cop" Debate*, SALON (Mar. 12, 2013, 8:00 PM), http://www.salon.com/2013/03/13/the_cannibal_cop_debate; Weiser, *supra* note 14; *Walking the Line Between Off-Putting and Illegal*, *Room for Debate*, N.Y. TIMES, Mar. 5, 2013, http://www.nytimes.com/roomfordebate/2013/03/05/in-free-speech-a-line-between-offputting-and-illegal.

20. *See infra* Part I.C.

21. United States v. Shabani, 513 U.S. 10 (1994).

I. *UNITED STATES OF AMERICA V. GILBERTO VALLE*

The United States charged Gilberto Valle with conspiracy to commit kidnapping[22] under 18 U.S.C. § 1201.[23] For the jury to find Valle guilty, the government was required to prove beyond a reasonable doubt that Valle intentionally entered into an agreement to commit kidnapping, that he intended that the kidnapping actually occur, and that he or one of his co-conspirators committed an overt act in furtherance of the conspiracy.[24] The use of an instrumentality of interstate commerce—the Internet—supplied the nexus required for federal prosecution.[25] This Section describes the progression of the trial and Valle's subsequent acquittal. It also briefly summarizes several other cases illustrating some circumstances in which defendants may raise fantasy defenses.

A. The Prosecution's Case

1. *Valle's Online Communications.* The first prong of the prosecution's case was evidence about the content and nature of Valle's online chats with other users of Dark Fetish Net.[26] Specifically, the government alleged that Valle's co-conspirators included a New Jersey man named Michael Van Hise, a Pakistani man named Ali

22. The government also charged Valle with unauthorized access of a police database under 18 U.S.C. § 1030(a)(2)(B) (2012). Complaint, *supra* note 5, at 1. This Note will not discuss that charge except to the extent that the government offered Valle's access of the police database as evidence of conspiracy.

23. Valle was charged under 18 U.S.C. § 1201(c), which provides: "If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life." 18 U.S.C. § 1201(c) (2012). The government specifically alleged that Valle conspired to violate 18 U.S.C. § 1201(a)(1), which reads:

> Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person . . . [when] the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense.

18 U.S.C. § 1201(a)(1) (2012).

24. Transcript of Record at 1651, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

25. *Id.* at 1654.

26. *See* Transcript of Record at 121, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 25, 2013) (outlining the prosecution's evidence to be offered).

Khan, and a user known as Moody Blues[27] (discovered during trial to be an English nurse named Dale Bollinger).[28]

The prosecution introduced the chats through the testimony of FBI agent Corey Walsh.[29] Walsh testified that of the thousands of chats and emails recovered from Valle's computer, the FBI concluded that about forty represented actual conspiracy discussions, and that the remainder were mere fantasy.[30] Walsh concluded that a chat was part of a mere fantasy when the participants used the word "fantasy" and that a chat was part of a real conspiracy when participants did not use the word "fantasy" and "the two people were sharing real details of women, names, what appeared to be photographs of the women, details of past crimes and [saying] that they were for real."[31]

The prosecution asked Agent Walsh to read aloud from the transcripts of the chats that he determined were real.[32] The plans were violent and detailed—in the excerpts read in court, Valle painted himself as an aspiring professional kidnapper, willing to negotiate prices for contract deals, or to collaborate on plans to rape, kill, and eat targets.[33] He outlined how he would kidnap the women,[34] shared photographs of potential targets,[35] and engaged in seemingly endless back-and-forth about cooking techniques.[36] In a typical exchange, Valle, using the handle Mhal52, discussed his plan for cooking his friend Andria with Ali Khan:

> Mhal52: "Yeah, I really want her to be alive in the oven. I want her to experience being cooked alive."

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27. *Id.*

28. Robert Gearty, Ginger Adams Otis & Dareh Gregorian, *'Moody Blues,' Alleged Twisted Online Chat Buddy of Accused 'Cannibal Cop' Gilberto Valle, Arrested in U.K. on Child Porn Rap*, N.Y. DAILY NEWS (Feb. 28, 2013, 11:46 PM), http://www.nydailynews.com/new-york/cannibal-buddy-moody-blues-booked-u-child-porn-charges-article-1.1276679#ixzz2ptrMxS8i.

29. Transcript of Record at 426, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 26, 2013).

30. Transcript of Record at 650–51, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 27, 2013).

31. Transcript of Record at 425, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 26, 2013).

32. *Id.* at 432–33.

33. *Id.* at 425.

34. *Id.* at 441.

35. *Id.* at 443.

36. Transcript of Record at 635, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 27, 2013).

> Alisherkhan: "Tie her in a hogtied position and put her in oven. She will be a cool meat."
>
> Mhal52: "No. She'll be trussed up like a turkey laying on her back, her hands tied in front of her, her feet crossed at the ankles and tied up, then the hands and feet connected, tied with cooking twine."[37]

The defense acknowledged the horrific nature of the communications, but argued that the forty chats Walsh read from at trial were as fantastical as the thousands the FBI dismissed as role-play.[38] On cross-examination, defense counsel questioned Walsh's methodology for distinguishing between the real and fantasy chats, pointing out that the mere fact that a chat does not explicitly identify itself as fantasy does not mean that it is part of a real conspiracy plot.[39] The defense argued that many elements of the "real" chats were also present in the fantasy chats, such as negotiating a price for kidnapping a victim or discussing the use of chloroform.[40] Additionally, the defense pointed to Valle's user profile on Dark Fetish Net, on which he wrote, "I like to press the envelope, but no matter what I say, it is all fantasy."[41]

Furthermore, the defense contended that though the "real" chats contained references to actual women, Valle often falsified their last names and parts of their biographical information, as well as his own identity.[42] And although the plots were meticulous in their detail, they were also patently preposterous. For instance, in one chat the FBI considered "real," Valle said he would kidnap a woman; take her in his van to his mountain cabin; torture her using a pulley apparatus in his soundproofed basement; and, finally, cook her in his giant, human-sized oven.[43] However, Valle had no van, no mountain cabin,

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37. *Id.*

38. Transcript of Record at 1547, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013). In one chat the FBI deemed a fantasy, Valle told his chat partner "Jackcrow Two" that he would kidnap Andria, the same woman he promised to Aly Khan, by "stick[ing] [Andria] in the oven while she is still alive [but] at a relatively low heat." United States v. Valle, 301 F.R.D. 53, 71 (S.D.N.Y. June 30, 2014) (second alteration in original).

39. Transcript of Record at 655–56, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 27, 2013).

40. Transcript of Record at 1552, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

41. Transcript of Record at 1409, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 5, 2013).

42. Transcript of Record at 1553, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

43. *Id.* at 1556.

no basement or pulley apparatus, and no giant oven.[44] And although Valle's alleged co-conspirators purported to live in other countries, including Pakistan and the United Kingdom, they bought no plane tickets and made no hotel reservations for the dates of the alleged plots.[45]

Additionally, the defense argued, Valle and his chat partners regularly set dates for each kidnapping attempt, and each date passed by with no further contact or communication about the attempt.[46] Never did one of Valle's co-conspirators complain that he had failed to deliver a target as promised.[47] Instead, the co-conspirators would pick up chatting about a new target and a new plan as if the previous plan had never existed.[48]

Finally, the defense attempted to demonstrate to the jury that Valle's chats were not as singularly aberrational as they might seem. To help demystify Dark Fetish Net, where Valle met his alleged co-conspirators, the defense played a video deposition of Sergey Merenkov, the website's founder, who testified that he created the site for fantasy, and that it had tens of thousands of members.[49] Additionally, defense counsel called as a witness their paralegal, who took the jury on a video tour of Dark Fetish Net to demonstrate that other users were engaging in activity similar to Valle's.[50]

2. *Valle's Off-line Activities*. The second prong of the prosecution's case was evidence of Valle's off-line activities, which, according to the prosecution, both satisfied the overt-act requirement of the conspiracy charge and proved that Valle intended that the kidnappings occur.[51] These acts included giving Police Benevolent Association (PBA)[52] cards to his alleged targets, searching for them in

44. *Id.*

45. *Id.* at 1554–55.

46. *Id.* at 1552–53.

47. *Id.* at 1553.

48. *Id.*

49. Transcript of Record at 1357, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 5, 2013).

50. *Id.* at 1393.

51. Transcript of Record at 1526, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

52. PBA cards are union-membership cards that police officers give to friends. If the friend is stopped for a traffic violation, she can show the card in hopes of lenient treatment from the officer. Transcript of Record at 1424–25, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 5, 2013).

the police database, and surveilling them under the guise of friendship.[53] The alleged surveillance activities involved meeting one woman for brunch,[54] visiting another woman at work,[55] and occasionally texting or messaging various women.[56]

The defense countered that these off-line actions were innocuous social gestures, just as consistent with innocent conduct as with conspiracy.[57] For example, the defense elicited testimony that when meeting one of his alleged targets for brunch, Valle brought along his wife and infant daughter.[58] The defense also called as a witness a police officer who testified about the common use of PBA cards to rebut the government's implication that Valle was behaving suspiciously by giving PBA cards to his alleged targets.[59]

Finally, along with those two lines of evidence, the prosecution presented the jury with a litany of pornographic images and videos Valle had viewed or saved to his computer,[60] as well as his search histories (most notably, his visit to a website with the rather on-the-nose title "howtomakechloroform.net").[61] These, the prosecution claimed, demonstrated Valle's motivation for entering into the conspiracy, and bolstered the seriousness of his chats.[62] The defense disputed this characterization, saying that Valle's Internet history was equally consistent with a sick, but fantastical, fetish.[63]

53. Transcript of Record at 1528–30, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

54. *Id.* at 1526.

55. *Id.* at 1541.

56. *Id.* at 1528, 1530.

57. *Id.* at 1570.

58. *Id.* at 1566–67.

59. Transcript of Record at 1426, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 5, 2013).

60. *E.g.*, Transcript of Record at 1094, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 1, 2013) (describing an image found on Valle's computer of a naked woman suspended upside-down).

61. Transcript of Record at 639, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Feb. 27, 2013).

62. Transcript of Record at 1596, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

63. *Id.* at 1568.

B. The Conviction and Acquittal

Ultimately, after sixteen hours of deliberation, the jury convicted Gilberto Valle of conspiracy to commit kidnapping.[64] However, in a surprising turn of events, Judge Gardephe granted a judgment of acquittal just over a year later, in June 2014, on the basis of insufficient evidence.[65] He wrote in his opinion, "Despite the highly disturbing nature of Valle's deviant and depraved sexual interests, his chats and emails about these interests are not sufficient—standing alone—to make out the elements of conspiracy to commit kidnapping. There must be evidence that Valle intended to act on these interests with an alleged co-conspirator."[66]

The court echoed the defense's doubts about the government's characterization of the chats and emails as "real" instead of as fantasy, pointing out that the facts on which the government distinguished the two—such as negotiation over price or discussion of fear of getting caught—were present in both types of chats.[67] Furthermore, the court noted that several facts seemed to affirmatively suggest the chats were fantasy role-play, such as Valle's lies to his alleged co-conspirators about his own identity as well as the identities of the alleged targets.[68]

Finally, the court addressed the "unique circumstances" of a conspiracy "alleged to have taken place almost exclusively in cyberspace, and in a context in which . . . the Defendant engaged in countless fantasy role-play conversations."[69] The court wrote, "[I]n determining whether the Government proved beyond a reasonable doubt Valle's criminal intent—his specific intent to actually kidnap a woman—the fact that no kidnappings took place and that no real-world, concrete steps toward committing a kidnapping were ever undertaken, is significant."[70]

After exhaustively cataloging and analyzing the evidence, the court concluded that no reasonable jury could have found that the

64. Benjamin Weiser, *'Ugly Thoughts' Defense Fails; Officer Guilty in Cannibal Plot*, N.Y. TIMES, Mar. 12, 2013, at A1.

65. United States v. Valle, 301 F.R.D. 53, 115 (S.D.N.Y. 2014).

66. *Id.* at 61–62.

67. *Id.* at 84–86.

68. *See, e.g.*, *id.* at 98 (describing the false information Valle provided to then-anonymous user Moody Blues about himself and alleged target Kimberly Sauer).

69. *Id.* at 61.

70. *Id.*

government proved beyond a reasonable doubt that Valle entered into genuine agreements, or had specific intent, to kidnap the women featured in his chats.[71] The government has appealed this decision.[72]

C. Other Fantasy-Defense Cases

Gilberto Valle is not the only criminal defendant to raise the so-called "fantasy defense."[73] The advent of the Internet has led to a number of cases in which defendants claimed that their online conduct merely expressed personal fantasies, and did not constitute criminal behavior. To begin with, the FBI's investigation led not only to Valle's arrest, but also to the arrest of one of his alleged co-conspirators, Michael Van Hise, as well as two other individuals who engaged in similar communications.[74] One man has pled guilty,[75] and the other two were convicted by jury and are awaiting the judge's rulings on their motions for acquittal.[76]

The fantasy defense has also arisen in the prosecutions of other inchoate sex-related crimes.[77] Perhaps the most notorious example is the case of well-known software developer Patrick Naughton. Naughton allegedly flew from Seattle to Los Angeles to meet his online chat correspondent, who described herself to Naughton as a thirteen-year-old girl, for sex.[78] In fact, the "girl" was an FBI agent, and Naughton was charged with traveling in interstate commerce with

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71. *Id.* at 102.

72. Notice of Appeal, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. July 28, 2014).

73. Chris Francescani, *'Cannibal Cop' Co-Defendants To Offer Same Fantasy Defense*, REUTERS, Feb. 24, 2014, *available at* http://www.reuters.com/article/2014/02/24/us-usa-crime-cannibal-idUSBREA1N0UH20140224.

74. Daniel Engber, *The Cannibal Cop Goes Free, but What About the Murderous Mechanic?*, SLATE (July 2, 2014, 7:18 PM), http://www.slate.com/articles/news_and_politics/crime/2014/07/the_cannibal_cop_gilberto_valle_goes_free_what_about_michael_van_hise_and.html.

75. *Id.*

76. *See* Motion for Judgment of Acquittal at 5, United States v. Van Hise, No. 12-cr-00847 (S.D.N.Y. May 21, 2014) (requesting a judgment of acquittal for defendants Michael Van Hise and Robert Christopher Asch).

77. Donald S. Yamagami, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 SANTA CLARA L. REV. 547, 549 (2001); *see also* United States v. Alkhabaz, 104 F.3d 1492, 1496 (6th Cir. 1997) (dismissing an indictment for communicating threats because the emails the defendant sent to another person—violent, sexual stories featuring a classmate as a character—took place in a mutual exchange of fantasy stories, and so defendant did not send them with intent to intimidate).

78. Greg Miller, *In Sentencing Deal, No Jail Time for Ex-Online Exec in Sex Case*, L.A. TIMES, Aug. 10, 2000, at 1, *available at* http://articles.latimes.com/2000/aug/10/business/fi-2015.

the intent to have sex with a minor.[79] Naughton claimed that he had always believed his correspondent to be an adult who was merely role-playing as a child.[80] The jury hung, and Naughton eventually pled guilty pursuant to a plea agreement.[81]

Analogous defenses have also emerged in cases that have little or no relation to sexual expression. In *United States v. Myers*,[82] for instance, the defendant sought—unsuccessfully—to have his conviction for bribery overturned by arguing that his agreement to receive a bribe was mere "playacting."[83] Similarly, the Supreme Court has recently granted certiorari in *Elonis v. United States*,[84] a case that presents issues comparable to those inherent in the fantasy defense. Anthony Douglas Elonis was convicted of transmitting threats in violation of 18 U.S.C. § 875(c), partly on the basis of rap "lyrics" he posted on Facebook in which he wrote about killing his estranged wife.[85] Elonis argued on appeal that the First Amendment requires the government to prove he subjectively intended to make a threat, not just that a reasonable person would understand it as such, and that therefore his "lyrics" were protected speech.[86] The Third Circuit disagreed, and upheld his conviction.[87]

II. THE FIRST AMENDMENT RIGHT TO EXPRESSION AND FANTASY

Before it can be established that conspiracy law risks violating the First Amendment right to expression in cases like Valle's, the precise contours of the right itself must be delineated. Under the First Amendment, unpopular or offensive expression cannot be restricted merely because the government disagrees with it,[88] even if the speech in question advocates conduct proscribed by law.[89] The Supreme

79. *Id.*

80. *Id.*

81. *Id.*

82. United States v. Myers, 692 F.2d 823 (2d Cir. 1982).

83. *Id.* at 831.

84. Elonis v. United States, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (June 16, 2014) (No. 13–983), *argued*, Dec. 1, 2014.

85. *Id.* at 324–26, 327.

86. *Id.* at 327–28.

87. *Id.* at 335.

88. *See* Carey v. Population Servs., Int'l, 431 U.S. 678, 701 (1977) ("[W]e have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.").

89. Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y., 360 U.S. 684, 689–90 (1959). There is a narrow, historical exception for speech that "is directed to inciting or

Court has held that the government may not restrict expression on the basis of its content[90] unless the restriction is narrowly tailored to serve a compelling government interest.[91] Application of this strict scrutiny "leaves few survivors."[92] For example, the government may not prohibit burning the American flag,[93] showing a film that portrays adultery in a positive light,[94] or posting racist symbols.[95]

Like all rights, however, First Amendment rights are not unlimited in scope. Falsely shouting "fire" in a crowded theater is the archetypal example of speech that deserves no constitutional shield.[96] Though all speech is presumptively protected, there are two major lines of limitations on First Amendment rights. First, content-neutral regulations, which regulate speech for reasons other than its expressive impact, are subject to a relaxed standard of review.[97] For example, the state may constitutionally prohibit playing music above a certain decibel threshold because the prohibition's target is the volume of the music, not its expression.[98] Second, even content-based restrictions of speech may escape strict scrutiny if they fall into historically recognized categories of exceptions.[99] The fantasy defense to criminal conspiracy implicates two possible historical exceptions: the exception for obscenity and the exception for speech that is itself defined as criminal conduct.

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producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

90. To determine whether a regulation is based on the content of the regulated speech, the Court asks "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

91. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

92. City of Los Angeles v. Alameda Books, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

93. United States v. Eichman, 496 U.S. 310, 319 (1990).

94. *Kingsley Int'l Pictures Corp.*, 360 U.S. at 689.

95. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992).

96. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (originating the famous analogy).

97. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

98. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286 (2005) (explaining that a law barring noise louder than ninety decibels is "content-neutral as applied"); *see also R.A.V.*, 505 U.S. at 386 (noting that "[f]ighting words are thus analogous to a noisy sound truck").

99. United States v. Stevens, 559 U.S. 460, 468 (2010). For a list of all currently acknowledged First Amendment exceptions, see United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

A. The Obscenity Exception

Under the obscenity exception, transmission, dissemination, and receipt of obscene materials receive no First Amendment protection.[100] Although the Supreme Court has never held obscenity to be within the reach of the First Amendment, the Court has long struggled to define obscenity.[101] In the "tortured history"[102] of the exception, the Supreme Court has adopted and subsequently abandoned a number of methods for defining obscenity.[103]

Under current doctrine, established by *Miller v. California*,[104] obscene materials are those which "depict or describe sexual conduct," and "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[105] The Court further explained that only "'hard core' pornography," not any depiction of sex, can qualify as "obscene" under this test.[106] Thus, a state may prohibit distributing, for instance, only "[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[107] And even hard-core pornography will not qualify as obscene unless "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,"[108] meaning that it appeals to "shameful or morbid interest in sex,"[109] and not merely "normal, healthy sexual desires."[110]

The nature of the *Miller* test renders obscenity prosecutions on the basis of textual material exceedingly rare.[111] In *Kaplan v.*

100. *See* Miller v. California, 413 U.S. 15, 23 (1973) (reaffirming that the First Amendment does not protect obscene material).

101. *See id.* at 37–39 (Douglas, J., dissenting) (detailing the Court's different attempts to define obscenity).

102. *Id.* at 24 (majority opinion).

103. *Id.* at 37–39 (Douglas, J., dissenting).

104. *Miller*, 413 U.S. 15.

105. *Id.* at 24.

106. *Id.* at 29.

107. *Id.* at 25.

108. *Id.* at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

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

110. *Id.* at 498.

111. Ryen Rasmus, Note, *The Auto-Authentication of the Page: Purely Written Speech and the Doctrine of Obscenity*, 20 WM. & MARY BILL RTS. J. 253, 254 (2011).

California,[112] a companion case to *Miller*, the Court held that purely textual material was not categorically barred from qualifying as obscene under the *Miller* test.[113] However, after *Kaplan* was handed down in 1973, thirty-five years passed before federal prosecutors successfully pursued an obscenity case for purely textual material.[114] In that case, the defendant, who had agoraphobia, pled guilty to avoid the stress of trial,[115] and it is unclear whether the prosecution would have withstood a First Amendment challenge.

The obscenity exception is further narrowed by a distinction between private and public obscenity. Though the government may prohibit disseminating or receiving obscene materials, it may not prohibit merely possessing or consuming them in private.[116] In *Stanley v. Georgia*,[117] the Court held such a prohibition impermissible because it relied on the "assertion that the State has the right to control the moral content of a person's thoughts."[118] The Court further stated, "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[119]

In other words, private consumption and expression are not subject to the obscenity exception because there may exist some right to *thought itself* in the First Amendment. Extrapolating from this principle, lower courts have reasoned that the First Amendment protects the right to privately *generate* ideas as well.[120] For example, the Tenth Circuit ruled on this basis that the forcible administration of antipsychotic drugs to a detainee in jail could have

112. Kaplan v. California, 413 U.S. 115 (1973).

113. *Id.* at 119–20.

114. Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27, *available at* http://www.nytimes.com/2007/09/28/us/28obscene.html.

115. Paula Reed Ward, *Afraid of Public Trial, Author To Plead Guilty in Online Obscenity Case*, PITTSBURGH POST-GAZETTE, May 17, 2008, at A1, *available at* http://www.post-gazette.com/frontpage/2008/05/17/Afraid-of-public-trial-author-to-plead-guilty-in-online-obscenity-case/stories/200805170216.

116. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

117. *Stanley*, 394 U.S. 557.

118. *Id.* at 565.

119. *Id.*

120. *See, e.g.*, Bee v. Greaves, 744 F.2d 1387, 1393–94 (10th Cir. 1984) ("The First Amendment protects the communication of ideas, which itself implies protection of the capacity to produce ideas.").

unconstitutionally violated his First Amendment rights by interfering with his ability to think as he wished.[121]

The Supreme Court has not specifically addressed the question of whether private, noncommercial emails containing obscene textual descriptions fall within *Stanley*'s protection. However, the Court has upheld prohibitions on importing obscene materials for private use,[122] and on distributing obscene material through the mail.[123] The Fourth Circuit is the only federal appellate court so far to apply this line of precedent to the email context. In a highly controversial opinion, it held that obscene emails are no different from any other obscene material transported through the stream of interstate commerce, and thus deserve no *Stanley* protection.[124]

Therefore, under the obscenity exception, a state is likely within its rights to regulate the distribution of the gruesome pornography spotlighted in cases like Gilberto Valle's. Assuming the government could have satisfied the *Miller* test,[125] it could have legitimately prohibited Valle from purchasing pornography or from sharing his pornography with others on Dark Fetish Net. However, the First Amendment *does* protect Gilberto Valle's *personal* use of pornographic materials. Additionally, the textual content of Valle's chats and emails—which was necessary to, and formed the bulk of the evidence in, his conspiracy prosecution—also probably falls outside the obscenity exception. Textual material, as a general principle, is unlikely to qualify as obscene under *Miller*,[126] and Valle's chats contain relatively little in the way of hard-core descriptions of sexual conduct. Thus, unless another exception applies, Valle's chats likely qualify as protected speech under the First Amendment.

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121. *Id.* at 1395.

122. United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973).

123. United States v. Reidel, 402 U.S. 351, 356 (1971).

124. United States v. Whorley, 550 F.3d 326, 332–33 (4th Cir. 2008). For an example of criticism and discussion of this decision, see Christopher Shea, *Obscenity Law: Still a Hodgepodge?*, BRAINIAC (July 9, 2009), http://www.boston.com/bostonglobe/ideas/brainiac/2009/07/obscenity_law_s.html; Eugene Volokh, *Obscenity Conviction for Adult-to-Adult Noncommercial E-mail About (Fantasy) Sex with Children*, VOLOKH CONSPIRACY (June 16, 2009), http://www.volokh.com/archives/archive_2009_06_14-2009_06_20.shtml#1245192215.

125. *See supra* text accompanying notes 104–15.

126. *See supra* text accompanying notes 111–15.

B. Speech That Doubles as Criminal Conduct

Of course, some would argue that evaluating Gilberto Valle's case under the obscenity exception misses the point: although the heinous nature of his fantasies was naturally a focus at trial, he was charged with criminal conspiracy, not mere possession or transmission of pornography. Thus, this Note turns now to the second strain of First Amendment reasoning implicated by the fantasy defense: expression that is itself the prohibited actus reus of a criminal offense, or—put another way—speech that doubles as criminal conduct.

Although the First Amendment protects speech that advocates criminal conduct[127] as well as speech that could lead to criminal conduct,[128] it offers no protection for actual criminal conduct merely because it involves thought or expression.[129] As the Supreme Court has noted, "The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution."[130] Conspiracy poses an interesting problem in this framework because the actus reus of the crime—agreement—is pure expression.

Throughout history, both practitioners and scholars have assumed that the First Amendment has little to say about conspiracy and similar crimes.[131] In 1949, the Supreme Court decisively stated in *Giboney v. Empire Storage & Ice Co.*[132] that the First Amendment offers no protection for speech "used as an integral part of conduct in violation of a valid criminal statute,"[133] but apparently felt no need to

127. Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y., 360 U.S. 684, 689–90 (1959). *But see* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (delineating an exception for speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

128. *See* Stanley v. Georgia, 394 U.S. 557, 567 (1969) ("Given the present state of knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

129. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973); *see* United States v. Williams, 553 U.S. 285, 298 (2008) (holding that requests to obtain child pornography are not protected by the First Amendment because "[m]any long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech . . . that is intended to induce or commence illegal activities").

130. *Paris Adult Theatre I*, 413 U.S. at 67–68.

131. Volokh, *supra* note 98, at 1284.

132. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

133. *Id.* at 498.

explain what qualifies as "integral," or to offer any reasoning behind this seeming tautology.[134] Since then, most case law examining the intersection between conspiracy and the First Amendment has focused on situations in which the *goal* of the conspiracy involves protected speech.[135] However, the fantasy defense raises the question of whether the alleged conspiracy agreement *itself* can ever be protected. Although speech that doubles as criminal conduct—such as in conspiracy, perjury, and aiding-and-abetting offenses—presumably fits within the broader *Giboney* exception of speech integral to criminal conduct,[136] the Supreme Court has only recently begun to attempt to explain *why* speech that doubles as criminal conduct is excluded from First Amendment protection.[137]

1. *The Speech-As-Conduct Rationale*. In previous years, most scholars believed that expression in these types of crimes was exempt from protection because it fell within the "speech as conduct" rule the Court applied in other circumstances.[138] This rule distinguishes between speech restricted for its expressive content and speech restricted for its non-expressive aspects.[139] In this view, for instance, punishing a defendant for perjury is analogous to punishing a defendant for playing his music too loudly; what is being punished is not the content of the lie itself, but the conduct of lying. In his 1989

134. *See* Volokh, *supra* note 98, at 1314 ("[N]one of the obvious interpretations of Giboney's rather ambiguous language makes much sense.").

135. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 360–63 (2003) (addressing whether conspiracy to unlawfully burn crosses passes First Amendment muster); United States v. Mehanna, 735 F.3d 32, 49 (1st Cir. 2013) (deciding that a conviction for conspiracy to provide material support to a terrorist organization is constitutional under the First Amendment even when the material support at hand was the translation of jihadist texts).

136. Although speech that doubles as crime likely fits within the "speech integral to criminal conduct" exception, that exception is broader. For instance, this category also includes non-obscene child pornography, possession of which the Court has ruled is unprotected based not on its content, but on its status as the product of sexual abuse. United States v. Ferber, 458 U.S. 747, 762–63 (1982); *see also* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 249 (2002) (explaining that the First Amendment applies to artificially generated, non-obscene child pornography because in *Ferber*, "[t]he production of the work, not its content, was the target of the statute"). Because the precise outline of the speech-integral-to-criminal-conduct category is unclear, and because it seems to encompass more than just speech that doubles as criminal conduct, this Note limits its discussion to the narrower category.

137. *See* United States v. Williams, 553 U.S. 285, 298 (2008) (explaining that offers to give or receive unlawful items have no social value, and therefore, like "conspiracy and solicitation," are not protected by the First Amendment).

138. Volokh, *supra* note 98, at 1282–83.

139. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992) (explaining that "[f]ighting words are thus analogous to a noisy sound truck").

survey of First Amendment law, Professor Kent Greenawalt posited that conspiracy agreement fits into this doctrine because it is a "situation-altering utterance"—speech that alters the expectations and felt obligations of the listener—rendering agreement more like an act than like expression.[140] Thus, in Greenawalt's view, conspiracy is not a true exception to the First Amendment's protections, but is simply not expression.

In more recent years, scholars such as Professor Eugene Volokh have criticized what they view as a false distinction between conduct and speech inherent in Greenawalt's argument.[141] For instance, Volokh argues that giving a speech advocating a boycott might create a feeling of moral obligation in the listeners to do as the speaker says because of the persuasive nature of his speech.[142] However, such a speech, far from being exempted as "conduct" from First Amendment protection, is a classic example of political expression, unquestionably falling within the First Amendment's ambit.[143] Thus, Volokh argues, speech that doubles as criminal conduct must be understood as a true exception to the First Amendment.[144]

2. *The Battle of the True-Exception Rationales*. This scholarly debate was resolved, however temporarily, in 2008 by *United States v. Williams*,[145] in which the defendant argued that 18 U.S.C. § 2252A(a)(3)(B), a statute criminalizing offers to provide and requests to obtain child pornography, was facially invalid under the First Amendment because it prohibited a "substantial amount of

140. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 57–58 (1989).

141. *See* William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 114 (1982) ("It is futile to argue that an appropriately tailored law that punishes any or all of these utterances does not abridge speech. It does, it is *meant* to, and one should not take recourse to verbal subterfuge, *e.g.*, that it is 'speech-brigaded with-action' or 'conduct' alone that is curtailed by laws reaching these cases."); Volokh, *supra* note 98, at 1330–31 ("But why should a statement's creating a felt moral obligation turn that statement from presumptively constitutionally protected speech into unprotected conduct? After all, there are many social conventions under which the making of a statement will be seen by some as increasing the speaker's moral obligations, or increasing or decreasing the listener's moral obligations."); *see also* Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 910–11 (2013) (proposing a reformulation of Greenawalt's structure that distinguishes between "operational" and "aspirational" speech).

142. Volokh, *supra* note 98, at 1331–32.

143. *Id.*

144. *Id.* at 1337–38.

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

protected speech."[146] Citing *Giboney*, the Supreme Court explicitly held—for the first time—that the crime of solicitation garnered no First Amendment protection. Rather than distinguish between speech and speech-as-conduct to take solicitation outside of First Amendment protection, the Court seemed to recognize solicitation as a true exception, premised "on the principle that offers to give or receive what it is unlawful to possess *have no social value* and thus, like obscenity, enjoy no First Amendment protection."[147]

This justification echoed the Court's analysis in many other First Amendment–exception cases.[148] For instance, in the seminal case *United States v. Roth*,[149] the Court justified the obscenity exception on the basis of its estimation that obscenity is "utterly without redeeming social importance."[150] Other First Amendment contexts in which the Court has used this line of reasoning include child pornography that does not rise to *Miller*'s obscenity standard,[151] fighting words,[152] and defamation.[153] Furthermore, the *Williams* Court implied that its reasoning applied not only to solicitation, but also to the expression inherent in conspiracy and incitement, because they are all "speech . . . that is intended to induce or commence illegal activities."[154]

However, the Court deemphasized the lack-of-social-value rationale a mere two years later in *United States v. Stevens*.[155] In *Stevens*, the government argued that First Amendment jurisprudence, including *Roth* and *Williams*, established a test under which the First Amendment extends only to expression that meets a minimum

146. *Id.* at 292.

147. *Id.* at 298 (emphasis added).

148. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (finding an exception to First Amendment protection for expression deemed "obscene . . . profane . . . or libelous").

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

150. *Id.* at 484.

151. *See* New York v. Ferber, 458 U.S. 747, 762–63 (1982) ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis.").

152. *See Chaplinsky*, 315 U.S. at 572 ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

153. *See* Beauharnais v. Illinois, 343 U.S. 250, 257 (1952) (quoting *Chaplinsky*, 315 U.S. at 571–72) (finding that epithets, personal abuse, or "fighting words" do not constitute communication for First Amendment purposes).

154. United States v. Williams, 553 U.S. 285, 298 (2008).

155. United States v. Stevens, 559 U.S. 460, 472 (2010).

threshold of social value.[156] Under this test, the government argued, a statute outlawing "crush videos," films of animal killing or cruelty, was valid under the First Amendment because such videos have a de minimis social value that is outweighed by society's interest in morality and order.[157]

The Court flatly rejected "permit[ting] the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."[158] Rather, the Court held that solicitation, obscenity, and other excepted forms of speech escape First Amendment protection not because of "cost-benefit analysis" but because they belong to "historic and traditional categories [of exceptions] long familiar to the bar."[159] Because not all crush videos prohibited by the statute fell within one of these categories, the statute was unconstitutional.[160]

In many ways, the decision in *Stevens* was protective of First Amendment rights. By refusing to expand exceptions to First Amendment protections to the kind of almost-but-not-quite obscenity at hand in *Stevens*, the Court affirmed that legislative determinations of social value could not control the constitutionality of government restriction of expressive speech. However, by retracting the lack-of-social-value rationale for obscenity and speech that doubles as criminal conduct, the *Stevens* Court suggested that a long pedigree is the sole and sufficient justification for their exclusion from First Amendment protection. For obscenity cases, this holding has little practical effect: the guiding principles of the exception, including social-value determinations, are already baked in the cake of the *Miller* test. However, for speech that doubles as criminal conduct, the absence of a principled rationale renders it difficult to precisely delineate the scope of the exception.

First, it cannot be seriously suggested that actual conspiracy and solicitation should categorically *gain* First Amendment protection; such a shift would put an end to criminal convictions that are both

156. Reply Brief for the United States at 11–12, *Stevens*, 559 U.S. 460 (No. 08-769), 2009 WL 2564714.

157. *Stevens*, 559 U.S. at 469–70.

158. *Id.* at 471.

159. *Id.* at 468.

160. *Id.* at 474–75.

legitimate and necessary for public safety.[161] On the other hand, it seems problematic to claim that First Amendment considerations can *never* have a place in these prosecutions, particularly in the fantasy-defense context. After all, if a defendant is convicted of conspiracy when his "conspiracy" agreement was, in fact, fantasy, his wrongful conviction not only punishes him for a crime he did not commit, but also punishes his entirely protected speech—an impermissible result under the First Amendment.[162]

C. Evidence Law in the Shadow of the First Amendment

Although *Stevens* has made it clear that conspiracy agreement is not *categorically* protected by the First Amendment, even speech that allegedly doubles as criminal conduct might require First Amendment protection in some circumstances. After all, a criminal prosecution can run a serious risk of punishing a defendant for the unpopularity of his expression, rather than for his actual guilt. In these types of cases, the courts have demonstrated some willingness to adopt heightened evidentiary standards, sometimes by institution of doctrinal protections, and sometimes only in practice, to control for this First Amendment risk.

Although the First Amendment is not understood to apply as a general evidentiary privilege, the Supreme Court has created prophylactic evidentiary doctrines for specific types of cases that have the potential to punish defendants for protected expression.[163] For instance, the Court has held that in defamation cases, the First

161. *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1326–27 (2003) (explaining how conspiracy law prevents sophisticated individuals who lead criminal undertakings from insulating themselves from personal criminal liability).

162. This is unlike, say, a conviction for possession of obscene materials in which the jury was improperly instructed as to the legal definition of obscenity. In that type of case, the defendant's First Amendment rights are violated whether or not the alleged factual basis of the charge is true. In the fantasy-defense context, a conviction does not punish the defendant's protected First Amendment expression when the alleged factual basis of the charge—that the communication was the actual conspiracy agreement—is true.

163. *See* Waters v. Churchill, 511 U.S. 661, 669 (1994) (listing some examples and stating that "we have often held some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech"); Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of* United States v. Rosenberg, 86 YALE L.J. 1622, 1648–51 (1977) (listing cases in which the Court has adopted special evidentiary rules to protect speech); *see also* Robert P. Faulkner, *Evidence of First Amendment Activity at Trial: The Articulation of a Higher Evidentiary Standard*, 42 UCLA L. REV. 1, 14–15 (1994) (evaluating Quint's discussion).

Amendment requires a plaintiff who is a public official to bear the burden of proof in showing "actual malice,"[164] and also to prove actual malice by clear and convincing evidence.[165] In another case, the Court struck down a state constitutional provision that placed the burden of proof on a taxpayer to show that he had not engaged in "advocacy of 'the overthrow of Government . . . by unlawful means'" to qualify for a tax exemption for veterans, on the grounds that the government may not restrict speech by manipulation of evidentiary presumptions any more than it may by direct regulation.[166]

For speech that doubles as criminal conduct, like conspiracy, the Supreme Court has not articulated similar heightened evidentiary standards. However, the Court acknowledged possible First Amendment problems for crimes like conspiracy in *Noto v. United States*[167] and *Scales v. United States*[168]—companion cases involving the Smith Act's membership clause, which criminalized being an active member of a group that planned violent overthrow of the government with the specific intent that the group's illegal goals be accomplished.[169] The Court emphasized that the specific-intent element, "like [the] others, must be judged *strictissimi juris*" to avoid impugning the First Amendment freedom of association, "for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes."[170]

Although *Scales* and *Noto* are most fairly read as a reminder of the importance of holding the government to its usual burden of proof, some lower courts have taken them as an invitation to articulate their own heightened evidentiary standards in prosecutions of speech that doubles as crime.[171] The First Circuit's widely cited

164. New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

165. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

166. Speiser v. Randall, 357 U.S. 513, 520, 528–29 (1958). "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." *Id.* at 526.

167. Noto v. United States, 367 U.S. 290 (1961).

168. Scales v. United States, 367 U.S. 203 (1961).

169. *Id.* at 205–06.

170. *Noto*, 367 U.S. at 299–300.

171. *See* Hellman v. United States, 298 F.2d 810, 813 (9th Cir. 1961) (overturning a Smith Act conviction where the government failed to prove specific intent *strictissimi juris*, and holding that specific intent could be proven by "activity . . . which is explainable on no other

opinion in *United States v. Spock*[172] contains perhaps the broadest application of these decisions. Spock was convicted of conspiracy to aid and abet Selective Service registrants in avoiding service based on his participation in an anti-draft group.[173] Some of the group's rhetoric was purely political, but some members of the group also advocated for the burning of draft cards and other illegal resistance.[174] Spock argued that his part in the group's activities consisted solely of political expression, not conspiracy to commit illegal acts, and should therefore gain First Amendment protection.[175] The First Circuit, citing *Scales* and *Noto*, held:

> When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."[176]

In addition to these special prophylactic doctrines, in practice, the Supreme Court and lower courts sometimes import First Amendment concerns into what is purported to be application of ordinary evidentiary rules.[177] In *Dawson v. Delaware*,[178] for instance, the Supreme Court held that although no per se ban on evidence of First Amendment–protected activity exists at sentencing, admitting evidence of a criminal defendant's ties to the Aryan Brotherhood in his sentencing for murder violated his First Amendment right to

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basis than that [a defendant] personally intended to bring about the overthrow of the Government as speedily as circumstances would permit"); United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969).

172. *Spock*, 416 F.2d 165.

173. *Id.* at 168.

174. *Id.*

175. *See id.* at 169 (raising First Amendment issues considering the public nature of some of the acts of the defendants).

176. *Id.* at 173 (quoting Scales v. United States, 367 U.S. 203, 234 (1961)).

177. Dawson v. Delaware, 503 U.S. 159, 166–67 (1992); *see* Herbert v. Lando, 441 U.S. 153, 180 (1979) (Powell, J., concurring) ("I join the Court's opinion on my understanding that in heeding these admonitions [about relevance analysis], the district court must ensure that the values protected by the First Amendment, though entitled to no constitutional privilege in a case of this kind, are weighed carefully in striking a proper balance.").

178. *Dawson*, 503 U.S. 159.

freedom of association.[179] According to the Court, the defendant's membership in the organization demonstrated only his "abstract beliefs," which, in the Court's estimation, were irrelevant to character, even under the relatively lax evidentiary standards of the sentencing phase.[180] Although the Court purported to apply its typical relevance analysis to reach this result, Justice Thomas in dissent was skeptical that a defendant's moral beliefs could ever be "irrelevant" to character, and suggested that the Court in fact applied a higher relevance standard, seemingly to protect the defendant from being punished for the content of his thoughts in violation of the First Amendment.[181]

Like the Supreme Court in *Dawson*, the lower courts have in practice adopted heightened evidentiary standards for evidence that poses a risk of punishing a defendant for First Amendment activity, particularly in Rule 403 analyses.[182] Rule 403 of the Federal Rules of Evidence states that relevant evidence may be excluded when its probative value is "substantially outweighed" by the risk of "unfair prejudice" to the party against whom the evidence is offered.[183] In one instance of Rule 403 analysis in the shadow of the First Amendment, the Fifth Circuit explicitly gave weight to First Amendment concerns in excluding evidence of a medical society's meeting, stating, "Admissibility, we think, should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's [F]irst [A]mendment rights."[184] On similar grounds, the Seventh Circuit excluded evidence that banks lobbied together that was

179. *Id.* Freedom of association is not expressly mentioned in the text of the First Amendment, but the Supreme Court has held that it is protected by the First Amendment right to expression. *Id.* at 163–64.

180. *Id.* at 168. In the sentencing phase of a criminal trial, the standard rules of evidence do not apply. Furthermore, even at the trial stage, evidence is not inadmissible simply by virtue of constituting expression within the meaning of the First Amendment. Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993).

181. *Dawson*, 503 U.S. at 173–76 (Thomas, J., dissenting). Justice Thomas excoriated the majority for obscuring its true reasoning, finding it implausible that gang membership was anything but highly relevant in sentencing to help a jury determine the defendant's character and dangerousness. *Id.*

182. *See, e.g.*, Walther v. FEC, 82 F.R.D. 200, 202 (D.D.C. 1979) (recognizing "that discovery may be restricted when it unnecessarily interferes with [F]irst [A]mendment activity").

183. FED. R. EVID. 403.

184. Feminist Women's Health Ctr. v. Mohammad, 586 F.2d 530, 543 n.7 (5th Cir. 1978).

purported to show that they collaborated in a price-fixing scheme.[185] It held the evidence inadmissible under Rule 403 because admission "could easily result in a finding of antitrust liability for engaging in the First Amendment right to petition which *Noerr-Pennington* protects."[186]

As in those cases, fantasy-defense cases implicate the concern that a defendant will be punished for his First Amendment activity, rather than the charged crime. This danger is arguably greater for defendants claiming gruesome fantasies as a defense than it is, for instance, for defendants engaging in lobbying activity. The inflammatory nature of the fantasies, combined with the difficulty of drawing the line between fantasy and conspiracy, makes clear the serious constitutional issues in fantasy-defense cases.

III. THE ACTUS REUS REQUIREMENT OF CRIMINAL LAW

It is a cherished maxim of criminal law that "evil intent alone" may not be punished.[187] Rather, criminal law's traditional actus reus requirement expresses "the feeling that the individual thinking evil thoughts must be protected from a state which may class him as a threat to its security."[188] This has not always been the case: for instance, it was once a crime in England to "compass or imagine, the death of the king."[189] For the past several centuries, however, action has been firmly established as a prerequisite to punishment.[190]

Ancient maxims aside, there are obvious practical barriers associated with prosecuting thought: namely, the difficulty of knowing what lies within another person's mind.[191] Indeed, to demonstrate the necessity of the actus reus doctrine, criminal-law textbooks have resorted to imagining dystopian futures in which the government can

185. Weit v. Cont'l Illinois Nat'l Bank & Trust Co. of Chi., 641 F.2d 457, 467 (7th Cir. 1981).

186. *Id.* Under the *Noerr-Pennington* doctrine, private entities are not liable under the Sherman Act for having attempted to influence the passage of laws "even though the resulting official action damaged other competitors at whom the campaign was aimed." United Mine Workers of Am. v. Pennington, 381 U.S. 657, 669 (1965). However, *Pennington* notes that evidence of such activity in proceedings based on *other* violations of the Sherman Act is subject to only ordinary evidentiary rules. *Id.* at 670 n.3.

187. Abraham S. Goldstein, *Conspiracy To Defraud the United States*, 68 YALE L.J. 405, 405 (1959).

188. *Id.*

189. *Id.* at 405 n.1.

190. *Id.* at 405.

191. *See id.* (describing the actus reus requirement as "[r]ooted in skepticism about the ability . . . to know what passes through the minds of men").

read brainwaves with cutting-edge technology,[192] or science-fiction scenarios in which psychics can predict crimes long before their commission.[193]

However, these speculative mind-reading tools are no longer necessary to give the government a window into a person's thoughts. Rather, individuals proclaim their ponderings publicly over Twitter, Facebook, and other social-media sites, or privately in emails, chats, and online journals.[194] Law enforcement regularly accesses social media as a crime-fighting tool,[195] and we now know that even our most private and secure online activities are subject to scrutiny by the federal government.[196]

But despite our apparent willingness to share our innermost thoughts online, popular opinion rebels at the notion of thoughtcrime as representing the epitome of Orwellian overreach.[197] For instance, some critics have invoked the concept to denounce the recent institution of hate-crime legislation, arguing that punishment enhancements based on unacceptable thoughts like racial animus allow criminal law to intrude too far into men's minds.[198] Like the rationales underpinning the First Amendment, this understanding of the actus reus requirement relies on values of personal liberty and the free exchange of ideas.

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192. *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 129 (6th ed. 2012) (discussing a study in which psychologists could identify ten out of twelve mock terrorists by their brainwaves).

193. *See id.* (discussing the 2002 film *Minority Report*); Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. . . . Can it be that the Constitution affords no protection against such invasions of individual security?").

194. *See* Chris Rose, *The Security Implications of Ubiquitous Social Media*, 15 INT'L J. OF MGMT. & INFO. SYS. 35, 36 (2011) ("Society is changing, norms are changing, confidentiality is being replaced by openness. If you join . . . social media sites, this means giving up some privacy, but millions of people are willing do so just to be a part of this social media phenomenon.").

195. *See* Heather Kelly, *Police Embrace Social Media as a Crime-Fighting Tool*, CNN (Aug. 30, 2012, 5:23 PM), http://www.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media (reporting that 80 percent of law-enforcement officers who use social media use it for their investigations).

196. *See, e.g.*, James Glanz & Andrew W. Lehren, *U.S. and Britain Extended Spying to 1,000 Targets*, N.Y. TIMES, Dec. 20, 2013, at A1 (reporting that the U.S. and British governments were spying on the email traffic, phone calls, and other communications of over one thousand people, including government officials of other countries).

197. *See, e.g.*, Robert J. Corry, Jr., *Burn This Article: It Is Evidence in Your Thought Crime Prosecution*, 4 TEX. REV. L. & POL. 461, 461–62, 468–70 (2000) (referencing George Orwell's novel *1984* to argue that hate crime is thoughtcrime and thus impermissible).

198. *See, e.g.*, *id.* at 468–70.

Of course, some might argue that there is a distinction between punishing thoughts and punishing expression—just as there is a distinction between punishing someone for thinking about killing the king and punishing someone for talking about killing the king. One could conceive of the latter act as a thoughtcrime or not, depending on whether the speaker is ultimately punished for her expression's thought-content—wishing the king was dead—or for her effort to actually bring about such a result—such as asking a hitman to kill the king.

Not only does the actus reus requirement protect against punishing expression for its thought-content as an end in itself, but it also protects against wrongly punishing expression because of an incorrect belief that it will lead to harmful action. In other words, it ensures that only those who truly threaten society are punished, by "seek[ing] to assure that the evil intent of the man branded a criminal has been expressed in a manner signifying harm to society; that there is no longer any substantial likelihood that he will be deterred by the threat of sanction; and that there has been an identifiable occurrence."[199] Concluding that a given expression of fantasy will lead to action requires two inferential steps: first, the inference that the expressed fantasy represents actual desire, and second, the inference that the desire will lead to action. Both inferences are highly problematic—for example, although multitudes of beleaguered employees may fantasize about the office burning down, most would not actually want such an event to pass, and fewer still would take action to bring it to fruition.[200]

Empirical evidence demonstrates that sexual fantasy is no exception to this principle. First, sexual fantasies do not necessarily represent actual desires.[201] For instance, although many women fantasize about rape, that fantasy does not reflect a desire to be raped.[202] Similarly, many men and women who fantasize about same-sex encounters nonetheless identify as heterosexual.[203] Second, though deviant sexual fantasies are almost universal, they are rarely acted

199. Goldstein, *supra* note 187, at 405.

200. *See* OFFICE SPACE (Twentieth Century Fox 1999) (portraying an employee burning down his office as a *twist* ending, even though the employees of the office are generally unhappy with their jobs).

201. *See* SIMON LEVAY & JANICE BALDWIN, HUMAN SEXUALITY 235 (4th ed. 2012) (explaining that rape fantasies do not reflect a desire to be raped).

202. *Id.* at 234–35.

203. *Id.* at 233.

upon.[204] In one study, researchers found that although almost all of those who participated in deviant sexual behavior had fantasized about it at some point, the reverse was not true: most of those with deviant sexual fantasies had never acted on them.[205]

The inferential steps are even more attenuated for cannibal fetishists. Startlingly, fantasizing about cannibalism is prevalent enough to warrant its own psychological terminology (vorarephilia) and Internet slang (vore).[206] Dark Fetish Net, the website Gilberto Valle used, has hundreds of users who list cannibalism as a fetish,[207] and other vore sites boast membership in the tens of thousands.[208] However, among these scores of cannibalism enthusiasts, there has been only one recorded case of a vore-forum user actually committing cannibalism: a German man who killed and ate his victim at the victim's own request.[209] Moreover, forum users often state in their profiles that they are interested only in fantasy, and, outside the context of role-play, widely affirm their unwillingness to actually eat human beings.[210]

Thus, although modern technology allows the government to engage in some "mind-reading," the tenets of criminal law prohibit

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204. *See* Kevin M. Williams, Barry S. Cooper, Teresa M. Howell, John C. Yuille & Delroy L. Paulhus, *Inferring Sexually Deviant Behavior from Corresponding Fantasies: The Role of Personality and Pornography Consumption*, 36 CRIM. JUST. & BEHAV. 198, 205–06 (2008) (finding that 95 percent of the study subjects had deviant sexual fantasies, but only 38 percent of those with deviant sexual fantasies had acted on them).

205. *Id.*

206. Amy D. Lykins & James M. Cantor, *Vorarephilia: A Case Study in Masochism and Erotic Consumption*, 43 ARCHIVES OF SEXUAL BEHAV. 181, 181 (2014).

207. *See Members List*, DARK FETISH NETWORK, http://darkfetishnet.com/search_advanced.php (last visited Jan. 20, 2015) (yielding through search 252 users who list cannibalism as their "main fetish," and an additional 112 who list it as another "fetish interest").

208. *See* Josh Kurp, *Cannibal Seeking Same: A Visit to the Online World of Flesh-Eaters*, THE AWL (Mar. 16, 2011), http://www.theawl.com/2011/03/cannibals-seeking-same-a-visit-to-the-online-world-of-flesh-eaters (describing Dolcett Girls Forum, a site dedicated to cannibalism fetishes with over forty thousand members).

209. *See* Daniel Politi, *German Police Officer Arrested in Alleged Cannibalism Case*, SLATE (Nov. 29, 2013), http://www.slate.com/blogs/the_slatest/2013/11/29/german_police_officer_arrested_in_alleged_cannibalism_case.html (describing a current case in which if suspicions of fetishistic cannibalism are confirmed, it will be the second time such a crime has been committed in Germany).

210. On the vore forum *Dolcett Girls*, one commenter in a thread called "Would you? Really?" asked: "If presented with an opportunity to Eat a Female in a 'Dolcett-ish' fantasy fulfillment . . . would you?" Kurp, *supra* note 208. In a response typical of the thread, one user replied, "In the end, I think I would probably avoid it in real life. Nice to think about, wonderful to see animated or made into a movie, but I've seen enough blood and other really nasty things in my life (some of them done to me) that I really don't want to feel the rest of that blade." *Id.*

punishment until it is clear that thoughts will lead to harm. Both popular notions of personal liberty and the attenuated relationship between thought and action necessitate this conclusion. The actus reus requirement is therefore necessary to protect these criminal law ideals, particularly in fantasy-defense cases.

IV. CONSPIRACY LAW'S THREAT TO THOUGHT AND FANTASY

The heart of criminal conspiracy is agreement to achieve—rather than proximity to achieving—an unlawful goal.[211] Its basis is the assumption that "to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."[212] In other words, as long as he has agreed with another to commit a crime, a defendant can be arrested for conspiracy well before he has even come close to achieving his purpose.[213]

This feature of conspiracy—"that darling of the modern prosecutor's nursery,"[214] as Judge Learned Hand called it—has led to its dramatic expansion in recent decades.[215] Conspiracy has two major functions that make it "an increasingly important weapon in the prosecutor's armory."[216] First, conspiracy operates as an inchoate offense that allows law enforcement to intervene early in criminal activity and prevent its harms.[217] Second, a judicial finding of

211. *See* Goldstein, *supra* note 187, at 406 ("[C]onspiracy doctrine comes closest to making a state of mind the occasion for preventive action against those who threaten society but who have come nowhere near carrying out the threat. No effort is made to find the point at which criminal intent is transformed into the beginnings of action dangerous to the community."). In fact, under the common-law definition, conspiracy does not even require an unlawful goal, but can be premised on an agreement to achieve a lawful goal by unlawful means. People v. Carter, 330 N.W.2d 314, 319 (Mich. 1982).

212. Krulewitch v. United States, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring).

213. *See Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 924 (1959) ("When the defendant has chosen to act in concert with others, rather than to act alone, the point of justifiable intervention is reached at an earlier stage.").

214. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925).

215. *See* Paul Marcus, *Criminal Conspiracy Law: Time To Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 8 (1992) (describing a "substantial increase" in federal conspiracy prosecutions between 1952 and 1992).

216. *Developments in the Law—Criminal Conspiracy*, *supra* note 213, at 922.

217. *See* United States v. Feola, 420 U.S. 671, 694 (1975) ("[A]t some point in the continuum between preparation and consummation, the likelihood of a commission of an act is sufficiently great and the criminal intent sufficiently well formed to justify the intervention of the criminal law.").

conspiracy triggers procedural[218] and evidentiary[219] advantages that allow defendants to be implicated in criminal activity for which they might otherwise escape liability.[220]

However, critics allege that these functions, while useful, are vulnerable to abuse and carry a "serious threat to fairness in our administration of justice."[221] Conspiracy law endangers both the First Amendment right to thought and fantasy, as well as the ideal—manifested in criminal law's actus reus requirement—that only expression and conduct posing an actual risk of harm may be punished.[222] The threat originates from two unique and interrelated features of conspiracy law. First, because conspiracy seeks to punish agreement itself rather than an independent act, more than any other crime, conspiracy "comes closest to making a state of mind the occasion for preventive action."[223] Second, prosecutors have unparalleled flexibility in proving conspiracy, heightening the risk that a defendant will be convicted for what he thinks rather than for what he does.[224]

A. Conspiracy and the Actus Reus

Ironically, given these criticisms, conspiracy is often described as requiring not just one, but two acts.[225] First, the defendant must intentionally agree with another to achieve an unlawful purpose.[226] Second, the defendant must take some overt action in furtherance of

218. Most notably, the *Pinkerton* doctrine under federal law allows one conspirator to be held liable for all acts of the other conspirators that were taken in furtherance of the conspiracy and were reasonably foreseeable. Pinkerton v. United States, 328 U.S. 640, 647 (1946). Additionally, a finding of conspiracy allows all of the alleged conspirators to be charged in any jurisdiction where any overt act took place. Hyde v. United States, 225 U.S. 347, 365–67 (1912).

219. Namely, a judicial finding of conspiracy exempts co-conspirator statements from the hearsay rule. FED. R. EVID. 801(d)(2)(E).

220. *See* Katyal, *supra* note 161, at 1326–27 ("In general, those insulated will be leaders, who orchestrate actions to maintain plausible deniability. . . . Conspiracy liability partially compensates for diffusion by punishing those who hide behind the veneer of the group.").

221. Krulewitch v. United States, 336 U.S. 440, 446 (1949) (Jackson, J., concurring).

222. *See supra* Parts II–III.

223. Goldstein, *supra* note 187, at 406.

224. *Developments in the Law—Criminal Conspiracy*, *supra* note 213, at 920.

225. *See* United States v. Shabani, 513 U.S. 10, 16 (1994) (holding that a particular statute did not require proof of an overt act, even though it is typically an element of many conspiracy statutes).

226. Iannelli v. United States, 420 U.S. 770, 777 (1975).

the agreement.[227] Conspiracy has a double mens rea as well: in addition to the state of mind required for each actus reus, the defendant must have the specific intent that the object of the conspiracy be effected.[228]

Criminal agreement is thought to be the primary danger of conspiracy, and the true actus reus of the offense.[229] Agreement in conspiracy may be proven by either direct or circumstantial evidence.[230] In a typical conspiracy case, law enforcement finds no written memorialization or other direct evidence of agreement.[231] Instead, agreement often must be inferred from the actions of the defendants.[232] Judges routinely prepare jury instructions to the effect that "conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret and clandestine."[233]

Overt acts require still less in the way of proof. Unlike agreement, the overt-act requirement is a vaguely defined concept that does not quite rise to the level of an actus reus.[234] In fact, some federal conspiracy statutes do not even require an overt act at all.[235] The Supreme Court has upheld these statutes on the grounds that neither the common-law backdrop to conspiracy law nor the ordinary principles of statutory construction require reading an overt-act

227. The overt-act requirement varies—some federal statutes do not require proof of an overt act as an element of conspiracy, but many do. *See* Whitfield v. United States, 543 U.S. 209, 214 (2005) (explaining that some, but not all, federal statutes have an overt-act requirement).

228. *See* United States v. Rodriguez-Velez, 597 F.3d 32, 39 (1st Cir. 2010) ("To establish a defendant's willing participation, the government must show 'two kinds of intent: intent to agree and intent to commit the substantive offense.'" (quoting United States v. Bristol-Mártir, 570 F.3d 29, 39 (1st Cir. 2009))).

229. *See Iannelli*, 420 U.S. at 777 ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.").

230. *See* United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir. 1986) ("While the government must establish the elements of conspiracy beyond a reasonable doubt, this can be done entirely through circumstantial evidence.").

231. *See Developments in the Law—Criminal Conspiracy*, *supra* note 213, at 933 ("Conspiracy is by nature a clandestine offense. It is improbable that the parties will enter into their illegal agreement openly.").

232. *Id.*

233. Goldstein, *supra* note 187, at 411 n.15 (citation omitted).

234. Indeed, some have argued that the overt-act requirement cannot be properly described as an element at all, but as a mere procedural requirement. *See* Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting) ("The cases in this court have agreed that the statute has not made the overt act a part of the crime, which still remains the conspiracy alone.").

235. *See* Whitfield v. United States, 543 U.S. 209, 214 (2005) (explaining that some, but not all, federal statutes have an overt-act requirement).

requirement into a statute that does not explicitly contain one.[236] Rather, the Court said in *Shabani* that agreement alone is sufficient actus reus to pass constitutional muster.[237]

The origins and rationale of the overt-act requirement are somewhat murky.[238] It may have originated as a kind of descriptive formalization of the "legislative interpretation of what was necessary to prove a conspiracy at common law," since agreement is usually proven by circumstantial evidence.[239] Others posit that the overt-act requirement serves merely as a formal procedural requirement.[240] Most popular and convincing, however, is the argument that the overt act serves to "manifest that the conspiracy is at work," and is not just "a project still resting solely in the minds of the conspirators."[241] In this view, the overt act serves to buttress the actus reus's role in ensuring that bad thought is punished only when it poses an actual threat to society. Or, to reframe the analysis slightly, the overt act helps safeguard "mere talk" from being wrongly understood to signify specific intent to achieve an unlawful goal.[242]

Under current law, almost any act, no matter how small, may fulfill the overt-act requirement.[243] It may be minor to the point of triviality,[244] and need not even be "reasonably calculated to effect the

236. *See* United States v. Shabani, 513 U.S. 10, 15 (1994) (declining to read an overt-act requirement into a statute that did not explicitly state one).

237. *Id.* at 15–16.

238. *See Developments in the Law—Criminal Conspiracy*, *supra* note 213, at 946 ("The inclusion of the overt-act requirement in the federal general conspiracy statute was unaccompanied by any indication of the function it was to serve.").

239. *Id.* at 946–47.

240. *See* Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting) ("[I]t is no more a part of the crime . . . than is the fact that the statute of limitations has not run."). Additionally, in some jurisdictions the overt act serves to establish venue. *See* United States v. Naranjo, 14 F.3d 145, 147 (2d Cir. 1994) ("In a prosecution for conspiracy, venue is proper in any district in which 'an overt act in furtherance of the conspiracy was committed by any of the coconspirators.'" (quoting United States v. Ramirez-Amaya, 812 F.2d 813, 826 (2d Cir. 1987))).

241. Yates v. United States, 354 U.S. 298, 334 (1957) (quoting Carlson v. United States, 187 F.2d 366, 370 (10th Cir. 1951) (quotation marks omitted)), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

242. *See* United States v. Gigante, 982 F. Supp. 140, 169 (E.D.N.Y 1997), *aff'd*, 166 F.3d 75 (2d Cir. 1999) ("As an added protection to defendants against punishment for mere talk, in some instances an overt act must take place in furtherance of the conspiracy.").

243. *See, e.g.*, *Yates*, 354 U.S. at 334 (holding that attending an otherwise lawful meeting constituted an overt act).

244. *See id.*

specific object of the conspiracy."[245] That an act was undertaken in furtherance of a conspiracy may be inferred from the existence of the agreement.[246] Thus, even an innocent and lawful act, when infected with criminal agreement, can serve as the overt act that may create criminal liability—even calling someone on the telephone[247] or driving to another city[248] can be enough. The overt act need not even be the defendant's, but can be carried out by any of the alleged conspirators, including those not named in the indictment.[249]

Giving the prosecutor such wide latitude to prove conspiracy weakens the actus reus requirement; when agreement can be proven by circumstantial evidence, and an overt act can be almost any minimally corroborative, innocuous event, the "double" actus reus requirement starts to look more like a half measure. As Professor Steven Morrison rather sarcastically explains it, "[W]e know that defendants agreed to rob a bank because they bought ski masks. Buying ski masks constitutes an overt act because the defendants agreed to rob the bank."[250] This kind of bootstrapping effectively lowers the standard of proof for the agreement to something less than beyond a reasonable doubt, and allows the jury to convict on only the barest implication that a crime has occurred.[251]

The weak actus reus requirement of conspiracy law has given rise to a series of cases in which juries have convicted defendants on the

245. *See Developments in the Law—Criminal Conspiracy*, *supra* note 213, at 947 (describing a court's decision that a statutory offense for conspiracy only required an agreement, and that "the overt act merely afford[ed] a '*locus poenitentiae*' so that before the commission of the act a conspirator might withdraw from the scheme without incurring guilt").

246. *See* United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir. 1986) ("While the government must establish the elements of conspiracy beyond a reasonable doubt, this can be done entirely through circumstantial evidence."); *see also* United States v. Brodie, 403 F.3d 123, 134 (3d Cir. 2005) ("[T]he very nature of the crime of conspiracy is such that it often may be established only by indirect and circumstantial evidence.").

247. *See* Bartoli v. United States, 192 F.2d 130, 132 (4th Cir. 1951) ("In our opinion, the telephone conversations . . . were all overt acts.").

248. *See* United States v. Shearer, 794 F.2d 1545, 1550–51 (11th Cir. 1986) (holding that the transportation of smuggled electronics through the Middle District of Florida was a sufficient overt act performed in furtherance of a conspiracy to create venue in the district).

249. United States v. Angotti, 105 F.3d 539, 545 (9th Cir. 1997).

250. Morrison, *supra* note 141, at 896–97.

251. Goldstein, *supra* note 187, at 411–12 ("The net effect . . . is to free juries from the automatic compliance with 'law' which instructions ordinar[i]ly demand and to invite a 'guilty' verdict on less evidence than might otherwise be required."); *Developments in the Law—Criminal Conspiracy*, *supra* note 213, at 947 (arguing that "in their zeal to emphasize that the agreement need not be proved directly, the courts sometimes neglect to say that it need be proved at all").

basis of evidence so insufficient as to breach the constitutional requirement that crimes be proven beyond a reasonable doubt.[252] The most notorious of these cases involve large, multi-defendant conspiracy trials. In these group-liability cases, defendants who have some association with conspirators, but who are not themselves part of any conspiracy, are likely to be "swept into the conspiratorial net."[253] Because "[t]here generally will be evidence of wrongdoing by *somebody*,"[254] and because the jury is expressly permitted to make inferences from circumstantial evidence, even a defendant who did no more than ride in a conspirator's car can be convicted for a criminal plot he never intended to join.[255] Conspiracy's weak actus reus requirement often poses a temptation too great to resist for the average jury to find a defendant guilty by his association with conspirators.[256]

B. The Fantasy Defense

Conspiracy law poses two main problems for those claiming a fantasy defense. First, conspiracy's de facto relaxed standard of proof poses the risk of convicting defendants on the basis of insufficient evidence, a due-process violation. Second, because the charged agreement involved in a fantasy-defense case is likely to be highly inflammatory, the jury may convict a defendant on the basis of the

252. *See* Marcus, *supra* note 215, at 19 n.98 ("[I]t is not clear whether the courts mean to suggest that jurors can be instructed on anything other than the reasonable doubt standard for individual defendants (clearly they cannot be) or whether somehow the government is relieved of its burden to show proof beyond a reasonable doubt."). Professor Paul Marcus conducted an empirical study of conspiracy law in 1977 by interviewing over one hundred judges and lawyers and distributing questionnaires to many others. *Id.* at 2. In 1992, he followed up with written communications to those judges and lawyers to see how conspiracy prosecutions had changed. *Id.* He found that the survey respondents observed growing sensitivity to issues of insufficient proof in conspiracy prosecutions, and one lawyer noted that "[these] courts have reversed several conspiracy convictions . . . where, though the evidence may have aroused substantial suspicion concerning the defendant, it failed to establish more than association and presence." *Id.* at 19–20 (alteration in original).

253. *Id.* at 18–19.

254. Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., concurring) (emphasis added).

255. *See* United States v. Hernandez, 896 F.2d 513, 519 (11th Cir. 1990) (overturning the defendant's conviction in a drug conspiracy because the only evidence linking him to the conspiracy was a ride he took in a conspirator's car and his presence at a drug transaction, which was insufficient proof to establish guilt beyond a reasonable doubt).

256. *See* Marcus, *supra* note 215, at 19–20 (discussing instances of courts reversing conspiracy convictions where the evidence established only that individual defendants were associated with the conspirators).

thought-content of her expression, whether or not it believes she truly intended to achieve an unlawful goal. This second problem is both a due-process violation—because of its probability of leading to wrongful convictions based on fantasy instead of real conspiracy—and a First Amendment violation—because a wrongful conviction also infringes the defendant's right to expression.

The fantasy defense is too new a development to have engendered substantial scholarship or appellate opinions the way large, multi-defendant conspiracy cases have, making it difficult to evaluate the impact of conspiracy law on fantasy defendants.[257] However, by comparing the characteristics of the large group-liability cases that lead to wrongful convictions to characteristics of fantasy-defense cases, it becomes clear that the fantasy-defense cases pose an even greater risk of wrongful convictions.

First, as in the group-liability context, conspiracy cases involving the fantasy defense pose a due-process risk of convicting an innocent defendant on insufficient evidence as a result of the weak actus reus requirement. Arguably, the fantasy defense poses a greater risk of conviction on the basis of insufficient evidence. In group-liability cases, the risk of convicting an innocent defendant stems from the possibility of the jury giving too much weight to *circumstantial* evidence of an agreement.[258] For example, a jury might impermissibly conclude that a defendant has agreed to take part in a conspiracy because he was near the crime scene and knew the conspirators.[259] In fantasy-defense cases, in contrast, the jury is presented with what the prosecution claims is *direct* evidence of agreement. In Valle's case, for instance, the government's case relied on the proposition that Valle's chats represented actual agreement, rather than fantasy expression.[260] Thus, the due-process risk in these cases is the possibility that a jury will misinterpret expressions of fantasy as expressions of conspiratorial agreement on the basis of constitutionally insufficient evidence. Arguably, this problem is more subtle and difficult to

257. One exception is a paper discussing the fantasy defense in the context of the Patrick J. Naughton case. *See* Yamagami, *supra* note 77, at 547. The Naughton case is discussed in Part II.D.

258. *See Developments in the Law—Criminal Conspiracy*, *supra* note 213, at 947 (discussing strategies used by prosecutors to circumvent the overt-act requirement in conspiracy cases).

259. *See, e.g.*, *Hernandez*, 896 F.2d at 519 (where the only evidence linking the defendant to the conspiracy was the fact that he rode in a conspirator's car and was present at a drug transaction).

260. *See supra* Part I.

understand than the problem posed in the group-liability context. As a result, it seems even more likely that a jury will convict a defendant in a fantasy-defense case on the basis of insufficient evidence of an unlawful agreement.

Second, fantasy-defense cases pose an additional risk that group-liability cases do not. Although defendants in both categories suffer the risk of a conviction based on insufficient evidence—albeit in slightly different ways—the fantasy-defense cases additionally raise the concern that a defendant will be convicted for the thought-content of his expression, rather than for his conduct.[261] As discussed previously, the actus reus requirement functions as criminal law's primary protection against both the risk that a defendant will be punished for the bad thought-content of his expression, as well as the risk that a jury will punish a defendant's thoughts in the mistaken belief that they will necessarily lead to action.[262] Because fantasy-defense cases, like Valle's, are likely to demonstrate that the defendant has expressed inflammatory and taboo thoughts, a jury may convict on the basis of disgust or fear rather than on its actual belief that a defendant intended his expression as conspiracy agreement. If conspiracy law's weak actus reus requirement fails to protect against even the comparatively simple problem posed by group-liability cases, it hardly seems plausible that it can protect against the complex and inflammatory issues that arise in fantasy-defense cases.

Therefore, like the defendant convicted because of his trivial association with a conspirator,[263] the defendant charged with conspiracy on the basis of his fantasy role-play is likely to be convicted on the basis of evidence insufficient to prove his unlawful agreement. However, the fantasy role-player runs an even greater risk of unfair conviction than the group-liability defendant because the jury may punish him for his bad expression, a constitutionally unacceptable result.

V. LINE-DRAWING AND THE FANTASY DEFENSE

Although the Constitution and core tenets of criminal law instruct that Gilberto Valle has a right not to be punished for his

261. *See supra* Part II.

262. *See supra* Part III.

263. *See supra* text accompanying notes 253–56.

fantasy expression,[264] the relaxed actus reus requirement of conspiracy law, combined with the inflammatory nature of his speech, posed the risk that the jury would do just that.[265] This tension suggests that additional safeguards are necessary to ensure that those charged with conspiracy are not unfairly convicted on the basis of the socially unacceptable thought-content of their expression. First, this Part uses Valle's case to demonstrate why conspiracy law must be reformed to protect those who invoke a fantasy defense from due-process and First Amendment violations. Second, this Part explores some possible safeguards, and proposes that the best option is overruling *Shabani* and strengthening the overt-act requirement.

A. Valle's Acquittal: A Case Study in the Need for Safeguards in Conspiracy Cases

Gilberto Valle's trial starkly demonstrated both the due-process and First Amendment risks a conspiracy prosecution poses to those who claim a fantasy defense. First, the prosecution offered insufficient evidence that Valle had actually entered into an agreement to commit an unlawful act. Second, the inflammatory nature of Valle's expression rendered it likely that the jury would be disgusted by or afraid of him, and would therefore be more willing to convict.

To begin with, the prosecution introduced direct evidence of agreement in the form of Valle's chats, but offered little in the way of extrinsic evidence from which the jurors could infer the meaning behind the text—that is, whether the chats were fantasy or agreement.[266] Rather, Valle's alleged overt acts—including visiting one woman for brunch with his wife and child in tow, giving PBA cards to various acquaintances, and texting friends—were just as likely to be innocuous social gestures as they were to bear any actual relation to a kidnapping conspiracy.[267] In other words, the purported overt acts, while meeting the current legal standard to fulfill that requirement, did not perform their function of bolstering the actus reus requirement to ensure that Valle's expression actually signified his intent to kidnap anyone.

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264. *See supra* Parts II–III.

265. *See supra* Part IV.

266. *See supra* text accompanying notes 53–58.

267. *See id.*

Furthermore, the emotional incentive for the jury to convict was great. They were presented with the possibility of a truly horrific criminal plot, and tasked with determining whether it was real or fantasy without much substantial evidence to indicate which to choose.[268] They were invited to make this determination on the basis of any and all of the circumstantial evidence the prosecution offered, including not only the content of the chats alleged to represent agreement, but also the contents of chats that concededly represented fantasies.[269] Furthermore, they were to make this determination using their own "common sense," without the benefit of any expert testimony explaining the relationship between fantasy and action.[270] A reasonable person could very well become convinced that a man like Gilberto Valle, guilty of the charged crime or not, was too dangerous or too distasteful to live among the population at large.

Of course the government could (and in Valle's case did) argue that it is the special province of the jury to sift through the evidence, contested though it may be, and determine a defendant's true intentions.[271] After all, the courts have said that giving deference to a jury's verdict is "especially important when reviewing a conviction for conspiracy" because of the jury's role in applying their understanding of human behavior to draw inferences about whether a conspiracy exists.[272] The jury has never been treated as infallible, however.[273] In fact, our entire body of evidentiary rules exists to mitigate the risk that a jury will convict or acquit a defendant based on the wrong kind of information or reasoning.[274] Courts have proven especially willing to control jury decisionmaking when First Amendment rights are at stake.[275] And although examples are rare, courts will sometimes overturn a jury verdict on the basis of insufficient evidence.[276]

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268. *See id.*

269. *See supra* text accompanying note 61.

270. *See* Transcript of Record at 1582, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013) (referring to the "limits of fantasy under common sense").

271. Response of the United States of America in Opposition to the Defendant's Motions for a New Trial and Judgment of Acquittal at 6, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Aug. 16, 2013) ("Thus, the task of choosing among the permissible competing inferences that can be drawn from the evidence is for the jury, not for the reviewing court.").

272. *See* United States v. Pitre, 960 F.2d 1112, 1120–21 (2d Cir. 1992).

273. *See, e.g.*, Marcus, *supra* note 215, at 13 (discussing the actions of trial judges to break up large conspiracy cases to make the jury's task of determining individual guilt easier).

274. GEORGE FISHER, EVIDENCE 1 (2d ed. 2008).

275. *See supra* Part II.C.

276. FED. R. CRIM. P. 29.

Of course, Judge Gardephe did just that, holding that the jury convicted Valle on the basis of insufficient evidence.[277] For a judge to overturn a jury verdict, it must be the case that even when all the evidence is viewed in the light most favorable to the government, *no* reasonable jury could convict the defendant.[278] The risk inherent in having a jury decide fantasy-defense cases under current conspiracy law should be evident to any observer; it seems highly plausible that the jury convicted Valle based not on his actions, but on his fantasies, either because his fantasies were horrific, or because—due to conspiracy law's de facto relaxed burden of proof—the jury misinterpreted his expression of fantasy as an actual agreement to kidnap and eat other human beings. The fact that Judge Gardephe resorted to the rare remedy of overturning a jury verdict further demonstrates the singular risk of unconstitutional convictions in fantasy-defense cases.

If it can be shown that a jury is likely to convict a defendant on anything less than proof beyond a reasonable doubt, some safeguard is not only justified, but required to prevent a violation of a defendant's constitutional rights.[279] Establishing reasonable safeguards is particularly important because though Valle's case is truly bizarre, the fantasy defense seems unlikely to stop with him. As law enforcement becomes increasingly Internet-savvy, we are likely to continue to see defendants like Valle arrested for their chats and forum participation.[280]

Of course, for every defendant like Valle, who can make a strong case that his chats were mere expressions of fantasy, there is another Internet user who really does pose a threat to society.[281] For example, a Boston-area man recently pled guilty to solicitation to commit a crime of violence after he described online his plan to kidnap and kill children.[282] These chats led police to discover that he possessed a soundproofed basement, torture devices, bleach, and a child-size

277. United States v. Valle, 301 F.R.D. 53, 90 (S.D.N.Y. 2014).

278. FED. R. CRIM. P. 29.

279. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that the Fifth Amendment requires proof beyond a reasonable doubt to convict a criminal defendant).

280. *See* Kelly, *supra* note 195 (discussing law enforcement's increasing use of social media as a crime-fighting tool).

281. Morgan Winsor, *Man Who Plotted To Kill and Eat Children Gets More than 26 Years in Prison*, CNN (Sept. 17, 2013, 11:06 PM), http://www.cnn.com/2013/09/17/us/cannibal-eat-children-case/index.html.

282. *Id.*

coffin, along with other supplies he had acquired in preparation for his plans.[283] Accordingly, this Note does not propose that law enforcement should refrain from investigating those who engage in suspicious online conversations. Rather, what the law needs is a more robust way of distinguishing between the fantasy role-players and the real criminal conspirators.

B. Potential Modes of Safeguarding the Right to Fantasy

But even if the fantasy defense presents special due-process and First Amendment problems, what safeguards are appropriate to ensure that fantasy defendants are not wrongfully convicted on the basis of their "bad" expression? Although the fantasy defense is too novel for scholars to have addressed it directly at length, examining First Amendment protections proposed or enacted in other contexts may shed light on the question. This Part appraises some of those protections, before suggesting that the best alternative is for the Court to overrule *Shabani* and strengthen the overt-act requirement.

1. *Proposed Options*. Two broad categories of doctrinal safeguards seem possible in the context of the fantasy defense: changing substantive First Amendment law and changing the evidentiary requirements of conspiracy law. Though the first method is perhaps the more traditional approach courts and scholars have taken with respect to protecting freedom of expression, the latter method is likely to be more effective in the context of speech that doubles as criminal conduct.

Often when the free exchange of ideas and personal autonomy are threatened by a restriction on speech, courts respond by expanding the definition of First Amendment expression to cover the area of threatened speech. For example, when the Supreme Court decided *Miller*, it limited the scope of the obscenity exception by redefining obscenity to exclude all but those works that "appeal to the prurient interest in sex" and have no "serious literary, artistic, political, or scientific value."[284]

However, this kind of definitional change to the scope of First Amendment protections seems unlikely to be workable in the area of conspiracy law, because First Amendment implications for speech as crime are different *in kind* from First Amendment implications for

283. *Id.*

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

other kinds of expression like obscenity. An obscenity conviction based on materials that are protected by the First Amendment violates the defendant's rights whether he in fact possesses the charged material or not. In other words, all that matters to him is the legal definition of obscenity. However, for speech that doubles as crime, the conviction violates the defendant's First Amendment rights only when the defendant is *innocent* of the charge. The determining factor is not the legal, but the factual status of the purported agreement. No plausible way of changing the legal definition of "agreement" would be able to capture real, but not fake, criminal agreements.

This problem with changing the scope of First Amendment protections by redefining the limits of protected speech suggests that the appropriate First Amendment prophylactic rule in conspiracy cases is an evidentiary one. The Supreme Court and lower courts have already demonstrated some willingness to use evidentiary rules to protect against the possibility of a defendant being wrongly convicted for the thought-content of his expression. For example, recall the First Circuit's decision in *Spock*, in which the court outlined special requirements for proving specific intent in cases where the purported conspiratorial expression consisted of both protected speech and potential agreements to participate in a criminal conspiracy.[285] Furthermore, an evidentiary safeguard could protect not only against the First Amendment risk of a defendant being convicted for the thought-content of his expression, but also against the due-process risk of a defendant being convicted on the basis of insufficient evidence.

2. *The Overt-Act Requirement.* Perhaps the most obvious evidentiary method of safeguarding the right to fantasy is strengthening conspiracy law's overt-act requirement. In fact, the most plausible justification for maintaining an overt-act requirement at all is to ensure that the conspiracy is indeed "at work," and that the alleged conspirators actually intended to achieve an unlawful goal.[286]

Despite this function, courts have given short shrift to the overt-act requirement over the years. Although many federal conspiracy statutes require an overt act, the Supreme Court held in *Shabani* that an overt-act element is not constitutionally required in a conspiracy

285. *See supra* text accompanying notes 172–76.

286. *See supra* text accompanying notes 241–42.

statute because the agreement itself is the true actus reus of conspiracy offenses.[287]

However, as one commentator points out, the *Shabani* Court erred in considering the necessity of the overt act only as a formal actus reus requirement.[288] The Court neglected to factor in another constitutionally relevant function of the overt act: ensuring that agreement be proven beyond a reasonable doubt.[289] The article cites this as the reason the Court should overrule *Shabani*, arguing that without an overt act, no conspiracy can be proven beyond a reasonable doubt.[290] Professor Martin Redish further argues that the overt act is required to safeguard First Amendment rights in conspiracy prosecutions.[291] He contends that the First Amendment requires a non-expressive overt act that "effectively transform[s] the communication into nothing more than an element of the non-expressive behavior."[292]

However, as previously discussed, even when an overt-act requirement *is* instituted, current conspiracy law treats it more like a formality than a true element, robbing it of its usefulness.[293] An overt act can be any trivial or innocent act that is minimally consistent in some way with the alleged conspiracy.[294] For example, in Gilberto Valle's case, the alleged overt acts included giving out PBA cards, searching for "targets" in the police database, and arranging social meetings with women.[295] These acts, by the letter of the law, are sufficient to meet the overt-act requirement. However, it seems obvious that these acts have little, if any, probative value when it comes to determining Valle's true intentions. As the defense pointed

287. United States v. Shabani, 513 U.S. 10, 15–16 (1994).

288. *See* Kevin Jon Heller, Note, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and* United States v. Shabani, 49 STAN. L. REV. 111, 113 (1996) (equating the overt-act requirement in conspiracy with the Fifth Amendment reasonable-doubt standard).

289. *Id.*

290. *Id.* at 142.

291. Martin H. Redish & Michael J.T. Downey, *Criminal Conspiracy as Free Expression*, 76 ALB. L. REV. 697, 732 (2013).

292. *Id.*

293. *See* Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting) ("[I]t is no more a part of the crime . . . than is the fact that the statute of limitations has not run.").

294. Cramer v. United States, 325 U.S. 1, 6 (1945) (quoting United States v. Robinson, 259 F. 685, 690 (S.D.N.Y. 1919)).

295. Transcript of Record at 1528–30, United States v. Valle, No. 12-cr-00847 (S.D.N.Y. Mar. 7, 2013).

out, and as the court noted in overturning Valle's conviction, those acts are just as consistent with a theory of innocence as they are with a theory of guilt.

As a result, this Note goes further than those commentators, and argues that not only is an overt act required to avoid constitutional violations, but also the overt act must be more substantial than the kind the law currently considers acceptable. As Professor George Fletcher points out, this would be a "sensible restrictive measure" that would prevent the government from using conspiracy to target unpopular speech and thought.[296] However, little, if any, scholarship or case law seems to have explicitly proposed this solution.

A redefinition of the overt-act requirement could be formulated a number of ways to balance the constitutional need for the overt act to be more significant with the government's interest in effective prosecution and enforcement. Any redefinition should, however, include the requirement that an overt act must independently make it more likely that the defendant actually intended an unlawful goal; an overt act should not be equally consistent with guilt or innocence.

In designing this definition, one could follow the lead of the First Circuit in *Spock*, which suggested that when a defendant participates in a group that engages in both protected political expression and illegal conspiratorial agreement, specific intent must be proven in one of several particular ways. One way the court allowed the government to prove specific intent was by an "individual defendant's subsequent legal act if that act is 'clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.'"[297] Another possibility is found in the commentary to a proposed revision to the federal criminal code, which states, "[T]he overt act must be such that it manifests a purpose to effect an objective of the agreement."[298]

These modest definitional changes assign the overt-act requirement some weight to carry, but pose little risk of preventing the government from prosecuting a legitimate conspiracy. In Gilberto Valle's case, a more robust overt-act requirement could have precluded the jury's constitutionally insufficient guilty verdict. As the court noted in overturning the verdict, "[I]n determining whether the

296. GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 3.6, at 225 (2000).

297. United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969) (quoting Scales v. United States, 367 U.S. 203, 234 (1961)).

298. S. REP. 95-605, at 163 (1977).

Government proved beyond a reasonable doubt Valle's criminal intent—his specific intent to actually kidnap a woman—the fact that no kidnappings took place and that *no real-world, concrete steps toward committing a kidnapping were ever taken*, is significant."[299] Consequently, if the jury understood conspiracy to require a more robust overt act like the formulations proposed above, it seems unlikely that it would have wrongfully convicted Valle.

CONCLUSION

Even a defendant with the most utterly repulsive fantasies imaginable should not be convicted based on anything less than the jury's belief beyond a reasonable doubt that he committed the acts charged. The First Amendment and criminal law's actus reus requirement demand that conspiracy law give effect to this standard to avoid impinging on a defendant's constitutional right to express his fantasies and thoughts. Although the current Supreme Court seems indisposed to tighten the requirements to prove conspiracy, one way to attain this goal is for courts to return to a meaningful definition of conspiracy's overt-act requirement. Bolstering the overt-act requirement will ensure that juries are better equipped to come to the correct verdict in cases like Gilberto Valle's, eliminating the need for judges to engage in post hoc mitigation.

299. United States v. Valle, 301 F.R.D. 53, 61 (S.D.N.Y. 2014) (emphasis added).