OVERCRIMINALIZING SPEECH

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Recent years have seen a significant expansion in the criminal justice system's use of various preemptive measures, aimed to prevent harm before it occurs. This development consists of adopting a myriad of prophylactic statutes, including endangerment crimes, which target behaviors that merely pose a risk of future harm but are not in themselves harmful at the time they are committed.

This Article demonstrates that a significant portion of these endangerment crimes criminalize various forms of speech and expression. Examples include conspiracies, attempts, verbal harassment, instructional speech on how to commit crimes, and possession crimes. The Article argues that in contrast with conventional wisdom's assumption that the right to free speech is broadly protected under existing jurisprudence, much speech is currently overcriminalized under the endangerment justification. Free speech doctrines and criminal law are in tension with one another. While under its First Amendment jurisprudence the Court contracts government's power to ban speech, criminal law constantly expands the scope of speech crimes.

The Article contends that existing doctrines attempting to explain this inconsistency fail to provide a principled explanation for the absence of First Amendment scrutiny from various types of speech crimes. To ameliorate this problem, this Article proposes a unified analytical framework for assessing when speech justifies criminalization and when it warrants constitutional protection. The proposal suggests that all speech crimes should be subject to constitutional scrutiny under free speech doctrines, as well as to additional constraints stemming from criminal law theory. This Article provides several factors to guide the judicial inquiry into determining the scope of criminal bans on speech.

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And the act
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INTRODUCTION

Tarek Mehanna, a twenty-two-year-old Muslim-American citizen, was living in Massachusetts and studying towards a doctorate degree in pharmacy.[2] A devoted scholar of Islam, Mehanna began to translate Arab-language materials into English. He then posted his translations on al-Tibyan, an Islamic website that comprised an online community for those sympathetic to al-Qaeda and Jihadi perspectives. Website members shared opinions, videos, and texts in online forums. The translated writings, which were already available on the Internet, varied significantly in their potential link to terrorism, ranging from some al-Qaeda–generated media and materials supportive of al-Qaeda and/or jihad, such as instructing readers to "ask God for martyrdom" and to "Go for Jihad Yourself," to more innocuous writings loosely tethered to the jihad movement, such as maintaining physical fitness.[3]

In 2009, Mehanna, who had no prior criminal record, was arrested on terrorism-related charges.[4] The government argued, among others, that the translated writings provided a service to al-Qaeda, because its purpose was to spur readers on to jihad and inspire al-Qaeda supporters to commit terrorist acts.[5] On December 19, 2011, a Massachusetts jury convicted Mehanna of four terrorism-related charges, including conspiring to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. § 2339B.[6] The district court sentenced Mehanna to a prison term of 210 months.[7] On November 13,

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1 T.S. ELIOT, THE HOLLOW MEN (1925), *reprinted in* THE COMPLETE POEMS AND PLAYS: 1909–1950, at 56, 58 (1971).

2 United States v. Mehanna, 735 F.3d 32 (1st Cir. 2013).

3 *See* MUHAMMAD BIN AHMAD AS-SĀLIM, 39 WAYS TO SERVE AND PARTICIPATE IN JIHĀD (At-Tibyān Publ'ns trans.), *available at* https://ia700408.us.archive.org/7/items/39WaysToServeAndParticipate/39WaysToServeAndParticipateInJihad.pdf (last visited Apr. 14, 2015) (providing the full-text English language translation of the Arabic document, which is publicly available on numerous Islamic Internet sites).

4 *Mehanna*, 735 F.3d at 41.

5 *Id.* (charges against Mehanna "were based on two separate clusters of activities": one centered on his travel to Yemen, in search of an al-Qaeda training camp, the other was "translation-centric").

6 *Id.* at 42.

7 *Id.*

2013, the U.S. Court of Appeals for the First Circuit upheld Mehanna's conviction and sentence.[8]

Mehanna's translation-centered conviction raises some vexing questions concerning how we distinguish between speech that warrants criminal prohibition and speech that ought to be protected against criminal sanctions by the First Amendment. As the case poignantly illustrates, making this distinction can be difficult. Convicting Mehanna with conspiring to provide material support to a foreign terrorist organization based on translation into Arabic of materials that praise terrorist acts, raises significant concerns about how and the extent to which speech is criminalized. Concerns about the scope of speech-based criminal prohibitions extend beyond the terrorism context. Other examples include criminalizing a host of risk-creation conducts, ostensibly to prevent future harm. These statutes range from conspiracies and attempts to instructional speech providing information useful for the commission of crimes. Indeed, when one reviews the broad array of instances in which speech is now criminalized, it begins to seem as if speech has become overcriminalized.

The overcriminalization of speech parallels a broader trend in substantive criminal law, which has undergone an unprecedented expansion in recent years.[9] The "overcriminalization phenomenon" as commentators have dubbed it, is the tendency for a constantly growing array of criminal statutes to make individuals liable for conviction and punishment for a wider range of behaviors.[10] Scholars have identified four principal manifestations of this phenomenon. First, *federalization of crimes*, the explosive growth in the scope and size of federal criminal offenses.[11] Second, *overlapping crimes*, namely, re-criminalizing conduct that has already been proscribed by another statute.[12] Third, *endangerment offenses*, where harm is merely threatened but the risk has not yet materialized.[13] Fourth, *ancillary crimes*, namely, offenses that function as surrogates for the prosecution of primary or core crimes.[14] Although the literature describing this general phenomenon is

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8 *Id.* at 69.

9 *See generally* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3–6 (2008) (discussing the scope of the dramatic expansion in criminal laws).

10 *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 506, 512–15 (2001) (noting the continual expansion of criminal statutes); *see also* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–19 (2005) (discussing the features of the "overcriminalization phenomenon").

11 *See* Sara Sun Beale, Essay, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 753–56 (2005) (discussing the overfederalization of criminal law).

12 *See* HUSAK, *supra* note 9, at 36–40.

13 *Id.* In this Article, the phrases "endangerment crimes," "risk-creation crimes," and "harm prevention crimes" are used interchangeably.

14 *See* Norman Abrams, *The New Ancillary Offenses*, 1 CRIM. L.F. 1 (1989).

extensive, any specific discussion of the overcriminalization of speech is notably absent. This Article fills that void.

As it turns out, one particular category of criminal prohibitions on speech—endangerment speech crimes—is the area in which the overcriminalization of speech is most prominent and disconcerting. Endangerment speech crimes consist of prohibitions that target expression that ostensibly increase the likelihood of inflicting future harm. Examples include conspiracy to commit terrorism-related crimes, criminal bans on verbal harassment, and an array of statutes covering disorderly conduct, including prohibitions on public drunkenness and expression of profanities in public.[15] In recent years, federal and state legislatures have expanded the scope of these crimes by prohibiting a myriad of crime prevention offenses that target risk-creating speech.[16] The overcriminalization of speech is, therefore, yet another facet of the overall overcriminalization phenomenon.

To some readers, the claim that current laws overcriminalize speech may seem highly implausible in light of the popular belief concerning the fundamental importance of the right to free speech in American constitutional law. A skeptical observer might respond that speech not only is not overcriminalized, but also is broadly protected; some might even contend over-protected. Indeed, at first blush, the U.S. Supreme Court has been strongly protective of speech, beginning with the landmark *Brandenburg v. Ohio* decision—which significantly limited the criminalization of advocacy of the use of force or of law violation only to cases where the speech is "directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action"[17]—and culminating in the recent decision in *United States v. Stevens*, which struck down a federal statute that criminalized the commercial creation, sale, or possession of illegal depictions of treatment of animals, considered to be cruel.[18]

However, a more nuanced examination of the relationship between First Amendment jurisprudence and substantive criminal law reveals that this preliminary assumption provides only a partial account of the more complex interplay between them. In fact, these two areas of law run along two parallel lines: Although under its free speech jurisprudence the Court significantly *contracts* the government's power to adopt content-based restrictions on speech, at the same time, substantive criminal law continuously *expands* restrictions on speech via broadly-worded speech crimes.

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15 *See infra* Part I.A–C.

16 *See infra* Part I.A–C.

17 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (emphases added).

18 United States v. Stevens, 559 U.S. 460, 482 (2010).

The explanation for this seemingly inconsistent treatment of these two areas of law lies in the limited boundaries of the First Amendment.[19] While some speech enjoys First Amendment scrutiny, numerous statutes simply fall beyond its reach and are not measured against its rigorous standards.[20] Existing First Amendment doctrine treats many types of speech crimes as categorically falling beyond the ambit of First Amendment coverage. Consequently, a wide array of crimes—including attempts, conspiracies, solicitations, and instructional speech—are not subject to free speech scrutiny. Instead, they are viewed as speech acts, an integral part of an illegal course of conduct or "speech brigaded with action" (speech acts).[21]

Speech acts consist of speech that performs some functional task other than the expressive communication of ideas.[22] These include various forms of expressions that are so intertwined with performative actions that they are treated similarly to conduct, rather than pure speech. The implications of the speech act classification are far-reaching because the First Amendment provides unique protection to speech, subjecting regulations of speech to numerous restrictions that regulations of conduct need not satisfy, most notably, the stringent strict scrutiny review.[23] Importantly, speech acts are not viewed as implicating the fundamental right to speak and, therefore, are not subject to strict scrutiny review.[24] Instead, similar to general criminal prohibitions, speech acts are subject to only the most lenient judicial review, namely, rational basis scrutiny, which is notably deferential to the government.[25] The upshot is that speech acts are categorically excluded from the scope of First Amendment coverage.[26]

Commentators have long grappled with speech acts doctrines, but have yet to provide a single comprehensive theory that explains which speech falls within the boundaries of free speech coverage and which

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19 *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004) (noting the limited boundaries of the First Amendment).

20 *Id.* at 1771 (providing examples of civil and criminal restrictions on speech that fall beyond the scope of the First Amendment).

21 *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Unchartered Zones*, 90 CORNELL L. REV. 1277, 1283 n.16 (2005) (internal quotation marks omitted) (elaborating on the explanations for the exclusion of First Amendment coverage from many speech crimes).

22 *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 43, 57 (1989).

23 *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 776–78 (2001).

24 *See* Volokh, *supra* note 21, at 1281–84 (discussing examples not subject to First Amendment scrutiny).

25 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 624 (3d ed. 2006) (providing examples of the Court upholding legislation using rational basis review).

26 *See* Schauer, *supra* note 19, at 1769 (noting that speech acts are excluded from First Amendment coverage).

remains beyond its scope.[27] One prominent account suggests that certain kinds of speech, including offers, agreements, orders, permissions, and threats constitute "situation-altering utterances," which are not subject to free speech scrutiny.[28] Another explanation suggests that certain types of expressions, speech acts among them, are categorically excluded from the ambit of the First Amendment.[29] The latter account further contends that legal doctrines alone are unable to explain what speech is covered by the First Amendment and that an array of nonlegal factors—such as economic, political, and cultural considerations—may explain the lack of free speech coverage from various types of speech.[30]

Existing doctrines, however, are fraught with difficulties, and are unable to provide an analytical framework by which to identify the criteria for determining which speech merits constitutional protection. Notably, they fail to explain why various speech crimes consisting of mere speech, unaccompanied by any action, evade free speech scrutiny, even when the expression is prohibited because of its communicative message.

The purpose of this Article is to develop an analytical framework for policymakers to determine when it is appropriate to criminalize speech. While current accounts tell only a partial story, and one that is mostly viewed through the First Amendment lens, this Article focuses on the implications of speech crimes from a criminal law perspective by revisiting the justifications for these crimes. The main question that it asks is when, and to what extent, may speech alone, unaccompanied by further acts, constitute the actus reus of a criminal offense? In other words, when does pure speech transform into criminal behavior? This question has been further sharpened in recent years with the huge explosion in cyberspace communication. Its modified version asks: When does virtual crime, consisting merely of speech, become a crime in the real world?

To answer this question, I develop several constitutional constraints as well as constraints stemming from criminal law theory to limit the ambit of speech crimes. The proposed framework suggests a two-step analysis. It begins with the premise that the kernel of what makes a crime one that criminalizes speech lies in the fact that its actus reus is speech of some sort. An initial step in assessing when criminalization is warranted would be asking whether the actus reus of

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27 *See* John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495–97 (1975).

28 *See* GREENAWALT, *supra* note 22 (discussing "situation-altering utterances").

29 *See* Schauer, *supra* note 19, at 1771 (explaining the lack of coverage from certain speech restrictions).

30 *Id.* at 1788–89 (elaborating on nonlegal factors relevant to free speech coverage).

the crime consists of a content-based restriction on speech. If the statute targets speech because of the harm that flows from its content, then the criminal prohibition needs to be scrutinized under First Amendment doctrines. The second step consists of examining familiar free speech considerations that are typically applied when a content-based restriction on speech is concerned, such as the value of the speech and the type of harm it threatens.[31] Importantly, appropriate risk management must account for the likelihood that grave harm would be inflicted before speech is criminalized. This Article, therefore, proposes that a probability test is incorporated into the definition of endangerment speech crimes to ensure that speech is criminalized only when a cost-benefit analysis demonstrates substantial likelihood of dire harm resulting from the speech. From a criminal law perspective, incorporating a probability requirement assures that speech is criminalized only if the perpetrator's dangerousness is established.

This Article proceeds as follows. Part I explains how speech is currently overcriminalized and elaborates on the problems that have arisen under existing statutes. It demonstrates that as a part of the criminal justice system's increasing reliance on preemptive law enforcement, legislatures adopt a myriad of endangerment speech crimes without requiring substantial probability that the speech would result in grave harm. This Part further frames the overcriminalization of speech argument within the broader context of the overcriminalization phenomenon in general and the increasing use of preventive measures in criminal law in particular.

Part II considers existing doctrines that attempt to explain when speech should be immune from First Amendment scrutiny. It critiques these explanations by contending that they are unable to properly draw the legal boundary between speech that warrants constitutional protection and one that justifies criminal sanction. This Part concludes that since current doctrines are unable to offer a comprehensive account of the absence of First Amendment scrutiny from many endangerment speech crimes, an alternative doctrinal framework should be adopted to evaluate the constitutionality of speech crimes.

Part III offers several constraints—constitutional ones as well as those grounded in substantive criminal law—to limit the scope of endangerment speech crimes. It proposes that *all* speech crimes would be subject to both strict scrutiny judicial review and to internal constraints stemming from criminal law theory. It further develops a number of guidelines that may construct such judicial review and alleviate some of the concerns that arise from the overcriminalization of speech.

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31 *See infra* Part III.A.1.

I. HOW SPEECH IS OVERCRIMINALIZED

In recent years, the paradigm model for law enforcement has shifted from reactive enforcement to proactive prevention.[32] This was done by significantly expanding law enforcement's prophylactic measures and preventive statutes.[33] The statutes include inchoate-anticipatory crimes, i.e., offenses that proscribe conduct that does not cause harm at the time it is committed, but creates a risk that increases the likelihood that harm will ensue in the future.[34] The imposition of criminal sanction is justified as a preventive measure, designed to preemptively reduce the odds of future harm.[35] Examples of risk-creation crimes fall under three main categories: inchoate offenses including conspiracies; solicitations; and attempts, endangerment or anticipatory offenses, such as reckless endangerment, prohibitions against driving under the influence of alcohol or drugs, and crimes of possession, mainly possession of illicit drugs or weapons.[36]

One overlooked feature of risk-creation crimes is that they often prohibit various types of speech and expression. Speech tends to be criminalized under the rubric of endangerment crimes as part of legislatures' efforts to prevent potentially dangerous future criminal conduct. These crimes target the risks that certain speech might persuade people to engage in unlawful activities or inform them how to engage in such activities. While the speech is not in itself harmful when it is expressed, communicating certain messages has the potential to result in harmful effects. Many jurisdictions have adopted a myriad of endangerment crimes whose actus reus consist of nothing but speech.[37] Examples range from expanding the scope of conspiracy doctrines to cover agreements of ambiguous nature, to extending the reach of attempt doctrines to criminalize speech that falls short of a substantial step to commit a crime, culminating in criminalizing a host of speech-based harassment and verbal bullying.

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32 *See* Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001) (noting the recent shift in criminal justice system towards prevention).

33 *See* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 1–3 (2003) (noting that the Court has recently expanded its understanding of preventive detention).

34 *See* R.A. Duff, *Criminalizing Endangerment*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 43, 51 (R.A. Duff & Stuart P. Green eds., 2005) (elaborating on the justifications for endangerment crimes).

35 *See* HUSAK, *supra* note 9, at 161–62 (discussing the criminalization of risk-creation behaviors).

36 *Id.* at 159–77 (providing examples of risk-creation offenses).

37 *See infra* Part I.A–C and accompanying notes.

The overcriminalization of speech stems not only from broadly worded speech crimes, but also from prosecutorial overreaching.[38] The risks of abuse of prosecutorial discretion are not limited to the specific context of endangerment speech crimes as unchecked prosecutorial discretion is sometimes used to reach conducts that do not warrant criminal sanction.[39] But expansive statutes criminalizing various forms of endangerment speech further exacerbate the risks of prosecutorial overreaching due to the vagueness, overbreadth, and targeting of inchoate conduct that characterize these laws.[40] The continual increase in preventive crimes in turn facilitates prosecutorial overreaching, thereby further contributing to the overcriminalization of speech.

The overcriminalization of speech has been greatly exacerbated over the last two decades due to the unprecedented rise in the use of the Internet as the dominant form of communication. This change not only has generated new technologies that effectively disseminate various forms of speech but also has created new risks flowing from the content of such speech.[41] The Internet provides a convenient forum for individuals who share potentially dangerous interests, such as pedophilia, to discuss these ideas and play out their thoughts, sometimes converting them into action.[42] Moreover, although cyberspace communication often includes more traditional one-on-one interactions in which the speaker communicates directly with the target by sending her private messages through emails or social networking sites, the Internet's primary impact is its ability to effectively reach an unlimited and unidentified audience. While under First Amendment doctrines, the paradigm "public forum" included only streets and parks, the Internet has become the modern equivalent of the "public forum."[43] The Internet's unique features, thus, raise novel challenges for the criminal law, as the following sections elaborate.[44]

The prime example of an endangerment speech crime is advocacy of law violation, namely, speech that *may* lead listeners to commit crimes. The constitutionality of such a statute was the issue at stake in the landmark U.S. Supreme Court decision in *Brandenburg v. Ohio*.[45] In *Brandenburg,* the defendant, a Ku Klux Klan leader, invited a journalist

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38 *See* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1715 & n.1 (2006) (noting the relationship between broad statutes and "heavy-handed" law enforcement).

39 *See* Beale, *supra note* 11 (discussing broader aspects of prosecutorial overreaching).

40 *See infra* Part I.C (discussing prosecutorial overreaching in sexting prosecutions).

41 *See* Susan W. Brenner & Megan Rehberg, *"Kiddie Crime"? The Utility of Criminal Law in Controlling Cyberbullying*, 8 FIRST AMEND. L. REV. 1, 15–16 (2009) (discussing new risks resulting from technological advancements).

42 *See infra* Part I.A.2.

43 *See* Peter Linzer, *From the Gutenberg Bible to Net Neutrality—How Technology Makes Law and Why English Majors Need to Understand It*, 39 MCGEORGE L. REV. 1, 3 (2008).

44 *See infra* Part I.A–C.

45 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

and a cameraman to a Klan rally, where hooded armed figures marched, burning a cross and uttering racist epithets.[46] Brandenburg was charged and convicted under Ohio's Criminal Syndicalism Act prohibiting advocacy of crime. The Court, however, struck down the statute on overbreadth grounds, finding it to be unconstitutional because it punished mere advocacy of unlawful actions, even in circumstances where the speaker did not threaten or incite others to commit imminent crimes.[47] The Court held that the prosecution failed to prove that Brandenburg's speech was *likely to cause an imminent public disturbance* or that Brandenburg had attempted to instigate *immediate* violence.[48] For the Ohio legislature, the increased risk that the speech would result in any harm—regardless of its likelihood—was sufficient in its mind to justify criminal prohibition. But the low likelihood that the risk-creating speech would lead to law violation was insufficient for the *Brandenburg* Court, which explicitly rejected criminalization of mere endangerment speech.

Following *Brandenburg*, a state may interfere with individuals' right to advocate unlawful action only when two requirements are met: high likelihood of law violation and imminence of harm. While the *Brandenburg* Court has left the "imminence" requirement ambiguous, the Court's decision in *Hess v. Indiana* clarified that advocacy of violence "at some indefinite future time" is not sufficient to take speech outside First Amendment shelter; only a "rational inference" of "imminent disorder" will suffice.[49] In light of *Hess*, imminent means nothing but *immediate* action, which is an almost impossible burden to satisfy.[50]

However, an entirely different picture emerges, one which is far less speech protective, when considering a host of other speech crimes. The *Brandenburg* test has been strictly limited to advocacy of crime and has not been further extended to related types of endangerment speech.[51] As the following sections will demonstrate, numerous criminal statutes broadly prohibit different types of risk-creating speech, without requiring any probability that the speech at issue would result in any harm, let alone grave harm, as a prerequisite for criminalization. These statutes are not only in tension with *Brandenburg*'s holding, but also raise doubts concerning the justifications for criminalization because speech is criminalized despite the lack of evidence concerning the

46 *Id.* at 445.

47 *Id.* at 447–49.

48 *Id.*

49 Hess v. Indiana, 414 U.S. 105, 108–09 (1973).

50 *See* GREENAWALT, *supra* note 22, at 209 (stating that *Hess*'s interpretation of imminence "is very restrictive").

51 *See* Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 669 (2009) (noting *Brandenburg*'s limited application).

perpetrator's dangerousness. Prohibiting the mere potential for future harm enables the criminalization of a multitude of risky conducts that arguably do not warrant criminal sanctions, thus accounting for the overcriminalization of speech.

While most legal theorists agree that various types of risk-creating behaviors justify criminalization, there is a significant controversy concerning the extent of criminal liability.[52] Commentators note that endangerment crimes are too expansive in scope and need to be redrafted, or at least subject to more intense judicial scrutiny.[53] Several scholars have begun to consider limits on endangerment crimes.[54] The main questions are: how early should the criminal law intervene; and when is a given behavior sufficiently dangerous to justify preventive criminal intervention? Many commentators agree that endangerment crimes should be significantly limited only to offenses that create *serious* risk of harm, requiring substantial probability that harm would occur.[55] A probability assessment considers the causal link between risk-creation conduct and actual materialization of harm, supporting criminalization only if there is conclusive empirical evidence to establish such nexus.[56] As the following sections demonstrate, many criminal statutes fall short of satisfying this requirement.[57]

The recent proliferation of endangerment speech crimes calls for the adoption of several constraints that might limit their scope. Existing proposals for limits on endangerment crimes in general provide the analytical foundation for developing a theory specifically designed to constrain the scope of speech-based endangerment statutes. This Article will revisit these limits in Part III and provide its own proposal for how to assess the propriety of criminalizing endangerment speech.[58]

Before delving into specific examples of endangerment speech crimes, it is worth pausing briefly to frame the overcriminalization of speech argument within a broader context. Overcriminalization of speech is principally one facet of a general problem concerning the excessive use of criminal statutes, commonly referred to as "overcriminalization."[59] Coining this term, Sanford Kadish noted that criminal statutes often encompass conduct that is not the target of

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52 *See* HUSAK, *supra* note 9, at 161.

53 *See* Slobogin, *supra* note 33, at 62 (noting the breadth of preventive laws).

54 *See, e.g.*, Duff, *supra* note 34, at 43–62 (proposing limits on the scope of endangerment crimes).

55 *See* HUSAK, *supra* note 9, at 159–77 (discussing limits to curb overcriminalization).

56 *See* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 869–73 (2011) (discussing the absence of empirical evidence to establish the link between risk and harm).

57 *See infra* Part I.A–C.

58 *See infra* Part III.

59 *See* Luna, *supra* note 10, at 712–17; *see also* HUSAK, *supra* note 9, at 3–5.

legislative concern.[60] Kadish broadly defined overcriminalization as the use of the criminal law to pursue public policy objectives for which it is poorly suited.[61] In recent years, criminal law scholars have vehemently criticized the continual expansion of substantive criminal law, warning against the costs and burdens incurred by the criminal justice system, as well as against the dangers this expansion poses to individual defendants.[62] They argue that there are too many broadly worded criminal statutes, covering a wide range of behaviors that do not justify the use of the resources of criminal enforcement.[63] Erik Luna, for example, summarizes "the overcriminalization phenomenon," which consists of untenable offenses, superfluous statutes, doctrines that overextend culpability crimes without jurisdictional authority, grossly disproportionate punishments, and excessive or pretextual enforcement of petty violations.[64]

With this background in mind, this Article turns to its main contribution concerning the specific problem of the overcriminalization of speech. The subparts below identify concrete manifestations of this phenomenon by considering prominent examples of endangerment speech crimes. These statutes fall under three categories, tracking the classification of general endangerment (nonspeech) crimes, and include inchoate crimes, independent endangerment crimes, and possession crimes.

A. *Inchoate Crimes*

Inchoate offenses, such as conspiracies and attempts, provide a prime example of how much speech is currently overcriminalized.

1. Conspiracy

a. Terrorism

Recent years have seen a significant increase in preventive criminal statutes prohibiting speech associated with terrorism. Criminalization of terrorism-related behaviors is facilitated through two factors: first, the expansion of the scope of traditional conspiracy doctrines and second,

60 *See* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962).

61 *See* Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967).

62 *See* Luna, *supra* note 10, at 703–04, 725–29 (describing overcriminalization and its costs).

63 *See* Stuntz, *supra* note 10, at 507 (noting the broad range of crimes, including trivial ones).

64 *See* Luna, *supra* note 10, at 717 (summarizing the main features of overcriminalization).

the broad coverage of the prohibition against providing material support to foreign terrorist organizations (FTO).

The continual threats of terrorism have led the federal government and the states to create numerous endangerment crimes targeted towards reducing the risks that *may* emanate from behaviors believed to be related to the activities of terrorist organizations.[65] Following 9/11, the government placed a premium on early detection and prevention by vigorously prosecuting suspects whose conduct was perceived as posing threats to national security.[66] 18 U.S.C. §§ 2339A–B make it a crime to knowingly provide material support to any designated FTO, with the phrase "material support" broadly defined to include "training," "expert advice or assistance," "service," and "personnel."[67] Bringing criminal charges under this statute has become the main tool used by the government in exercising preemptive measures against those suspected of connections to terrorism.[68]

Various types of provision of services and expert advice or assistance are often grounded in speech and expression, thus arguably meeting the "support" requirement enumerated in § 2339B. For instance, a publication that praises terrorism would be perceived as one form of support for a terrorist organization. As the discussion below illustrates, the broadly worded statute provides the government with expansive powers to prosecute individuals for expressing a host of political viewpoints, when it suspects that the expressive messages conveyed by the speech increase the chances that these messages would persuade others to engage in terrorism.

In *Holder v. Humanitarian Law Project* (*HLP*), the U.S. Supreme Court held that the criminal prohibition on advocacy performed in coordination with, or at the direction of, a foreign terrorist organization was not unconstitutional as applied to the particular activities stated by the plaintiffs.[69] More specifically, the Court held that the plaintiffs were prohibited from providing legal support to PKK (a designated FTO on how to follow and implement humanitarian and international law), even when that support consisted of peaceful resolutions of disputes and the petitioning of various international bodies.[70] The Court rejected the plaintiffs' vagueness claim, finding that the plaintiffs' specific conduct squarely fell within the scope of the terms "training" and "expert advice

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65 *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 456–58 (2007) (discussing the scope of liability for terrorism conspiracies).

66 *Id.* at 429–32 (describing the government's policy concerning early prevention).

67 18 U.S.C. §§ 2339A–B (2012).

68 *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 26–30 (2005).

69 Holder v. Humanitarian Law Project, 561 U.S. 1, 22–24 (2010).

70 *Id.* at 29–31, 35–39.

or assistances" required by the statute. As for the claim that the statute violates the First Amendment, the Court acknowledged that the statute limits the scope of free speech, but nonetheless held that it was a permissible preventive measure that criminalizes aid that makes terrorist attacks more likely to occur.[71]

Cognizant of the fact that the above statute adopts a content-based prohibition on speech, the *HLP* decision purports to draw on two important distinctions demarcating the legal boundary between protected and prohibited speech. The first distinguishes between mere membership and actual support of the organization by implying that joining a terrorist organization is a constitutionally protected activity, while engaging in speech that aids that organization may be criminalized.[72] The second distinction rests on the purported difference between independent advocacy of terrorism, which is constitutionally protected under the First Amendment, and concerted activity amounting to provision of service to the FTO, in coordination with or at the direction of this organization, which is criminalized.[73] Prohibiting the latter is justified, reasoned the Court, because the probability of a terrorist attack increases due to receiving support.[74] It is crucial to note, however, that the *HLP* holding does not require a substantial probability that the speech would result in tangible harm. Any slight increase in the probability of harm, regardless of its actual likelihood, suffices to uphold criminalization.

The prohibition against providing material support criminalizes not only the provision of support to FTOs but also *conspiring* to do so.[75] A significant component in the government's use of preventive statutes includes bringing criminal charges for conspiring to provide material support to FTOs.[76] The above statutory language provides an important measure for the government to broaden the scope of conspiracy law in order to curb what it perceives as potential risks of future terrorism. Notably, these conspiracy charges are based solely on the defendants' engagement in various forms of speech.

Examples of the government's use of conspiracy doctrine to criminalize different types of endangerment speech fall under two categories, the first involving prosecutions against Muslim religious leaders whose teachings are perceived as advocating terrorism, and the second involving prosecutions of individuals who operate, post

71 *Id.* at 35–36.
72 *Id.* at 39–40.
73 *Id.* at 23–24.
74 *Id.* at 4–5.
75 18 U.S.C. § 2339B (2012).
76 *See* Chesney, *supra* note 65, at 456 (discussing liability for terrorism conspiracies).

messages, or otherwise contribute to various Islamic websites suspected of connections with terrorist organizations.[77]

The prosecution of Omar Abdel Rahman provides a salient example of the first category of cases.[78] Rahman, a Muslim religious figure (Sheik), was charged with seditious conspiracy and solicitation based on the government's theory that he was the leader of the terrorist network that plotted to bomb the World Trade Center in 1993.[79] The government presented evidence that Rahman dispensed religious opinions (fatwas) on the holiness of terrorist acts, instructing his supporters to "do *jihad* with the sword, with the cannon, with the grenades, with the missile . . . against God's enemies."[80] This speech, argued the government, amounted to conspiracy to commit crimes of terrorism. A jury convicted him on all counts, and he was sentenced to life in prison.[81] On appeal, the Second Circuit rejected Rahman's argument that his conviction violated the First Amendment.[82] The court held that criminal conspiracies were not protected simply because they were formed through words.[83] While the Second Circuit treated the case as one involving conspiracy, much of the evidence it relied upon to prove this conspiracy consisted of the defendant's advocacy of terrorism.[84] The *Rahman* case thus illustrates the blurred line between advocacy of crime—which is generally protected under the *Brandenburg* test—in the absence of high likelihood and imminence of harm, and conspiracy to commit terrorist acts, which is criminalized.

The case mentioned in the Introduction, *United States v. Mehanna*, is illustrative of the second category of cases concerning criminal charges against individuals who advocate terrorism on Islamic websites.[85] Mehanna's conviction of conspiring to provide material support to al-Qaeda rested on two separate clusters of activities: one related to a trip he made to Yemen, allegedly to join an al-Qaeda training camp, which he failed to find; the other was speech-based, namely, his translation of al-Qaeda's propaganda materials from Arabic into English, which he posted on a jihadist website.[86] Since this Article's main thesis concerns the overcriminalization of speech, the analysis below focuses solely on the latter grounds for conviction.

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77 United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013); United States v. Al-Hussayen, No. CR03-048-C-EJL, 2004 U.S. Dist. LEXIS 29793 (D. Idaho Apr. 6, 2004).

78 United States v. Rahman, 189 F.3d 88, 104 (2d Cir. 1999).

79 18 U.S.C. § 2384 (2012); *see also Rahman*, 189 F.3d 88.

80 *Rahman*, 189 F.3d at 104 (alteration in original) (internal quotation marks omitted).

81 *Id.* at 111.

82 *Id.* at 114–18.

83 *Id.* at 115.

84 *See* Healy, *supra* note 51, at 670–71.

85 *See* United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013).

86 *Id.*

The government alleged that Mehanna's translations constituted "material support" in the form of a "service" to a terrorist organization because they aided al-Qaeda by spreading its messages and by facilitating recruitment of followers who would pursue terrorist endeavors.[87] The government further alleged that Mehanna agreed with others to provide material support to al-Qaeda and that he committed several overt acts in furtherance of this conspiracy, including watching jihadi videos, discussing efforts to create like-minded youth in the Boston area, and discussing attending a terrorist camp.[88] Mehanna denied having any direct connection with al-Qaeda, insisting that the government was required to establish such connection.[89] The jury accepted the government's theory and convicted Mehanna, among others, based on the translated materials.[90] Mehanna appealed his conviction, arguing, in part, that the district court committed legal errors in charging the jury with respect to the translations.[91]

Writing for the court, Judge Selya rejected Mehanna's argument that the translations merely amounted to independent advocacy, which the *HLP* Court held was constitutionally protected speech.[92] The court reiterated *HLP*'s holding that advocacy performed in coordination with or at the direction of an FTO is not shielded by the First Amendment.[93] Dismissing Mehanna's claim that the jury instructions failed to define the term "coordination," the court held that the district court defined the term functionally by explaining to the jury that independent advocacy for either an FTO or an FTO's goals does not amount to coordination. The court further stressed that the government's theory rested on the premise that the translations are one type of "service" and thus amount to provision of material support, which the statute prohibits.[94] Therefore, the court held that the jury instructions embraced the legal construct adopted by the court's holding in *HLP* that "service," as material support, "refers to concerted activity, not independent advocacy," and thus is not "shielded by the First Amendment."[95] The court further clarified that neither the statute itself nor the Court's decision in *HLP* require that the person providing the

87 *Id.* at 49 (internal quotation marks omitted).

88 *Id.* at 44–46.

89 *Id.* at 46, 50.

90 *Id.* at 42.

91 *Id.* at 48 (noting that the defendant argued that the jury's instructions were erroneous in three respects: they "(i) fail[ed] to define the term 'coordination'; (ii) [they] incorrectly direct[ed] the jury not to consider the First Amendment; and (iii) [they] should have been replaced by a set of instructions that [the defendant] unsuccessfully proffered to the district court").

92 *Id.* at 49.

93 *Id.* (citing Holder v. Humanitarian Law Project, 561 U.S. 1, 24 (2010)).

94 *Id.* at 49.

95 *Id.* (citing *Holder*, 561 U.S. at 23–24).

alleged support to an FTO have a direct connection to the FTO.[96] Addressing Mehanna's claim that the jury's finding of "coordination" with an FTO lacked sufficient supporting evidence, the court further held that even if that proof was factually insufficient, the conviction was independently supported based on the government's Yemen trip theory, for which the government presented mass evidence.[97]

Cognizant of the difficulties that the government's "translation as service" theory posed for First Amendment jurisprudence, the court attempted to play down the significance of the translation-centric charge by characterizing it only as an "alternative basis" for conviction.[98] But while Mehanna's trip to Yemen figured more prominently in the decision, nowhere did the court reject the government's unprecedented theory that mere translation of materials already publicly available on the Internet amounts to provision of service to al-Qaeda. The court accepted the government's expansive position, even though it neither provided evidence that Mehanna ever met or communicated with anyone from al-Qaeda, nor demonstrated that the translation was sent to this organization.[99]

The *Mehanna* decision is deeply troubling for several reasons. First, it demonstrates how the prohibition against providing material support to FTOs criminalizes a lot of speech, despite the arguably weak causal link between the speech in question and the risk of future harm. As the Court has long noted, the Constitution is not a suicide pact, and defendants' right to free speech should be outweighed by clear risks emanating from dangerous speech, provided that such risks are indeed established.[100] However, the evidence in the *Mehanna* case fell short of demonstrating high likelihood of substantial harm to national security. Instead, criminalization of speech was upheld there based on mere risk that the translations would support al-Qaeda by inciting others to commit terrorist acts. Furthermore, existing literature offers little evidence of a correlation between religiously based speech or particular religious ideologies and terrorism.[101] Convicting individuals for disseminating speech that merely praises an ideology, including a violent and repugnant one, rather than explicitly calling for commission of terrorist acts, is especially disconcerting because such speech reflects

96 *Id.* at 50.

97 *Id.* at 51.

98 *Id.* at 50.

99 *See* David Cole, *39 Ways to Limit Free Speech*, N.Y. REV. BOOKS (Apr. 19, 2012, 3:15 PM), http://www.nybooks.com/blogs/nyrblog/2012/apr/19/39-ways-limit-free-speech.

100 *Cf.* Terminiello v. City of Chicago, 337 U.S. 1, 36–37 (1949) (Jackson, J., dissenting) (suggesting that individual constitutional rights may be encroached when significant risks are identified).

101 *See* Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 876–80, 900 (2011).

mere aspirations rather than concrete operational plans. The assumed dangers stemming from glorifying terrorist acts have yet to be verified empirically.

Second, the decision undermines existing First Amendment jurisprudence by expanding government's authority to suppress political expression and association in the name of perceived threats to national security, creating a "chilling" effect on political dissent.[102] Mehanna's ideological support for al-Qaeda undoubtedly expresses extremist viewpoints that are rightly perceived by the vast majority of Americans as abhorrent. Judge Richard Posner, for example, contends that speech that supports terrorism does not warrant constitutional protection because such messages do not comport with Western democratic values.[103] In contrast, this Article argues that it is precisely that type of abominable messages that are the paradigm example of political speech warranting constitutional protection as long as they fall short of establishing high likelihood of harm. The strength of the First Amendment and a democratic regime's tolerance towards dissenting opinions are best measured when considering these appalling cases.

Third, and most importantly, a fundamental concern raised by the *Mehanna* decision is the surprising interplay between general criminal law and First Amendment law. As noted earlier, speech that incites others to violence is generally protected under *Brandenburg*'s stringent test. Prior to 9/11, Mehanna could not have been convicted for advocacy of terrorism even if he had written the inciting materials himself, unless the government could demonstrate the high likelihood and immanency requirements, a standard virtually impossible to meet for written texts.[104] Arguably, prosecutions of individuals based on their advocacy of terrorism directly clashes with *Brandenburg*.[105] Under *Brandenburg*, the First Amendment should have protected Mehanna's expression of abstract views supporting violence by someone acting independently of an FTO, even when those views coincide with those of the terrorist organization.

Nevertheless, by taking the indirect path of criminalizing conspiracy to provide material support to an FTO, the criminal law enables the government to accomplish precisely the same result that the First Amendment squarely prohibits.[106] Although under federal law

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102 *Cf.* David Cole, Essay, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 147–50 (2012) (noting that the *HLP* decision creates a chilling effect on legitimate political speech).

103 *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 120–25 (2006).

104 *See* Cole, *supra* note 99.

105 *See* Healy, *supra* note 51, at 680.

106 *See* Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SECURITY J. 1, 28 (2011).

there is no statute directly criminalizing incitement to terrorism, substantive criminal law—via its generous conspiracy doctrines—provides the government with ample measures to limit the spread of allegedly terrorist messages. Importantly, unlike First Amendment jurisprudence, requiring high likelihood of harm, conspiracy law criminalizes speech without requiring any nexus between the expressive messages and actual harm. Conspiracy law, thus, functions as an effective means for the government to bypass First Amendment jurisprudence's strict requirements for prohibiting advocacy of violence, resulting in a direct collision between these two areas of law.[107] Advocacy of crime (ostensibly including terrorism), which is constitutionally protected under free speech doctrines, becomes prohibited under conspiracy doctrine, with no constitutional constraints to limit criminalization. In practice, the upshot is that advocacy of crime is protected only as long as the crime at issue is not terrorism-related.

The government's use of the conspiracy to provide material support statute raises not only First Amendment concerns but also a host of other concerns from the perspective of substantive criminal law.[108] First, these prosecutions expand criminal liability above and beyond traditional conspiracy doctrines to cover conduct of highly ambiguous nature.[109] Commentators have long criticized conspiracy law in general as an unjustified expansion of criminal liability.[110] Conspiracy liability in the terrorism context demonstrates even further enlargement of criminal liability because these prosecutions often do not square with conspiracy law's main tenets: agreement, overt act, and intent.

The agreement requirement, which is the actus reus of the terrorist conspiracy and the cornerstone of conspiracy liability is significantly eroded if the government is not required to establish any evidence that the defendants actually communicated with a terrorist organization.[111] In a typical conspiracy prosecution, the agreement may be proven circumstantially through concerted action toward a common purpose.[112] But even this minimal requirement becomes diffused in terrorism-related prosecutions, resulting in banning behaviors falling short of concrete agreements to cooperate with others in the commission of crimes.[113] The nature of the agreement between the

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107 *Id.* at 29–30.

108 *See* Chesney, *supra* note 65, at 479–81, 492–93; *see also* NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 57–62 (4th ed. 2011).

109 *See* Chesney, *supra* note 65, at 474.

110 *See* Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413–14 (1959).

111 *See* Cole, *supra* note 99.

112 *See* Chesney, *supra* note 65, at 448–56 (discussing the elements of conspiracy).

113 *Id.* at 473–74 (discussing the risks of expanding conspiracy liability).

alleged co-conspirators is often highly equivocal given that individuals are charged based on their ambiguous connections with unidentified groups without clear proof of the type of relationship between the co-conspirators and the FTO.[114]

The overt act requirement is also diluted as the prohibition against providing material support enables prosecution based merely on speech that is perceived as supporting terrorism, but falls short of overt acts in the commission of specified crimes. Conspiracy law's mens rea of intent is similarly eroded when individuals are prosecuted for running Islamic websites and for dispensing religious opinions where the only proof of criminal intent is the content of their speech.[115] No separate evidence is required to prove the defendants' intent to agree with the terrorist organization to commit any crimes. Prosecution of terrorism-related conspiracies, thus, poses particular threats in casting too broad a net, creating a significant risk that protected speech will be used to prove nonexistent conspiracies.[116] The upshot of expanding conspiracy liability is that criminalization is grounded on pre-inchoate liability, prohibiting the mere preparatory stages before liability under traditional conspiracy doctrines could have been attached.[117]

Second, an additional concern stemming from criminal law theory rests with grounding criminal liability on associational conduct. Prior to the Court's decision in *HLP*, associational conduct could be punished only when there was evidence that a defendant had specific intent regarding an organization's specific criminal ends.[118] Traditional complicity doctrines criminalize aiding and abetting acts that are directly linked to commission of specific crimes only.[119] The Court's decision in *HLP* significantly reduced constitutional protection against guilt by association by relying on a dubious distinction between mere membership in an organization and actual provision of support to the organization.[120] This distinction, however, is notably weak, allowing the government to circumvent the prohibition against guilt by association.[121] Under the material support statute criminal liability is grounded merely on an organization's status as a terrorist group. Following *HLP*, any type of relationship between an individual and the

114 *Id.* at 492–93 (noting the risks of expanding conspiracy liability).

115 *See* United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013).

116 *See* Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865, 886–87 (2013) ("[E]arlier law enforcement intervention also increases the risk that protected speech will be used to prove nonexistent conspiracies."); *id.* at 917–19.

117 *See* Andrew Ashworth & Lucia Zedner, *Prevention and Criminalization: Justifications and Limits*, 15 NEW CRIM. L. REV. 542, 545 (2012).

118 *See* Elfbrandt v. Russell, 384 U.S. 11, 19 (1966).

119 *See* Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 10–11 (2005).

120 Holder v. Humanitarian Law Project, 561 U.S. 1, 29–33 (2010).

121 *See* Huq, *supra* note 101, at 891–93.

FTO would amount to provision of material support, without requiring the government to prove the perpetrator's particular contribution to the FTO's specified crimes.

An initial intuition many readers may share is that speech is overcriminalized only in the limited context of national security, where terrorism's grave threats should trump individuals' speech rights while outside this specific area speech is broadly protected. This assumption, however, is false. The scholarly focus on the criminalization of terrorism-related speech overlooks the broader ramifications of overcriminalizing speech above and beyond the terrorism context. Legislatures' general trend towards preventive law enforcement has also resulted in an increase in endangerment speech offenses in additional areas as the following subsections demonstrate.

b. Other Conspiracies Beyond Terrorism

While the terrorism context presents its unique challenges, the government also uses broad conspiracy theories in situations that go above and beyond this distinct realm. Conspiracy charges brought in the case of *United States v. Valle* provide a prominent example in which conspiracy doctrine has been unjustifiably expanded based on speculative assessments of the defendant's dangerousness.[122] Defendant Gilberto Valle, a former New York Police Department police officer, was charged under federal law[123] with conspiring with three other individuals to kidnap, rape, torture, kill, cook, and eat body parts of several identified women.[124] The prosecution had argued that Valle had entered into an agreement with three alleged co-conspirators to commit the above crimes and that he had formed the specific intent to carry out the plan.[125] To prove these allegations, the prosecution largely relied on emails and instant message "chats" that were found on his home computer.[126] In these electronic communications, Valle discussed with his alleged co-conspirators the gruesome details of his plan.[127] In addition, a search of Valle's computer revealed that he created eighty-nine computer folders containing the names and pictures of numerous women.[128] Valle also accessed, without legal authorization, law

122 United States v. Valle, (S.D.N.Y. 2014) (overturning the jury's conviction of the defendant).

123 18 U.S.C. § 1201(c) (2012) (prohibiting conspiracy to commit kidnapping). In addition, Valle was also charged in violation of 18 U.S.C. § 1030(a)(2) (2012), for accessing without authorization law enforcement databases in order to obtain information about potential victims. *Valle*, 301 F.R.D. at 59.

124 *Valle*, 301 F.R.D. at 60.

125 *Id.* at 59.

126 *Id.* at 65–77 (detailing the content of the cyberspace communication between Valle and others).

127 *Id.* at 60.

128 *Id.* at 77.

enforcement databases in order to obtain the home addresses and places of business of these women.[129] The evidence also showed that Valle had conducted Google searches for phrases like "how to abduct a girl" and "how to chloroform a girl."[130] While the government conceded at trial that the Internet communications between Valle and twenty-one other individuals were mere fantasy role play, it had argued that Valle's communications with three alleged co-conspirators amounted to genuine conspiracy to actually kidnap women.[131]

In response to the prosecution's conspiracy theory, the defense stressed that Valle merely played out a fantasy of role playing on a fetish website, and that going through the motions of planning the alleged kidnapping was part of that fantasy.[132] Valle communicated with his co-conspirators, the argument continued, about a plan that he never meant to carry out in the real world.[133] The defense emphasized that Valle neither followed through on any of the acts he was accused of discussing nor planned to do so and that the prosecution failed to establish that Valle had taken any overt acts to turn those fantasies into violent actions.[134]

The main issue in this case was whether the evidence against Valle was sufficient so that a rational jury could have found that Valle and his alleged co-conspirators had entered into a genuine agreement to kidnap several identified women and had formed the specific intent to actually kidnap these women.[135] The government had argued that it had proved beyond a reasonable doubt the elements of the alleged conspiracy—namely, an actual agreement between Valle and his alleged co-conspirators and the overt acts in which he engaged to further this alleged agreement and bring it to fruition by laying out the groundwork for kidnapping, torturing, and killing the women he had singled out.[136] The defense argued that the government failed to meet that burden and that neither an agreement nor specific intent was formed.[137] A New York jury agreed with the government's theory, convicting Valle on all charges on March 12, 2013.[138]

Valle appealed his conviction and on June 30, 2014, District Court Judge Paul G. Gardephe overturned his conviction on the kidnapping

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129 *Id.* at 62–63.

130 *Id.* at 76 (internal quotation marks omitted).

131 *Id.* at 60. The three alleged co-conspirators were Michael Van Hise, a New Jersey resident; Aly Khan, an Indian or Pakistani resident; and Christopher Collins, a British resident known to Valle as "Moody Blues." *Id.* at 59.

132 *Id.* at 59–60.

133 *Id.*

134 *Id.* at 59.

135 *Id.*

136 *Id.* at 59–60, 62–63.

137 *Id.* at 83.

138 *Id.*

conspiracy charge.[139] With respect to establishing the element of agreement between the alleged co-conspirators to carry out their criminal plan, the court found that the government failed to prove beyond a reasonable doubt that Valle had indeed entered into a genuine agreement to kidnap women.[140] The court held that "the evidentiary record is such that it is more likely than not the case that all of Valle's Internet communications about kidnapping are fantasy role-play."[141] The court observed that "[o]nce the lies and the fantastical elements are stripped away, what is left are deeply disturbing misogynistic chats and emails written by an individual obsessed with imagining women he knows suffering horrific sex-related pain, terror, and degradation."[142] The court concluded that "[d]espite 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."[143]

With respect to proving the specific intent element, the court further held that the government failed to prove beyond a reasonable doubt that Valle had formed the requisite specific criminal intent to commit the kidnapping.[144] The court pointed at ample facts that were indicative of Valle's lack of intent, supporting the conclusion that Valle and his alleged co-conspirators understood that no actual kidnapping was going to take place; these included the following facts: Valle and his alleged co-conspirators had never undertaken any steps in the real world to carry out their cyberspace plan and had never kidnapped anyone neither on one of the set dates nor on a different date, the dates that were set to purportedly commit the crimes were repeatedly ignored without any explanation, the information regarding the victims that Valle provided his alleged co-conspirators with was false, and the communication with the alleged co-conspirators was substantially indistinguishable from the numerous chats that the government conceded were mere fantasy role play.[145]

The *Valle* case best captures the legal difficulties in distinguishing between electronic communications in the "virtual world" and actual acts in the "real world." The main point of contention in this case was whether there was an actual crossing of the line from fantasy to reality, from mere thoughts, speech, and cyberspace role playing to real-life

139 *Id.* at 62 (holding, however, that Valle's conviction for exceeding "his authorized access to a federal database" shall be affirmed).

140 *Id.* at 61–62.

141 *Id.* at 104.

142 *Id.* at 61.

143 *Id.* at 61–62.

144 *Id.*

145 *Id.* at 60–61.

violent crimes.[146] The jury accepted the prosecution's theory that Valle had indeed crossed that line between engaging in mere speech in the realm of cyberspace and taking concrete steps in practice to materialize his sexual fantasies into horrific violent crimes.[147] In finding Valle guilty, the jury was unable to overcome prejudices and biases that stem from the inflammatory nature of the evidence, which consisted of extremely graphic depictions of sexual violence. Convicting Valle, therefore, raised the danger that guilt determination was largely based on the jury's disgust and revulsion concerning Valle's unusual sexual fantasies.[148] The court, however, rejected such an expansive reading of the conspiracy statute, stressing that the alleged conspiracy exclusively took place in cyberspace, in a context in which even the government conceded that Valle had engaged in countless similar fantasy role plays with other individuals.[149] Given the evidence, the prosecution failed to prove that Valle's cyberspace speech had transformed into a criminal agreement, accompanied by a specific intent, to commit kidnapping and murder of women.[150] The decision further demonstrates the difficulties in drawing the boundary between speech that merely raises a generalized and unquantifiable risk of potential future harm on one hand and dangerous behavior leading to actual harm on the other. The decision also demonstrates the risks of convicting defendants based not on the evidence itself but rather on emotions such as deep fear, as well as on the "ick factor."

Moreover, implied in Valle's acquittal are also free speech arguments establishing the defense's theory that the case merely involved sexual fantasies and role play rather than actual criminal actions.[151] In essence, the defense's primary contention was that the government could not punish the defendant for engaging in "ugly thoughts," which are a form of protected speech under the First Amendment.[152] The decision to prosecute Valle was, therefore, problematic not only from the substantive criminal law's perspective but also from a free speech perspective. Had the court accepted the prosecution's unprecedented expansion of conspiracy doctrine, the decision would have facilitated a flood of conspiracy charges based on

146 *Id.* at 61.

147 *Id.* at 59, 61.

148 *Id.* at 103–10 (addressing the steps taken by the court to avoid the risk that the jury would be prejudiced against the defendant).

149 *Id.* at 61.

150 *Id.* at 102.

151 *See* Benjamin Weiser, *'Ugly Thoughts' Defense Fails; Officer Guilty in Cannibal Plot*, N.Y. TIMES, Mar. 12, 2013, at A1 (noting that the defense described the charges against Valle as a "'thought prosecution'").

152 *Id.* (providing the statement of Valle's attorney that the conviction cannot stand, because it is based on prosecuting Valle's ugly thoughts).

speech from cyberspace communication that falls short of either genuine agreements to commit a crime or specific intent to do so.

2. Attempt

Another facet of the overcriminalization of speech problem concerns the expansion of traditional attempt doctrines. Attempt doctrine embodies an important constraint under which the prosecution is required to establish that the defendant engaged in conduct constituting a substantial step toward the commission of the crime.[153] Some criminal statutes, however, adopt a sweeping position, obscuring the crucial boundary between mere preparatory acts, which are not the proper subject of criminal liability, and attempts, which mark the point where criminal liability attaches.[154] Under these statutes, criminal sanctions may be imposed at a much earlier stage to cover the pre-inchoate offense stage. This often results in criminalizing an actus reus that consists merely of ambiguous and equivocal speech, unaccompanied by any acts that establish the defendant's dangerousness, as the following statute demonstrates.

Sexual predators who lure minors into engaging in sexual acts have become a growing concern for the criminal justice system in light of the proliferation of cyberspace communication. Responding to these concerns, federal law adopted a criminal provision aimed at the early targeting of sexual predators by thwarting the threat that the communication between perpetrator and minor would materialize into sexual abuse of the minor. 18 U.S.C. § 2422(b) prohibits the following:

> Whoever, using the mail or any facility or means of interstate or foreign commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined . . . and imprisoned not less than 10 years or for life.[155]

The justification for law enforcement's preemptive intervention to prevent sexual abuse of vulnerable minors is uncontested, as these heinous crimes warrant the most severe criminal punishment. The controversial issue, however, is how early in the course of communication between perpetrator and minor the law may intervene and what evidence suffices to demonstrate that the perpetrator has

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153 *See* MODEL PENAL CODE § 5.01(1)(c) (Official Draft 1962) (defining attempt to require "a substantial step").

154 *See* Ashworth & Zedner, *supra* note 117 (noting the expansion of liability to the pre-inchoate stage).

155 18 U.S.C. § 2422(b).

taken a substantial step towards commission of a sex crime.[156] The circuit split concerning the proper scope of the above statute sharpens these questions, as the cases below demonstrate.

In *United States v. Rothenberg*, the defendant was convicted of one count of attempting to induce or entice a minor to engage in illicit sex, and one count of possession of sexually explicit visual material involving minors.[157] The first count was based on the defendant advising an adult male how to engage in sexual acts with his eleven-year-old daughter.[158] The basis for the second count came from the results of a warranted search of the defendant's residence in connection with the first count, as the defendant's seized computer revealed numerous sexually explicit images of minors.[159] The Eleventh Circuit upheld the conviction, rejecting the defendant's theory that "mere talk . . . unaccompanied by some other form of overt conduct cannot constitute a substantial step necessary [for] an attempt to commit an offense . . . ."[160] The court further held that the statute does not require proof of direct communication with a minor, and that dealing with an adult intermediary for the purpose of attempting to entice a minor into having sex with the defendant or some third party is sufficient to satisfy the elements of the statute.[161]

The *Rothenberg* court's holding is troubling in several respects. First, it significantly expands existing attempt doctrines. The court adopts the government's broad reading of the statute, upholding the criminalization of a sexually solicitous communication, without accompanying action.[162] Moreover, the statute's overbroad wording captures all types of sexual communication concerning minors, even when minors themselves are not a part of the communication, which takes place between consenting adults.[163] Under this approach, sexual communication *about* a minor in itself constitutes a substantial step toward commission of the target offense.[164]

Furthermore, the court holds that mere sexual speech—without evidence demonstrating either the likelihood of harm to a minor or the

156 United States v. Gladish, 536 F.3d 646, 649–50 (7th Cir. 2008) (noting that prosecution requires an unmistakable proposal to engage in sex with a minor and that mere "explicit sex talk" is insufficient).

157 United States v. Rothenberg, 610 F.3d 621, 623 (11th Cir. 2010).

158 *Id.* at 624.

159 *Id.*

160 *Id.* at 626.

161 *Id.*

162 *Id.* at 627.

163 *Id.* at 626 ("[T]o prove an attempted exploitation offense under 18 U.S.C. § 2422(b), the Government does not have to prove the existence or identity of a specific minor victim; a fictitious minor will suffice so long as the defendant understood and believed that a minor was involved.").

164 *Id.* at 627.

perpetrator's dangerousness—amounts to a substantial step towards committing the target offense.[165] In holding so, the court virtually obliterates attempt doctrine's substantial step requirement, which is designed to ensure that a defendant had crossed the boundary between harmless speech and dangerous action. Instead, criminal liability is expanded here to include the preparatory stages that an offender engages in before taking any substantial step. The upshot is that an actor who has not yet committed himself to having sex with a minor would be criminally liable based merely on sexually based speech.

Second, one of the unintended consequences of an expansive reading of the statute at issue concerns criminalizing improper thoughts rather than dangerous acts. Imposing criminal liability based solely on verbal discussion of abstract ideas obfuscates the core distinction between actions and thoughts that is one of the fundamental tenets of the criminal law.[166] Playing out sexual fantasies over the Internet does not rise to the level of taking a substantial step toward having sex with a minor. Moreover, grounding criminal liability based on some unquantifiable risk that the speech *may* lead to sexual abuse is an unjustified expansion of the criminal law. Criminalizing risk-creation behavior is warranted only when there is substantial probability that the sexual speech would lead to dangerous action.

In contrast with the Eleventh Circuit's approach, the Seventh Circuit rejects a governmental attempt to interpret the statute at issue expansively, refusing to impose criminal sanction on speech falling short of dangerous conduct. In *United States v. Gladish*, a thirty-five-year-old man was caught in a sting operation in which a government agent impersonated a fourteen-year-old girl in an Internet chat room.[167] Gladish visited the chat room, attempting to solicit "Abagail" to have sex with him.[168] In a typical prosecution based on such an operation, the defendant, after obtaining consent, goes to meet his party and is arrested upon his arrival.[169] However, Gladish was arrested before making any concrete travel plans.[170]

Reversing Gladish's conviction, Judge Posner used harsh words to express his dissatisfaction with the government's decision to prosecute the case.[171] Posner rejected the prosecution's theory that Gladish's

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165 *Id.*

166 *See* Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2443–44 (2007) (discussing the act requirement's role in criminal law).

167 United States v. Gladish, 536 F.3d 646, 648 (7th Cir. 2008).

168 *Id.*

169 *Id.*

170 *Id.* ("['Abagail'] agreed to have sex with the defendant and in a subsequent chat he discussed the possibility of traveling to meet her in a couple of weeks, but no arrangements were made. He was then arrested.").

171 *Id.* at 650–51.

behavior satisfied the elements of the offense of attempting to entice a minor, noting that the charges were based only on Gladish's cyberspace communication with "Abagail," without any indication of his intention to meet or have sex with her.[172] Posner noted that Gladish might have believed he was playing out a fantasy, which is common in Internet relationships.[173] Posner further stressed that "[t]reating speech (even obscene speech) as the 'substantial step' would abolish any requirement of a substantial step."[174] Instead, added Posner, the defendant must take some specific actions beyond speech, such as agreeing on a time and place for the meeting, making a hotel reservation, or buying a bus or train ticket, none of which were taken by Gladish.[175] Posner noted that the defendant's dangerousness is the main purpose behind punishing attempts, and that the substantial step requirement demonstrates it, marking the perpetrator as genuinely dangerous, "a doer and not just one of the 'hollow men' of T.S. Eliot's poem, incapacitated from action . . . ."[176]

The above circuit split stems from a doctrinal disagreement about the nature of the complete crime of enticing a minor to engage in illicit sex. Judge Posner's reading implies that in order for the enticement offense to be complete, the government must prove that the defendant actually had sex with the minor.[177] In contrast, Judge Hodge's reading in *Rothenberg* implies that the actus reus of the complete offense consists merely of the successful verbal persuasion of a minor, which is in itself an inchoate speech-based crime. Under the latter position, the victim's state of mind—assent—constitutes the complete enticement, rather than the sex act itself, therefore, enabling the government to prosecute attempts at an earlier point in time, based on speech alone. The U.S. Supreme Court has not yet resolved the circuit split concerning the scope of the above statute.

B. *Anticipatory/Independent Endangerment Crimes*

Risk-creation speech crimes consist not only of inchoate crimes but also of independent endangerment offenses that separately criminalize as a complete crime the creation of a risk of future injury. Criminal responsibility under the endangerment rationale holds that one is responsible for endangering another if one's conduct creates a significant risk of harming that person, even if no harm results from the

172 *Id.* at 649.
173 *Id.* at 650.
174 *Id.*
175 *Id.* at 649.
176 *Id.* at 648.
177 *Id.* at 649.

endangerment.[178] Numerous criminal statutes prohibit risk-creating behaviors, including reckless endangerment, reckless driving, and driving under the influence of drugs or alcohol.[179] A significant portion of endangerment crimes involves prohibitions on expression, providing yet another illustration of the proliferation of speech crimes. The following subsections elaborate on two notable examples of excessive criminalization of endangerment speech.

1. Verbal Harassment

Many jurisdictions have adopted a wide array of criminal statutes expansively prohibiting various forms of harassment.[180] Commentators note that the term "harassment" has no unified legal definition and that it covers different types of undefined misconducts, ranging from stalking and cyberstalking (physically or virtually) that is following or conducting surveillance of another individual, causing her fear for her safety, to threats to a person or property, fighting words, or profanity.[181] Moreover, many criminal statutes fail to accurately define what misbehaviors are encompassed in the term "harassment" by including a residual subsection, which prohibits engaging in "any other course of alarming conduct serving no legitimate purpose of the actor" if it is done with purpose to harass another.[182] A comprehensive analysis of harassment statutes and the challenges they present to both free speech and criminal law doctrines exceeds the scope of this Article.[183] The following discussion is, therefore, limited to one specific example of

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178 *See* Michelle Madden Dempsey, *Sex Trafficking and Criminalization: In Defense of Feminist Abolitionism*, 158 U. PA. L. REV. 1729, 1762–63 (2010) (discussing the endangerment justification).

179 *See, e.g.*, 18 PA. CONS. STAT. ANN. § 2705 (West 2013); TENN. CODE ANN. § 39-13-103 (2013).

180 These statutes are typically modeled after the MODEL PENAL CODE § 250.4 (1980), which prohibits the following:

> A person commits a petty misdemeanor if, with purpose to harass another, he: (1) makes a telephone call without purpose of legitimate communication; or (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or (4) subjects another to an offensive touching; or (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.

181 *See* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L.J. 781, 790–92, 810–11 (2013) (discussing the scope of criminal harassment statutes).

182 *Id.* at 791–92 (noting that the drafters of the Model Penal Code enacted the residual prohibition, preferring a vague and broader law rather than leaving unforeseen actions to go unpunished).

183 For discussion of these harassment statutes, see generally Caplan, *supra* note 181 and Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731 (2013).

verbal harassment, often dubbed bullying in layman's terms, which has lately become the target of legislatures and courts. In particular, this discussion *excludes* criminal statutes against cyberstalking and threats often communicated in cyberspace, which are typically covered by existing criminal statutes.[184] The latter inflict severe forms of emotional and psychological harm and are beyond the scope of my critique here.[185]

While the term "bullying" covers both traditional face-to-face verbal harassment and cyberspace harassment, the discussion below specifically aims at cyberbullying as a prominent facet of the broader trend towards criminalizing speech-based harassment. The term "cyberbullying" does not have an acceptable legal definition and it encompasses a broad spectrum of speech disseminated via electronic communication, ranging from threatening and harassing to annoying, offending, gossiping, and name calling.[186] Given the absence of a legal definition, this Article uses the term cyberharassment instead. In recent years, the growing use of cyberspace communication to verbally harass others has led to a host of legislative measures aimed at curbing the problem of cyberharassment.[187] While the vast majority of states have adopted civil measures, predominantly focusing on the liability of schools for students' bullying, several states have also criminalized verbal harassment, explicitly clarifying that it includes cyberharassment.[188] These jurisdictions have expanded their existing criminal harassment laws above and beyond explicit threats of violence, stalking, and traditional telephone harassment to also include various acts of cybercommunication over a period of time, directed at a specific person, that seriously alarm that person and would cause a reasonable person to suffer substantial emotional distress.[189]

Massachusetts provides a prominent example for a state that passed such a law, with its "Criminal Harassment" statute proscribing the following:

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184 For a comprehensive discussion of these criminal prohibitions, see generally DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014).

185 *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 361–74 (2014) (advocating the expansion of criminal sanctions to cover cyberstalking and intentional infliction of harm); *see also* Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 125–35 (2007).

186 *See* Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 MO. L. REV. 693, 718 (2012) (noting various forms of verbal harassment).

187 *See* Volokh, *supra* note 183, at 741–42 (noting that most courts have upheld these laws); *see also* Lidsky & Garcia, *supra* note 186, at 695–96.

188 *See, e.g.*, MASS. GEN. LAWS ch. 265, § 43A(a) (2013); N.Y. PENAL LAW § 240.30 (McKinney 2014), *invalidated by* People v. Golb, 15 N.E.3d 805 (N.Y. 2014); 18 PA. CONS. STAT. ANN. § 2709(a) (West 2013).

189 *See* Lidsky & Garcia, *supra* note 186, at 700 (discussing various types of criminal cyberharassment statutes).

> (a) Whoever willfully and maliciously engages in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer substantial emotional distress, shall be guilty of the crime of criminal harassment . . . . The conduct or acts described in this paragraph shall include . . . electronic mail, internet communications, instant messages or facsimile communications.[190]

The U.S. Supreme Court has not yet examined the constitutionality of any specialized criminal harassment statute. Commentators have begun to criticize these statutes largely from the perspective of the First Amendment.[191] However, criminal cyberharassment laws raise not only free speech concerns but also insurmountable problems stemming from substantive criminal law. First, these statutes are at odds with basic tenets of the criminal law because they are typically overbroad and vague. The statute adopted by the Massachusetts legislature criminalizes a host of behaviors that are not specifically defined, potentially raising a lack of fair notice problem. Grounding criminal liability on ambiguous phrases, such as "conduct which seriously alarms" is particularly problematic since it is unclear of what the actus reus of the crime consists. Moreover, the phrase "alarm a person" is notably overbroad, covering a wide range of speech that ought to be constitutionally protected. Such indeterminate language introduces a dangerous degree of uncertainty into criminal prohibitions, which ought to be clear and definite. Furthermore, this term is so broad that determining its precise scope also raises significant vagueness concerns.[192] Grounding criminal liability on such equivocal notions limits individuals' freedom of action, resulting in a "chilling effect" that may cause them to abstain from engaging in a host of permissible behaviors.

Second, criminal sanctions are not best suited to address the complexities of cyberharassment and to curb its harms. Combating cyberharassment requires changing prevailing social norms through the education of teenagers about its injuries. Criminal law, however, is often ineffective in fostering social change, being an inadequate means for solving social problems.[193] While incarcerating teenagers for cyberharassment sends an expressive societal message, there are less drastic measures for conveying society's condemnation of the

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190 MASS. GEN. LAWS ch. 265, § 43A(a) (2013).

191 *See* Lidsky & Garcia, *supra* note 186, at 698 (contending that criminal cyberharassment laws are prone to overreaching, suppressing protected speech).

192 *See* Caplan, *supra* note 181, at 810–11 (discussing the vagueness of verbal harassment statutes).

193 *See* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009) (discussing the shortcomings of criminal sanctions in fostering social change).

phenomenon. Criminal sanctions are not suitable for accomplishing such goals.[194]

Criminalization is also problematic in light of the view that prohibiting cyberharassment is justified, among others, as yet another example of a risk-creation crime. Put differently, criminal statutes against verbal harassment offer another salient example of endangerment speech crimes. Characterizing cyberharassment as one type of a prophylactic measure, aimed to prevent harm before it is inflicted, warrants some further exploration, since it is a somewhat novel idea, and has not been explored yet in existing legal literature. Cyberharassment is typically viewed as a complete offense, inflicting severe emotional harm on tormented individuals at the moment it is committed. Ample studies suggest that cyberharassment causes serious psychological trauma on young victims, ostensibly justifying the use of various legal remedies.[195] However, the view that one type of harm stemming from cyberharassment is the infliction of emotional distress does not preclude the dual nature of the prohibition, and the multifaceted understanding of the harms it targets. Viewed this way, the criminal prohibition against cyberharassment may also be perceived as one type of an endangerment offense. In other words, cyberharassment is not only a complete offense but also is an inchoate crime that aims to provide a prophylactic measure against the potential future risk of young victims committing suicide. The criminal prohibition, thus, targets not only the separate harm of infliction of emotional distress but also the additional future danger that the devastating emotional effects of the tormenting speech may lead victims to take their own lives.

Several reasons support the assertion that extending criminal prohibitions on verbal harassment to include expanded forms of cyberharassment statutes serves as yet another prophylactic measure aimed at protecting minors from the risk of self-inflicted death. The first lies with considering legislatures' intents and motives in enacting these prohibitions. A number of studies suggest that cyberharassment has contributed to the suicides of many teenagers.[196] Some notable examples include Phoebe Prince of Massachusetts, Megan Meier of Missouri, and Tyler Clementi of New Jersey.[197] In response to several high-publicized ostensibly bullying-related suicides, legislatures have adopted

194 *See* Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 437 (2012) (explaining why criminal anti-bullying statutes are unjustified).

195 *See* SAMEER HINDUJA & JUSTIN W. PATCHIN, CYBERBULLYING RESEARCH CTR., CYBERBULLYING: IDENTIFICATION, PREVENTION, & RESPONSE (2014), *available at* http://cyberbullying.us/Cyberbullying_Identification_Prevention_Response.pdf.

196 *See* Lidsky & Garcia, *supra* note 186, at 694 & nn.6 & 10.

197 *See* Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 645–47 (2011).

excessively severe measures in an attempt to appear "tough on bullying."[198] The Massachusetts experience is illustrative. Phoebe Prince, a Massachusetts fifteen-year-old girl, was subject to relentless taunts and verbal assaults from fellow students at her high school, before she hanged herself.[199] Prince's suicide received national attention, creating a media buzz and a major public uproar attributing the suicide to the torturous bullying.[200] Shortly thereafter, Massachusetts adopted the above specialized criminal harassment statute, designed to target the perceived risk of suicide.[201] Criminal statutes against cyberharassment, thus, rest on the assumption that there is a direct connection between teenagers' suicides and cyberharassment, and that criminalization provides a preventive measure aimed at reducing the risks associated with bullying's fatal effects.[202]

Second, considering the prevailing discourse around civil harassment statutes suggests that the prophylactic value of these statutes is a particularly dominant theme when civil harassment orders are concerned.[203] Commentators note, for example, that the core of civil harassment statutes should focus on protecting victims' safety and privacy.[204] But the notion of promoting victim's safety underlies not only civil harassment statutes but also criminal ones. Indeed, one of the main purposes of criminal law is to promote individuals' safety and security and protect them against potential future harm, thus supporting the claim that the endangerment rationale also plays an important role in criminal statutes against cyberharassment. Finally, comparing criminal prohibitions against cyberharassment to civil regulation of discrimination-based harassment further buttresses the argument that the criminal prohibition aims at a prophylactic measure. The harms inflicted on victims of sexual harassment may be equally devastating to those inflicted by cyberharassment, as both may cause severe emotional distress on victims.[205] Sexual harassment in the workplace and in academic institutions, however, is not criminalized but instead treated under Title VII and Title IX of the Civil Rights Act

198 *See* Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1696–97 (2012) (discussing legislative responses to suicides).

199 *See* Emily Bazelon, *What Really Happened to Phoebe Prince?*, SLATE (July 20, 2010, 10:13 PM), http://www.slate.com/id/2260952/entry/2260953.

200 *See* Jeff Glor, *Cyberbullying Continued After Teen's Death*, CBS NEWS (Mar. 29, 2010, 7:26 AM), http://www.cbsnews.com/news/cyberbullying-continued-after-teens-death.

201 *See* Waldman, *supra* note 194, at 386–87.

202 *Id.* at 436–37.

203 *See* Caplan, *supra* note 181, at 853–54 (noting that the statutory language of civil harassment provisions should focus on unconsented contact that cause fear for one's safety and intrusion into one's privacy).

204 *Id.* at 829–31.

205 *See* Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409 (2010).

of 1964.[206] Several explanations may be offered to account for the fact that cyberharassment is often criminalized, while discrimination-based harassment is not. First, sexual harassment typically affects adults while cyberharassment typically affects minors who may be more vulnerable and in greater need for the criminal law's protection. A second explanation may rest on the assumption that criminally prohibiting cyberharassment also aims to prevent the potential risk of victims' suicides, a risk that is notably absent in the discriminatory harassment context.

Having established the assertion that criminal prohibitions on cyberharassment serves as yet another prophylactic measure leads to the contention that such use of the endangerment rationale exemplifies an unwarranted trajectory toward expanding the scope of endangerment speech crimes. To be sure, this Article's critique of criminal cyberharassment statutes nowhere suggests that cyberharassment is not an extremely harmful conduct inflicting serious psychological injuries. Contrary to several commentators who believe that the infliction of emotional distress does not warrant criminalization, this Article does not contend that this type of harm never justifies criminal prohibition.[207] By contrast, it argues that inflicting severe emotional harm is a serious injury that may justify the imposition of criminal sanctions, in the appropriate circumstances. The following reasons, however, demonstrate why, for the most part, cyberharassment is just not one of the cases justifying criminal sanction.

First, criminalizing cyberharassment is in tension with criminal law theory that generally rejects negligence as sufficient mens rea.[208] Under contemporary criminal law, the default mens rea is typically recklessness, thus requiring a conscious disregard of a substantial and unjustifiable risk of harm.[209] Commentators note that psychological research shows that much crime is the product of normal adolescent development and that adolescents often engage in common childhood wrongdoing, making poorly-considered decisions due to their susceptibility to negative influences and external pressures.[210] Perpetrators of cyberharassment are typically immature teenagers, often not fully aware of the consequences of their risky behaviors. These young perpetrators' mens rea is ambiguous, typically falling short of

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206 *Id.* at 410–11.

207 *See* Brenner & Rehberg, *supra* note 41, at 81–83 (rejecting criminalization of inflicting emotional harm).

208 *See* Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 932 (2000) (noting that negligence is typically insufficient for imposing criminal liability).

209 *Id.* at 932–35.

210 *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 385–87 (2013).

intent, awareness, or even conscious disregard of a substantial and unjustifiable risk of inflicting substantial harm. Criminalizing cyberharassment is thus grounded on a mens rea of negligence, which is an unwarranted expansion of criminal liability.

Second, grounding criminal liability on the endangerment justification raises insurmountable problems of causation. Arguably, since an independent actor—the bullied victim—intervenes by causing her own death, perpetrators cannot reasonably foresee this consequence, as they often lack actual awareness that their behavior would lead others to commit suicide.[211] Suicide is too remote and unforeseeable a consequence of bullying. Proving the nexus between the cyberharassment and the ensuing suicide beyond a reasonable doubt is an impossible requirement to meet at a criminal trial.

Finally, criminal statutes against cyberharassment are unwarranted because they are typically passed in response to public outcry exerting political pressure on legislatures to provide harsh criminal sanctions on bullying.[212] Commentators have long noted the role that strong emotions—mainly fear, anger, and hatred—play in promoting legislation aimed at solving pressing social problems.[213] Examples of statutes that draw heavily on communities' outrage include not only cyberharassment but also terrorism and pedophilia, often leading to similar concerns regarding the risk of overreaching.[214] Drawing solely on the public's emotional responses and need for vindictive measures should not serve as justification for criminalization as such statutes are often hastily drafted, without fully weighing the high costs of criminalization against its limited benefits.

2. Instructional Speech

Instructional speech consists of speech that gives people factual information that can assist them in the commission of crimes.[215] Examples include the dissemination of information explaining how to make bombs, cook methamphetamine, grow marijuana, and evade

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211 *See* Waldman, *supra* note 194, at 431–33 (discussing causation problems).

212 *See* Ahrens, *supra* note 198, at 1696 (discussing the public's outcry following teens' suicides).

213 *See* Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 74 (2009).

214 *See* Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345, 359–63, 377–80 (2003) (discussing similar rhetoric used in terrorism and pedophilia cases that stem from the public's strong emotional responses to both problems).

215 *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1097, 1103 (2005) (noting that instructional speech also consists of information on how to commit other harmful conduct such as torts).

taxes.[216] Criminally instructional speech consists of two categories. First, speech that results in the commission of a crime may be prosecuted under aiding and abetting statutes.[217] Second, speech that has not yet resulted in the commission of a specific crime, but creates a risk that a crime might be committed in the future.[218] The U.S. Supreme Court has not yet squarely confronted the scope of First Amendment protection in instructional speech cases.[219] Many lower courts, however, uphold instructional speech restrictions, noting that they do not implicate the First Amendment.[220]

Criminal prohibitions against instructional speech manifest yet another example of overcriminalizing speech. The following case is illustrative. In 1999, Congress passed an amendment to the Antiterrorism and Effective Death Penalty Act (AEDPA).

The amendment provides in pertinent part:

> (2) Prohibition. It shall be unlawful for any person—
>
> (A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence . . . .[221]

In *United States v. Austin*, the defendant was prosecuted under the above-referenced statute for material posted on his website, titled "raise the fist."[222] The site expressed the defendant's anarchist views and included a "Reclaim Guide" with instructions for disrupting International Monetary Fund and World Bank events. The guide, which the defendant claimed not to have written himself but to have copied from another website, contained sections on "Police Tactics and How To Defeat Them" and "Defensive Weapons" that included bombmaking

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216 *Id.* at 1096–97 (providing examples of information facilitating the commission of crimes).

217 *See* Leslie Kendrick, Note, *A Test For Criminally Instructional Speech*, 91 VA. L. REV. 1973, 1979 (2005).

218 *Id.*

219 Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of the petition for writ of certiorari).

220 Rice v. Paladin Enters., Inc., 128 F.3d 233, 267 (4th Cir. 1997); United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983); United States v. Barnett, 667 F.2d 835, 842 (9th Cir. 1982); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978).

221 18 U.S.C. § 842(p)(2)(A) (2012).

222 United States v. Austin, No. CR-02-884-SVW (C.D. Cal. Aug. 4, 2003); *see also* H. Brian Holland, *Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech That Performs a Teaching Function*, 39 U.S.F. L. REV. 353, 365–66 (2005); Brian McWilliams, *FBI Raid Silences Teen Anarchist's Site*, NEWSBYTES (Jan. 31, 2002, 12:15 AM), http://www.cs.cmu.edu/~dst/raisethefist/msgs/newsbytes-2002-01-31.txt.

instructions. Austin was convicted and sentenced to one year in federal prison.[223]

The *Austin* case demonstrates the risks of prohibiting expansive categories of criminally instructional speech. By classifying viewpoints posted on the Internet as criminally instructional speech, the statute enables the criminalization of speech based merely on the possible potential for harm flowing from its content, even if such harm is only slightly probable. The broadly worded statute enables conviction even in cases where there is no evidence that anyone is *likely* to use the instructions or that the defendant intended for anyone to use them. The use of the statute as applied to the defendant's conduct in this case violates his constitutional right to speak.[224] Prohibiting criminally instructional speech may sometimes be justified to prevent the risks of grave harms, thus making the statute facially constitutional. For example, holding an individual criminally liable for providing another with detailed instructions on how to commit suicide bombing, intending that he commit a terrorist act, is uncontested, even if eventually the bomb did not go off. However, criminalization ought to be limited to cases where there is proof of the speaker's dangerousness, including his intent to assist in the commission of a crime, as well as evidence demonstrating substantial probability that the speech might facilitate the crime the speaker intended.[225] Since *Austin* was resolved in a plea agreement, it remains unclear whether the government had sufficient evidence to prove these requirements.[226]

C. *Possession Crimes*

The widespread use of cyberspace communication has resulted in a notable increase in the availability of child pornography on the Internet.[227] The acknowledgement that children are a vulnerable group deserving unique protection has led to a uniformly severe legislative response, consisting of not only statutes that criminalize the production and distribution of child pornography, but also criminal sanctions on privately possessing such materials.[228] In *Osborne v. Ohio*, the Court

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223 *See* David Rosenzweig, *Man Gets 1 Year for How-To on Explosives*, L.A. TIMES, Aug. 5, 2003, at B3.

224 This Article raises "as applied"—as opposed to facial—challenges to the speech-based statutes at issue. *See generally* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321–22 (2000) (summarizing the distinction between facial and as-applied challenges).

225 *See* Kendrick, *supra* note 217, at 2013.

226 *Id.* at 2013–14 (noting that too little information was available to evaluate the speech).

227 *See* Hessick, *supra* note 56, at 854–55.

228 *See* Osborne v. Ohio, 495 U.S. 103, 108–10 (1990) (upholding prohibitions against private possession of child pornography).

held that possession of child pornography is not constitutionally protected under the First Amendment, upholding criminalization based on the endangerment rationale.[229] Possession of child pornography is perceived as a risk-creating behavior, consisting mainly of three types of risks.[230] First, child pornography fuels viewers' sexual fantasies, which can incite them to commit sexual offenses against children.[231] Second, pedophiles use child pornography to "groom" children by convincing them that having sex with adults is acceptable.[232] Third, possession of child pornography both creates and supports a market for the material, encouraging its further creation with the accompanying exploitation of children.[233]

The justifications for current laws' harsh penalties on possession of child pornography are highly disputed among social scientists.[234] Commentators suggest that existing empirical evidence fails to conclusively establish a causal link between mere possession of child pornography and actual contact offenses involving molestation of children.[235] A detailed assessment of these arguments exceeds the scope of this Article. For present purposes, suffice it to say that current child pornography laws conflate different types of harms. The production and distribution of child pornography involves the actual sexual abuse of children, inflicting the most severe harms. The protection of children from such irreparable injuries justifies the harshest criminal sanctions, and this Article does not take issue with these statutes. The alleged harms stemming from private possession of child pornography, however, are much more ambiguous, given the lack of clear evidence that there is substantial probability that viewing child pornography leads to sexual offenses against minors.

But even assuming that severe criminal penalties on private possession of child pornography are warranted, significant problems remain concerning the enormous scope of child pornography prohibitions and the precise definition of the images falling under it. These statutes contribute to the overcriminalization of speech because they often sweep within their reach innocuous materials that do not harm children. The problem stems from the overbroad and vague nature of these statutes.[236] The phrase "child pornography" is broadly

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229 *Id.* at 111–12.

230 *See* Hessick, *supra* note 56.

231 *Id.* at 871.

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

233 *See* New York v. Ferber, 458 U.S. 747, 759–61 (1982).

234 *See* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1693–95 (2012) (discussing the controversy among social scientists).

235 *Id.* at 1715–16.

236 Osborne v. Ohio, 495 U.S. 103, 108–10, 112–14 (1990) (upholding the constitutionality of an Ohio statute that makes it a crime to "possess[] or view[] . . . material or performance of a

defined to cover not only actual sexual acts with children but also sexual images of minors, involving mere nudity.[237] Take for example, depictions of nudity in photographs and paintings, or sexualized images of minors in popular culture and fashion magazines.[238] Arguably, possessing such images does not implicate the above justifications for banning possession of child pornography.

Furthermore, as suggested earlier, the overcriminalization of speech stems not only from passing overbroad statutes, but also from prosecutorial overreaching.[239] Existing child pornography statutes enable prosecutors to further expand criminalization above and beyond the traditional rationales justifying these prohibitions. One notable illustration of such prosecutorial overreaching involves charging teenagers for *consensual* sharing of sexually explicit photos via the Internet or cell phones, commonly known as sexting.[240] The dissemination of any sexual material involving minors technically falls under the scope of child pornography laws.[241] Criminal charges brought against adolescents for sexting each other, however, are often unjustified because their behaviors fall short of risking actual abuse of children.[242] When two teenagers consensually exchange explicit photos of themselves, none of the justifications for criminalizing possession of child pornography is present since the rationale of protecting an innocent child from an adult sexual predator is absent. Prosecuting sexting, thus, often results in charging adolescents with crimes even though their conduct does not amount to criminal wrongdoing.[243] In light of the devastating effects of a criminal conviction on an adolescent's future, stemming from the host of collateral consequences following conviction such as the "sex offender" label, the dangers of overcrminalizing this type of speech are disconcerting.[244]

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minor who is in a state of nudity . . . and where the person depicted is neither the child nor the ward of the person charged" (internal quotation marks omitted)).

237 *See* 18 U.S.C. § 2256(2)(A) (2012) (federal definition of child pornography, which constitutes visual depictions of actual children engaged in sexually explicit conduct, including, "(i) sexual intercourse . . . ; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person").

238 *Osborne*, 495 U.S. at 128, 131 (Brennan, J., dissenting) (warning that the statute's overbroad language enables the criminalization of "[p]ictures of topless bathers at a Mediterranean beach, [or] teenagers in revealing dresses").

239 *See supra* Part I.

240 *See* Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 804 (2012).

241 *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982) (discussing the definition of child pornography).

242 *See* Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 513 (2008).

243 *See* Luna, *supra* note 240 (noting that adolescents are often prosecuted under child pornography laws even though they "might not appreciate that such behavior can be criminal").

244 *See* Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungverwahrung*, 30 FORDHAM URB. L.J. 1621, 1626 (2003); *see also* Dr.

II. THEORIES EXPLAINING THE ABSENCE OF FIRST AMENDMENT SCRUTINY

The preceding Part demonstrates that the federal government and the states adopt numerous statutes that prohibit various forms of speech. At first blush, this finding may seem surprising in light of common perceptions concerning the scope of free speech protections under the Constitution. Conventional wisdom holds that the Court's First Amendment jurisprudence is strongly protective of speech.[245] However, a closer look at the speech crimes discussed above illustrates that this generalization is inaccurate. The false assumption concerning the allegedly broad protection of speech obscures current criminal law's trajectory, which is, in reality, far less protective of speech than many commentators assume.[246] The following subparts explain why First Amendment doctrines fail to cover a host of speech crimes.

A. *Speech Act Doctrines and Their Critique*

Constitutional theorists have long identified a division between speech and conduct, noting that the First Amendment protects the former but not the latter.[247] Thomas Emerson has contended that while expression and action are always mingled and most conduct involves both, the "predominant element" in a course of conduct can be identified and First Amendment thereby determined.[248] Speech is presumptively beyond governmental regulation when it possesses communicative qualities, expressing thoughts, ideas and viewpoints.[249] In contrast, conduct implicates little or no communicative value thus not triggering any First Amendment considerations and enabling the government to regulate it to effectuate significant interests such as harm prevention.[250]

JoAnne Sweeny, *Do Sexting Prosecutions Violate Teenagers' Constitutional Rights?*, 48 SAN DIEGO L. REV. 951, 955 (2011) (noting that the Court has not yet ruled on the constitutionality of these prosecutions).

245 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (striking down a content-based restriction on speech).

246 *But cf.* Erwin Chemerinsky, Lecture, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 733–34 (2011) (noting that the Roberts Court is not a speech-protective court).

247 *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970).

248 *Id.* at 80–86 (explaining the doctrinal distinction between speech and conduct).

249 *See* Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1194 (1994) (noting the theoretical and philosophical justifications for protecting speech).

250 *Id.*

1. Speech Integral to Criminal Conduct

The 1949 U.S. Supreme Court decision in *Giboney v. Empire Storage & Ice Co.* stands for the proposition that the right to free speech under the First Amendment does not protect speech used as an integral part of conduct in violation of a criminal statute.[251] The decision concerned the constitutionality of a Missouri law criminalizing "any pool, trust, agreement, combination, confederation or understanding . . . in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity."[252] The state attempted to use the law to enjoin union members from peaceful picketing carried on as an essential part of a course of conduct in violation of state law.[253] The Court affirmed the conviction, holding that

> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. . . . [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.[254]

Courts have often cited *Giboney* to justify a wide variety of restrictions on speech, including criminal statutes on conspiracies, solicitation, aiding and abetting, and more.[255] The "speech integral to criminal conduct" exception has been used to target conduct that is viewed as specific tools used for the purpose of causing harm.[256] For example, one court relied on *Giboney* in allowing liability for publishing a book that describes how to commit contract murder.[257] *Giboney*'s exception, however, has not received any doctrinal articulation in more recent U.S. Supreme Court cases; the Court merely cites *Giboney* to support its decisions refusing to protect certain types of speech, without

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251 Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498–99 (1949).

252 *Id.* at 491 n.1.

253 *Id.* at 491–92.

254 *Id.* at 498, 502.

255 *See* Volokh, *supra* note 21, at 1283 n.22. While the distinction between speech and conduct is not limited to the criminal context, this Article focuses solely on criminal prohibitions on speech because of the nexus between the overcriminalization of speech argument and doctrines grounded in speech acts. *See also* Schauer, *supra* note 19, at 1766–67, 1801–02 (noting that both civil and criminal statutes implicate various restrictions on speech, requiring legislatures to draw the line between the communicative and noncommunicative elements of certain acts).

256 *Giboney*, 336 U.S. at 498; *see also* Volokh, *supra* note 21, at 1283.

257 *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997).

providing guidelines on the scope of the exception.[258] Scholarly treatment of *Giboney* has also proved unhelpful in clarifying its scope as commentators have not developed a coherent doctrinal framework grounded in this exception.[259]

Given the difficulties in determining the distinction between speech and conduct, most commentators now recognize the fallacy of such division, arguing that definitively categorizing every behavior as either "speech" or "conduct" is not a feasible task.[260] Words are often the exclusive means of prohibited forms of conduct, and conversely, conduct often expresses viewpoints and ideas.[261] As John Hart Ely has noted, expressing political protest against the government often takes both the form of action and of speech and, therefore, attempts to determine which element "predominates" necessarily call for judgments about whether the activity should be protected.[262] Commentators conclude that the "speech-conduct" distinction is unable to distinguish between speech that warrants free speech protection and one that does not.[263] Instead, commentators have endeavored to develop an alternative analytical framework to determine which speech ought to be subject to First Amendment scrutiny.[264]

2. Generally Applicable Laws

One doctrinal account attempting to explain which types of speech justify criminal sanction relies on the "generally applicable laws" argument.[265] Speech should not be constitutionally protected when a generally applicable law that restricts all conduct that has similar harmful effects covers the prohibited behavior.[266] This speech may be criminalized because "it is the act by which one either violates an independent criminal prohibition," seemingly referring to prohibitions unrelated to speech, "or facilitates the violation of such a prohibition."[267] For example, publishing a book with the intent to help readers commit a

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258 *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978); Searle v. Johnson, 646 P.2d 682, 685 (Utah 1982).

259 *See* Morrison, *supra* note 116, at 901–03 (noting the absence of a coherent doctrine).

260 *See* Ely, *supra* note 27, at 1495–96 (noting that the distinction invites sophism and ad hocery).

261 *See* Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 856 (2012).

262 *See* Ely, *supra* note 27, at 1496.

263 *See* Volokh, *supra* note 21, at 1284.

264 *See* Ely, *supra* note 27, at 1495–96.

265 *See* Volokh, *supra* note 21, at 1281.

266 *Id.* at 1281–82 (noting that some commentators suggest that "generally applicable laws should be treated as content-neutral restrictions").

267 Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 392 (2003); *see id.* at 377–78.

crime is punishable under generally applicable aiding and abetting law because this speech is simply the means of committing a criminal offense or the evidence of the crime.[268]

A slightly different variation of this account draws on the Court's seminal decision in *United States v. O'Brien*.[269] O'Brien concerned a man who burned his draft card as part of a public antiwar protest, and was convicted under a federal law prohibiting the intentional destruction of Selective Service registration certificates.[270] The *O'Brien* Court announced the following three-element test to determine when the state may ban speech: "[(1)] if [the statute] furthers an important or substantial governmental interest; [(2)] if the governmental interest is unrelated to the suppression of free expression; and [(3)] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[271]

The *O'Brien* test sets a key distinction in First Amendment jurisprudence between content-neutral and content-based restrictions on speech.[272] Speech consisting of expressive conduct may be restricted because of harms flowing from its noncommunicative component, which is content-neutral. Examples include the destruction of Selective Service system, obstruction of traffic, and noise violations.[273] However, speech may not be restricted because of harms flowing from its communicative component, which is content-based, unless these restrictions fall under one of the recognized exceptions to free speech such as incitement, threats, and obscenity, or pass the strict scrutiny test.[274]

Relying on *O'Brien*, courts and commentators focus their attention on the government's motives in regulating speech.[275] If the government's motives may be independently grounded on justifications unrelated to speech, then the criminal ban passes constitutional scrutiny. But if the government's motives are related to the suppression of disfavored messages and silencing political dissent, the statute fails strict scrutiny review.[276] Under this account, generally applicable laws should be treated similarly to content-neutral restrictions on expressive

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268 *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 243 (4th Cir. 1997).

269 United States v. O'Brien, 391 U.S. 367 (1968).

270 *Id.* at 369.

271 *Id.* at 377.

272 *Id.* at 382 (noting that the restriction implicates only the noncommunicative impact of the conduct).

273 *See* Volokh, *supra* note 21, at 1278.

274 *Id.* at 1284.

275 *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 427–32 (1996); Kahan et al., *supra* note 261, at 856–57; Rubenfeld, *supra* note 23, at 775–77.

276 Kahan et al., *supra* note 261, at 885–87 & n.127.

conduct, and thus should be upheld under *O'Brien* as speech restrictions that are incidental to the law's overall thrust.[277]

The problem with the "generally applicable laws" doctrine, however, is that it enables criminalization of content-based restrictions on speech without subjecting them to First Amendment scrutiny.[278] As the examples in Part I demonstrate, the speech at issue there is criminalized based on its communicative message, namely, because its content informs, persuades, or offends others, and because of the harms that flow from this informing, persuasion, or offense. Yet, the "generally applicable laws" doctrine excludes First Amendment analysis from many speech restrictions even though they target speech precisely because of the content that speech communicates. Criminalizing speech based on its content is in tension with the *O'Brien* test, under which speech cannot be restricted because of the harm that flows from its content unless it passes strict scrutiny.[279]

Moreover, generally applicable prohibitions cannot be upheld as facially content-neutral when they are content-based *as applied.*[280] When the prohibition is triggered based on the harm stemming from the content of the speech, First Amendment scrutiny should apply.[281] Instead of relying on the "generally applicable laws" standard, the relevant question that ought to determine the scope of free speech protection should be whether the statute at issue prohibits speech because of the harm that flows from its content.[282] When a statute punishes speech because the harms are caused by the persuasive, informative, or offensive elements of the opinions expressed, that statute should be treated as a content-based restriction on speech and therefore subject to full-fledged First Amendment scrutiny.[283] Furthermore, the usual free speech considerations should apply here, including mainly the type of harm that speech may cause, the value of the speech and the risk that the restriction would create a chilling effect, resulting in prohibiting permissible forms of speech.[284]

An additional drawback of the "generally applicable laws" doctrine is that the government's motives have only limited relevance in assessing the constitutionality of speech restrictions. The examples set forth in Part I illustrate that the government's motives for regulating speech appear perfectly legitimate and unrelated to suppressing political

277 *See O'Brien*, 391 U.S. at 382; *see also* Volokh, *supra* note 21, at 1281–83 & nn.13, 15–18.

278 *See* Volokh, *supra* note 21, at 1287.

279 *Id.* at 1284.

280 *Id.* at 1284–87.

281 *Id.*

282 Cohen v. California, 403 U.S. 15, 18–19 (1971) (holding that the law was directed at Cohen because of the offensive content of his message).

283 *See* Volokh, *supra* note 21, at 1284–87.

284 *Id.* at 1339.

dissent.[285] Legislatures often have ample bases for adopting generally applicable prohibitions and there is no basis for suspecting that they had any impermissible motivation with regard to suppressing speech.[286] For example, aiding and abetting statutes are motivated by promoting social goods that can be defined independently of the government's hostility to disfavored ideas.[287] But even when legislatures' motivations are not grounded on impermissible considerations, the result of adopting generally applicable prohibitions is often sweeping among others content-based restrictions on speech.[288] Statutes should, therefore, be presumptively unconstitutional when applied to speech based on its content, regardless of whether they are well motivated and benign. These may be upheld only if they pass strict scrutiny review, just as is the case for statutes that on their face adopt content-based restrictions.

3. The Theory of Communicative Action

Lawrence Solum's 1989 paper draws on the theory of communicative action to explain which speech warrants First Amendment protection and which does not.[289] The theory, which was developed by German philosopher Jurgen Habermas, distinguishes between communicative action, oriented at the coordination of behavior through rational agreement, and strategic behavior, in which speech is used to manipulate, coerce, or deceive.[290] Solum suggests that the theory of communicative action be used to demarcate the boundary between speech that warrants constitutional protection and speech that does not.[291] Under this theory, the First Amendment freedom of speech is interpreted as the freedom to engage *only* in communicative action. Therefore, the First Amendment protects only communicative action while strategic action remains unprotected speech.[292] For example, the freedom of communicative action theory encompasses a right to advocate violent revolution because rational consensus on the legitimacy of the government use of force cannot be accomplished if advocacy of illegal conduct is prohibited.[293] In contrast, strategic action is aimed at affecting others, not through the achievement of agreement

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285 *See supra* Part I.

286 *See* Volokh, *supra* note 21, at 1301–03.

287 *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 242–45 (4th Cir. 1997); *see also* Kahan et al., *supra* note 261.

288 *See* Volokh, *supra* note 21, at 1284–85.

289 *See* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 55–56 (1989).

290 *Id.* at 91.

291 *Id.* at 106.

292 *Id.* at 107–09.

293 *Id.* at 122.

and understanding, but rather through means such as deception, coercion, and manipulation, thus underserving free speech protection.[294] The distinction between communicative and strategic action explains the exclusion from First Amendment protection of a wide variety of strategic actions. Since strategic action includes speech acts that are beyond the scope of protection of the First Amendment, a probability assessment is not required in examining the constitutionality of the speech restriction, which may be upheld "even if the danger [posed by the speech] is fuzzy and remote."[295]

While the communicative action theory offers some important insights that explain the distinction between speech that warrants free speech protection and speech that does not, the theory is insufficient to account for more contemporary contexts that have arisen since it was first articulated in the 1980s. First, the communicative action theory precedes some recent changes, both in technological advancements such as the enormous spread of cybercommunication as well as challenges stemming from the emergence of new threats such as terrorism. Second, the main problem with the distinction between communicative and strategic action is that the vast majority of speech acts share the characteristics of both strategic and communicative action, thus drawing a clear line between them is impossible.[296] For example, the theory is unable to determine whether terrorist speech that encourages violent terrorist attacks would be classified as predominately communicative or predominantly strategic, as such speech often contains both elements, aiming at achieving understanding among listeners as well as manipulating listeners. Third, another drawback in this theory is that determining that communicative action is protected speech does not resolve the more difficult question concerning the extent of the right at issue.[297] Granted, there are certain circumstances that outweigh the right to engage in communicative action, but the theory does not elaborate on these limits. As Solum concedes, even though certain types of speech, such as advocacy of unlawful action, fall under the communicative action rubric, this speech might still be restricted if the communicative action is likely to lead to harmful strategic action which cannot be prevented by other means.[298] Therefore, the distinction between communicative and strategic action provides only the first step in evaluating the constitutionality of the speech. The necessary additional step in this inquiry must include a probability test, assessing the likelihood of future harm stemming from

294 *Id.* at 107.
295 *Id.* at 108.
296 *Id.* at 114.
297 *Id.* at 122.
298 *Id.* at 122–23.

the speech at issue. The theory of communicative action does not provide any mechanism for assessing this likelihood.

4. Situation-Altering Utterances

An elaborate doctrinal explanation for the absence of free speech protection from many speech acts is developed in Kent Greenawalt's book, *Speech, Crime, and the Uses of Language*.[299] Greenawalt distinguishes between "assertions of fact and value," which are statements about the way things are or should be, and are entitled to full First Amendment protection, and "situation-altering utterances," which are ways of doing things, changing the world by altering normative obligations, and are not entitled to First Amendment protection.[300] The latter category includes—among others—offers, agreements, orders, permissions, and threats, which are tantamount to conduct and are subject to civil and criminal regulation.[301] Greenawalt identifies four factors that may explain the circumstances under which the First Amendment applies: (1) speech that is public rather than private; (2) speech that is inspired by the speaker's desire for social change rather than for private gain; (3) speech relating to something general rather than to a specific transaction; and (4) speech that is normative rather than informational in content.[302] Conversely, these factors explain the absence of free speech coverage in circumstances where the speech is face-to-face, informational, particular, and for private gain.

Greenawalt's theory, however, is also unable to provide a sufficient conceptual framework that explains the absence of First Amendment scrutiny from the speech crimes discussed in Part I. One problem with this theory for today is that it is dated and does not account for the vast changes that have occurred since it was formulated in 1989. These changes include a significant increase in the scope of speech offenses, in the terrorism context as well as in other areas.[303] These changes also consist of technological advancement affecting the nature of speech, mainly the enormous explosion in the use of the Internet as a primary form of speech. These legal and technological changes are not considered in Greenawalt's proposed factors for distinguishing between protected and unprotected speech. For example, the spread of cyberspace communication has significantly blurred Greenawalt's distinction between face-to-face communication and a general appeal to

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299 *See* GREENAWALT, *supra* note 22.

300 *Id.* at 43–44, 57.

301 *Id.* at 43–44, 57–58.

302 *See* Schauer, *supra* note 19, at 1801 (summarizing the four factors that Greenawalt has offered).

303 *See supra* Part I.A–C.

the public at large. Much speech in today's virtual world, however, consists of expression that is publicly available on the Internet, reaching unidentified audience. Greenawalt's theory fails to explain why a publication on the Internet, providing information on how to commit crimes may be criminalized even though this speech is targeted towards the public at large rather than towards a specific perpetrator.

B. *Categorical Exclusion as Coverage and Its Critique*

Professor Frederick Schauer has offered a broader framework for considering speech falling outside the boundaries of the First Amendment.[304] Schauer's analysis first distinguishes between free speech *protection* and free speech *coverage*.[305] The question of coverage, argues Schauer, consists of a preliminary inquiry asking whether an event that involves "speech" in the ordinary use of the word presents a First Amendment issue.[306] Although the First Amendment broadly refers to "speech" much speech remains completely uncovered by it.[307] Only once the First Amendment covers certain type of speech, the question of its protection comes into play.[308] Schauer notes that numerous verbal acts such as criminal solicitation, criminal conspiracy, and other forms of verbal participation in and facilitation of crime do not present any First Amendment inquiry.[309] Importantly, under this account, the entire class of speech acts is categorically excluded from First Amendment scrutiny. Since whole categories of speech crimes lie well beyond the boundaries of the First Amendment, the arsenal of protections provided by free speech doctrines do not show up in the analysis.[310]

Schauer further contends that no single theory or doctrinal principle explaining the First Amendment coverage has yet been found.[311] The explanation for the lack of free speech coverage, argues Schauer, lies not only in legal doctrine.[312] Instead, it lies in the combination of doctrines and a complex array of nonlegal, nondoctrinal factors, including political, cultural, and economic considerations

304 *See* Schauer, *supra* note 19, at 1766–68.
305 *Id.* at 1769.
306 *Id.*
307 *Id.* at 1771.
308 *Id.* at 1769.
309 *Id.* at 1801.
310 *Id.* at 1769.
311 *Id.* at 1785–86.
312 *Id.* at 1787.

determining which speech the First Amendment covers and which it does not.[313]

There are, however, several problems with this approach. First, it is mostly descriptive rather than proscriptive. Describing numerous forms of speech as uncovered by the First Amendment with only a small portion of speech subject to strict scrutiny review says little with respect to the normative question of whether speech acts *should* be subject to First Amendment analysis. Schauer's account does not explain whether the categorical exclusion of First Amendment scrutiny from all speech acts is indeed a proper approach from a normative perspective. Moreover, while the theory unfolds the broad political and institutional reasons for subjecting certain speech to First Amendment scrutiny, it does not provide a separate scheme consisting of legal criteria for distinguishing between different types of speech.

The categorical exclusion account also lacks practical utility because of its indeterminate nature. This theory falls short of offering an analytical framework that would be able to draw, in advance, a principled legal boundary between speech that warrants free speech protection and one that does not. This account thus leads to inconsistent outcomes, and are unable to explain why some communicative messages are subject to free speech protections, while others are restricted even though both types of speech may result in harmful consequences. Take, for example, the different legal treatment of hate speech and harassing speech. Hate speech, including racist expressions, falls within the boundaries of the First Amendment even though it is clearly harmful, inflicting emotional distress on victims.[314] In contrast, verbal harassment, another type of harmful speech inflicting emotional distress on victims, falls outside the scope of First Amendment coverage and is subject to civil and criminal regulation.[315]

Second, the categorical exclusion account precludes the use of any balancing mechanisms to evaluate the constitutionality of specific examples of speech acts. One of the key distinctions in First Amendment jurisprudence is the division between categorization and balancing.[316] Balancing approaches weigh individuals' interests in asserting a right against the government's interests in regulating it and determine which interest ought to prevail in a specific case.[317] In contrast, categorization prohibits this kind of weighing of interests in

313 *Id.* at 1787, 1800–01.

314 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382–84, 391 (1992).

315 *See* Lidsky & Garcia, *supra* note 186, at 695–96 (discussing criminalization of cyberharassment).

316 *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 383–84 (2009) (discussing the distinctions between categorization and balancing).

317 *Id.* at 381.

individual cases by inquiring only whether the case falls into certain predetermined, outcome-determinative lines.[318]

Contemporary First Amendment opinions use the rhetoric of balancing of interests rather than categorically excluding entire classes of speech from First Amendment coverage.[319] Commentators thus agree that the balancing approach has generally prevailed, largely replacing categorization as the preferred mode of First Amendment protection.[320] A notable exception to this general preference is current law's treatment of speech acts, which is still grounded in a categorical approach.[321] As Part I illustrates, entire classes of speech acts are currently categorically excluded from First Amendment scrutiny. No balancing tests are used when suppressing speech in a given case falling under the speech act classification, regardless of the specific circumstances underlying the specific speech.

The main problem with this categorical exclusion is that it is over-inclusive. It precludes First Amendment scrutiny from specific speech acts that do carry communicative messages and, thus, might warrant free speech protection. Casting entire categories of speech crimes outside the First Amendment's ambit, based solely on the prohibition's classification, impede a more nuanced, case-by-case examination of whether a particular conspiracy, instructional speech, or verbal harassment warrants criminal sanction. This wholesale exclusion fails to distinguish between various degrees of harm stemming from different types of speech. For example, the sexting prosecutions discussed above demonstrate that free speech protection is categorically precluded even from nonharmful expressions, since they fall under an uncovered category.[322] In contrast, a balancing approach weighs "competing interests in maintaining free and open expression on the one hand [while] assuring security and preventing [harm] on the other."[323] A typical strict scrutiny analysis applies such a balancing process, enabling courts to assess whether in specific cases individuals' liberty to express certain messages should outweigh others' right not to be harmed by the speech's potential outcomes. Balancing, therefore, provides a much-needed flexibility by allowing courts to evaluate the costs and benefits underlying a particular speech on a case-by-case basis.

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318 *Id.*

319 *See* Rubenfeld, *supra* note 23, at 779 (noting that contemporary First Amendment opinions are loaded with the rhetoric of balancing).

320 *See* Blocher, *supra* note 316, at 386 (noting that balancing is the preferred mechanism in First Amendment jurisprudence).

321 *Id.* at 386–88 (observing that no balancing is needed in a given case for categories such as fraud or crime facilitating speech, which are entirely outside the bounds of free speech).

322 *See supra* Part I.C.

323 *See* Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 17–18 (2004).

Third, the categorical exclusion approach does not account for a host of free speech justifications underlying many speech acts. Categorical exclusion is premised on the assumption that speech acts implicate none of the theoretical rationales for protection therefore their regulation does not raise any serious First Amendment problems.[324] This assumption, however, is false. As the examples discussed in Part I demonstrate, many speech acts in fact consist of clearly communicative messages and as such they do implicate important justifications for First Amendment protection.

Consider for example, a website consisting of instructions on how to cultivate marijuana plants in one's backyard. While the U.S. Supreme Court has not yet resolved the question of the constitutionality of crime facilitating speech, legislatures often assume that such speech may be subject to criminal sanction.[325] Excluding free speech considerations from all types of crime facilitating speech, however, is highly problematic if the actual purpose behind the publication is not to advocate any illegal action but instead to promote political change concerning the legal regulation of privately growing marijuana. Expressing politically motivated viewpoints by peacefully advocating legal change is the core justification behind free speech protection and, therefore, should be subject to First Amendment scrutiny. This ideologically grounded speech touches upon ample First Amendment concerns, most notably individuals' liberty to freely express viewpoints that are disfavored by the government.

C. *The Link Between Existing Doctrines and Overcriminalization of Speech*

The doctrines discussed above are directly responsible for the overcriminalization of speech for the following reasons. First, exposing the expansive scope of criminal statutes that are not touched by the First Amendment sharpens the fact that the speech with which the First Amendment deals is the *exception*, while the speech that may routinely be criminally prohibited is the general *rule.*[326] The speech that the First Amendment ignores based on speech acts doctrines includes countless areas of content-based criminal prohibitions on speech. Among them lies the vast domain of criminal law dealing with conspiracy,

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324 *See* Kent Greenawalt, *"Clear and Present Danger" and Criminal Speech*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 97, 111 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

325 *See* Volokh, *supra* note 215, at 1128–30 (noting that no Supreme Court case addresses crime-facilitating speech directly, but legislatures assume that this speech may be punished).

326 *See* Schauer, *supra* note 19, at 1784 ("[T]he speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives.").

solicitation, attempt, crime facilitation, and verbal harassment.[327] Those numerous speech offenses are precisely the crimes identified in Part I as contributing to the overcriminalization of speech. If these widely accepted restrictions on speech become the rule, the inevitable upshot is criminalizing too much speech.

Second, since no single doctrine explains when speech falls within the coverage of the First Amendment, legislatures are granted unlimited discretion to enact an array of criminal statutes as they see fit. The reason for lawmakers' unconstrained power is twofold. First, substantive criminal law is predominantly not constitutionalized.[328] Constitutional law places very few constraints on the definition of crimes, with limited exceptions concerning speech that is covered by the First Amendment, consensual sexual practices, and reproductive rights.[329] Scholars have long suggested that constitutional scrutiny ought to be applied to substantive criminal law.[330] The criminal law, however, has not yet developed significant constitutional doctrines for checking legislative action. The practical implications of this reality are crucial because different types of judicial review are applied to speech based on its categorization. Speech that is categorized as falling within the boundaries of the First Amendment is subject to strict scrutiny review that imposes much greater burdens than the highly deferential scrutiny of rationality review.[331] The vast majority of speech restrictions that are measured against the stringent strict scrutiny review are struck down.[332] By contrast, speech acts categorically fall outside the scope of First Amendment coverage, thus they are not measured against the demanding strict scrutiny analysis.[333] Instead, they are subject only to rational basis review, the lowest level of judicial scrutiny. Under this test, the government only needs to demonstrate that the statute at issue is "rationally related" to a "legitimate" governmental reason offered as its justification—a standard that is easily satisfied.[334] Statutes typically

327 *Id.* at 1801 ("[N]umerous verbal acts stand far outside the purview of the First Amendment.").

328 *See* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 510 (2004) (noting that substantive criminal law is predominantly not constitutionalized).

329 *See* HUSAK, *supra* note 9, at 123–24 (observing that most criminal statutes implicate nonfundamental rights and thus are subject only to rational basis review).

330 *See* Dubber, *supra* note 328, at 529–31 (advocating for constitutional constraints on criminal statutes).

331 *See* Schauer, *supra* note 19, at 1770.

332 *See* Sherry F. Colb, *Freedom from Incarceration: Why is this Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 822 (1994) (noting that statutes typically fail strict scrutiny review).

333 *See* Schauer, *supra* note 19, at 1801–02.

334 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14, 314 n.6 (1993) (applying rational basis review).

pass that scrutiny, which is very deferential to the government.[335] The upshot is that speech crimes that are measured against the lenient rational basis review are almost always upheld, therefore directly contributing to the overcriminalization of speech.

An additional reason explaining legislatures' unconstrained discretion stems from the fact that substantive criminal law is not grounded in a comprehensive theory.[336] Scholars note that there are no conceptual boundaries to criminalization or clear criterion limiting the scope of criminal statutes.[337] Substantive criminal law, they further note, is not grounded on a coherent framework under which criminalization decisions are based solely on harmful, fault-based culpable conducts.[338] Moreover, the concept of harm itself eludes definition, allowing criminalization without proof of injury or wrongdoing.[339] The upshot of the lack of a comprehensive theory of criminalization is that legislatures often succumb to political pressures by enacting statutes that satisfy their constituents' demands.[340] In the absence of a theory that constraints legislatures' crime creation choices, the problem of overcriminalization of speech is further exacerbated.

D. *An Alternative Framework for Considering Speech Acts*

A notable alternative analytical framework to assess the constitutionality of speech crimes lies in Eugene Volokh's work.[341] Volokh rejects the doctrines that are currently used to preclude First Amendment consideration from many speech crimes.[342] As an alternative to relying on speech acts doctrines, Volokh proposes that all speech crimes be subject to full-fledged strict scrutiny review.[343] Determining whether any given speech crime warrants constitutional protection, Volokh argues, requires an examination of factors usually considered under a typical First Amendment inquiry, such as the value of speech and the harm that it causes.[344] For example, in an attempt to

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335 United States v. Lopez, 514 U.S. 549, 574, 578 (1995) (Kennedy, J., concurring) (remarking on the leniency of rational basis review).

336 *See* Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 972–73 (2010) (reviewing DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2008)).

337 *Id.* at 971–72 (discussing the absence of a comprehensive theory underlying criminalization).

338 *Id.*

339 *Id.* at 971.

340 *See* Stuntz, *supra* note 10, at 529–30.

341 *See* Volokh, *supra* note 21, at 1284.

342 *Id.* (rejecting prevailing explanations for excluding free speech protection from many speech crimes).

343 *Id.*

344 *Id.* at 1338–39.

consider an independent analytical framework for determining the constitutionality of crime-facilitating speech, Volokh considers possible distinctions within this specific category, which would distinguish between protected and prohibited forms of crime-facilitating speech.[345] Providing information that is helpful in the commission of a crime, contends Volokh, generally ought to be constitutionally protected unless several limited circumstances apply (when the speech is "said to . . . a small group of people [and] the speaker knows [that they] are likely to use the information for criminal purposes[; when the speech] has almost no noncriminal value[; or when] it can cause extraordinarily serious harm").[346]

Volokh's contribution provides an important starting point for further exploration of the idea of subjecting *all* content-based speech crimes, regardless of the category into which they currently fall, to First Amendment scrutiny. Volokh himself recognizes that his proposal only outlines the task of delineating the proper constitutional boundaries of speech offenses, and that a considerable amount of work remains to be done.[347] The next Part takes up that call to engage in an analytical undertaking that would better draw the line between speech that warrants protection and one that does not.

III. A PROPOSAL FOR LIMITING THE SCOPE OF ENDANGERMENT SPEECH CRIMES

The following proposal advocates the adoption of several constraints to limit the criminalization of speech.

A. *External and Internal Constraints on Criminalizing Speech*

Considering a broader conceptual framework that would limit the scope of criminalization in general, Douglas Husak advocates the adoption of both external and internal constraints on criminal statutes.[348] These external constraints draw on existing constitutional doctrine of judicial review, while the internal constraints draw on criminal law theory itself.[349] The following proposal builds on Husak's general framework by applying it to the specific area of endangerment speech crimes.

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345 *See* Volokh, *supra* note 215, at 1104–06.
346 *Id.* at 1106.
347 Volokh, *supra* note 21, at 1286.
348 *See* HUSAK, *supra* note 9, at 64–67.
349 *Id.* at 128–32.

The first key feature of this Article's proposal to limit the scope of endangerment speech crimes calls for extending strict scrutiny review to all of these crimes, including those currently viewed as speech acts that are categorically excluded from First Amendment coverage. The proposal substitutes a specialized case-by-case balancing of competing interests underlying specific speech crimes for existing categorical exclusion of free speech coverage based on labeling many types of speech as "speech act."

Part II elaborates on the arguments justifying the application of strict scrutiny review on all speech crimes.[350] To reiterate the main points made above, the speech crimes discussed in Part I prohibit speech because of the harm that flows from its content, namely, because of its communicative element. When speech is restricted because the message it conveys informs, advocates, or persuades others, these restrictions are content-based and, similarly to other fundamental rights, they ought to be subject to full-fledged strict scrutiny review.[351] A typical First Amendment analysis engages in a balancing process between the value of a given speech and the harm it inflicts.[352] A similar balancing process should also be used to evaluate the constitutionality of all speech crimes, including those currently excluded from First Amendment scrutiny. This balancing should take into account the factors that are generally applicable under a typical First Amendment analysis, such as the magnitude of the harm, the value of speech, and the risk that punishing speech would deter constitutionally protected speech.[353]

Endangerment speech crimes, however, demonstrate why applying only external constitutional constraints may prove insufficient to limit their scope. First Amendment doctrines do not lend themselves to drawing a legal line between behaviors that warrant criminal bans and those that warrant only civil restrictions, such as tort actions, injunctions, or administrative measures.[354] Typically, under a First Amendment analysis, bans on speech are either upheld or rejected, without carving out distinctions between criminal and civil restrictions.[355] First Amendment scrutiny applies similar standards of review to both types of restrictions without suggesting that the

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350 *See supra* Part II.A.

351 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992)).

352 Dennis v. United States, 341 U.S. 494, 519, 524–25 (Frankfurter, J., concurring) (suggesting that free speech demands weighing of the competing interests).

353 *See* Volokh, *supra* note 21, at 1339 (noting factors generally applicable in a First Amendment scrutiny).

354 N.Y. Times Co. v. Sullivan (*N.Y. Times v. Sullivan*), 376 U.S. 254, 277 (1964). *But cf.* Near v. Minnesota, 283 U.S. 697, 710–11 (1931).

355 *N.Y. Times v. Sullivan*, 376 U.S. at 277.

government might enjoy less constitutional leeway when regulating speech through criminal means.[356] In light of this feature of the First Amendment, constitutional constraints on criminalization of endangerment speech crimes must be supplemented with internal constraints.

The proposed limits on endangerment speech crimes should also include several internal constraints stemming from criminal law theory. Professor Husak proposes that these constraints consist of the following factors: criminalization is justified only when criminal statutes target nontrivial harms or evils,[357] address only wrongful conduct,[358] impose punishment only on offenders who deserve it,[359] and carry a heavy burden of proof justifying them.[360] While Husak's proposal outlines an overall framework for limiting the scope of criminalization in general, he also examines several constraints on risk-creation offenses.[361] Husak's theory, however, does not recognize that notable examples of risk-creation offenses include speech crimes, and thus his analysis does not separately consider these offenses. As the preceding parts demonstrate, endangerment speech crimes raise additional concerns stemming from the fact that they prohibit speech based on the harm that flows from its content. The distinct problems arising from the criminalization of speech are unaccounted for in Husak's proposal. The following proposal seeks to fill this gap by developing constitutional constraints specifically designed for endangerment speech crimes. In what follows, this Article will separately consider factors that should be incorporated into strict scrutiny analysis and those that ought to shape internal criminal law constraints.

1. Relevant Factors to Structure Strict Scrutiny Analysis

This subsection articulates a framework for considering the constitutionality of endangerment speech crimes by offering several guidelines to structure judicial inquiry into the elements of a strict scrutiny analysis.

a. A Probability Test: Substantial Probability of Harm

A key factor in evaluating the constitutionality of endangerment speech crimes should consist of a judicial inquiry into the probability of

356 *See* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1007 & n.72 (2013).

357 *See* HUSAK, *supra* note 9, at 65–66.

358 *Id.* at 66.

359 *Id.* at 82–83.

360 *Id.* at 83–84.

361 *Id.* at 159–70 (addressing limits on risk-creation crimes).

harm that may flow from the content of the speech at issue. To satisfy strict scrutiny analysis, I propose that the government be required to establish a clear nexus between the speech in question and the likelihood of harm. More specifically, the government would have to demonstrate that given the content and the context of the speech it wants to ban, there is a *substantial probability* that the speech would result in grave harm. Requiring such probability test is necessary because criminal sanctions are unjustified in circumstances where speech merely creates a remote possibility or mere tendency for future harm. A probability test thus ensures that only dangerous perpetrators are held criminally liable for their speech.

The probability test advocated here draws on existing probability standards already in use under free speech doctrines. The Court currently employs one probability mechanism in an important line of cases concerning violence-inducing speech.[362] The doctrines embodied in these cases incorporate what commentators refer to as "probability thresholds."[363] A "probability threshold" sets a predefined lower boundary on how likely a potential harm must be in order for that harm to be assessed in the constitutional analysis. Under this inquiry, courts will not engage in balancing the benefits of speech against the possible harm from that speech in those cases in which the likelihood of harm is so low that the probability that it would occur does not cross the minimum threshold.[364] The *Brandenburg* decision discussed above is the prime example of the Court's application of "probability thresholds."[365] Recall that incitement doctrine requires, among others, that the speech be likely to incite violence—an explicit probability threshold that eliminates from consideration all low-probability harms.[366]

While inciting speech is subject to a demanding probability test, probability assessments are currently not incorporated into the Court's strict scrutiny analysis, which lacks an explicit doctrinal probability component.[367] The cases discussed in Part I exemplify the implications of the absence of a probability test.[368] These examples demonstrate that courts do not impose any bars against asserting extremely low-probability harms as the basis for suppressing various forms of expression. Criminal prohibitions on speech acts are often based on questionable predictions of dangerousness, without requiring any

362 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

363 *See* Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293 (2007).

364 *Id.* at 1297.

365 *Id.* at 1307.

366 *Id.* at 1306.

367 *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 33–38 (applying heightened scrutiny without discussing the probability of harm).

368 *See supra* Part I.A–C.

likelihood that the speech would result in any harm.[369] In the absence of a probability requirement, mere tendency to cause harm or an increase in the propensity of violence suffice for enacting numerous speech crimes.[370] The ultimate result of refusing to incorporate any probability test as a threshold condition for criminalizing these types of speech is the overcriminalization of speech.

Speech restrictions in the terrorism context best illustrate the risks of a failure to include a probability requirement for evaluating the constitutionality of a specific speech crime. As previously noted, while the *HLP* Court noted that the speech in question increases the probability of a future terrorist attack, it did not require substantial or high likelihood that such grave harm to national security would ensue.[371] The refusal to incorporate a probability test is particularly problematic in the national security context due to what Cass Sunstein dubs "probability neglect": the tendency among policy makers to disregard probability assessments when making decisions under indeterminate conditions.[372] This type of bias, the argument continues, is especially prominent when considering the probability of events that trigger the public's strong emotional responses, e.g., terrorism.[373] Several factors explain how the importance of low-probability threats is exaggerated. First, the government tends to inflate the risks of low-probability speech it attempts to suppress. Second, individuals tend to overvalue the danger of low-probability risks, and finally, dreadful threats such as terrorism trigger much stronger responses compared to low-probability risks in other contexts.[374] The examples discussed in Part I demonstrate that criminal prosecutions often draw on the public's strong emotional response to what it perceives as dire dangers especially in the areas of terrorism and speech endangering minors including sexual expression and cyberharassment.

Several commentators have considered incorporating probability assessments into strict scrutiny review.[375] One commentator suggests that probabilities may be examined when asking whether the restriction

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369 *See, e.g.*, MODEL PENAL CODE § 250.2(a) (1980) (proscribing the creation of "public inconvenience, annoyance or alarm," if a person, with intent or recklessness, in any public place engages in conduct having a direct tendency to cause acts of violence).

370 *See supra* Part I.A–C.

371 *See Humanitarian Law Project*, 561 U.S. at 4–6.

372 *See* Cass R. Sunstein, Essay, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62–70 (2002).

373 *Id.* at 83–85, 94–95.

374 *See* Masur, *supra* note 363, at 1298.

375 *See, e.g.*, Stephen A. Siegel, *The Death and Rebirth of the Clear and Present Danger Test*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 211, 220–23 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1330 (2007).

is narrowly tailored, especially if asking whether it is overinclusive.[376] Alternatively, other commentators suggest that probability assessments may be considered as part of the inquiry whether the state interest is sufficiently compelling.[377] Under both accounts, to satisfy the strict scrutiny review, the government would be required to establish a much stronger causal link between the speech in question and the future harm before it can criminalize speech.[378] Drawing upon these ideas, this Article proposes that probability assessments be incorporated into a strict scrutiny review of all speech crimes. As of yet, the Court has not adopted a probability threshold as part of its strict scrutiny analysis.

Having established the significance of probability assessments, the next question is what level of probability should be required. Alternative probability tests range from the highest level of probability, requiring near certainty or very high likelihood, to a less demanding test requiring substantial probability, culminating in the far more lax "reasonable consequences" standard.

Brandenburg's "high likelihood" test has proved an extremely onerous, if not impossible, threshold to satisfy.[379] This test fails to take into consideration the distinct dangers that terrorism-related speech poses.[380] It also fails to account for the enormous proliferation of cyberspace communication. Extending the *Brandenburg* test to additional contexts is, therefore, unwarranted. To curb significant risks of future harm, falling short of satisfying the "high likelihood" requirement, the *Brandenburg* test's stringent elements should be relaxed by adopting an alternative probability test.

A much less demanding standard, however, such as one grounded in "reasonable consequences," should also be rejected. When speech only reasonably increases the chances of some future harm, criminal sanctions are unjustified for the following reasons. First, this lax standard is inconsistent with the Court's current application of probability thresholds in the incitement context under which criminal restrictions on speech may be upheld only when harms reach a substantial level of probability. Second, a "reasonable consequences" requirement is in tension with the special status that speech enjoys under the First Amendment. The premise underlying contemporary free speech jurisprudence is that American society is willing to tolerate low-probability risks by setting a high threshold for restricting

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376 Fallon, *supra* note 375.

377 *See* Siegel, *supra* note 375, at 220.

378 *Cf.* Erik Luna, Essay, *The Bin Laden Exception*, 106 NW. U. L. REV. 1489, 1493–95 (2012) (discussing risk assessments in the terrorism context and considering the likelihood and consequences of given threats).

379 *See* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539, 570 (2006).

380 *See* Ronald K.L. Collins & David M. Skover, *What is War?: Reflections on Free Speech in "Wartime,"* 36 RUTGERS L.J. 833, 848–51 (2005); Healy, *supra* note 51, at 726.

potentially injurious speech.[381] The lenient "reasonable consequences" test falls short of satisfying this standard.

Lastly, considering other areas of law where personal freedoms may be abridged based on some probability assessments further demonstrates that reasonable suspicion or mere chance of harm are typically insufficient to justify the encroachment on individual freedoms. The Fourth Amendment context is illustrative. It provides individuals with the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, requiring that warrants to search and seizure shall be issued only upon *probable* cause.[382] While the Court has never explicitly defined the term, it has held that "probable cause" means a "substantial chance" or "fair probability," and that it is more than reasonable suspicion but less than a "more likely than not" standard.[383]

The substantial probability standard offers a middle ground between the rigid high likelihood test and the lax "reasonable probability" one. Under the proposed test, the state would not be able to satisfy the strict scrutiny's compelling interest prong if it is unable to demonstrate that there is substantial probability that the speech in question would result in grave harm. The test thus ensures that individuals would not be punished for speech falling short of substantial likelihood of serious harm. But is also ensures that while a real and significant prospect of harm is necessary, this requirement falls short of high likelihood, which under *Brandenburg* has evolved into near certainty.

One critical component of the substantial probability test is assessing the specific context against which the speech is expressed. Probability tests typically rely on the content of speech to judge its potential for harm.[384] The underlying context under which the speech is disseminated, however, should play a crucial role in evaluating the likelihood of harm. Relevant factors that a probability assessment must account for include the identity of speakers, their role among the community, and their influence over listeners among the general public or specific individuals.[385] Some speakers, mainly political and religious leaders, may have significant influence over their ideological supporters.

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381 *See* Masur, *supra* note 363, at 1297.

382 U.S. CONST. amend. IV.

383 Illinois v. Gates, 462 U.S. 213, 238, 243 & n.13 (1983).

384 *See* Moshe Cohen-Eliya & Gila Stopler, *Probability Thresholds as Deontological Constraints in Global Constitutionalism*, 49 COLUM. J. TRANSNAT'L L. 75, 97–98 (2010); *see also* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

385 *See* Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 521 (2008).

Speech expressed by a Jewish rabbi, a Muslim imam, or a Christian minister has a potentially much greater effect compared to that of a layperson. The form and degree of the speaker's influence among listeners thus help fact-finders determine the dangerousness of a given speech.

b. The Magnitude of the Harm

The nature and severity of the harm that the speech may cause should also be a considered when assessing the constitutionality of endangerment speech crimes. Generally speaking, criminal law's purpose is to prevent conduct that unjustifiably and inexcusably inflicts or threatens *grave harm* on others.[386] Endangerment speech crimes, however, often enable criminalization based merely on inflicting trivial or minimal harm or even no harm at all because their definitions do not require that the prohibited behavior result in grave harm.[387] The dated offense of public drunkenness is illustrative of the implications of the absence of this element.[388] This offense has been traditionally defined as "the appearance of a person who is under the influence of drugs or alcohol in a place open to the general public."[389] The justification for the offense was based on the risk stemming from the perpetrator's rowdy behavior, consisting mainly of various forms of speech and expression.[390] The Georgia statute, for example, targets speech that is "boisterousness, by indecent condition or act, or by vulgar, profane, loud, or unbecoming language."[391] Other jurisdictions, however, criminalize appearance only to the degree that it may endanger the perpetrator or other persons or property or annoy persons in the defendant's vicinity.[392] Importantly, these prohibitions extend above and beyond behaviors that endanger actual harm to others to cover behaviors that merely offend or annoy others. Criminalization of public

386 *Cf.* MODEL PENAL CODE § 250.7 cmt. 44 (1980).

387 *See supra* Part I.

388 Powell v. Texas, 392 U.S. 514, 530, 535 (1968) (affirming conviction under public intoxication law).

389 United States v. Francisco, No. CR 06-1015 JB, 2008 WL 2367253, at *4 (D.N.M. Feb. 1, 2008) (citing BLACK'S LAW DICTIONARY 663 (7th ed. 2000)); *see, e.g.*, IOWA CODE § 123.46(2) (2011); MISS. CODE ANN. § 97-29-47 (West 1971); VA. CODE ANN. § 18.2-388 (West 2014); W. VA. CODE § 60-6-9(a)(1) (1999); *see also* United States v. Garcia-Sandobal, 703 F.3d 1278 (11th Cir. 2013) (discussing the scope of these statutes).

390 *See, e.g.*, Martin v. State, 662 S.E.2d 185, 187–88 (Ga. Ct. App. 2008) (upholding conviction of defendants under public drunkenness statutes for boisterous behavior in public places involving different forms of speech and expression); Ridley v. State, 337 S.E.2d 382, 383–84 (Ga. Ct. App. 1985) (same). On trends towards decriminalizing public drunkenness, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 242–43 & nn.98–99 (2007).

391 GA. CODE ANN. § 16-11-41 (West 2014).

392 *See, e.g.*, DEL. CODE ANN. tit. 11, § 1315 (West 2014); 18 PA. CONS. STAT. ANN. § 5505 (West 2014); TEX. PENAL CODE ANN. § 49.02 (West 2014) (proscribing being intoxicated in public to the degree that a person may endanger himself or others).

drunkenness is, therefore, based on conduct merely giving offense to others, falling short of risking grave harm.[393] The criminalization of public drunkenness, despite only risking either trivial/minimal harm or mere offensiveness, provides yet another illustration of the overlooked problem of overcriminalizing speech.

The Court's existing jurisprudence further enables criminalization of speech without proof of grave harm.[394] For example, the *Brandenburg* test rejects a sliding scale approach, requiring high likelihood that the speech would lead to *any* law violation, regardless of the magnitude of its harm.[395] The Court adheres to a "probability thresholds" approach, under which the magnitude of harm is not taken under consideration.[396] When low-probability, high-magnitude dangers speech is concerned, the Court does not engage in a cost-benefit analysis, which balances between competing interests, including the gravity of the harm.

In contrast with the Court's approach, commentators note that an alternative position that predominates both within the academy and among the lower courts is a cost-benefit analysis.[397] This approach requires courts to balance the cost of dangerous speech—the harm that the expression is likely to cause if it is allowed—against the benefits one might expect the speech to produce. Speech warrants First Amendment protection only if its benefits outweigh its costs.[398] Proponents of using cost-benefit analysis to decide free speech cases concede that the magnitude of the harm is a key factor in such analysis.[399] For example, under a cost-benefit analysis the devastating harms of terrorism are a substantial cost that often outweighs the benefits of terrorism-related speech. Since the magnitude of harm inflicted by terrorism is so enormous, this factor heavily tips the scale towards precluding free speech protection, provided that the evidence demonstrates substantial likelihood of such harm.

Here, this Article advocates the application of a cost-benefit analysis to measure the constitutionality of all endangerment speech crimes. This approach would balance between competing interests by taking into consideration, among others, the magnitude of the harm. Under the proposal, the state would satisfy the "compelling interest" requirement only if it proves that the speech it wants to ban risks not

393 *See* 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 26 (1984) (defining the offense principle).

394 *See* Jed Rubenfeld, Comment, *A Reply to Posner*, 54 STAN. L. REV. 753, 758 & n.23 (2002).

395 *See* Larry Alexander, *Redish on Freedom of Speech*, 107 NW. U. L. REV. 593, 597–98 (2013) (contrasting *Brandenburg*'s approach with Judge Learned Hand's position that requires lower probability for more serious harms than for less serious harms).

396 *See* Masur, *supra* note 363, at 1309.

397 *Id.* at 1296.

398 *Id.*

399 *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 360–61 (2003).

just any harm but *grave* harm. A cost-benefit analysis would require the judge to determine the approximate probability that a potential speech-borne threat will materialize, estimate the magnitude of the damage that threat might cause, multiply the probability and magnitude to arrive at the expected outcome of permitting the speech to occur and then compare this outcome with the benefit that the judge expects the speech to confer.[400] Importantly, incorporating the magnitude of the harm requirement into a cost-benefit analysis cuts both ways. On one hand, it ensures that the risk of merely minimal or trivial harm is insufficient to justify criminalization of endangerment speech crimes. On the other hand, however, it also ensures that the greater the potential harm that may flow from the speech is, the more compelling interest the government has to criminalize that speech.

c. Least Restrictive Means

Another factor for evaluating the constitutionality of endangerment speech crimes is whether a criminal sanction, as opposed to less drastic forms of regulation, is the least restrictive means to satisfy the government's compelling interest to ban a given speech. Commentators have long noted that criminal law is the strongest formal condemnation society can impose on individuals.[401] It is a stringent weapon, capable of inflicting the harshest and most intrusive sanctions, subjecting defendants to numerous collateral consequences.[402] Criminal law should, therefore, be used selectively and discriminately and only as a last resort when alternative and less restrictive sanctions fail.[403]

Modern legislation often attempts to appear "tough on crime" and provide "quick fixes" to what the public perceives to be pressing problems by adopting harsh criminal sanctions.[404] This often results in hasty legislative responses, substituting excessive use of the blunt criminal law for more moderate regulation. The upshot is that criminalization often serves as a first, rather than a last, resort in curbing harmful conduct.[405]

The above legislative trend further contributes to the proliferation of endangerment speech crimes. Criminalizing cyberharassment is a

400 *See* Masur, *supra* note 363, at 1296 (explaining the components of the cost-benefit formula).

401 *See* Dubber, *supra* note 328, at 546.

402 *See* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999) (noting the collateral consequences of punishment).

403 *See* Douglas Husak, *The Criminal Law as Last Resort*, 24 OXFORD J. LEGAL STUD. 207, 211 (2004).

404 *See* Stuntz, *supra* note 10, at 529–31.

405 *See* Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 523 (2005).

case in point, as broadly worded prohibitions raise serious doubts as to whether these offer the least restrictive means to address its harms. Arguably, less intrusive measures, mainly civil and administrative remedies, including common law tort actions such as intentional infliction of emotional distress, invasion of privacy, and defamation, as well as injunctions, may suffice and be more effective in curbing the injuries of cyberharassment.[406] While a civil ban on cyberharassment may pass strict scrutiny review by satisfying the least restrictive means requirement, a criminal ban may fail to do so because civil measures offer less restrictive means to curtail this harmful speech.[407]

2. Internal Constraints on Criminalizing Speech

As previously suggested, strict scrutiny review alone is insufficient to draw the legal boundary between speech that warrants criminal sanction and one that does not.[408] The following factors, which stem from criminal law theory, provide additional limits on the scope of endangerment crimes.

a. The Perpetrator's Dangerousness

Establishing the defendant's dangerousness is a key factor in limiting the scope of endangerment speech crimes. Speech becomes more dangerous as the gravity of the potential harm increases. When the harm threatened is not sufficiently serious, the speech is not dangerous enough to justify criminalization. Moreover, a defendant's dangerousness may be defined in terms of the likelihood that her conduct will inflict harm.[409] Speech becomes more dangerous when there is substantial probability that it would result in harmful conduct. The dangerousness requirement is, thus, closely linked to the above constitutional constraints. But the essential role that dangerousness assessments play in the criminal justice system calls for a separate discussion of this requirement.

Dangerous determinations cut across the criminal justice system, prominently featuring in various stages of the criminal process.[410] Examples of situations in which the government engages in

406 Near v. Minnesota, 283 U.S. 697, 710–12 (1931). *But cf.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764–66 (1994).

407 *Cf. Near*, 283 U.S. at 715–16 (implying that the Constitution enables the distinction between permissible criminal and civil laws against libel on one hand and impermissible prior restraint of a publication).

408 *See supra* Part III.A.

409 *See* Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law is Predicated*, 66 N.C. L. REV. 283, 285–87 (1988).

410 *See* Slobogin, *supra* note 33, at 1–2.

dangerousness assessments include investigative stops by the police, pretrial detention, noncapital sentencing, and death penalty determinations.[411] Dangerousness evaluations, however, also play a more tacit role in the realm of substantive criminal law, mainly with respect to inchoate crimes. The function of conspiracy law's overt act requirement and attempt law's substantial step requirement is to demonstrate the defendant's dangerousness.[412] The premise underlying these requirements is that a perpetrator becomes dangerous only by transforming plans and thoughts into real action.

Demonstrating the perpetrator's dangerousness becomes more challenging in cases where criminalization is grounded on speech alone, unaccompanied by tangible action. As previously noted, legislatures often criminalize risk-creating speech without requiring evidence of the perpetrator's dangerousness.[413] Prosecutors in turn bring charges for mere speech, absent of proof of the defendant's dangerousness.[414] These trends, thus, result in diluting the significance of the dangerousness element. By insisting that criminalization of speech is contingent on clear proof of the perpetrator's dangerousness, the proposal advocated here reinvigorates the role that the dangerousness requirement must play in all endangerment speech crimes.

b. Distinguishing Criminal Wrongdoing from Civil Harm

Another constraint on the criminalization of speech calls for a more principled distinction between conduct appropriately targeted through criminal law and one better targeted through civil measures. Current law often proves unsuccessful in drawing a meaningful line between these two types of regulation. This shortcoming may be traced to an ambiguity concerning the notion of criminal harm. In recent years, the harm principle has arguably become the main justification for criminal prohibitions.[415] The term harm itself, however, is so elusive that it escapes a unanimous definition.[416] Over the years, expansive harm definitions have enabled legislatures to use this principle to justify a myriad of criminal prohibitions.[417] While originally the harm principle was perceived as a tool to limit the scope of criminal statutes, it

411 *Id.*

412 *See* Larry Alexander & Kimberly Kessler Ferzan, *Danger: The Ethics of Preemptive Action*, 9 OHIO ST. J. CRIM. L. 637, 644 (2012) (discussing the dangerousness requirement).

413 *See supra* Part I.

414 United States v. Gladish, 536 F.3d 646, 648 (2008) (elaborating on the significance of proving the defendant's dangerousness).

415 *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 131–32 (1999) (discussing the triumph of the harm principle).

416 *See* Brown, *supra* note 336, at 971.

417 *See* Harcourt, *supra* note 415, at 139–40 (explaining how the harm principle justifies criminal statutes).

now serves to expand the scope of criminal regulation.[418] The upshot of the overbroad definition of harm is that the criminal justice system conflates criminal and civil harms.

To some theorists, the prevention of harm is a sufficient basis for criminalization.[419] Others, however, insist that in addition to inflicting harm, an act should also have offended a moral wrong.[420] While the notion of harm cuts across injuries addressed both in civil and in criminal law, it is simply an inadequate measure for evaluating whether criminal regulation is warranted. A distinct tenet of criminal harm is that it stems from a morally wrongful and blameworthy conduct.[421] Civil harm, by contrast, does not hinge on culpable behavior.

Criminalizing endangerment speech is often inconsistent with these fundamental requisites. The case of verbal harassment is again illustrative. As previously suggested, using criminal sanctions to address the harms of cyberharassment is unwarranted in light of the numerous problems they create.[422] Constitutional constraints, however, would not suffice to limit criminalization because the grave harms inflicted by cyberharassment may justify civil remedies that might satisfy the First Amendment's least restrictive means requirement. While I concede that verbal harassment may inflict severe emotional harm, I also contend that this type of injury is typically not a criminal harm, therefore calling for a civil rather than a criminal sanction. Indeed, the intentional infliction of emotional harm is a recognized cause of action under tort law.[423] Additional constraints must include not only serious harm but also normatively wrongful conduct justifying criminal sanction. The latter requirement may be lacking with respect to adolescents' cyberharassment, where awareness of the elements of the offense is often absent. For these behaviors, civil sanctions may be more appropriate for achieving the goals of harm prevention.

c. Intent to Inflict Harm

A final limit that draws a clearer distinction between criminal and noncriminal harm is proof that the perpetrator *intended* to inflict harm, or at least demonstrated willful blindness to the risk of causing harm. While intent is already a fundamental element of attempts and conspiracies, it is not a requisite element of all endangerment speech crimes. Take, for example, the offense of disorderly conduct in public

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418 *See* Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS 1, 14 (2006).

419 *See* JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

420 *See* MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 649 (2010).

421 *See* FEINBERG, *supra* note 393, at 116–18.

422 *See supra* Part I.B.1.

423 RESTATEMENT (SECOND) OF TORTS § 46 (1965); *see also* Benjamin C. Zipursky, Snyder v. Phelps*, Outrageousness, and the Open Texture of Tort Law*, 60 DEPAUL L. REV. 473 (2011).

places, broadly proscribing various forms of behaviors, many of which are grounded solely in speech, arguably as a means to prevent the disturbance of public order.[424] In *Tobey v. Jones*, a person was charged with disorderly conduct after he had removed his clothes when requested by Transportation and Security Administration agents to submit to enhanced screening at the airport, in order to expose the text of the Fourth Amendment, which he had written on his bare chest.[425] Tobey claimed that he was protesting against the government's practice of enhanced screening, which he believed to violate his constitutional rights.[426] Notably, the offense's elements may be satisfied not only upon proof that the defendant intended to create a risk of public inconvenience, annoyance, or alarm, but also upon proof that he recklessly created such risk.[427]

Evaluating the firmness of defendants' intent is of particular significance in endangerment speech crimes because of the often-ambiguous nature of speech. A defendant may engage in speech that threatens future harm without intending that others engage in conduct that ultimately inflicts the harm. Since individuals may abandon their risky endeavors even at the last moment, criminalization of endangerment speech ought to be limited only to cases where the defendant's intent has already risen to the level of firm resolution to inflict harm. Merely taking a substantial and unjustifiable risk that the speech would result in harm should not suffice to uphold criminalization.

Moreover, since criminalizing speech may be warranted when speech is aimed at leading others to commit crimes, evidence should be required to prove that the defendant intended to influence the listeners' conduct, as opposed to their attitudes and beliefs.[428] Criminalizing speech is unjustified if the speaker's expression only aims at affecting others' ideas. While such speech may contribute to an atmosphere of violence, changing people's attitudes in itself is insufficient to justify criminalization.[429]

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424 *See, e.g.*, MD. CODE ANN., CRIM. LAW § 10-201 (West 2014); VA. CODE ANN. § 18.2-415 (West 2014) (proscribing disorderly conduct).

425 *See* Tobey v. Jones, 706 F.3d 379 (4th Cir. 2013).

426 *Id.* at 383–84. The attorney for Henrico County then dropped the charge. *Id.* Tobey sued the agents and police officers, and the Court of Appeals for the Fourth Circuit accepted the argument that his action stated a cognizable First Amendment claim. *Id.*

427 *See* VA. CODE ANN. § 18.2-415 (West 2014) (stating that liability may be based on a mens rea of recklessness).

428 *See* Miriam Gur-Arye, *Can Freedom of Expression Survive Social Trauma: The Israeli Experience*, 13 DUKE J. COMP. & INT'L L. 155, 179 (2003) (noting the difference between affecting attitudes and behaviors).

429 *Id.* at 177 (rejecting criminalization based on the creation of an atmosphere of violence).

B. *A Test Case*

Heinous crimes of mass violence under International criminal law provide a powerful test case for applying the proposed constraints. The purpose of turning to this specific context is twofold: first, to demonstrate that even in the area of genocide, the most horrific type of mass atrocities, endangerment speech does not always justify criminalization. Second, to offer an analogy between the large-scale effects of genocide and those of terrorism by suggesting that similar constraints should be applied in both areas.

Genocidal slaughter of the minority Tutsi by the majority Hutu was committed in 1994 in Rwanda, massacring between 500,000 and 800,000 Rwandans.[430] Several individuals were criminally charged in the International Tribunal for Rwanda for incitement to commit genocide.[431] Among them was Simon Bikindi, an immensely popular Rwandan pop singer, and an extremist Hutu, who was charged based on two speech-related events. One count stemmed from an incident in which Bikindi rode in a truck with a loudspeaker, in an area where Tutsis have been massacred, urging militant Hutu to kill all surviving Tutsis.[432] Another count alleged that Bikindi composed, performed, recorded, or disseminated musical compositions extolling Hutu solidarity, and characterizing Tutsi as enslavers of the Hutu. These compositions were subsequently deployed in a propaganda campaign to target Tutsi as the enemy and to instigate, incite, and encourage the Hutu population to separate themselves from the Tutsi and to kill them.[433] The songs were disseminated at political rallies, radio broadcasts, pre-killing meetings, and Bikindi's public speeches.[434]

The International tribunal convicted Bikindi for incitement to genocide based only on his ride with the loudspeaker, reasoning that it amounted to direct call to Hutu militants to commit genocidal acts against individual Tutsis. Importantly, the tribunal acquitted Bikindi of the songs-based count, holding that there was insufficient evidence to prove that Bikindi composed the songs with specific intent to incite the killings.[435]

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430 *See* Mark A. Drumbl, "*She Makes Me Ashamed to Be a Woman*": *The Genocide Conviction of Pauline Nyiramasuhuko, 2011*, 34 MICH. J. INT'L L. 559, 560 (2013).

431 *See* Benesch, *supra* note 385, at 489.

432 *See* Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607, 620–21 (2010).

433 *Id.* at 618–19.

434 *Id.* at 617.

435 *See* Benesch, *supra* note 385, at 493 ("[T]reaty law instructs only that to commit [the crime of] incitement to genocide: [(1)] one must have specific intent to cause genocide, and [(2)] the incitement must be direct and public." (footnote omitted)).

To consider the application of the above proposal on Bikindi's case, let us first frame the case in the context of American law by assuming that there was jurisdictional authority to prosecute Bikindi. It is reasonable to assume that in most jurisdictions, jurors would have convicted Bikindi of solicitation of murders or aiding and abetting these crimes based both on the truck ride event and on disseminating the songs.[436]

Applying the proposed limits on Bikindi's two speech-based charges would have resulted in conviction with respect to the truck ride event but in acquittal with respect to the inciting songs. As for the former charge, Bikindi would have been rightly convicted for explicitly calling to kill Tutsis because given the content and the context of his direct instruction to militants, there was a substantial probability that his call would result in genocidal acts. The basis for this conclusion rests with incorporating a probability assessment into the speech at issue. The magnitude of the harm—genocidal murders—plays an important role in a cost-benefit analysis of Bikindi's speech because the costs of such speech clearly outweigh its benefits. Moreover, a direct call to militants to engage in genocidal acts demonstrates Bikindi's dangerousness and his intent to cause genocide of Tutsis.

In contrast, under the proposal Bikindi would likely not have been convicted for disseminating these songs for the following reasons. First, the government would have likely been unable to prove that there was substantial probability that the artistic expression of national sentiments would ensue in genocidal acts. Admittedly, the songs amounted to hate speech, consisting of abhorrent messages against Tutsi. But even the prosecution characterized them only as "songs [extolling] Hutu solidarity" rather than direct calls for the killing of Tutsis.[437] Second, communicating extremist solidarity messages by an artist would have likely failed to prove Bikindi's dangerousness. Third, the evidence would have likely failed to establish Bikindi's intent to cause the genocide. Finally, even the suspect context, allegedly supporting conviction—given the facts that genocide had already occurred and Bikindi enjoyed immense influence among extremists—would have been insufficient to prove that the songs were likely to incite genocide. In sum, the guidelines provide a principled analytical framework for assessing the constitutionality of speech crimes, ensuring consistent outcomes in future cases.

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436 *See, e.g.*, 18 U.S.C. § 373 (2012) (prohibiting solicitation to commit a crime of violence); CAL. PENAL CODE § 653f (West 2014) (prohibiting the solicitation of commission of certain offenses).

437 *See* Gordon, *supra* note 432, at 619.

CONCLUSION

This Article has identified endangerment speech crimes as yet another example of legislatures' excessive use of the preventive paradigm in the criminal justice system. It has demonstrated the ways in which these crimes have resulted in the overcriminalization of speech, a phenomenon that carries a host of unintended consequences not only from the perspective of the First Amendment but also from the perspective of substantive criminal law.

The Article has argued that existing theories categorically excluding all speech acts from First Amendment scrutiny are responsible for the overcriminalization of speech. Having established that these theories are flawed, the Article has offered an alternative doctrinal scheme that would ameliorate the problem. The proposed analytical framework suggests that all speech crimes would be subject to strict scrutiny judicial review as well as to internal constraints arising from criminal law theory.

While subjecting all speech crimes to these constraints is arguably more protective of speech, this Article nowhere suggests that all endangerment speech crimes are entitled to broader First Amendment protection. Admittedly, the First Amendment must yield when speech threatens grave harm to the nation or to specific individuals. Subjecting endangerment speech crimes to the proposed constraints would not result in granting constitutional protection to speech that warrants criminal sanctions.

Many speech crimes are normatively justified and would pass constitutional muster, because the government would be able to demonstrate—based on a balancing process between competing interests—that the benefits of criminalization outweigh the costs it imposes on the right to speak. The proposal would therefore not frustrate the purposes of criminal law—mainly harm prevention and the deterrence of potentially dangerous conduct. Appropriate risk management, however, must account for the probability that grave harm would be inflicted. Applying strict scrutiny analysis to all endangerment speech crimes ensures that risk-creating speech is criminalized only once substantial likelihood of grave harm is established. Additionally, the use of the criminal law is justified only upon proof of truly dangerous behavior.