
# *GITLOW* REVISITED: DISENTANGLING IDEAS AND CRIMES VIA THE HARM PRINCIPLE

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## I. INTRODUCTION: *GITLOW*'S RELEVANCE TO DETERMINING WHEN HYPERBOLIC SPEECH MAY CONSTITUTE CRIME CONSISTENT WITH THE FIRST AMENDMENT

An enraged King Henry II famously asked several of his barons, while the court met in Normandy at Christmas in 1170, "Will no one rid me of this turbulent priest?!"[1] King Henry was referring, of course, to Thomas Becket, the incumbent Bishop of Canterbury and head of the Roman Catholic Church in England. Becket had steadfastly insisted on preserving the independence of the ecclesiastical courts and authority over bishopric appointments (much to King Henry's dismay). Subsequently, four of these same barons went from Normandy, in France, to Canterbury, in England, and proceeded to assassinate Becket, on December 29, 1170, while he was conducting a prayer service in Canterbury Cathedral.[2] The perpetrators (shockingly) escaped the king's justice.[3] Perhaps Becket received some small justice, however, when Pope Alexander III proclaimed him a martyr and saint on February 21, 1173.[4]

Could Henry II's musing, consistent with the requirements of the First Amendment, serve as a basis for criminal charges in the contemporary United States? On a first cut, one might answer this question negatively. After all, Henry II was in France; Becket was in England. His speech could not have produced an "imminent" threat to Becket's safety.[5] On the other hand, the barons who assassinated Becket did so only four days after Henry II pondered aloud his abstract desire to be rid of

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[1] GEORGE MCKINNON WRONG, THE BRITISH NATION: A HISTORY 99 (1903); *see* J.S. FLETCHER, THE STORY OF THE ENGLISH TOWNS: HARROGATE AND KNARESBOROUGH 22 (1920) (providing Henry II's famous quotation, noting the existence of some debate about whether Henry II actually said these words on December 24, 1170 or December 27, 1170, and reporting the place as "Bure, near Bayeux, in Normandy, where Henry was then keeping his court").

[2] FLETCHER, *supra* note 1, at 23–24. Regardless of whether Henry II uttered his famous words on December 24, 1170, the date traditionally credited, or December 27, 1170, four of his barons were back in England, heading for Canterbury, by December 28, 1170. *Id.* at 23.

[3] WRONG, *supra* note 1, at 99 (noting that "[t]he perpetrators of the murder were, it seems, never punished").

[4] MICHAEL STAUNTON, THOMAS BECKET AND HIS BIOGRAPHERS 10 (2006).

[5] *See* Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (holding that only speech "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" may be criminalized consistent with the First Amendment's Free Speech Clause).

"this turbulent priest"—which, for the Middle Ages, constitutes a rather rapid response.

Even if Henry II might not be on the hook for criminal incitement charges, which under the *Brandenburg* test require both a clear call to unlawful activity and circumstances in which the speaker's audience would likely act on the suggestion of unlawful action,[6] a clever prosecutor in today's United States could evade the *Brandenburg* rule entirely through the expedient of charging Henry II with solicitation or conspiracy (rather than incitement).[7] Would the First Amendment preclude solicitation charges on these facts? Or, for that matter, conspiracy charges? Moreover, should changing the criminal charges fundamentally affect the governing First Amendment analysis?

Current free speech doctrine offers a less than clear answer—but most likely solicitation charges would stand up against a Free Speech Clause challenge.[8] The controlling Supreme Court precedent on point, *Williams*, decided in 2008, seems straightforwardly to hold that proposing a criminal action enjoys absolutely no First Amendment protection.[9] The Supreme Court doubled down on this approach in 2023, in *Hansen*, holding that "[s]peech intended to bring about a particular unlawful act has no social value; therefore it is unprotected [under the First Amendment]."[10] To be sure, neither of these cases expressly holds that speech proposing a crime, in contexts where the speech activity clearly constitutes expression about a public policy question, may be criminally punished. Moreover, the facts in both cases do not involve advocacy related to matters of public concern. Nevertheless,

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[6] *See id.*

[7] *See* United States v. Hansen, 599 U.S. 762, 771–73, 783 (2023) (upholding against a First Amendment challenge solicitation charges under a federal statute that prohibits "encourag[ing]" or "induc[ing]" unlawful immigration into the United States).

[8] *See* United States v. Williams, 553 U.S. 285, 297–98 (2008) (observing that "[m]any long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities"); *see also Hansen*, 599 U.S. at 783 (holding that speech that facilitates a criminal act enjoys no protection under the Free Speech Clause of the First Amendment).

[9] *Williams*, 553 U.S. at 297 ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection.")

[10] *Hansen*, 599 U.S. at 783.

neither majority opinion bothers to distinguish speech with no relationship to democratic deliberation (for example, an effort to hire a hit man to commit a murder) from hyperbolic speech at a mass public rally (for example, an impassioned call to support illegal immigrants and immigration, and advocating taking direct actions to facilitate it, such as leaving jugs of water in the Arizona desert, because the speaker believes U.S. federal immigration policies are cruel and unjust).[11]

Accordingly, whatever residual doubts might exist about charging Henry II with incitement would greatly diminish if a prosecutor were to charge solicitation or conspiracy instead. This outcome, of course, does not make any sense normatively or as a matter of public policy. First Amendment protection for speech that arguably calls for unlawful action should not depend on the vagaries of the indictment.[12]

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[11] Shalini Bhargava Ray, *The Law of Rescue*, 108 CAL. L. REV. 619, 620–21, 648–50 (2020) (discussing the federal government's criminal prosecution of persons rendering aid in the form of water bottles in the California and Arizona desert along routes commonly used by unlawful immigrants). If the placing of water bottles along unlawful immigration routes violates federal law, then merely calling for the placement of water bottles along unlawful immigration routes could constitute either solicitation, conspiracy, or both—even if general and entirely abstract expressions of support or sympathy for unlawful immigrants would not. The Roman Catholic Church, in fact, both advocates and practices acts of Christian mercy directed toward immigrants regardless of whether or not they are lawfully present in the United States; this arguably makes the organization a vast criminal conspiracy under the logic of *Hansen* because advocating material support for unlawful immigrants "encourages" or solicits unlawful entry into the United States. *See* United States Conference of Catholic Bishops, *Catholic Social Teaching on Immigration and the Movement of Peoples*, https://perma.cc/U5PA-WDPB ("Jesus reiterates the Old Testament command to love and care for the stranger, a criterion by which we shall be judged: 'For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me' (Mt 25:35)."); United States Conference of Catholic Bishops, *Welcoming the Stranger Among Us: United in Diversity*, Nov. 15, 2000, https://perma.cc/F89F-8ESX ("Without condoning undocumented migration, the Church supports the human rights of all people and *offers them pastoral care, education, and social services, no matter what the circumstances of entry into this country*, and it works for the respect of the human dignity of all—especially those who find themselves in desperate circumstances." (emphasis added)).

[12] The Supreme Court has, at least on one occasion, taken pains to suggest that the social harm associated with speech activity, rather than the crime charged, should govern whether the government may criminalize pure speech. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253–54 (2002). Writing for the majority, Justice Anthony Kennedy explains that:

> The government may not prohibit speech because it increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana*, 414 U.S. 105, 108

In the area of tort law, for example, the relevant cases reflect a single animating idea—namely that regardless of the specific tort the plaintiff has alleged (libel, intentional infliction of emotional distress, intrusion upon seclusion, etc.), the same general free speech rules will apply and limit the government's ability to use civil juries to censor speech that offends prevailing community norms and sensibilities.[13] By way of contrast, in the criminal law context, the Justices to date have developed only crime-specific rules without articulating a more generalized set of

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(1973) (per curiam). The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). There is here no *attempt, incitement, solicitation, or conspiracy*. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

*Id.* (emphasis added). This language strongly suggests that the First Amendment would still protect the speech activity being discussed—virtual child pornography or pornography featuring youthful-looking adults, that does not involve the exploitation of any actual real children—if the U.S. Attorney were to shift gears and charge "attempt, incitement, solicitation, or conspiracy" rather than a violation of the Child Pornography Protection Act. Unfortunately, most of the Supreme Court's cases deploying the First Amendment to disallow the criminalization of pure speech as a crime do not make as clear that changing the crime charged will not affect the First Amendment analysis. *See infra* text and accompanying notes 33–57.

[13] *See* Snyder v. Phelps, 562 U.S. 443 (2011) (limiting the use of the intrusion upon seclusion tort in order to protect highly offensive speech about matters of public concern from censorship based on a standard of "outrageousness"); Hustler Magazine, Inc., v. Falwell, 485 U.S. 46 (1988) (limiting the imposition of tort liability for intentional infliction of emotional distress claims for public figures to circumstances in which the plaintiff proves, by clear and convincing evidence, that a published article includes a false statement of fact made with actual malice and holding that a defendant's subjective intent to cause severe emotional distress was entirely irrelevant to the requisite First Amendment analysis); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (substantially limiting the ability of a public official plaintiff to recover damages for libel by requiring a public official plaintiff to prove falsity and also establish "actual malice" on the defendant's part, meaning publication with actual knowledge of falsity or reckless indifference to the truth or falsity of the damaging statement of fact of and concerning the plaintiff). Indeed, in *Snyder*, the plaintiff asserted not one, not two, but *five* state law torts—presumably in an effort to escape the gravitational pull of *Sullivan* and its progeny. *See Snyder*, 562 U.S. at 550 (reporting that Albert Snyder's complaint set forth claims for "defamation, publicity given to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy"). The 8–1 *Snyder* majority found that the Free Speech Clause precluded the imposition of civil liability on the two remaining torts at issue in the

First Amendment principles that establish clear limits on treating pure speech as a crime (as opposed to a tort). Simply put, First Amendment protection for speech activity that the government deems to be criminal should depend on the social value, and the social cost, of the expressive activity, as well as on its relationship to the ongoing project of democratic self-government.[14] To borrow Justice Amy Coney Barrett's framing device in *Hansen*, speech that possesses some "social value" should enjoy some level of First Amendment protection (even if it directly calls for unlawful action).[15]

The problem of reconciling criminal law with the Free Speech Clause remains both current and pressing. Indeed, one need not go back to the time of Henry II to find an example of an important political leader engaging in speech that could be viewed as calling for unlawful action (whether denominated as "incitement," "solicitation," or even "conspiracy"). On January 6, 2021, then-President Donald Trump told his followers, toward the end of a mass rally on the Ellipse (a park located about two miles from the U.S. Capitol) that "[W]e fight. We fight like hell.

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appeal (intrusion upon seclusion and intentional infliction of emotional distress, plus a civil conspiracy claim annexed to these), with the lower federal courts having already tossed out the others and Albert Snyder not appealing these lower court rulings. *See id.* at 560 ("Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts."). The federal courts' message is crystal clear: When a tort claim rests on speech activity, the Free Speech Clause will significantly affect the ability of a civil jury to impose civil liability. In my view, a parallel general free speech principle should apply when the government seeks to treat pure speech as a crime. To be sure, the application of free speech principles might vary somewhat from crime to crime, just as it does with torts. *See id.* at 459–60 (refusing to sustain the jury's verdict based on the intrusion upon seclusion claim because the Westboro protesters spoke out about a matter of public concern, did not intrude upon either the funeral mass or burial service, and did not constitute a "captive audience" unreasonably forced to observe the protest activity).

[14] *See generally* ASHUTOSH BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 3–6 (2020) (arguing that all four of the First Amendment's clauses related to expressive freedom exist to facilitate democratic self-government and that the First Amendment's principal purpose is enabling the process of democratic deliberation essential to democracy).

[15] *Hansen*, 599 U.S. at 783.

And if you don't fight like hell, you're not going to have a country anymore."[16] A bit later, he said "So let's walk down Pennsylvania Avenue."[17]

Are either of these statements "incitements" to unlawful action under governing First Amendment doctrine? And, if not, does it much matter given that a sufficiently determined prosecutor could easily criminally charge these deliberately ambiguous statements as either solicitations or conspiracies rather than incitements?[18] A solicitation or conspiracy conviction might still be hard to obtain because of the reasonable doubt standard and the inherent ambiguity of the President's language—but a trial judge would not reflexively dismiss the charges on First Amendment grounds. Thus, the potential chilling effect of conspiracy and solicitation charges currently is considerably wider and deeper than for incitement charges.[19]

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[16] *Transcript of President Trump's Speech at Rally Before U.S. Capitol Riot*, AP NEWS (Jan. 6, 2021), https://perma.cc/V2HG-EKZ7.

[17] *Id.*

[18] *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951) (sustaining federal criminal convictions based solely on speech, association, and assembly-related activities); United States v. White, 610 F.3d 956, 960–61 (7th Cir. 2010) (upholding the constitutional validity of a solicitation charge, in the context of a juror intimidation scheme, because "[s]peech integral to criminal conduct, such as fighting words, threats, and solicitations, remain categorically outside [the First Amendment's] protection"); United States v. Rahman, 189 F.3d 88, 103–04, 107–08, 114–15 (2d Cir. 1999) (upholding conspiracy and solicitation criminal convictions, based on incendiary public statements calling for jihad against the United States). *But cf.* Watts v. United States, 394 U.S. 705, 708 (1969) (holding that First Amendment does not permit the criminalization of "political hyperbole" as a criminal threat because "[t]he language of the political arena . . . is often vituperative, abusive, and inexact"). *Dennis* and *White* are very different cases in my view. No evidence existed of any social harm flowing from the expressive activities charged as crimes in *Dennis*. By way of contrast, however, the behavior in *White* sought to punish with violence the foreman of a federal criminal petit jury that voted to convict Mathew Hale of federal crimes—which clearly constitutes the kind of legally cognizable harm that the criminal law should be able to punish without transgressing the Free Speech Clause.

[19] *But cf. Rahman*, 189 F.3d at 115 ("After *Dennis*, the Court broadened the scope of First Amendment restrictions on laws that criminalize subversive advocacy. It remains fundamental that while the state may not criminalize the expression of views—even including the view that violent overthrow of the government is desirable—it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action."). The problem here is that the Second Circuit is proposing a distinction without a difference. *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). Justice Scalia unfortunately proposes the exact same distinction in *Williams*—and thereby makes the same mistake. Williams, 553 U.S. at 298–99 ("To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.").

This raises an important, and difficult, free expression question, namely: For purposes of the First Amendment's Free Speech Clause, should charging decisions prefigure the ability of the government to treat speech as a crime? It seems reasonably clear that, as in the tort law context, the ability to proscribe and punish pure speech in the criminal law context should turn on whether the speech presents a serious risk of actually causing social harm and a concomitant showing that, on the facts at bar, the potential harm clearly exceeds the social value of the speech activity. The harm principle, rather than the crime charged, should determine the protected status of speech that arguably calls for unlawful action.

Justice Oliver Wendell Holmes, in his iconic dissent in *Gitlow v. New York*,[20] fully appreciated this point. In his view, the government may criminalize speech, including speech calling for unlawful action, only if it can show the speech actually causes or presents a serious risk of causing significant social harm.[21] In the absence of such a showing, the First Amendment should protect speech and speaker alike.[22] Unfortunately, however, the contemporary Supreme Court's approach to bringing the Free Speech Clause to bear in the general area of criminal law has been opaque and arguably inconsistent. This lack of jurisprudential clarity gives rise to a serious chilling effect: Would-be speakers must choose their words very carefully, particularly if the speaker's organization supports or previously has engaged in unlawful

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Both *Claiborne Hardware* and *Watts* feature speech that, on its face, involved threats against particular individuals and not just "abstract advocacy." NAACP v. Claiborne Hardware Co, 458 U.S. 886, 902, 928–29 (1982) (holding speech encouraging support for a boycott of racially discriminatory businesses protected under the Free Speech Clause despite one speaker stating "[i]f we catch any of you going into any of them racist stores, we're gonna break your damn neck"); Watts v. United States, 394 U.S. 705, 706, 708 (1969) (holding protected under the Free Speech Clause "[i]f they ever make me carry a rifle the first man I want to get in my sights is [the President]"). Whatever salient differences exist between *Rahman* and *Williams*, on the one hand, and *Claiborne Hardware* and *Watts* on the other, have nothing whatsoever to do with the "abstractness" of the relevant speech the government sought to criminalize.

[20] 268 U.S. 652, 672, 673 (1925) (Holmes, J., dissenting).

[21] *See id.* ("If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question.").

[22] *See id.* (observing that, had Gitlow been involved in an active conspiracy to actually overthrow the government, "[t]he object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences").

direct action, even if all that takes place at a particular public rally involves hyperbolic speech about matters of public concern and governance.

Important First Amendment precedents on speech as crime or tort, notably including *Watts v. United States*,[23] *Brandenburg v. Ohio*,[24] *Hess v. Indiana*,[25] *NAACP v. Claiborne Hardware Co.*,[26] and *Virginia v. Black*[27] all point in one direction—toward disallowing the imposition of civil or criminal liability unless the government can convincingly show that the speech at issue caused or was highly likely to cause cognizable social harm. The results in the Supreme Court's recent cases sustaining criminal liability based solely on speech activity, where the operative facts and circumstances clearly relate to a cognizable social harm, also seem consistent with a general constitutional rule that the government may criminalize speech standing alone when it causes identifiable social harm: *Williams*[28] (involving solicitation charges related to an offer to sell child sexual abuse materials) and *Hansen*[29] (involving a fraud scheme related to illegal immigration). Pointing in the exact opposite direction, but nevertheless still on the books as a constitutional precedent, stands *Dennis v. United States*,[30] which sustained federal criminal conspiracy charges against the entire leadership of the Communist Party USA in the utter absence of any credible evidence of record that their expressive activities actually caused any social harms.[31]

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[23] 394 U.S. 705, 706–08 (1969).

[24] 395 U.S. 444, 447–48 (1969).

[25] 414 U.S. 105, 107–09 (1973).

[26] 458 U.S. 886, 920, 927–31 (1982).

[27] 538 U.S. 343, 366–68 (2003).

[28] United States v. Williams, 553 U.S. 285, 299 (2008) ("In sum, we hold that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.").

[29] United States v. Hansen, 599 U.S. 762, 771, 773, 781–83 (2023) (sustaining federal criminal charges for soliciting and facilitating unlawful immigration into the United States and rejecting a First Amendment-based objection to this application of the statute in the context of a fraudulent scheme to have noncitizen adults adopted by U.S. citizens).

[30] 341 U.S. 494 (1951).

[31] *Id.* at 502–04, 510–11 (upholding criminal convictions under the Smith Act, 18 U.S.C. § 2385, for organizing a group to and/or willfully advocating, abetting, or teaching, the overthrow of "any government" in the United States by "force or violence" against a Free Speech Clause challenge). The *Dennis* majority conflates "discussion" and "advocacy" and allows the government to punish speech alone in the absence of any evidence that it would actually produce social harm. *See id.* at

With the exception of *Dennis*, the Supreme Court's decisions, in practice if not in theory, seem to turn on whether the speech at issue either caused or was highly

502, 511 (noting that the Smith Act "is directed against advocacy, not discussion" and finding "the requisite danger existed" of the violent overthrow of the federal government despite the absence of any evidence that the defendants had taken any actions directed toward bringing that outcome about). The concurring opinions are no better on this count. *See id.* at 548 (Frankfurter, J., concurring) ("It is true that there is no divining rod by which we may locate 'advocacy.' Exposition of ideas readily merges into advocacy."). Justice Felix Frankfurter acknowledges that ideas and advocacy are really one and the same, citing Justice Holmes in *Gitlow*, *see id.*, but then astonishingly concludes that, on the record, "[t]he object of the conspiracy before us is so clear that the chance of error in saying that the defendants conspired to advocate rather than to express ideas is slight." *Id.* The key point, for First Amendment purposes, should have been the absence of any evidence suggesting that the defendants' activities actually caused any legally cognizable harm. *See id.* at 561 (Jackson, J., concurring) ("Activity here charged to be criminal is conspiracy—that defendants conspired to teach and advocate, and to organize the Communist Party to teach and advocate, overthrow and destruction of the Government by force and violence. *There is no charge of actual violence or attempt at overthrow.*") (emphasis added). Jackson mocks the dissenters, Justices Hugo L. Black and William O. Douglas, for their "lamentation" regarding "the injustice of conviction in the absence of some overt act," but dismisses these objections because "the shorter answer is that no overt act is or need be required." *Id.* at 574. He adds that "[c]ommunication is the essence of every conspiracy, for only by it can common purpose and concert of action be brought about or be proved." *Id.* at 575.

Justices Black and Douglas surely had the better of this argument when, like Holmes in *Gitlow*, they rejected the federal government's effort to criminalize speech unbrigaded with any actual criminal actions. *See id.* at 579 (Black, J., dissenting); *id.* at 581, 584 (Douglas, J., dissenting). I find myself in general agreement with Justice Douglas's objection that "[t]o make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions." *Id.* at 584. Moreover, "[t]hat course is to make a radical break with the past and to violate one of the cardinal principles of our constitutional scheme." *Id.* For an excellent general overview, critique, and explanation of the *Dennis* majority's decision to reject Holmes and embrace the criminalization of seditious thoughts, see Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115 (2005). To avoid a future *Dennis*, Professor Wells provides a very sensible checklist of requirements that the federal courts should demand that the government meet in order to punish speech advocating unlawful conduct as a conspiracy. *See id.* at 218–19. All of these proposed considerations seek to ensure that the government can obtain a criminal conviction for conspiracy "only when it is clear that it will cause serious and imminent harm, the speaker intends this result, and there is no other plausible explanation for the speaker's behavior." *Id.* at 219. This suggested approach aligns well with my suggestion that the government should be permitted to criminalize speech only if it can prove the speech causes a cognizable legal harm.

likely to cause serious social harm (or legally cognizable harm, to use language deployed by Justice Anthony Kennedy in his plurality opinion in *U.S. v. Alvarez*).[32] What's more, despite the majority opinions in *Williams* and *Hansen* not placing much, if any, emphasis on the speech activity at issue being entirely irrelevant to democratic deliberation, both cases plainly involve facts that do not implicate (at all) speech about governance or matters of public concern. Strictly speaking, then, neither case required the Justices to speak to the First Amendment rules that would apply when speech calling for a criminal act is part and parcel of public advocacy or a protest. The problem, in my view, is that to date the Justices have not adequately identified and then explicated the harm principle—and this holds true both in cases reversing and sustaining criminal conviction for speech activity alone. Simply put, the Free Speech Clause should require the government to establish actual harm (or a very high probability of it) before treating speech activity unbrigaded with any overt criminal acts as a crime.

To be sure, the Supreme Court has modified the law of criminal incitement to ensure that the government cannot use this crime as a general weapon for censoring speech that it dislikes.[33] The same can be said for the criminal law of threats.[34] It cannot be said, however, for all criminal laws that potentially involve not merely speech, but political speech. Clever public prosecutors could use solicitation and conspiracy charges, no less than incitement charges, as engines of government censorship. At the same time, of course, some solicitations and conspiracies plainly cause "legally cognizable harm[s]" and punishing them as crimes does not offend baseline First Amendment values. The critical issue here is distinguishing reliably and consistently between speech calling for unlawful action that causes, or presents a serious risk of causing, a legally cognizable harm and speech that does not, even if the speech is perhaps unwise, intemperate, or highly offensive. The devil, of course, is in the details in this area of free speech law as in so many others.

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[32] *See* 567 U.S. 709, 719–21 (2012) (plurality opinion) (holding that the Free Speech Clause prevents the government from criminalizing false speech based solely on its falsity, but rather may do so only when "some other legally cognizable harm" arises from a false statements of fact, as holds true for false statements in cases involving defamation, perjury, and fraud, which all involve false speech that causes legally cognizable harm).

[33] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

[34] Watts v. United States, 394 U.S. 705, 706, 708 (1969).

At present, no Supreme Court decision exists that squarely holds, as with cross burnings and other "true threats," that speech calling for unlawful activity, or suggesting joint unlawful action, must actually *cause* a legally cognizable harm. By way of contrast, however, false speech cannot be criminalized absent the government pointing to a harm that the false speech actually caused or foreseeably could cause.[35] It lies beyond the scope of my immediate project to set the precise constitutional standard that should be a precondition to criminally charging pure speech as a crime. At a minimum, however, the Free Speech Clause should require the government to show that a defendant's subjective intent was to bring about a crime otherwise within the power of the state to proscribe (for example, seditious libel would be excluded[36]) on facts and circumstances where the speech activity, standing alone, would cause social harm or would present a significant risk of causing it.

The second part of my proposed test mirrors the constitutional standard currently used in public school student speech[37] and government employee speech cases.[38] Of course, one could take the view that *Tinker* and *Pickering/Connick* have

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[35] United States v. Alvarez, 567 U.S. 709, 719–20 (2012) (plurality opinion).

[36] *But cf.* Willa Pope Robbins, *Stephen Miller Floats Arresting JB Pritzker for 'Seditious Conspiracy,'* MEDIAITE, Oct. 24, 2025, 9:03 PM, https://perma.cc/FUS5-GRG5 (reporting that "Deputy White House Chief of Staff for Policy Stephen Miller told Fox host Will Cain on Friday that anyone attempting to interfere with ICE operations could be arrested for engaging in a 'criminal conspiracy' against the United States, including Illinois Governor JB Pritzker" and, in addition, "as you to [sic] get up the scale of behavior, you obviously get into seditious conspiracy charges, depending on the conduct"). It bears noting that most, albeit not all, "conduct" taking place proximate to Immigration and Customs Enforcement (ICE) facilities in Chicago, and elsewhere as well, consists solely of public protests against the agency's draconian immigration enforcement policies and tactics.

[37] *See* Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 509–10, 514 (1969) (holding that a public school district may censor a student's on-campus speech only if the speech either causes or is highly likely to cause material and substantial disruption to the school's regular educational mission).

[38] Pickering v. Bd. of Educ., 391 U.S. 563, 568, 570–72 (1968) (holding that a public school district could not fire a teacher based on critical comments set forth in a letter published by the local newspaper unless the teacher's continued presence would be unduly disruptive of the government's workplace); *see* Connick v. Myers, 461 U.S. 138, 145–46, 150–52 (1983) (limiting *Pickering*'s scope of application to speech related to a matter of public concern but reaffirming *Pickering*'s holding that if such speech causes material disruption to a government workplace, the government employer may fire the public servant even if the public servant's speech would have been protected against criminal punishment or civil liability).

proven to be insufficiently protective of speech and unduly credulous toward government claims that, if unregulated, speech could cause material disruption to a public school classroom or a government workplace. *Alvarez* also fails to define or explain with much granularity the kind or degree of social harm needed to justify proscribing false speech.[39] At a minimum, however, the requisite standard should be *at least as demanding* as the *Tinker* and *Pickering/Connick* tests. Indeed, because the imposition of criminal sanctions (notably including imprisonment and thus loss of one's personal liberty) is at stake in criminal conspiracy and solicitation cases, rather than school or workplace discipline, a more demanding, more speech-protective constitutional standard arguably should obtain.

To take one example, federal judges and free speech scholars alike do not hesitate much (if at all) in concluding that civil and criminal fraud laws do not violate the First Amendment. Consumer fraud plainly imposes a legally cognizable harm on its victims.[40] The same can be said for criminal perjury and the laws that criminally punish it.[41] But a call to unlawful action, whether charged as incitement, solicitation, or a conspiracy, might or might not present a serious risk of causing social harm.

Unfortunately, to date the Supreme Court has done a rather poor job of explaining when the government can criminally punish speech, standing alone, as a crime. Instead, the Justices have told us that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[42] So too, "[s]peech intended to bring about a particular unlawful act has no social value;

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[39] *See generally* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of legally obscene hardcore pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

[40] Donaldson v. Read Magazine, Inc., 333 U.S. 178, 190 (1948) (noting that criminal proscriptions against fraud have "always been recognized in this country" and this proposition "is firmly established").

[41] United States v. Dunnigan, 507 U.S. 87, 97 (1993) ("To uphold the integrity of our trial system, we have said that the constitutionality of perjury statutes is unquestioned."); *see Alvarez*, 567 U.S. at 720–21 ("Perjury undermines the function and province of the law and threatens the integrity of judgments that are the basis of the legal system.").

[42] United States v. Williams, 553 U.S. 285, 297 (2008).

therefore, it is unprotected."[43] But these are conclusions devoid of meaningful free expression analysis. It also bears noting that these statements were both issued in cases involving behavior that clearly caused, or was highly likely to cause, significant social harms.[44] Rather than totalizing statements about criminal activity being outside the First Amendment's zone of protection—to be sure, coupled with vague reassurances that mere "abstract advocacy" remains robustly protected under the First Amendment—we need to know when speech can be a crime in the first place. Because of the significant potential chilling effect of being charged with a crime, ambiguity about the use of solicitation and conspiracy charges to punish pure speech will exact a high toll on expressive freedom in the contemporary United States.

Many Supreme Court precedents involving the government attempting to criminalize speech hold squarely that the speech enjoys substantial protection. Perhaps most famously, *Brandenburg v. Ohio* disallows the imposition of criminal liability for calls to racialized violence (or, for that matter, in theory other kinds of violence as well), unless "advocacy of the use of force or of law violation" involves speech "directed to inciting or producing imminent lawless action" in circumstances where the speech "is likely to incite or produce such action."[45] Accordingly, "[a] statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments" because "[i]t sweeps within its condemnation speech which our Constitution has immunized from government control."[46]

The same approach applies to other crimes as well. For example, only a "true threat," rather than "political hyperbole," can serve as the basis for criminal charges—even when speech involves an arguable call for the assassination of the President.[47] This general approach also limits the use of state law disorderly conduct charges to punish an angry protester who told a law enforcement officer that those participating in a public protest of the Vietnam War would be back out on the streets—order to disperse or no. The crucial fact that led the Supreme Court to

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[43] United States v. Hansen, 599 U.S. 762, 783 (2023).

[44] *See infra* text and accompanying notes 156–163.

[45] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[46] *Id.* at 448.

[47] Watts v. United States, 394 U.S. 705, 708 (1969).

void the criminal conviction? No one, save for the local sheriff, appears to have heard the defendant's call to arms (much less acted on it).[48] When a call to criminal action is neither heard nor heeded, no cognizable legal harm results—yet in *Hess* a public prosecutor nevertheless sought and obtained a criminal conviction for disorderly conduct based on an utterly futile call to arms. Indeed, on these facts punishing the speaker looks more like viewpoint discrimination than ordinary criminal law enforcement. Thus, in addition to incitement, the Supreme Court has constitutionalized the criminal law of threats and disorderly conduct in order to create adequate breathing room for intemperate political speech.

What separates, on the one hand, decisions like *Williams* and *Hansen*, from, on the other, decisions such as *Brandenburg*, *Claiborne Hardware*, *Watts*, and *Hess* (hiving off *Dennis* for the moment)? Justice Oliver Wendell Holmes's iconic dissenting opinion in *Gitlow v. New York* arguably provides the key to identifying the First Amendment line that should, in theory, separate protected hyperbolic expression, including direct calls for unlawful action not seriously intended and not acted upon, from crime. In the balance of this Essay, drawing on Justice Holmes's justifiably famous *Gitlow* dissent, I will attempt to show that a harm principle provides the constitutional rationale that the federal courts are actually using in practice to distinguish protected speech from speech as criminal activity.

This Essay also will argue that rather than leaving the harm principle as an unstated or an implied constitutional rule, the federal courts need to identify and explain, ideally above the line, how the harm principle works in order to provide better guidance to prosecutors, defense attorneys, judges, and legislators alike. In fact, the Supreme Court has identified and deployed the harm principle overtly and above the line in only one important First Amendment case—*United States v. Alvarez*.[49] Under this precedent, the government may criminally punish false speech only in circumstances where the false speech causes a cognizable legal harm.[50] The federal courts need to generalize the *Alvarez* approach and apply it across all crimes that involve only speech.

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[48] Hess v. Indiana, 414 U.S. 105, 108–09 (1973).

[49] 567 U.S. 709, 719 (2012) (plurality opinion).

[50] *See id.* at 716–23.

Thus, this same general constitutional analytical approach should apply in cases involving incitement, solicitation, conspiracy, and attempt. The harm principle provides a far better, clearer, and more coherent constitutional yardstick than *Brandenburg*'s "imminence" standard because the imminence requirement simply serves as a proxy for social harm. It is the harm, not the timing of its realization, which should determine whether speech can constitute a crime. This also explains lower court decisions, such as *Rice v. Paladin Enterprises, Inc.*,[51] that strain mightily to sustain liability even when an immediate cause and effect temporal relationship between speech and socially harmful behavior is plainly absent. Moreover, identifying and explicating the harm principle would also go a long way toward cutting off bogus First Amendment arguments in cases where the defendant plainly seeks to facilitate a crime such as jury tampering.[52]

In sum, this Essay proposes a different, more holistic approach to bringing the criminal law to bear on speech. Just as the Supreme Court's effort to reconcile tort law with the imperatives of the Free Speech Clause did not end with *New York Times Co. v. Sullivan*[53] and the tort of libel, free speech principles and values should

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[51] 128 F.3d 233, 253–56, 262–63 (4th Cir. 1997) (holding that aiding and abetting-based civil liability could be imposed for the publication of *Hit Man*, a how-to guide for committing a murder without being caught, and rejecting a First Amendment objection premised on *Brandenburg* because "one finds in *Hit Man* little, if anything, even remotely characterizable as the abstract criticism that *Brandenburg* jealously protects").

[52] *See*, *e.g.*, United States v. White, 610 F.3d 956, 960–61 (7th Cir. 2010) (rejecting, quite correctly, a strained free speech claim related to an effort to terrorize the foreman of a criminal petit jury that voted to convict a defendant, but doing so using the same problematic "advocacy" versus "discussion" dichotomy that the Supreme Court deployed in *Dennis*). Simply stated, the reason for treating William White's solicitation of violence against a juror in Mathew Hale's federal criminal trial was that such speech causes significant social harm that the criminal law may constitutionally seek to punish and deter—not that White was engaged in "advocacy" rather than "discussion."

[53] 376 U.S. 254, 279–86 (1964) (holding that a public official cannot recover against a media defendant for libel absent a showing, by clear and convincing evidence, of actual malice).

inform criminal law enforcement too.[54] A careful review of the relevant cases involving speech-crimes shows that, in all save one case (namely *Dennis*),[55] the speech activity clearly caused, or had an obvious potential for causing, a serious social harm. The federal courts should apply the harm principle to any and all speech crimes—not just to the crimes of incitement and threats. Moreover, switching the crime charged from incitement to solicitation, for example, should not render the First Amendment wholly irrelevant any more than changing torts from libel to intentional infliction of emotional distress would foreclose a meaningful First Amendment analysis.[56] And yet at worst this is unfortunately more or less how things seem to work today and, at best, the Justices have not taken sufficient care to disentangle speech integral to committing a crime from hyperbolic political advocacy.

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[54] Snyder v. Phelps, 562 U.S. 443, 455–61 (2011) (disallowing the imposition of tort liability for intrusion upon seclusion and civil conspiracy because the imposition of tort liability for otherwise lawful protest activity in a public forum would permit civil juries to censor unpopular speakers and the ideas that they seek to propagate and explaining that "[a]s a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate"); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53–56 (1988) (disallowing on free speech grounds the imposition of tort liability for intentional infliction of emotional distress where the plaintiff was a public figure because "in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment"). Quite obviously, if a civil jury could use tort law to impose bankrupting damages on unpopular speakers and groups, the ability of such groups to participate in the process of democratic deliberation essential to our project of democratic self-government would completely cease to exist. *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 623–26, 665–69 (1990) (discussing in some detail how *both* the concepts of "outrageousness" and "public concern" can facilitate majoritarian censorship of highly offensive, contrarian viewpoints that minorities, broadly defined, seek to propagate).

[55] Dennis v. United States, 341 U.S. 494, 502, 510–11 (1951).

[56] *See Falwell*, 562 U.S. at 55 ("'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."); *see also* Post, *supra* note 54, at 668–69 (discussing why the First Amendment should protect the ability of individuals and groups alike to determine for themselves appropriate topics and ideas for public debate).

Part II of this Essay discusses, in some detail, Justice Oliver Wendell Holmes's iconic dissent in *Gitlow v. New York* and his argument that all ideas are potentially incitements to action as well. Because ideas and actions are inexorably intertwined, a legal test that turns entirely on a federal judge arbitrarily applying one label or another is really no test at all. Part III then considers the Supreme Court's treatment of speech crimes and argues that, although the Justices have so far never clearly articulated the harm principle beyond *Alvarez*, this concept clearly and best explains the outcomes in all of the relevant cases save one (again, *Dennis*).

In Part IV, I draw upon Justice Anthony Kennedy's important opinion in *United States v. Alvarez* to argue that speech can constitute a crime consistent with the Free Speech Clause of the First Amendment *only* when the government can prove, beyond a reasonable doubt, that it causes or would be highly likely to cause some kind of legally cognizable harm.[57] Consistent with John Stuart Mill's cogent arguments in *On Liberty*,[58] and the plurality's holding in *Alvarez*,[59] the fact that speech offends or scandalizes many within the community, or might even have bad tendencies, must not be constitutionally sufficient to justify the imposition of criminal punishment. Part IV also explicates the harm principle and how the federal courts should deploy it consistently across the criminal law to limit the potential censorial effects of speech crimes. Finally, Part V provides a brief summary and conclusion.

For present purposes, Justice Holmes' recognition that all ideas are also incitements constitutes his most important contribution in *Gitlow* to theorizing how the freedom of speech and punishment of crime should be reconciled. Because every idea is, potentially, an incitement, giving the government carte blanche to punish incitements would necessarily involve giving it a free hand to extirpate ideas that it dislikes from the marketplace of ideas. But the risk of government censorship is not limited to the crime of incitement; it exists too when the government charges a solicitation, a conspiracy, an attempt, a threat, or disorderly conduct. In any given case, the government should have the burden of showing that speech serving as the basis for a criminal charge (of any type) either caused or was highly likely to cause a serious social harm; if the government cannot meet this burden, the federal courts

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[57] *See supra* text and accompanying notes 34–41.

[58] *See infra* text and accompanying notes 80–89.

[59] United States v. Alvarez, 567 U.S. 709, 716–22 (2012).

should hold the speech protected under the Free Speech Clause of the First Amendment.

## II. JUSTICE HOLMES ON IDEAS AS INCITEMENTS: THE *GITLOW* DISSENT REVISITED

In *Gitlow*, Justice Holmes argued that "[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."[60] He rejected prosecuting Benjamin Gitlow for his contributions to and dissemination of the *Left Wing Manifesto*[61] because the publication created at most a danger that was "futile and too remote from possible consequences."[62] But what if the government had charged solicitation of draft evasion or a conspiracy to conduct illegal labor strikes? Would Holmes's free speech concerns simply have vanished based solely upon the technicalities of the indictment? Quite obviously, publishing and then distributing the *Left Wing Manifesto* was no more the crime of solicitation or conspiracy than it was an incitement to unlawful action.

First Amendment protection for speech should not turn on the crime alleged, but rather on the social value of particular speech activity (in general) and its relevance to facilitating democratic self-governance (in particular). It is implausible to think that Justice Holmes, like Gilda Radner's iconic Emily Litella character,[63]

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[60] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[61] *See id.* at 655–61 (discussing Gitlow's role in the publication of the Left Wing Manifesto and the proceedings in the New York state courts). The Left Wing Manifesto's principal author was Louis C. Fraina; however, the leadership of the Left Wing Section of the Socialist Party, of which Benjamin Gitlow was an important member, reviewed and approved it. *See* DAVID A SHANNON, THE DECLINE OF THE AMERICAN SOCIALIST PARTY 135–37 (1950). Fraina served as the Editor in Chief of *Revolutionary Age* and Gitlow was the publication's business manager. *See id.*; *see also* THEODORE DRAPER, THE ROOTS OF AMERICAN COMMUNISM 166–69 (2003) (discussing the leadership of the Left Wing Section and the *Left Wing Manifesto*); DONAL LEVIN, JAMES LARKIN: LION OF THE FOLD 68 (1998) (discussing the leadership of the Left Wing Section, which included both Gitlow and Fraina).

[62] *Gitlow*, 268 U.S. at 673.

[63] STEPHEN TROPIANO & STEVEN GINSBERG, THE SNL COMPANION: AN UNOFFICIAL GUIDE TO THE SEASONS, SKETCHES, AND STARS OF SATURDAY NIGHT LIVE (2024) (discussing Gilda Radner's recurring Miss Emily Litella SNL character and the real-life inspiration for Litella, Radner's childhood nanny, Mrs. Elizabeth Clementine Gillies).

would simply have said "Well, never mind!"[64] had New York indicted and convicted Benjamin Gitlow for solicitation or conspiracy. His concerns obviously relate to the chilling effect that arises from the government treating speech as a crime; the particulars of the charges are quite irrelevant to the creation of this profound chilling effect.

Given that the chilling effect, not the crime charged, should be the focus of the relevant First Amendment analysis, it becomes essential for the federal courts to disentangle the advocacy of "bad ideas," on the one hand, from incitement and other crimes, on the other. As Holmes argues in *Gitlow*, bad ideas should almost always be fully protected because the dangers associated with government censorship are at their zenith when the government seeks to prohibit any public discussion of an idea, theory, or policy. First Amendment protection should, as Holmes argues, only give way when public necessity so requires—meaning when the speech at issue either will cause or is highly likely to cause a serious social harm. Absent a showing of actual or highly likely harm, rather than the abstract possibility of it, the need for federal courts to protect speech related to democratic self-government from government censorship should drive the First Amendment analysis.

For Holmes, two conditions must be satisfied in order to impose criminal liability for speech. First, the harm to be avoided must be significant; advocacy of crossing streets against the crosswalk signal would be too trivial a social harm to justify criminal punishment. Holmes speaks not of picayune law violations but rather of "starting a present conflagration."[65] Gitlow's *Left Wing Manifesto* presented at most the social harm equivalent of a dumpster fire. His writings might have been inconvenient or unhelpful to the government's war effort, but they did not constitute an existential threat to the community (the standard that Justice Holmes proposes in *Gitlow*) or, for that matter, clearly present a material risk of bringing about a cognizable social harm (the standard that I advocate for treating pure speech activity as a crime).

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[64] Dennis Hevesi, *Obituary, Gilda Radner, 42, Comic Original of "Saturday Night Live" Zaniness*, N.Y. TIMES, May 21, 1989, § 1, at 46 ("As a guest editorialist on 'Saturday Night Live's' parody of the weekend news, Miss Radner, in the character of Miss Litella, would rail against broadcasters for paying too much attention to 'endangered feces.' And only when it was made clear to her that the subject was 'endangered species' would she back off, mewling, 'Never mind.'").

[65] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

Second, the probability of the harm actually coming into being must be real and serious—not merely speculative (i.e., "there could be trouble").[66] This is perhaps more expressly stated in Justice Holmes's dissent in *Abrams*.[67] If one reads the *Gitlow* dissent in pari materia with the *Abrams* dissent, the requirement of the harm being serious, rather than trivial, comes into very clear focus indeed. It would be a gross overstatement to say that Gitlow's criminal advocacy, *The Left Wing Manifesto*, published in a magazine called *Revolutionary Age*, with a total print run of 16,000, mailed to subscribers and also available at the New York City offices of the Left Wing Section of the Socialist Party, ever could have been a potential source of a "present conflagration"; it constituted, at most, little more than a puny spark that could never have ignited a national fire.[68]

It bears noting that Justice Holmes, if taken at his word anyway, establishes an extremely high threshold for imposing criminal punishment based on public advocacy of unlawful action. Whether he would have stayed this course on facts involving a more clearly proven risk of social harm, even with a less potentially apocalyptic social consequence than the violent overthrow of a state or the national government—for example, an offer to sell child sexual abuse materials, the speech at issue in *Williams*—might be open to some doubt. The facts in *Gitlow* were, on this front, quite easy because the government failed to muster even a scintilla of credible evidence that the publication had any effect whatsoever on the New York state or federal government's operations.

In fact, Justice Holmes swats away as facially preposterous the *Gitlow* majority's conclusion that the *Left Wing Manifesto* presented a serious danger to the existing governing arrangements in either New York state or at the federal level of government. He argues that "it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views."[69] The majority, by way of contrast, exhibited

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[66] *See id.*

[67] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country").

[68] *See Gitlow*, 268 U.S. at 655–56 (discussing Benjamin Gitlow's writing and its distribution).

[69] *Id.* at 673 (Holmes, J., dissenting). *But cf. id.* at 667–68 (holding that "a State may punish utterances endangering the foundations of organized government and threatening its overthrow by

extreme credulity to New York's wholly unsubstantiated claim that Gitlow's writings imperiled the continued existence of its governing institutions.[70] The majority opines that laws like New York's "may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such character and used with such intent and purpose as to bring it within the prohibition of the statute."[71]

A reasonable observer might well ask, as does Justice Holmes, why Gitlow's utterances were not "too trivial to be beneath the notice of the law." The record contained no evidence whatsoever of Gitlow taking any concrete steps to actually overthrow the state or federal governments. Nor did any evidence of record show that Gitlow's musings motivated anyone else to engage in criminal conduct. To be sure, the *Gitlow* majority viewed the mere *possibility*, or plausible foreseeability, of an adverse impact on the government's ongoing operations as a sufficient constitutional predicate for criminalizing Gitlow's writings and the government's more censorial impulses more generally.[72] Despite the majority's concerns about the difficulties associated with predicting the real-world effects of pure speech, the fact remains that speech, and speech alone, constituted Gitlow's "crime." Given this state of affairs, punishing him for his advocacy involved denying him his liberty under the First and Fourteenth Amendments without a sufficient justification involving harm to others. The principal purpose and effect of the charges was not to prevent a serious social harm or a *serious* risk of harm, but instead was to silence

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unlawful means" and positing that "a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States").

[70] *See id.* at 670 ("We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.").

[71] *Id.*

[72] *See id.* at 669 ("And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration.").

and chill the speech of the Left Wing of the Socialist Party. Censoring speech, not preventing serious crimes, was the name of the game.

> The larger problem, identified with crystal clarity by Justice Holmes, is that
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> > Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.[73]

In a democracy committed to the practice of self-government, however, no idea should be off the table. The voters, not the government, should get to decide for themselves about the wisdom or prudence of any particular set of political ideas.[74]

As Alexander Meiklejohn states this important point, "the citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them."[75] In his view, "[t]he unabridged freedom of public discussion is the rock on which our government stands."[76] Holmes makes precisely this argument in his *Gitlow* dissent: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[77]

Moreover, Justice Holmes carefully distinguishes a merely theoretical threat from a real one. He explains that "an attempt to induce an uprising against government at once and not at some indefinite time in the future . . . would have presented a different question" because "[t]he object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication

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[73] *Id.* at 673 (Holmes, J., dissenting).

[74] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 90–91 (1948) (arguing that the freedom of speech gives U.S. citizens the right to "attack the Constitution in public discussion as freely as we may defend it," "to advocate socialism or communism, just as some of our fellow citizens advocate capitalism," and to read whatever books they choose, including Adolf Hitler's *Mein Kampf* and Vladimir Lenin's *The State and the Revolution*).

[75] *Id.* at 91.

[76] *Id.*

[77] *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

could produce any result, or in other words, whether it was not futile and too remote from possible consequences."[78] In sum, given the government's failure to prove beyond a reasonable doubt any actual harm flowing from the *Left Wing Manifesto*—or even the realistic prospect of it[79]—Gitlow's speech could not be criminalized consistent with the imperatives of the First Amendment.

Although Holmes does not cite John Stuart Mill in his *Gitlow* dissent, his reasoning seems strikingly consistent with Mill's overall theory of liberty in general and freedom of expression in particular. It might go too far to say that the First Amendment enshrines John Stuart Mill's *On Liberty* into the Bill of Rights. But this seems to be the central idea that Justice Holmes has in mind.[80]

Mill famously argues that state power can legitimately be deployed to limit an individual's freedom only to prevent harm to others.[81] He posits that even if most

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[78] *Id.*

[79] The problem of a risk of social harm has arisen routinely in the context of speech proximate to major events, such as the national presidential nominating conventions; lower federal courts have allowed problems at other, long-past events, wholly unrelated to a proposed protest proximate to an event, to serve as a basis for banning public protest near the upcoming event. For many years, the lower federal courts commonly invoked the violent anti-World Trade Organization protests in Seattle, Washington, in 1999, to support preemptive, security-based bans on protest activity using public streets and sidewalks proximate to major event meeting venues. *See*, *e.g.*, Citizens for Peace in Space v. City of Colorado Springs, 477 F.3d 1212 (10th Cir. 2007); Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005); Bl(a)ck Teas Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004); *see also* RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 31–39 (2012) (discussing and criticizing federal courts permitting unlawful behavior by one group of protestors, more often than not in the distant past and a different physical location, to be taxed against an entirely different group of would-be protestors, at a future point in time, and in an entirely different location and providing salient examples of lower federal courts crediting pretextual security claims as a basis for creating and enforcing free speech-free zones near major national events). I have serious misgivings about taxing the sins of one group of protestors against an entirely unrelated group, with respect to law enforcement agencies' dire predictions of chaos, crime, and public disorder. *See id.* at 50–54. However, if specific verbal formulations routinely correlated with *actual* criminal activity, the government's claim of a realistic prospect of social harm flowing from the use of those words, or substantially similar words, would be backed up by credible empirical evidence (rather than mere speculation) and therefore far more plausible.

[80] JOHN STUART MILL, ON LIBERTY (2d ed. 1859).

[81] *Id.* at 22 (arguing that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others").

members of the community deem particular behavior "foolish, perverse, or wrong," an individual should nevertheless be free to do as he pleases "without impediment from our fellow creatures, so long as what we do does not harm them."[82]

Turning to Mill's views on freedom of expression, he argues for very broad protection of even offensive or outrageous speech because enforcing mandatory civility norms creates an unacceptable risk of overt viewpoint discrimination.[83] Mill certainly acknowledges that intemperate or rude discourse imposes harm on others—thereby rendering somewhat credible arguments for government regulation.[84] As a general matter, however, the potential benefits of imposing mandatory civility norms to cabin free expression of opinions "merges into a more general objection" rooted in the reality that such rules invariably give rise to highly selective enforcement (often involving naked forms of viewpoint discrimination) and do not generally impose harm to others. In consequence, a justly-ordered government committed to democratic self-government should tolerate abusive, rude, or offensive speech.[85]

Consistent with these framing principles, Mill posits that "human beings should be free to form opinions, and to express their opinions without reserve."[86] But, in an example that implicates the facts of both *Gitlow* and *Brandenburg*, as well as other Supreme Court cases involving speech thought to be dangerous, such as true threats and conspiracy, he caveats this general rule with examples involving inciting a mob to attack grain merchants.[87] Mill writes that "[a]n opinion that corn-

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[82] *Id.* at 26.

[83] *Id.* at 95–97.

[84] *Id.* at 95–98. Mill concedes that "the manner of asserting an opinion, even though it be a true one, may be very objectionable, and may justly incur severe censure" but nevertheless cautions that "what is commonly meant by intemperate discussion, namely invective, sarcasm, personality, and the like, the denunciation of these weapons would deserve more sympathy if it were ever proposed to interdict them equally to both sides; but it is only desired to restrain the employment of them against the prevailing opinion: against the unprevailing they may not only be used without general disapproval, but will be likely to obtain for him who uses them the praise of honest zeal and righteous indignation." *Id.* at 96–97. In sum, Mill expresses sympathy for the idea of imposing mandatory civility norms, but great skepticism about the practicality of fairly and reliably enforcing such norms with an even hand.

[85] *See id.* at 95–96.

[86] *Id.* at 100.

[87] *See id.* at 100–01.

dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard."[88] Essentially, speech should be free unless it clearly causes harm to others—and the kind of harm Mill has in mind is not simply umbrage, offense, or moral outrage.

To be sure, the Supreme Court has never held, directly, that speech must be free absent a showing of harm, but it has applied this principle with some consistency in cases calling for unlawful action. So too, in *U.S. v. Alvarez*, discussed in Parts III and IV, the Justices held that the government may not criminalize false speech simply because it is false.[89] Justice Holmes, in *Gitlow*, supports the Millian thesis that, absent harm to others, speech should be free and unregulated by the state. His dissent also rejects the plausibility of a strong, categorical line of demarcation between "ideas" on the one hand and "incitements" (which can be made criminal) on the other. At the end of the day, ideas simply *are* incitements; attempting to draw and then police a line separating them constitutes a fool's errand.

## III. The Harm Principle in Action

In *Brandenburg v. Ohio*,[90] the Supreme Court clearly embraces the position that Justice Holmes so ably articulates in his *Gitlow* dissent—namely, that speech cannot be criminalized in the absence of some sort of concrete harm. In its per curiam opinion (written by Justice William Brennan[91]), the Supreme Court holds that "the

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[88] *Id.*

[89] *See infra* notes 106–108 & 134–136 and accompanying text; *see* United States v. Alvarez, 567 U.S. 709, 718–21 (2012) (plurality opinion) (holding that the First Amendment disallows criminal punishment of any and fall false speech based on its falsity).

[90] 395 U.S. 444 (1969) (per curiam).

[91] Bernard Schwartz, *Justice Brennan and the* Brandenburg *Decision—A Lawgiver in Action*, 79 JUDICATURE 24, 25 (1995) (noting that *Brandenburg* was "an important case where Justice Brennan played the crucial part," a fact that for many years "remained all but unknown outside the Court"). Professor Schwartz explains that "Justice Brennan's redraft of the original opinion, although his name does not appear in the public report of the case" had the effect of "replac[ing] the clear and present danger test." *Id.* at 25–26. Justice Brennan's alterations to the initial draft of the decision by Justice Abe Fortas, who had resigned from the Supreme Court in disgrace before the decision issued, "completely altered the nature of the *Brandenburg* opinion, converting it from one that confirmed the clear and present danger test to one that virtually did away with that test as the governing standard in First Amendment cases." *Id.* at 28.

constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[92]

*Brandenburg* effectively renders it quite difficult, arguably impossible, to charge successfully the crime of incitement in the absence of compelling evidence that an audience actually heeded a call to unlawful action or stood on the precipice of acting.[93] Moreover, the unlawful activity must follow hard upon the speech; it must be "imminent" as opposed to temporally disparate. One could see this as a laudable and highly desirable outcome because it creates a strong, bright-line rule that insulates would-be speakers from the chilling effect that would otherwise arise from a less demanding First Amendment standard. Viewed from this vantage point, *Brandenburg* is an essential bulwark against prosecutions of the sort at issue in *Gitlow*.

A less sympathetic view might focus on the fact that *Brandenburg* immunizes, against incitement charges, a great deal of speech that possesses relatively little social value. This includes speech that a reasonable observer might also think presents more than a modicum of social risk. Calling for a race war at a Ku Klux Klan rally is not conducive to harmonious race relations within the community—nor, for that matter, would calling for a communist revolution (at issue in *Gitlow*).[94]

Of course, the standard justification for protecting low-value speech of this sort is that the greater danger inheres in vesting the government with a general power of censorship.[95] After all, if the government can prosecute as a crime speech that

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[92] *Brandenburg*, 395 U.S. at 447.

[93] *See* Hess v. Indiana, 414 U.S. 105, 107–09 (1973) (overturning an Indiana state law breach of the peace conviction on free speech grounds, despite overt and open advocacy of disregard of a law enforcement officer's order to disperse a crowd, because "there was no evidence, or rational inference from the import of the language, that [Hess's] words were intended to produce, and likely to produce, imminent disorder" and, accordingly, "those words could not be punished by the State").

[94] *See Brandenburg,* 395 U.S. at 444–46 (setting forth the facts in *Brandenburg*, which involved a Klan rally featuring calls to racialized violence and a cross burning on a farm outside Cincinnati).

[95] Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1097 (2008) ("Yet even if First Amendment theory's faith in the fundamental rationality of public discourse is misplaced, distrust of government still may be a strong enough basis, standing alone, to warrant declaring any attempt to punish Holocaust denial unconstitutional.

imposes any social costs, as opposed to clear social harms, democratic deliberation would likely grind to a halt. Free speech, as Holmes cogently observed, requires assuming some non-trivial risks and tolerating speech that might be harmful to the community's best interests.[96] A meaningful commitment to freedom of expression thus requires a polity to accept some degree of risk that speech will cause harm.

Professor Lyrissa Barnett Lidsky explains that the anti-censorship rationale for protecting socially harmful false speech, such as Holocaust denial, "is essentially a slippery slope argument: The government must tolerate a certain amount of false speech in order to protect true speech, especially where the line between truth and falsity is difficult to discern."[97] From this vantage point, "[o]nce Holocaust denial is regulated, it seems that regulation of any sort of historical revisionism is but a short step away."[98] At the same time, however, Lidsky observes that "the European experience provides little evidence that punishment of Holocaust denial is the first step on the slippery slope to tyranny, though perhaps it is simply too early to tell where the path of punishing denial will lead."[99]

However, *Brandenburg*, strictly speaking, applies only to incitement charges and does not speak to the government's power to regulate speech that might undermine harmonious race relations within the community.[100] Most important for

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Past governmental attempts to 'prescribe what shall be orthodox' have resulted in suppression of truth and enshrinement of error.")

[96] *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (noting that "[e]loquence may set fire to reason" and lead people to embrace irrational positions but nevertheless concluding that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way").

[97] Lidsky, *supra* note 95, at 1098.

[98] *Id.* at 1099.

[99] *Id.*

[100] It is doubtful that such a government objective would survive judicial review under the First Amendment. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386–92 (1992) (invalidating a city ordinance that punished racially-targeted fighting words); *see also* American Booksellers Ass'n, Inc. v. Hudnut, 771 F. 2d 323, 328 (7th Cir. 1985) ("A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs

present purposes, the decision does not constitutionalize other crimes that involve only speech (such as solicitation or conspiracy). A prosecutor may charge these crimes and obtain a conviction without meeting *Branderburg*'s imminence requirement. Because *Brandenburg* does not expressly turn on the question of harm, but rather on whether a call to unlawful action either brings the unlawful action about or makes such an outcome very likely, both the Supreme Court and lower federal courts have held that it does not apply to solicitation and conspiracy charges. This, of course, makes little constitutional sense.

Just as with incitement, solicitation charges should be off the table when a person calls for or proposes a criminal act in circumstances where the speech clearly and quite obviously relates to advocacy of a public policy reform and does not present a clear and palpable risk of causing a non-trivial cognizable legal harm (on par with the same high probability of risk required constitutionally to charge an incitement or a true threat). For example, we could substitute calling for the burning of a draft card, or the actual burning of a draft card during the Vietnam War era, another period featuring involuntary conscription into the armed forces, for Benjamin Gitlow's advocacy of a communist revolution.[101] Stated more directly, the cardinal First Amendment sin is the censorship of "bad ideas"—not the particular means or modality of imposing the government censorship. The notion that one can somehow distinguish in a meaningful way, based on the precise language a speaker uses, abstract calls for action from criminal incitement, solicitation, or conspiracy is chimerical.

Consider, once again, Justice Holmes in *Gitlow*. He posits that "[e]very idea is an incitement."[102] Moreover, an idea, Holmes explains, "offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of

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is our absolute right to propagate opinions that the government finds wrong or even hateful."), *summarily aff'd*, 475 U.S. 1001 (1986). Things were not always so, however, and the Supreme Court once viewed creating and sustaining harmonious race relations as a legitimate government policy that did not necessarily violate the Free Speech Clause. *See* Beauharnais v. Illinois, 343 U.S. 250, 258 (1952) ("But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this [is] a wilful and purposeless restriction unrelated to the peace and well-being of the State.").

[101] *See* United States v. O'Brien, 391 U.S. 367 (1968).

[102] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

energy stifles the movement at its birth."[103] Thus, "[t]he only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result."[104] Holmes suggests that there is no principled distinction between generic advocacy, or speech, and criminal incitement because every idea, at least potentially, could motivate someone to act consistently with the idea or belief. And, because "eloquence may set fire to reason,"[105] the only surefire way to avoid social harms flowing from ideas would be to permit the government to censor any and all ideas it deems dangerous.

Justice Kennedy, writing in Holmes's free speech shadow in *Alvarez*, offers what should be the credited response to this censorial impulse: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."[106] Thus, although the government may act to prevent or punish speech that actually causes material social harms, it may not seek to extirpate bad ideas, including false speech, from the public discourse.

Again, Justice Kennedy, in his *Alvarez* plurality opinion draws the correct distinction, when he posits that "[w]here false claims are made to effect a fraud or secure moneys or other valuable considerations, say, offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment."[107] But, by way of contrast, an abstract government interest in "truthful discourse," standing alone, cannot justify the imposition of criminal punishment on a speaker. Indeed, "[t]he mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom."[108] What is true of criminal punishment of false speech related to military honors and decorations also holds true for speech that, viewed in one light, calls for criminal activity (again, whether cast as incitement, solicitation, or conspiracy).

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[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] United States v. Alvarez, 567 U.S. 709, 723 (2012) (plurality opinion).

[107] *Id.*

[108] *Id.*

These observations support the need for a doctrinal innovation that clarifies the meaning of decisions like *Williams* and *Hansen*. A serious commitment to protecting ideas requires the creation and enforcement of a single First Amendment rule that generally cabins the use of criminal law to punish and deter political speech that directly advocates unlawful (meaning criminal) action when the speech does not bring about a cognizable social harm or present a very serious prospect of causing it. Moreover, the necessary cases to support such a rule already exist—*Brandenburg*,[109] *Watts*,[110] *Hess*,[111] and *Claiborne Hardware*.[112]

If speech truly is integral to democratic self-government, then it makes little sense to immunize speakers broadly against potential incitement charges, when a speaker advocates unlawful actions, but to say, concurrently, that the Free Speech Clause imposes absolutely no limits at all on solicitation or conspiracy charges. A more rational, speech-friendly, unified approach would consider carefully the context of speech advocating law violation and the social costs and benefits that flow from the speech that the government seeks to criminalize. Speech directly and clearly related to democratic self-government should be more robustly and reliably protected than speech that lacks any relationship to it. This, of course, would involve a kind of balancing, or proportionality analysis.[113] But it seems fairly obvious that, in this context, balancing tests and forms of proportionality review would better protect core political speech from government censorship than a categorical approach that relies on judges arbitrarily slapping "speech" and "conduct" labels onto expressive activity the government seeks to punish.

Moreover, the potential objection that courts cannot make principled judgments about how to characterize the social value of speech lacks merit. Existing First Amendment doctrine is rife with rules and tests that depend critically on how

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[109] Brandenburg v. Ohio, 395 U.S. 444 (1969).

[110] Watts v. United States, 394 U.S. 705 (1969).

[111] Hess v. Indiana, 414 U.S. 105 (1973).

[112] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[113] *See* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

judges characterize speech and assess its social value. Commercial speech, for example, receives less First Amendment protection than non-commercial speech[114] and judges must assess whether particular speech is "commercial" or "non-commercial" in character to ascertain the requisite First Amendment level of scrutiny that a reviewing court should apply to the speech restrictions at issue.[115] Moreover, because corporations can and do speak in a non-commercial capacity,[116] this question of characterization can be essential.[117] So too, government employee speech receives protection only if it relates to a matter of public, rather than private, concern,[118] and does not relate to the employee's workplace duties.[119] And, even if these

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[114] Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–66 (1980). This approach reflects the fact that "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation." *Id.* at 564 n.6 (internal quotations and citations omitted).

[115] Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 65–68 (1983) (holding that pamphlets about venereal disease constituted commercial rather than noncommercial speech because of the sender's economic motivation in distributing them); *see* Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 DUKE L.J. 1193, 1221 (1996) ("*Bolger* strongly suggests the commercial or non-commercial nature of speech will depend in large part on the context in which the ostensibly non-commercial speech occurs. If the speech occurs in the context of plainly commercial speech, the Court appears to be willing to assimilate the arguably non-commercial speech into the 'commercial' category.").

[116] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778–84 (1978) (holding that corporations can engage in noncommercial speech and, when they do, enjoy the same protections under the Free Speech Clause as individual human beings).

[117] *See*, *e.g.*, Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 512, 515–20 (7th Cir. 2014) (analyzing whether a magazine feature congratulating Michael Jordan on his admission to the Basketball Hall of Fame constituted "commercial" or "noncommercial" speech and concluding that it fell within the "commercial" category because "[t]he ad is a form of image advertising aimed at promoting goodwill for the Jewel-Osco brand by exploiting public affection for Jordan at an auspicious moment in his career").

[118] City of San Diego v. Roe, 543 U.S. 77, 82–86 (2004); Connick v. Myers, 461 U.S. 138, 142, 145–47 (1983). *But cf.* Mary-Rose Papandrea, *The Free Speech Rights of "Off-Duty" Government Employees*, 2010 BYU L. REV. 2117 (2010) (arguing that government employers should be required to justify discipline for off-the-clock behavior with more compelling reasons than that a government employee's off-the-job expressive conduct might be embarrassing to the government employer).

[119] Garcetti v. Ceballos, 547 U.S. 410, 424–26 (2006). *But cf.* HELEN NORTON, THE GOVERNMENT'S SPEECH AND THE CONSTITUTION 64–67 (2019) (questioning the wisdom of *Garcetti* because

requirements are met, a generic balancing test applies that weighs the government employee's autonomy interest in speaking against the government's interest as a manager.[120] If the federal courts can manage these exercises in free speech taxonomy—all of which require careful and contextual balancing exercises—then they also could manage reasonable assessments of whether speech calling for unlawful action presented a serious risk of bringing it about, in conjunction with a determination of whether the speech meaningfully related to the ongoing process of democratic deliberation.

If a choice must be made between the categorical approach of *Williams* and *Hansen*, on the one hand, and a more open-ended, context sensitive, balancing exercise, of the sort reflected in *Claiborne Hardware*, *Hess*, and *Watts*, the choice should be an easy one to make—in favor of balancing and careful contextual analysis. In any event, the burden should always rest with the government to show legally cognizable harm, as *Alvarez* requires in the context of empirically false speech, before it imposes criminal punishment for speech.

In most run-of-the-mill criminal cases involving efforts to engage in activity that may constitutionally be criminalized, from hiring a hit man to selling illegal drugs, the government should not face much difficulty in establishing that, on the facts presented, the speech brought about or was highly likely to bring about legally cognizable harm. So too, speech of this sort contributes precisely nothing to the process of democratic deliberation.

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it produces a significant chilling effect on government employee speech in general and whistleblowing government employee speech in particular).

[120] Pickering v. Bd. of Educ., 391 U.S. 563, 568, 572–74 (1968) (holding that the First Amendment's Free Speech Clause prohibits a government employer from firing a public servant who speaks out about a matter of public concern unless the government employer can show that employee's continued presence in the government workplace produces material and substantial disruption). Of course, a potential danger associated with tests of this sort is that unlike more categorical tests, balancing tests can empower a kind of "heckler's veto" when workplace speech profoundly offends and/or upsets many, if not most, of the government employer's workforce. *See* Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 283 (2018) ("To be sure, the *Connick*/*Pickering* doctrine affords only a modest degree of protection to government employees who speak within the government workplace. The doctrine's most objectionable feature is the 'heckler['s] veto' that it embraces. The protection of government employee speech is always contingent on the reaction of other employees within the workplace." (citations omitted)).

By the same token, efforts to criminalize political advocacy, by charging solicitation or conspiracy when the criminal activity at issue consists solely of speech but the *Brandenburg* imminence requirement cannot be met, will come up short if the federal courts were to impose requirements on federal and state prosecutors of proving (1) actual social harm or a serious risk of it arising from the pure speech, (2) the absence of a material connection to democratic discourse about matters of public concern independent of the proposed criminal activity, and (3) a subjective intent on the part of the speaker to bring the unlawful result into being.[121] Of course, one might object that these requirements would go too far in immunizing calls for unlawful action as either solicitations or conspiracies. The proposed test would, however, better align First Amendment analysis of these crimes with the Supreme Court's existing free speech rules for criminal incitements and threats.

Thus, whether a formal criminal charge alleges incitement, solicitation, or conspiracy, the Free Speech Clause should apply and courts should consider carefully whether affording the speech protection would advance the core purpose of the amendment—namely, facilitating the process of democratic self-government. This could even be a preliminary requirement that a defendant must meet in order to bring the Free Speech Clause into play—just as a government employee, under *Connick* and *Roe*, has the burden of establishing that her speech relates to a matter of public concern (rather than private concern) in order to trigger *Pickering*.

The Supreme Court has taken exactly this approach, deploying a context-sensitive analysis that takes into full account the social value of speech in conjunction with its potential to cause legally cognizable harm, in other cases involving criminal

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[121] The use of the "speech"/"conduct" line as a basis for distinguishing between activity that the First Amendment protects ("speech") and activity that it does not ("conduct") has a long and not particularly storied history in the pages of *U.S. Reports*. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016) [hereinafter Volokh, *Criminal Conduct Exception*]; Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2006) [hereinafter Volokh, *Speech as Conduct*]. Speech falling on the "conduct" side of the line, Professor Volokh tells us, gets scored as "punishable because it is part of an illegal 'course of conduct,' or is perhaps 'speech brigaded with action, a "speech act" rather than pure speech." Volokh, *Speech as Conduct*, *supra*, at 1283. Professor Volokh, correctly in my view, posits "that these 'it's not speech, it's conduct' doctrines are misguided" and leave "courts to focus on the wrong questions." *Id.* at 1284. The problem, as he notes, is that all too often, the conduct "label is used as a substitute for serious First Amendment analysis, rather than as the starting point for it." *Id.* at 1347.

charges. For example, in *Watts v. United States*,[122] the Supreme Court reversed a criminal conviction for threatening the life of the President where the threat was made at an anti-war rally and, in context, the speaker was engaging in political hyperbole. The same is true of *Virginia v. Black*,[123] which holds that a state government can criminally proscribe cross burnings only when, in context, a particular cross burning conveys a targeted threat against a specific person or group of persons.[124]

In fact, *Watts* provides an excellent example of the general approach that I am advocating. Consider, in particular, how the *Watts* Court approaches the question of criminal liability. The Supreme Court explains that "we must interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"[125] Because "the language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive, and inexact,"[126] a blanket rule that imposes criminal punishment on any and all threats cannot be reconciled with the Free Speech Clause. Moreover, this rule holds true even when the threat involves the President of the United States. In circumstances where the speaker did not seriously intend his threat against the President, no legally cognizable harm sufficient to justify censoring his political speech existed.[127] On these facts, the First Amendment's protection of freedom of expression overbears a criminal law that, applied to a genuine threat, would be perfectly constitutional.[128]

Accordingly, the *Watts* Court correctly held that "the kind of political hyperbole indulged in by petitioner" did not constitute a real, or "true," threat against

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[122] 394 U.S. 705 (1969).

[123] 538 U.S. 343 (2003).

[124] *Id.* at 367–68.

[125] *Watts*, 394 U.S. at 708 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[126] *Id.*

[127] *See id.*

[128] At a public rally in 1966, Robert Watts said "And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 705–06.

the life of the President.[129] The Justices placed particular emphasis on "the expressly conditional nature of the statement" as well as "the reaction of the listeners" in reaching this quite sensible conclusion.[130] This is precisely the kind of careful, context-specific analysis that the federal courts should engage in whenever the government attempts to charge speech as a criminal act.[131]

Consistent with *Watts*, *Virginia v. Black* holds that the government cannot criminally proscribe cross burning categorically on the theory that the activity always conveys a true threat. Instead, the government must prove that, in context, the defendants used a cross burning to threaten or intimidate a particular person or group of people.[132] The harm principle applies in this context as well; only when a cross burning causes a legally cognizable harm to another person may the government impose criminal punishment for this form of expressive conduct.[133] The criminal law's definition of a "threat" cannot be used as a general tool to censor unpopular or offensive political speech. The careful, context-sensitive approach the Supreme Court has used to cabin the treatment of threats as crimes would work equally well in other criminal law contexts.

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[129] *See id.* at 708.

[130] *See id.*

[131] *See* Volokh, *Speech as Conduct*, *supra* note 121, at 1336 (arguing that "when speech is restricted because of the harms caused by its content, we ought not try to evade the First Amendment problem by simply renaming the speech 'conduct'). My point is similar but distinct: Just as a simplistic labeling exercise should not pretermit serious and careful First Amendment analysis, the government should not be able to achieve the same result through clever charging decisions in criminal indictments. Yet, unfortunately, decisions such as *Williams* and *Hansen*, which both feature very broad language devoid of caveats or limitations, open the door to criminalizing speech in the complete absence of a credible showing that the speech caused or would be likely to cause a serious social harm (or, in Justice Kennedy's language in *Alvarez*, a "cognizable legal harm").

[132] Virginia v. Black, 538 U.S. 343, 365–68 (2003).

[133] *See generally* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea, we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.") (internal quotations and citations omitted).

## IV. TOWARD A BETTER MODEL: FALSE SPEECH AND *ALVAREZ*

Without expressly saying so, Justice Kennedy's plurality opinion in *Alvarez* ratifies the harm principle. The government cannot proscribe false speech simply because it is untrue. Instead, the government may censor false speech only when false speech brings about a "legally cognizable harm."[134] In other words, the government may not criminalize, in a general way, empirically false speech on the theory that such speech stands outside the First Amendment's sphere of protection. The contrast with *Williams* and *Hansen*, which declare that speech that could be construed to solicit a crime is constitutionally unprotected, is obvious and compelling. *Alvarez* requires the government to do more than simply show that speech is false in order to impose criminal punishment on a speaker.

Moreover, *Alvarez* plainly embraces a kind of Millian harm principle.[135] False speech, as such, enjoys full and robust protection under the Free Speech Clause unless the government can show that, on particular facts and circumstances, it causes "legally cognizable harm."[136] Criminal law, no less than tort law, should bend to reflect the imperatives of freedom of expression in a polity committed to a project of democratic self-government. This proposition lies at the heart of Justice Holmes's dissent in *Gitlow*.

In this short Essay, it simply is not possible, or feasible, to fully theorize and operationalize how the harm principle should work in limiting the use of criminal law to punish speech. However, some general principles are relatively easy to identify.

First, expressly embracing the harm principle would mean that a legally cognizable harm, not the particular criminal charge, should serve as the basis for imposing criminal punishment on pure speech.[137] A true threat ticks this box because

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[134] United States v. Alvarez, 567 U.S. 709, 719 (2012) (plurality opinion).

[135] *See* MILL, *supra* note 80, at 22–26, 100–01.

[136] *Alvarez*, 567 U.S. at 719 ("These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.").

[137] *See* Volokh, *Criminal Conduct Exception*, *supra* note 121, at 1035–43 (discussing criminal harassment cases and cautioning that, unless some care is taken in defining precisely how far the criminal law may go in seeking to define, deter, and punish social harm, a First Amendment exception for "speech integral to [illegal] conduct" will morph into an exception that "covers speech that

a true threat causes harm to the victim of the threat. So too, a call to unlawful action that a crowd heeds, or which the speaker intends to motivate the crowd and which could predictably and imminently motivate the crowd, could serve as the basis for criminal charges because the speech causes legally cognizable harm. However, it bears noting that, as Justice Holmes warns, speech can "set fire to reason" and when harm does not directly result from pure speech, courts must carefully enforce the intent and probable effect requirements to prevent the government from *Dennis*-style prosecutions that rest more on antipathy to the speaker's ideas and viewpoints than on preventing or remediating any actual cognizable harm to the community. In this regard, one could certainly say that Holmes, in *Gitlow*, embraces an extraordinarily strong iteration of the test—by requiring a potential "conflagration" before imposing criminal liability for calls to unlawful action—precisely in order to ensure that adequate breathing room exists for hyperbolic political speech. If the greater risk to democratic self-government lies with a hair-trigger test, then the requisite legal test should instead constitute something of a sticky trigger.

By way of contrast, saying that everyone should be selling, buying, and smoking pot notwithstanding the federal Controlled Substances Act, at a rally of the National Organization for the Reform of Marijuana Law (aka NORML), would not—even if it happened that a number of people in the crowd ultimately decided to buy marijuana or even light up at the rally. This is so because, taken in the totality of the circumstances, the rally speaker has no intention of buying, selling, or smoking weed; it's hyperbolic political speech, no different, really, from the objectionable speech at issue in *Watts*, *Hess*, and *Claiborne Hardware*. Purely abstract advocacy, for example, suppose the rally speaker said "society would be better if more people toked," would clearly be protected under current law. So too, current First Amendment law plainly would not protect the speaker if he later offered to sell an undercover cop attending the rally a dime bag (as explained in both *Williams* and *Han-*

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is itself defined to be illegal conduct" (internal quotations omitted)). In other words, if the government can define speech as a crime and say the First Amendment conveys zero protection for speech that constitutes a crime, then the Free Speech Clause goes out the window via a simplistic tautology. *See id.* at 1038–39 (noting that applying a conduct label to harassing speech over the internet provides "a recipe for clandestinely denying full First Amendment protection to all speech in all media"). Under this kind of loose, tautological reasoning, "[a] court might assume that, so long as a law bans 'conduct' generally, it can be freely applied to speech as well, if the speech 'carri[es] out' the forbidden 'conduct.'" *Id.* at 1035.

*sen*). A middle position between these poles exists and First Amendment jurisprudence needs to acknowledge and protect speech sitting at this point on the free speech compass. When a speaker directly calls for unlawful action, in circumstances where the speaker does not intend to engage in an unlawful action, and in circumstances where unlawful activity does not occur or will not likely occur, the speaker's literal words should not constitutionally serve as a basis for either solicitation or conspiracy charges (thereby aligning First Amendment treatment of solicitation and conspiracy with existing law on incitement, threats, and disorderly conduct).

It will not do, if we are truly committed to a meaningful free speech principle, to allow judges to arbitrarily apply labels to speech the government seeks to treat as a form of criminal conduct. As Professor Eugene Volokh has cautioned, "relabeling the speech 'conduct,' and invoking *Giboney*, doesn't contribute to the analysis—it doesn't help explain why the speech should be unprotected, or define the boundaries of the lack of protection."[138]

The harm principle should require a unified approach to reconciling the use of criminal law to punish crimes that consist solely of speech (including incitement, of course, but also including solicitation and conspiracy). Both *Hustler Magazine, Inc. v. Falwell*[139] and *Snyder v. Phelps*[140] teach that a would-be tort plaintiff cannot

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[138] *Id.* at 1039; *see* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (opining that "it 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"). The problem with *Giboney*'s categorical statement is that, were this so, cases like *Brandenburg*, *Watts*, and *Hess* would go out the window. Clearly, some sort of balancing exercise is at work and a general free speech principle drives that balancing exercise. *See* Volokh, *Criminal Conduct Exception*, *supra* note 121, at 988 (objecting that scoring speech "criminal conduct" and zeroing out all First Amendment protection risks turning this exception into "a tool for avoiding serious First Amendment analysis—a way to uphold speech restrictions as supposedly fitting within an established exception, without a real explanation of how the upheld restrictions differ from other restrictions that would be struck down"). In my view, courts should always operate under a duty to provide a "real explanation" for why, on the facts presented, the government may constitutionally treat pure speech as a crime. To be sure, in many cases involving criminal enterprises, such as Medicare fraud, the government will be able to meet this burden quite easily. That this is so, however, does not serve as an excuse for not engaging in a careful, contextual analysis in cases presenting harder facts.

[139] 485 U.S. 46 (1988).

[140] 562 U.S. 443 (2011).

escape First Amendment limitations by shifting torts from libel to intentional infliction of emotional distress or invasion of privacy. The Supreme Court has made clear that regardless of the precise tort at issue, the constitutional gravitational pull of the Free Speech Clause applies and potentially will limit the imposition of liability for speech as a tort (without affecting, at all, tort law for things like batteries or conversions that do not involve speech activity). Simply put, changing the tort in a civil complaint will not allow a plaintiff to evade the First Amendment—or a serious First Amendment analysis—when speech activity constitutes the gravamen of the tort. So too, a general doctrinal principle that free speech rights limit the government's ability to treat pure speech as a crime also ought to apply in the context of the criminal law. The free speech concerns that animated the analysis and outcomes in *Brandenburg*, *Watts*, *Hess*, and *Claiborne Hardware* should equally apply in cases where a clever prosecutor charges solicitation or conspiracy rather than incitement (to evade *Brandenburg*).

In terms of substance, for speech to be criminally punishable, the federal courts should require the government to shoulder the burden of proving some kind of particularized, concrete harm (as required by *Alvarez* for punishing false speech). Generic calls for law violation or merely joining an organization that embraces unlawful means to advance its agenda should not take pure speech categorically outside the First Amendment's protection. For example, under existing Supreme Court precedents, threats of force to enforce a boycott, in the absence of anyone actually using force to keep people out of stores in the immediate aftermath of such public exhortations to unlawful action, should not be punishable as a conspiracy—even if all the elements of the crime are otherwise met.[141]

This is not to say that threats of physical harm to enforce boycotts do not impose a social cost. Even so, if a call to criminal action is not seriously intended (as Justice Stevens concluded to be the case with Charles Evers's musing about break-

[141] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902, 927–29 (1982). More specifically, the *Claiborne Hardware* Court holds that talk of "break[ing] damn neck[s]" at rallies in support of the NAACP's boycott of segregated local businesses "did not exceed the bounds of protected speech" in the absence of other, inculpatory evidence demonstrating that "the references to discipline in the speeches" were intended to foment violence. *Id.* at 929. However, on the facts at bar, "there [was] no evidence" of that sort and, in consequence, the state trial court's "findings [were] constitutionally inadequate to supports the damages judgment." *Id.*

ing necks during his rally speech), it should not be a sufficient basis for the imposition of criminal punishment (or civil liability either). By way of contrast, however, if a speaker at a public rally utters threats targeting a particular person or group, in circumstances where the threat appears to be seriously intended, and thereby makes the person or group so identified fearful and causing cognizable emotional/psychological harm, the Free Speech Clause should not insulate the speaker from facing criminal law sanctions.[142] This is so because a subjective purpose to cause harm, in circumstances where speech activity actually causes a concrete harm, plainly satisfies the harm principle.

Under the First Amendment, speakers addressing matters of public concern should not have to tread lightly when engaging in public discourse and carefully avoid advocating violations of the law; speech facially calling for criminal action should not be subject to censorship via the criminal law when it does not cause cognizable social harm. To be sure, working out the particulars of this general free speech principle will involve hard cases, gray areas, and some degree of subjective judicial assessment of the relevant facts and circumstances (as was so, for example, in *Watts*, *Hess*, and *Claiborne Hardware*). Even so, creating adequate breathing space for a wide-open and uninhibited marketplace of political ideas makes the game very much worth the candle.

Abstract calls for criminal action—Henry II's plaintive, but arguably ambiguous *cri de cœur*, namely "Will no one rid me of this turbulent priest?!" when King Henry is holding court in France and Thomas Beckett resides in Canterbury should not be criminally punishable. It's untenable to posit that the nobles were acting on Henry's II's musing about Beckett without thought, deliberation, or circumspection—much like an angry bull shown a red flag by a matador in a Spanish bull fighting ring. Perhaps more important, it's also less than clear that they believed that, by assassinating Beckett, they were working the king's will; Henry II's statement was simply too ambiguous on its face to say, certainly beyond a reasonable

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[142] *See generally* Virginia v. Black, 538 U.S. 343 (2003) (holding that under the First Amendment Virginia could not treat all cross burnings as crimes, namely true threats, but instead could criminally punish only those cross burnings that actually communicated a targeted threat to a particular person or persons). Criminal conspiracy and solicitation charges should work the same way; courts should have to consider context, meaning whether the speech took place in the context of public advocacy (rather than a criminal enterprise) and, in addition, whether the speech would actually cause, or be highly likely to cause, the social harm the criminal law seeks to punish and to deter.

doubt, that he solicited the crime or organized a conspiracy to commit it. The language Henry uses, like that of President Trump on January 6, 2021, is also deliberately ambiguous; it could be a hyperbolic expression of frustration over relations between church and state in King Henry's realm. Accordingly, Henry II should not be on the hook for criminal solicitation or conspiracy charges (as opposed to incitement charges) because his statement would seem to fall on the *Watts* and *Claiborne Hardware* side of the line.[143] Moreover, if one takes into account the reasonable doubt standard that a criminal jury must apply to its fact finding, then the

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[143] The lower federal court decisions in *United States v. White* and *United States v. Hale* present very differently. *See* United States v. White, 610 F. 3d 956, 957, 960–62 (7th Cir. 2010) (doxing the foreman of the jury that convicted Mathew Hale of criminal charges, including the posting of the juror's photograph, address, and other personal *information*); United States v. Hale, 448 F. 3d 971, 978–59, 982–85 (7th Cir. 2008) (sustaining a criminal conviction for soliciting the assassination of U.S. District Court Judge Joan H. Lefkow). Knowing full well that his audience was extremely angry over Matthew Hale's conviction of criminal charges related to Judge Lefkow's murder, William White provided the information one would need to punish the jury foreman. *White*, 610 F.3d 957–59. Matthew Hale's lawyers, to their credit, did not even attempt to argue that his solicitation of a follower to murder Lefkow constituted protected speech. *Hale*, 448 F. 3d at 982–85.

In both cases, the speech at issue had nothing to do with public policy or matters of public concern; if one analyzes the content and context of the speech, it lacks any social value and contributes nothing to democratic deliberation. At the same time, the speech at issue in both cases plainly presented a significant risk of bringing about cognizable legal harms. King Henry's motives in Normandy are not entirely clear—to be sure, he could have been seeking Beckett's assassination. Or he could have been expressing great frustration over the scope of ecclesiastical power in England and Beckett's fierce defense of that power. On these facts, King Henry's lawyers could make a plausible case that his speech was merely political hyperbole rather than a request for Beckett's assassination. Moreover, as a matter of geographic reality, it was simply impossible for the nobles to promptly implement the king's request (if that, in fact, is what it was).

To bring Henry II's speech squarely within the four corners of *White* and *Hale*, suppose that after musing about being rid of "this turbulent priest," King Henry proceeded to offer a reward of 5,000 gold sovereigns and being created Earl of Grantham for anyone who got the job done. This additional speech would remove any residual doubts about whether Henry II was expressing political frustration rather than soliciting a murder. In cases where speech is ambiguous, the First Amendment rule should be that the speaker enjoys constitutional protection—that is arguably the teaching of both *Brandenburg* and *Watts*. Such a rule also finds support in *Claiborne Hardware* and *Hess*, which both convey protection on speech that clearly calls for illegal action, but where such action either did not take place based on the speaker's public exhortations advocating criminal conduct (*Claiborne Hardware*) or could not have been heeded because no one heard the call to arms (*Hess*). Again, even a modicum of fealty to the Free Speech Clause requires a judge to engage in a

king's language inarguably falls on the "protected" side of the ledger. *Brandenburg*, read through the lens of Justice Holmes's *Gitlow* dissent, effectively requires this outcome.

By way of contrast, an extortion scheme planned by the mafia to secure "protection" payments from local business owners plainly causes a cognizable legal harm. When Tony Soprano says to his crew "If those dumb asses don't pay up, and right now, for the protection we provide well, then someone needs to bust a few kneecaps," and Big Pussy Bompensiero, later that day, breaks a pizza joint's owners legs after the owner declines to pay the protection money the Soprano crew is demanding, then Tony should be on the hook. Why? Because on these facts, Tony Soprano's speech plainly caused legally cognizable harm; it constituted either conspiracy to commit an assault and battery, solicitation of an assault and battery, or perhaps both.

This speech also occurs as part and parcel of an ongoing, highly organized, criminal enterprise that maintains multiple unlawful activities concurrently. *Claiborne Hardware* and Charles Evers's public comments at a political rally about "break[ing] neck[s]"[144] this is not. What's more, the NAACP does not exist to engage in organized crime, and civil rights protest of racially discriminatory local businesses does not constitute an extortion scheme. To state the matter simply and directly: Context matters. Without belaboring the point, the salient differences include (1) the political message, (2) the lack of other concurrent unlawful activities performed by the organization, and (3) the lack of a criminal purpose behind the statement. It bears noting that *none* of these conditions were satisfied in either *Williams* or *Hansen*—which might help to explain why the majority in both cases did not make any serious effort to disentangle a criminal enterprise from public advocacy that includes express calls for unlawful action.

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careful, contextual analysis when determining whether the government may treat speech, and speech alone, as a criminal act. The alternative risks turning the criminal law into a chilling effect machine. *See* Volokh, *Criminal Conduct Exception*, *supra* note 121, at 1051 ("But even when speech does tend to cause or threatens illegal conduct, the boundaries of any exception for that speech need to be defined by the courts with an eye towards making sure that the exception doesn't unduly suppress protected speech (just as the Court has done for the incitement, fighting words, and child pornography exceptions).").

[144] *Claiborne Hardware Co.*, 458 U.S. at 702, 726–27.

One could, of course, imagine circumstances where Tony says something similar—perhaps at the Bada Bing—but does not mean it seriously and where Big Pussy does not take it seriously. In fact, no kneecaps get "busted." In that context, criminal charges, even against Tony Soprano, should not lie. Simply put, everyone should enjoy a First Amendment right to engage in intemperate or imprudent hyperbolic speech—including direct calls to engage in unlawful action that a speaker does not intend to be taken seriously and which, in fact, do not cause any crimes (or present a very high probability of doing so).[145]

If, as Justice Holmes proposes in his *Gitlow* dissent, the First Amendment requires the government to make a convincing and particularized showing of likely harm flowing from specific speech in order to impose criminal liability, then the risk of chilling speech through the criminal law would be greatly reduced by adopting the approach that I am advocating (namely, conditioning the criminalization of pure speech on a credible showing of cognizable legal harm, regardless of the specific criminal charge at issue). As it happens, the Supreme Court already has gone part of the way down this road. The Justices should close the rest of the distance by

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[145] Another troubling failure of the Supreme Court involves the Justices' decision not to take up the U.S. Court of Appeals for the Fifth Judicial Circuit's bizarre decision in *Doe v. Mckesson*. This decision permits a Baton Rouge police officer, identified as "John Doe," to sue DeRay Mckesson for injuries he sustained at a Black Lives Matter rally. Doe v. Mckesson, 945 F.3d 818, 822–24, 828–30 (5th Cir. 2019). The majority embraces a respondeat superior theory of liability that makes the organizers of a civil rights protest civilly liable for any incidental tortious activity that occurs during the protest event. *See id.* at 830–32. Moreover, the decision does this despite *Claiborne Hardware* clearly disallowing this kind of respondeat superior liability. 458 U.S. at 931 ("To impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment."). No evidence existed to show that Mckesson "ratified the unlawful conduct" that caused Officer Doe injury. Accordingly, the First Amendment precludes imposing liability on either Mckesson or the Black Lives Matter Network, Inc. and #BlackLivesMatter organizations. *See* Doe v. Mckesson, 947 F.3d 874, 878 (5th Cir. 2020) (Dennis, J., dissenting from denial of rehearing en banc) (objecting that the *Mckesson* panel majority "appears to apply a free-wheeling form of strict liability having no resemblance to Louisiana law's careful duty-risk analysis, concluding that, because of his association with the demonstrators or his failure to anticipate and prevent the rock throwing incident, Mckesson can be held liable—despite the First Amendment protection historically afforded protest activity—for the acts of a 'mystery attacker.' Doe v. Mckesson, 945 F.3d 818, 842 (5th Cir. 2019) (Willett, J., dissenting)"). For a thoughtful and persuasive critique of *Mckesson* on free assembly grounds, see John Inazu, *Incitement, Enthusiasm, and the Dangers of Negligent Protest*, 6 J. FREE SPEECH L. 801 (2025).

realigning their approach to applying the Free Speech Clause in the context of the criminal law to better resemble its approach to reconciling free speech principles with the law of tort.

The best understanding of the Supreme Court's *Brandenburg* decision is that "imminence" serves as a proxy for cognizable legal harm. It is the harm principle, not imminence, that drives both the constitutional analysis and the outcome. The harm principle also explains *Watts*. No reasonable person would have taken the hyperbolic political speech as a serious threat against the life of the President. The harm principle also explains *Hess*—no one but a law enforcement officer was listening to Gregory Hess when he vowed "to take the fucking street again"[146] and, accordingly, there was little chance of his speech causing harm.

So too *Claiborne Hardware*.[147] To be sure, Charles Evers said "'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.'"[148] That language certainly sounds like a threat—and, accordingly, the state trial court placed great emphasis on it in sustaining a civil damages judgement for conspiracy.[149] For Justice Stevens, and a unanimous Supreme Court bench, the fact that not a single neck got broken as a result of Evers's speech was the key consideration in weighing whether civil conspiracy liability could be imposed on Evers and the NAACP. Nor, for that matter, did anyone step forward to report deep psychological trauma as a result of Evers's hyperbolic speech—which would also have ticked the "social harm" box if such evidence existed.[150]

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[146] Hess v. Indiana, 414 U.S. 105, 107 (1973).

[147] 458 U.S. at 916–17 (emphasizing that, when the government seeks to criminalize pure speech, "'precision of regulation' is demanded and, more specifically, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages"). Justice John Paul Stevens carefully considers all of the relevant facts and circumstances before disallowing the imposition of civil damages for conspiracy. *See id.* at 916–33. Justice Stevens hits the requisite mark when he observes that "[c]oncerted action is a powerful weapon" and that "special dangers are associated with conspiratorial activity," nevertheless "one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means." *Id.* at 932–33.

[148] *Id.* at 902.

[149] *See id.* at 900 n.28.

[150] *Id.* at 902.

To be sure, isolated acts of violence against Black residents who failed to respect the boycott did occur between 1966 and 1970[151]—but all of these events occurred many weeks, in some cases months, after Evers made his "break your damn neck" remarks at a rally held on April 1, 1966.[152] Thus, although "strong language was used," Justice Stevens emphasized that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases" and, in consequence, "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."[153] In sum, "[w]hen such appeals do not incite lawless action, they must be regarded as protected speech" because "[t]o rule otherwise would ignore the 'profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open.'"[154]

Of course, the governing tort law precedents require actual harm to flow and even disregard some *actual harms*—for example, false speech made without actual malice that nevertheless damages the reputation of a public official or a public figure—in the service of ensuring that debate about matters of public concern is "uninhibited, robust, and wide-open."[155] The key distinction, however, is that the victims of criminal activity are seldom public officials or public figures—or involved significantly in matters of public concern. At the heart of the *Sullivan* line is a kind of assumption of risk theory with respect to the kinds of dignitary harms that the Supreme Court's rulings impose on public officials and public figures.[156]

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[151] *Id.* at 900 n.28, 904.

[152] *Id.* at 928.

[153] *Id.*

[154] *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). Justice Stevens also cites *Watts* in support of his conclusion that neither Evers nor the NAACP could be held civilly liable based on Evers's remarks at the April 1, 1966 rally because the plaintiffs failed to prove that the remark directly caused a cognizable legal harm. *See id.* at 928 n.71.

[155] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[156] It bears noting that the Supreme Court's free speech and free press jurisprudence includes cases that involve imposing significant reputational and psychological harms on non-public officials/public figures who happen to be involved in crimes as victims. *See* Florida Star v. B.J.F., 491 U.S. 524, 531–34 (1989) (holding that, under the First Amendment, a newspaper could publish the name of the victim of a sexual assault without being subjected to a civil lawsuit seeking damages for the publication of the victim's name); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490–92 (1975) (holding that a newspaper may constitutionally publish the name of a rape and murder victim contained in a record open to the public without being liable for intruding on her parents' privacy).

Justice Antonin Scalia's effort in *Williams* to renormalize *Brandenburg* and *Claiborne Hardware* as involving merely "abstract advocacy" simply does not accord with the facts.[157] This is especially true with respect to the facts at issue in *Claiborne Hardware*, where Charles Evers, a leader of the boycott effort, plainly did suggest that unlawful physical force might be used to enforce the NAACP's boycott of the racially discriminatory, White-owned businesses in Claiborne County, Mississippi.[158] Justice Scalia's distinction in *Williams* is precisely the same line that the majority in *Gitlow* attempted to draw[159]—and the line that Justice Holmes wisely, and correctly, rejected as failing to honor the central meaning of the First Amendment.

In fact, one can quite easily distinguish *Williams* from cases that deploy the Free Speech Clause to block the imposition of criminal liability for pure speech. Most obviously, offering to sell child sexual abuse materials to a person who seeks to possess it causes a cognizable legal harm (by helping to feed and sustain an illicit market for these materials). And even if one resists the actual harm done on these facts

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[157] United States v. Williams, 553 U.S. 285, 298–99 (2008).

[158] *Claiborne Hardware*, 458 U.S. at 900 n.28, 902 & 927.

[159] *Compare Williams*, 553 U.S. at 299 ("To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."), *with* Gitlow v. New York, 268 U.S. 652, 664–65 (1925) ("The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. . . . What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means."). To be sure, Justice David Souter, in his *Williams* dissent, advocates an approach consonant with this Essay—namely that prosecution for a crime involving pure speech must involve a concrete and particularized showing of actual harm. *See Williams*, 553 U.S. at 322 (Souter, J., dissenting) ("*Brandenburg* unmistakably insists that any limit on speech be grounded in a realistic, factual assessment of harm. This is a far cry from the Act before us now, which rests criminal prosecution for proposing transactions in expressive material on nothing more than a speaker's statement about the material itself, a statement that may disclose no more than his own belief about the subjects represented or his desire to foster belief in another."). The question of a cognizable legal harm in *Williams* is, accordingly, arguably debatable. In my view, however, feeding an illicit market by offering to sell forms of pornography that the government may constitutionally proscribe helps to sustain a market that plainly causes serious social harm. What's more, the intent of the speaker and likely effect of the speech also relate to commission of a crime and don't contribute a thing to democratic self-government or public policies on child sexual abuse materials.

to kids, such offers are, in the main, highly likely to cause cognizable social harm.[160] To frame the question as *Alvarez* approaches criminal laws against perjury, impersonating a government officer, and lying incident to a government investigation, an offer to engage in a commercial transaction involving child sexual abuse materials clearly involves a serious social harm (sustaining a market for such materials among pedophiles). Moreover, no good argument exists in favor of the proposition that Michael Williams sought to move public policy regarding works of art featuring nude depictions of actual children.[161] Because conduct of the sort that Williams engaged in helps to sustain a market for child sexual abuse materials, his speech caused a legally cognizable harm. The producers of content of this sort exploit children in its production; the legally cognizable harm is obvious.

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[160] *See supra* text and accompanying notes 33 to 43 (discussing in some detail the concept of social harm, or a serious risk of it, in the context of crimes that consist solely of speech activity).

[161] *But cf.* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 228 (2001) (noting that "some members of the psychiatric establishment" have "suggested that the long-term effects of childhood sexual abuse may have been exaggerated"); *id.* at 256–57 (positing that "[c]hild pornography law has changed the way we look at children" and "sexualizes children, and thereby promotes one of the very dangers it purports to solve"); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 966–69 (2001) (arguing that the federal courts have undervalued the artistic importance of works of art featuring nude minors, by artists such as Sally Mann and Henry Darger, and that this First Amendment mistake significantly degrades and inhibits artistic freedom in the United States). To be sure, it is virtually unthinkable that Professor Adler's law review arguments challenging the criminalization of any and all nude or sexualized depictions of minors could constitutionally serve as a basis for a criminal prosecution related to distribution of child sexual abuse materials (whether for incitement, solicitation, or conspiracy); both articles clearly constitute well-informed policy critiques (something that simply cannot be said for the speech activity at issue in *Williams*). Even so, however, Justice Souter's dissent in *Williams*, which would straightforwardly limit liability for solicitation to speech that demonstrably causes actual harm, provides the better line of demarcation than Justice Scalia's embrace of "abstract advocacy" versus a call to engage in unlawful activity. The majority opinion in *Williams* does not identify or apply the harm principle (at all)—and the same holds true for Justice Barrett's majority opinion in *Hansen*. In fairness, one can level the exact same objection with respect to the majority opinions in *Brandenburg*, *Watts*, *Hess*, and *Claiborne Hardware*. In both cases sustaining and rejecting criminal liability for pure speech, the harm principle appears to be driving the outcomes—yet the Supreme Court never directly identifies and discusses the harm principle above the line. Justice Holmes does a (far) better job on this front in his *Gitlow* dissent. Free speech law in the contemporary United States could be significantly improved if the Justices would ratify and reaffirm his mode of analysis in a future decision.

So too, *Hansen* involves a scam that sought to rip-off would be immigrants to the United States by offering a quick, but legally spurious, route to citizenship via "adult adoption."[162] Helaman Hansen was not engaged in advocacy for undocumented persons or reform of U.S. immigration laws or policies.[163] Hansen was effectively stealing from desperate people seeking a lawful route to permanently reside in the United States. In short, a clear legally cognizable harm was present.

Unfortunately, however, the statute which the Supreme Court sustains against a First Amendment attack in *Hansen* could easily be deployed against immigrants' rights advocates who publicly advocate violations of U.S. immigration laws and policies.[164] The Justices in the majority would have better reconciled legitimate criminal law objectives with cherished First Amendment freedoms if they had held that, as applied to conduct of the sort Hansen engaged in, the statute did not present any constitutional difficulties. Instead, *Hansen* squarely holds that the government may generally criminalize advocacy of illegal immigration into the United States that might facilitate or encourage it—and even under a more charitable reading, Justice Barrett's majority opinion fails to signal with sufficient clarity that advocating unlawful immigration, or proposing illegal support for persons who unlawfully immigrate to the United States once here, in the absence of actual conduct or a very

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[162] United States v. Hansen, 599 U.S. 762, 766–67 (2023).

[163] *Cf. id.* at 766–68 (discussing and describing Helaman Hansen's fraudulent "adult adoption" program for non-citizens seeking a legal right to immigrate to the United States).

[164] For example, the Gospel of Mark clearly includes express admonitions to feed the hungry, clothe the naked, and to welcome the stranger—all regardless of the beneficiary's immigration status. *See* THE CATHOLIC FAITH AND FAMILY BIBLE 1232 (NRSV Catholic ed. 2010) (Matthew 25:35–36) ("[F]or I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, I was naked and you gave me clothing . . . ."). If a Catholic priest, during his Sunday homily, engages these words and admonishes his congregants "to do exactly as Jesus directs" with respect to unlawful immigrants, both *Williams* and *Hansen* leave the door completely open to criminal charges for soliciting unlawful immigration. What is more, actually rendering such aid can and in fact *does* result in both federal criminal charges and convictions. *See* Ray, *supra* note 11, 620–21, 648–50 (reporting on federal criminal prosecutions against lawful U.S. residents for charitable acts, including leaving drinking water along immigration routes that undocumented persons illegally entering the United States commonly traverse in the California and Arizona deserts). Despite the federal government's treatment of attempted rescues as criminal activity, the Roman Catholic Church clearly and consistently advocates and supports rendering such aid unconditionally. *See supra* note 11.

high prospect of it, would enjoy full and robust protection under the First Amendment. In fairness, one must concede that the *Hansen* majority opinion certainly imposes a limiting construction on the statute and also carefully notes that general, abstract criticism of the federal government's immigration policies enjoys strong constitutional protection as speech. Even so, the opinion simply does not address with sufficient clarity potential cases involving calls for unlawful action in circumstances where the call to arms either was not, or was highly unlikely to be, heeded by the message's audience.

Free speech protections should extend beyond the most anodyne, theoretical statements about unlawful immigration when only speech is at issue and the speech relates to a matter of public concern; Justice Holmes advocates precisely this approach in *Gitlow*. The difference in approaches is both obvious and important (particularly at a time when U.S. immigration law enforcement policies and tactics are the subject of widespread popular dissent).

To provide another example: A plan to rob a bank—a conspiracy—involves cognizable legal harm. By way of contrast, simply saying banks ought to be robbed because they impose abusive terms on their customers should constitute protected speech or, to make the point even more clearly, "We should all go out and rob a bank because the vampires should get what they dish out."[165] Unfortunately, however, the Supreme Court has not yet issued a *Brandenburg* for solicitation or conspiracy that involves a direct call for unlawful action in circumstances where it's not seriously intended and also unlikely to be heeded. *Williams* and *Hansen* say "abstract advocacy," and nothing more, is protected but the status of direct, targeted calls to illegal action remains more open than it should be. Abstractness certainly correlates with a significantly lower risk of social harm—but directness does not necessarily indicate that speech charged as a crime (under whatever label) satisfies the harm principle.

A direct call for unlawful action should enjoy protection as speech, no less when the government charges solicitation or conspiracy rather than incitement, when the speaker does not seriously intend the proposal to engage in a crime and where the audience does not or likely will not act on the suggestion. The Supreme Court's existing solicitation cases do not make this point with sufficient clarity to defang an

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[165] *See* MILL, supra note 80, at 100–01 (making precisely the same point with speech critical of corn dealers).

aggressive prosecutor who wishes to punish a speaker whose message offends the general community and includes a facial call to unlawful action. Indeed, the law is sufficiently vague that, after January 6, some well-regarded free speech scholars posited that President Trump could potentially face charges for criminal conspiracy or solicitation; this kind of daylight in the scope of First Amendment protection creates an unacceptable chilling effect on core political speech.

The problem, in my view, is of the "dog that did not bark" variety; speech that goes beyond mere abstract advocacy but that does not cause harm should enjoy robust protection as "speech." Indeed, this is the central lesson of the Holmes dissent in *Gitlow* and the Supreme Court's later decisions in *Brandenburg*, *Watts*, and *Hess*. To be sure, in the Supreme Court's decided cases involving solicitation and the First Amendment, the facts were (very) bad for establishing a plausible free speech claim. As noted, neither *Williams* nor *Hansen* involves the use of solicitation charges in a context where cognizable legal harm is absent or where the speaker sought to move public policy. Even so, both decisions make blanket, all-encompassing statements that speech that solicits a crime stands completely outside the protection of the First Amendment's Free Speech Clause. A more nuanced analysis was requisite in both cases.

If a health care advocate declaims, "Who will teach the bloodthirsty health insurance companies some lessons in compassion?," this hyperbolic speech should be fully protected under the First Amendment. By way of contrast, efforts to dox health care company corporate leaders, along the lines of the Nuremberg Files, should not.[166] If a person is emailing with Luigi Mangione and providing United-Healthcare CEO Brian Thompson's personal schedule and home address, criminal charges for solicitation or conspiracy would not violate the Free Speech Clause. In my view, either a post with health care executives' names or personal information, standing alone, might conceivably serve as a basis for solicitation charges (because the speaker intends to facilitate harm and the posts of this sort could easily lead to harm resulting); taken together however, and considering the reasonable doubt standard applicable to fact finding in the criminal law context, they present a very strong case for finding the government's criminal charges satisfy the harm principle.

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[166] Planned Parenthood v. Amer. Coalition of Life Activists, 290 F.3d 1058, 1062, 1075–76 (9th Cir. 2001) (en banc) (sustaining liability for doxing abortion care providers against a First Amendment objection).

The salient differences in these fact patterns should be obvious to any reasonable Article III judge or, for that matter, public prosecutor. Indeed, both *Williams* and *Hansen* involve facts of this stripe and imposing liability on such facts for solicitation (and the same analytical logic would extend to conspiracy charges) should not offend the Free Speech Clause. Both cases, it bears repeating, involved seriously intended proposals to engage in a crime that, moreover, could easily have facilitated an actual crime (*Williams*) or that actually constituted a crime (*Hansen*)—the sale of child sexual abuse materials, in *Williams*, and a fraudulent immigration scheme, in *Hansen*—rather than merely hyperbolic political speech that advocates direct law violation. The Supreme Court has made crystal clear that entirely abstract calls for unlawful activity enjoy robust First Amendment protection (and, for the record, did so again in both *Williams* and *Hansen*), whereas speech associated with criminal enterprises aimed at engaging in illicit activity does not.

The problem, in my view, inheres in the Justices' collective failure to address clearly the middle area involving direct calls for unlawful activity where the speaker does not seriously intend the call to be heeded and where the message's audience either ignores the call entirely or is highly unlikely to act on it. For example, a "middle case" using the health care executive posts would involve a statement, perhaps at a public rally, that health care providers should, in an ideal world, suffer the same fate as those refused necessary medical procedures by their insurers. The language, on its face, arguably calls for violence against this group. Even so, the probable intent of the speaker, and likely effect of the speech, would not satisfy the harm principle (as was the case in *Watts* with respect to threats).

To be clear, the Supreme Court correctly decided *Brandenburg*, *Watts*, *Hess*, as well as *Claiborne Hardware*. The problem with these important free speech decisions is that they do not clearly identify the absence of cognizable legal harm flowing from the expressive activity as the basis for their outcomes. By way of contrast, *Alvarez* makes this point expressly and repeatedly. Perhaps it is easier, and potentially less fraught, to address questions related to "imminence," "true threats," an actual breach of the peace, or criminal activity in support of a conspiracy than to define when a harm is sufficiently concrete, and speech sufficiently responsible for causing the harm, to justify denying the speech any and all First Amendment pro-

tection. The problem, however, is that leaving the harm principle implicit and unstated invites prosecutors to use crimes, such as solicitation and conspiracy, to squelch speech that plainly constitutes advocacy of public policy reform.

In sum, courts need to look carefully at the context of speech activity to ascertain whether it contributes meaningfully to public discussion about matters of public concern as well as whether the speech will likely bring about a legally cognizable harm. In undertaking this analysis, the federal courts should take into full and careful account the entire context of the speech activity—as the Supreme Court did in *Brandenburg*, *Watts*, *Hess*, and *Claiborne Hardware*. In particular, judges need to assess with care the social value of the speech activity, the speaker or organization engaging in the speech activity and the speaker's or organization's history of engaging in criminal activity (which would be relevant to the probable intent of the speaker and likely effect of the speech), and the relationship (if any) of the speech to democratic self-government when deciding whether speech does nothing more than propose a criminal transaction. Finally, the harm principle, as explicated in *Alvarez*, should strictly limit the ability of the government to punish speech as a crime by disallowing criminalization on facts where a cognizable legal harm does not or likely would not flow from speech that implicates matters of public concern.

## V. Conclusion: The Federal Courts Should Embrace and Deploy the Harm Principle to Differentiate Protected Speech from Crimes

First Amendment protection for speech should not turn on the crime alleged rather than on the social value—and social cost—of the particular speech activity. The requisite First Amendment analysis should be highly contextual—not categorical. Nor should the federal courts place undue reliance on simplistic labels that are far from self-applying. A simplistic speech/conduct line, which slaps the "conduct" label on socially harmful speech while saying that solicitation or criminal activity enjoys no First Amendment protection does not provide an effective means of disentangling ideas from crimes. This approach creates an unacceptable risk of punishing legitimate speech activity as a crime—and creating a no less unacceptable chilling effect for hyperbolic political speech.

*Brandenburg*, which adopts the approach that Justice Holmes advocates in his *Gitlow* dissent, does not expressly cabin the bite of either solicitation or conspiracy charges. The holding, admittedly quite important, defangs only the crime of incitement—a state of affairs that prosecutors will inevitably seek to exploit strategically to escape the First Amendment's reach. Moreover, *U.S. v. Williams* and *U.S. v.*

*Hansen* both fail to recognize adequately that speech that goes beyond mere "abstract advocacy" and directly advocates unlawful activity might nevertheless enjoy significant First Amendment protection because it did not cause, and was unlikely to cause, a cognizable social harm and, in addition, contributed materially to the marketplace of political ideas.

A more careful, contextual, and nuanced constitutional analysis is needed that conditions the criminalization of speech on the government's ability to show with convincing clarity that the speech actually caused, or presented a serious risk of causing, a cognizable legal harm. In this respect, *Alvarez* potentially provides the doctrinal key to renormalizing how the federal courts reconcile bedrock First Amendment principles with the application of the criminal law. *Alvarez*, however, simply follows the road map that Justice Holmes draws in his *Gitlow* dissent.

In sum, Justice Holmes points the way forward to avoiding the serious chilling effect that would inevitably result if the government can treat speech as a crime in the absence of a particularized showing of a non-trivial social harm. His arguments and reasoning provide a clear path forward for harmonizing a serious commitment to freedom of expression in a democratic polity with criminal law enforcement. The Supreme Court just needs to follow it by making express what, to date, has only been implicit—namely, that the government can only punish speech as a crime when it causes or is likely to cause social harm.