Suppose . . .

. . . on his Facebook page, a man posts original rap lyrics filled with violent language about his wife and children, the police, a kindergarten class and an FBI agent. He includes statements that the lyrics are “fictitious” artistic First Amendment expression not directed toward real individuals. The jury decides a reasonable reader would find the posts threatening, convicts him of the federal crime of conveying threats across state lines and sentences him to four years in jail. The appeals court affirms. But can song lyrics pose a criminal threat if you didn’t intend to threaten? Does it matter that you communicated them online to your Facebook “friends”? Look for the U.S. Supreme Court’s answers in the discussion and excerpt of *Elonis v. United States* in this chapter.

This chapter examines how courts determine the boundaries of protected speech. It explores expression at the fringes of First Amendment protection and beyond and the special considerations given to speech in and around public schools and universities.

A cornerstone of First Amendment analysis is that it does not prohibit all laws that infringe upon speech. To determine when laws violate the First Amendment, courts may use highly fact-specific ad hoc balancing to balance the societal harms against the personal freedoms involved in the case. Alternately, courts often rely on previously established categories of speech to apply specific standards of court review to that speech. Some categories of speech—blackmail, perjury, false advertising and obscenity, for example—are
unprotected categories. If the speech category is protected, courts then look to the specific context of the speech and the nature of the legal punishment to determine how best to review the case.

When the category of speech is developing or evolving, such as hate speech or threats, courts look at the language of the statute, the circumstances and the level of harm to determine whether the speech is protected. One difficulty is that the seriousness of harm caused by the speech rarely can be known in advance.

Evolving Court Tests to Protect Disruptive Speech

The U.S. Supreme Court has developed several tests to help it and other courts decide when unpopular or disturbing speech must be protected and when it may be punished. The Court has said free expression is not protected if it causes imminent harm or plays “no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.” No bright lines define the boundaries of this category. The border between protected and unprotected speech is not fixed. The Court's tests afford leeway in response to changing circumstances.

Landmark Cases in Context

1925
Gitlow v. New York

1917
U.S. enters World War I

1929
Wall Street stock market crashes

1956
Elvis Presley appears on "The Ed Sullivan Show"

1963
MLK Jr. gives "I Have a Dream" speech

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From a Bad Tendency to a Clear and Present Danger

A century ago, Justice Oliver Wendell Holmes wrote for a unanimous U.S. Supreme Court that government had both a right and a duty to prevent speech that presented a “clear and present danger” to the nation. The case of *Schenck v. United States* began when Charles Schenck, a Socialist Party member, mailed anti-draft pamphlets to men in Philadelphia. The pamphlets encouraged readers to reject the government’s pro-war philosophy and oppose U.S. participation in World War I. Schenck was convicted of violating the Espionage Act of 1917, which was enacted to unify the nation behind the war effort.

In affirming Schenck’s conviction, the Supreme Court said the mailing had a “bad tendency” that could endanger national security. Justice Holmes said ordinarily harmless words may become criminal during times of war because of the heightened danger they pose: “It is a question of proximity and degree.” Common sense indicates that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” Nor would it protect an individual in a military recruitment office falsely shouting, “I have a bomb.”

Under the Espionage Act, a unanimous Court affirmed other convictions for anti-war protests, speeches and pamphlets the Court said might tend to endanger the nation. In one case, the Court upheld a 10-year prison term for publishing writings that questioned the
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Vehement expression of opposing ideas is not the antithesis of free speech, but it does not necessarily produce informed democratic debate. When raucous name-calling, hate-filled signs and near-threats in the streets replace the reasoned exchange of ideas, free speech may seem pathological.

Law professor Martin Redish suggests that concern about speech “pathology pervades the flow of American political history,” and the U.S. Supreme Court rules accordingly. “Virtually all periods of strong political dissent throughout the nation’s history have been met with a corresponding rise in repression.”

Nonetheless, uncivil discord may be an essential cost of democracy.

“The labels ‘civility’ and ‘incivility’ . . . effectively function as exclusion instruments,” according to one legal scholar. “Although they create the appearance of inclusiveness and openness to contrarian views,” they work to silence dissenting voices.

The constitutionality of the draft and the merits of the war. The Court said the publications presented “a little breath [that] would be enough to kindle a flame” of unrest. The Court also upheld the conviction of a speaker who told Socialist Party conventioneers, “You are fit for something better than slavery and cannon fodder.” The jury relied on the speaker’s court testimony that he abhorred the war to demonstrate both his intent and the likelihood he would harm the war effort.

The Court also used this so-called bad-tendency standard to uphold a Sedition Act conviction of five friends whose pamphlets criticized U.S. interference in the Russian Revolution and encouraged strikes at U.S. munitions factories. The leaflets told workers to oppose “the hypocrisy of the United States and her allies.” This time writing in dissent, Justice Holmes said the “surreptitious publishing of a silly leaflet by an unknown man” did not pose a sufficiently grave and imminent danger to permit punishment. The First Amendment requires government to protect diverse and loathsome opinions, he wrote, “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.” This Holmes dissent in *Abrams v. United States* transformed his interpretation of the First Amendment and created the clear and present danger test.

The Court relied on the clear and present danger test for 50 years most often to affirm punishment of communists. During the Red Scare of the 1920s, the Court affirmed the conviction of an immigrant for publication and distribution of Socialist Party literature urging the rise of socialism in the United States. Without evidence that the pamphlets caused any harm or disruption, the Supreme Court in *Gitlow v. New York* upheld the conviction for criminal anarchy and advocacy to overthrow the government, saying that the pamphlets lit a “revolutionary spark” that might ignite a “sweeping and destructive conflagration.” The majority said the writings “endanger[ed] the foundations of organized government and threaten[ed] its overthrow by unlawful means.”
Now writing in dissent, Justice Holmes declared, “Every idea is an incitement” and most ideas “should be given their chance and have their way” in the dialogue of a free and democratic society. The mere dissemination of ideas does not endanger the nation.

The majority of the Court did not embrace Holmes’ view, but its Gitlow decision expanded free speech protection by establishing the doctrine of incorporation. The incorporation doctrine applies the 14th Amendment’s due process clause to limit the power of state and local governments to abridge the Bill of Rights. In other words, incorporation prevents the states, as well as the federal government, from abridging protected First Amendment rights.

In the years leading up to U.S. involvement in World War II, the Supreme Court used the clear and present danger test to uphold the conviction of a labor activist for participating in meetings of the Communist Labor Party. In Whitney v. California, the Court accepted without evidence that the Communist party was violent and ruled that the First Amendment did not bar California from making it a crime to belong to a group that advocated violence. Mere party membership was sufficient to pose an imminent threat that was “relatively serious.” Writing in concurrence, Justice Louis Brandeis said a clear and present danger existed when previous conduct suggested a group might contemplate advocacy of immediate serious violence.

During the anti-communist frenzy of the 1950s, the Court used the clear and present danger test to uphold a federal law that required labor union officers to swear they were not communists. In dissent, Justice Hugo Black said the test did not sufficiently protect unpopular political speech or association from overzealous regulation: “Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack.”

Members of the Court increasingly questioned the ability of the clear and present danger test to protect radical speech. In several cases, the Court ruled that regulation of speech is unconstitutional if it does not address a problem more severe than abstract expressions about revolt and is not narrowly tailored to avoid infringing on protected speech. While it is constitutional to regulate speech that advocates illegal action, government may not punish the mere expression of radical ideas. This doctrine was established in Brandenburg v. Ohio, a case involving incitement.

**From Clear and Present Danger to Incitement**

In 1969, the U.S. Supreme Court determined that the clear and present danger test was inadequate to protect innocent yet offensive speech. In Brandenburg v. Ohio, the Court adopted a new test that drew a bright-line distinction between advocating violence as an abstract concept and inciting imminent violence when it ruled that the First Amendment protects the right to advocate but not to incite, or provoke, immediate violence.

The case involved Clarence Brandenburg, a television repairman and Ku Klux Klan leader, who spoke to a dozen KKK members in the woods of rural Ohio. Brandenburg made vague threats to take “revengeance” against various government leaders, and his racist speech was later televised. Brandenburg was convicted under state criminal conspiracy law
of attempting to violently overthrow government. He said the conviction violated his right of free speech.

The Supreme Court struck down Brandenburg’s conviction, holding that the First Amendment protected people’s right to advocate abhorrent ideas. Brandenburg’s anti-Semitic and racist comments were highly offensive, the Court said, but “[m]ere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.” To protect the expression of abstract ideas about the necessity of violence from government intrusion, the Court established a test named after the case. The Brandenburg test permits government to punish the advocacy of violence only by showing that the advocacy was (1) intended to and (2) likely to incite imminent (3) lawless action.

In a second case, Hess v. Indiana, Gregory Hess used profanity at an anti-Vietnam War rally after sheriff’s officers moved demonstrators out of the street. On appeal, the U.S. Supreme Court overturned Hess’ conviction for disorderly conduct. The First Amendment protected his speech that was not intended to, and not likely to, provoke an imminent violation of the law. The Court held that unless a speaker so inflamed a crowd that people responded with immediate, illegal acts, the speech was protected.

Under Brandenburg, the incitement does not have to be explicit, but two recent U.S. Supreme Court decisions raise the bar needed for government to show that prosecution is reasonable because a communication is sufficiently likely to be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Relying on Bell Atlantic v. Twombly and Ashcroft v. Iqbal, the Court said charges should be dismissed if judges’ “common sense” and judicial experience indicated that (1) the preliminary facts (2) did not make a plausible showing (3) that the necessary elements of the crime were met.

**POINTS OF LAW**

**THE BRANDENBURG INCITEMENT TEST**

In Brandenburg v. Ohio, the U.S. Supreme Court established a test to determine when it is constitutional for government to punish illegal encouragement of violence. The Court clarified the test a few years later and affirmed that government could punish speech provoking illegal activity only if facts showed that the speaker

1. intended to
2. and was likely to incite imminent
3. violent or illegal action.

Under Brandenburg, punishable incitement exists if the facts show that intent, likelihood and imminence are probable and that the violence is so immediate that no other action would address the harm. The Court has not clearly defined these three elements. In 2007 and 2009, two Supreme Court rulings muddied the already murky Brandenburg test.
In a 2017 decision, the Sixth Circuit Court of Appeals applied the Twombly/Iqbal standard to dismiss an incitement suit brought against President Donald Trump for telling a crowd at a campaign rally to “get ‘em out of here.” He was referring to protesters at the event. After President Trump’s comment, members of the crowd pushed and shoved the protesters as they exited, and the protesters sued the president for damages for “inciting to riot.”

A court may dismiss a charge of incitement using the plausibility standard if the court’s common-sense interpretation of the preliminary facts establishes that intent, likelihood and imminence are unlikely to be shown. The government’s showing of these key elements must rely on facts alone, not on “legal conclusion[s]” that may be incorrect. The facts must present a case that is more than speculative; it must be “plausible on its face” and provide a “reasonable” basis for the court to believe that it is “more than a sheer possibility” that the defendant is liable.

The Sixth Circuit dismissed the case against the president on the grounds that the First Amendment protects speech that does not meet the Brandenburg standard.

When applied to claims that media provoke violence, the incitement test requires a showing that exposure to the media content would cause immediate violent or unlawful activity. That is nearly impossible to prove. Media content does not ordinarily provoke such a rapid response. When seeing, reading or hearing media material, a person must process the information before taking action. There generally is time to prevent a person from committing violent acts. The incitement test also requires proof that media content is likely to cause a reasonable person to act illegally. Rarely will a court find that a reasonable person would commit violence in response to media content.

SPEECH HARMS

Contrary to the childhood chant, words can hurt you. Speakers—sometimes intentionally, sometimes not—disrupt organized activities or offend, denigrate or degrade people. People call each other names; they hurl hateful insults and epithets at each other. They threaten; they harass. They fill public meetings and public streets with dissent and discontent. The words and images they use alienate, cause fear and increase conflict.

Offensive Speech

Although many different types of speech offend or cause discomfort, mental anguish or suffering, the U.S. Supreme Court has said the First Amendment protects our right to
express ourselves in our own words. In *Cohen v. California*, Paul Robert Cohen appealed his conviction for disturbing the peace for opposing the Vietnam War by wearing a jacket bearing the phrase “Fuck the Draft” in the Los Angeles courthouse. Cohen said the First Amendment protected his pure political speech. The Supreme Court agreed. Although court officials have broad authority to maintain decorum, they cannot punish speech that does not disrupt the court’s functioning simply because they find the words offensive.

The Supreme Court went further in *Cohen* and said the First Amendment protected both the content and the feelings expressed through a message. Meaningful protection for free speech goes beyond the “cognitive content” to protect the “emotive function” of a message, the Court said. It is not simply what you say but how you say it that enjoys constitutional protection. As Justice John Harlan famously wrote, “One man’s vulgarity is another’s lyric.”

In 2018, the U.S. Supreme Court ruled that a citizen’s First Amendment rights might protect him from punishment for disrupting city council meetings. The case began when the police arrested and removed an individual with a history of criticizing the city council from a council meeting after he repeatedly refused to stop interrupting the proceeding. The individual claimed the arrest violated his freedom of speech and retaliated for his lawsuit against the council for alleged open-meeting violations (see Chapter 7). The Supreme Court acknowledged the legitimate justification for the arrest but said probable cause did not automatically overcome a claim that the arrest was improperly motivated by retaliation for protected First Amendment activity. In an 8–1 decision limited to “these facts,” the Court said the case involved high-value political speech. In 2019, the Supreme Court resolved another case by concluding that “the presence of probable cause [for arrest] should generally defeat a First Amendment retaliatory arrest claim.”

**Fighting Words**

The First Amendment protects people’s right to vent anger in words. Free speech serves society as a safety valve, allowing people to blow off steam before they resort to physical violence. Nonetheless, the Supreme Court recognizes that to vent anger also may “set fire to reason.”

In a case that foreshadowed the logic of *Brandenburg*, the U.S. Supreme Court in 1942 in *Chaplinsky v. New Hampshire* established that government may punish speech that provokes violent listener reaction. When residents complained that Walter Chaplinsky was distributing Jehovah’s Witness pamphlets on the streets, a group of people became restless. A police officer warned Chaplinsky to stop because he was disturbing the peace, and later another officer detained him. The officer and Chaplinsky encountered the first officer, who warned Chaplinsky again, and Chaplinsky called the officer a “goddamned racketeer” and a “damned Fascist.” Chaplinsky
was convicted under a state law that defined disturbing the peace as publicly calling someone “any offensive, derogatory or annoying word . . . or name . . . with intent to deride, offend or annoy.”

In its landmark decision, the U.S. Supreme Court upheld the conviction, ruling that the First Amendment did not protect narrow categories of speech that make no contribution to the discussion of ideas or the search for truth. The Court said Chaplinsky’s comments were unprotected **fighting words** that “by their very utterance inflict injury or tend to incite immediate breach of peace.”

In 1949, the Supreme Court heard the case of a priest who was arrested for disorderly conduct when his anti-Semitic and pro-Fascist comments to a sympathetic audience riled a group outside the assembly hall to violence. Illinois courts upheld his conviction, ruling that the law punished only unprotected fighting words that “stir[] the public to anger, invite[] dispute, bring[] about a condition of unrest, . . . create[] a disturbance or . . . molest[] the inhabitants in the enjoyment of peace and quiet by arousing alarm.”

The U.S. Supreme Court reversed, reasoning that “a function of free speech under our system of government is to *invite* dispute.” The Court in *Terminiello v. Chicago* said speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger.” The First Amendment protects such speech “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.” Subsequent Supreme Court rulings have confirmed that the Constitution permits government to prohibit only those face-to-face comments that are inherently likely to trigger an immediate reaction of disorder or violence.

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**REAL WORLD LAW**

**CYBERBULLYING**

Teens and preteens rely on technology to connect with peers and family, but online activity exposes them to risks of cyberbullying and cybervictimization. Cyberbullying, or repeated online aggression that is difficult to diffuse or defend against, affects fully one-third of boys and one-fourth of girls during their adolescence, a study published in 2019 reported. Although cyberbullying and cybervictimization are linked with adverse health effects, psychological problems and suicide, half of all teens say their parents have no knowledge of their online activities.

In a rare case of cyberbullying that did not involve school/university students or personnel, the mother of a teen created a Myspace profile for a nonexistent 16-year-old boy to flirt with and then break up with her daughter’s classmate. The day the mom, posing as the boy, told the classmate, “The world would be a better place without you in it,” the girl committed suicide.

A jury convicted the woman for violating Myspace’s anti-harassment rules and the Computer Fraud and Abuse Act, intended to prevent unauthorized access to, or hacking of, computer accounts. A federal district judge set aside the verdict, ruling that the law was unconstitutionally vague because it provided neither the required fair warning of what constituted illegal activity nor objective criteria by which to determine when a crime had occurred. The judge also said the law was not intended to apply to cyberbullying.

All 50 states have laws or policies punishing cyberbullying; they differ broadly.
Two recent cases involving leafleting at an annual Arab International Festival demonstrate the principle that listeners’ reactions against speakers generally are insufficient grounds to regulate expression.51 The cases began when police arrested members of a Christian evangelical group, Bible Believers, for distributing leaflets and preaching against Islam in ways some Muslim festivalgoers responded to with threats of violence. The police removed the Bible Believers under a recently enacted city ban on leafleting promoted by the festival sponsors. The Bible Believers challenged their arrest and removal as a violation of their freedom of speech, but the trial court found the action to be a reasonable time, place and manner restriction to maintain an orderly festival. The Sixth Circuit Court of Appeals disagreed. It struck down the law as an example of what some call a “heckler’s veto,” which allows unhappy listeners to abridge others’ freedom of speech.

Hate Speech

Contemporary concerns about the harms caused by intolerance, racism and bigotry have generated state and local speech codes to regulate so-called hate speech, but courts generally find these laws unconstitutional. Hate speech is not a legal term, but it is commonly understood to involve name-calling, slurs and epithets that demean others on the basis of identity. Few cases dealing squarely with hate speech have reached the U.S. Supreme Court, but lower courts consistently have found anti-bias and anti-hate-speech laws unconstitutional.

The primary Supreme Court decision dealing with a hate speech law, R.A.V. v. City of St. Paul, involved several white teenage boys who, late one night, made a crude wooden cross from a broken chair and set it ablaze in the yard of a black family.52 They were convicted of
violating a local statute that punished the display of symbols—such as a burning cross—that arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” The Minnesota Supreme Court upheld the conviction, reasoning that the bias-motivated crime statute punished only unprotected fighting words.

A unanimous U.S. Supreme Court reversed, but the justices did not agree on why. Five justices said the law was too narrow, or underinclusive, because it punished only a specific subset of fighting words that the government found particularly objectionable. Thus, the law imposed unconstitutional viewpoint-based discrimination because it punished certain forms of racist speech (cross burnings) but not others. The remaining four justices said the law was overbroad; it punished too much speech, not too little. They said the law unconstitutionally went beyond fighting words to punish speech that did not arise in face-to-face encounters and whose only harm was to prompt “generalized reactions” of hurt or offense.

In explaining its reasoning, the R.A.V. Court said:

It is not true that “fighting words” have at most a “de minimus” expressive content, or that their content is in all respects “worthless and undeserving of constitutional protection”; sometimes they are quite expressive indeed. We have not said that they constitute “no part of the expression of ideas,” but only that they constitute “no essential part of any expression of ideas.” . . . [T]he unprotected features of [fighting] words are, despite their verbal character, essentially a “nonspeech” element of communication.53

Since R.A.V., most efforts to tailor a constitutional hate speech ordinance have failed. Supreme Court decisions make the precise level of protection the Constitution affords fighting words

INTERNATIONAL LAW
IS ONLINE CENSORSHIP THE ANSWER?

Although major social media networks like Facebook or Twitter argue that efforts to control hate speech cost them both users and profits, others see their open, often pseudonymous platforms as a freeway for hate, fringe radical ideas and the spread of terrorism.44 Most social networks take steps to moderate the most vile communicators and terrorist content, but a Facebook policy manager said a joint effort of tech companies and civil society was needed to effectively curb online extremism. Speaking to the World Government Summit in 2019, she said censorship is ineffective and only fuels authors to spread their messages further.45

Following the summit, the parliament of India summoned a Twitter representative to appear before hearings on an initiative to protect “citizens’ rights” on social media. The French digital minister proposed legislation to increase fines and penalties for online providers who fail to remove racist and hateful content. Google, Twitter and Facebook also jointly called on the British government to establish flexible principles to draw bright-line distinctions between legal and illegal content.46 The British government began pushing online providers to remove “abusive, humiliating or intimidating content” in 2017.

underinclusive
A First Amendment doctrine that disfavors narrow laws that target a subset of a recognized category for discriminatory treatment.

viewpoint-based discrimination
Government censorship or punishment of expression based on the ideas or attitudes expressed. Courts will apply a strict scrutiny test to determine whether the government acted constitutionally.
The Law of Journalism and Mass Communication

unclear. They suggest that speech loses its constitutional protection when the speaker intends to provoke violence or incite immediate unrest in a targeted individual or group. The Supreme Court has shied away from using the fighting words category to judge the constitutionality of laws that attempt to regulate highly volatile speech and instead has examined the reach of the law. The Court has struck down laws that attempt to punish specific types of offensive speech on the grounds that the laws are not sufficiently narrowly tailored to prevent intrusion on protected speech.

In 2015, the Ninth Circuit Court of Appeals denied a motion to require Google to take down a film an actor said forced her to be associated with hate speech. Without the actor’s permission, filmmakers put her five-second performance from an action film into “Innocence of Muslims” dubbed with anti-Islamic audio in Arabic. The film sparked threats against the actor and violent protests in many countries. YouTube blocked its display in several Arab and Muslim countries, and a three-judge panel of the Ninth Circuit initially ordered its removal in the United States. Rehearing the case en banc, the full court made no reference to R.A.V. and struck down the injunction because the actor had not shown the irreparable harm needed to justify a presumptively unconstitutional prior restraint.

In recent years, police in Pennsylvania have relied on the state’s hate crime statute against individuals showing them disrespect. The law makes it a crime to intimidate someone with “malicious intention toward the[ir] race, color, religion or national origin.” In a 2018 case, the police increased the charges against a 52-year-old black man they say resisted arrest for shoplifting and called them “Nazis,” “skinheads” and “Gestapo.” The hate crime charge transformed a first-degree misdemeanor into a third-degree felony. In another case, the state appeals court said Mike Love, a black man, had used “numerous racial epithets” when he called several undercover police officers “white boys” and “fucking crackers” and told them to “get off the corner” prior to an altercation. The court affirmed Love’s 23-month jail term for violating the state’s ethnic intimidation law.

Intimidation and Threats

When speech crosses certain lines, government may restrict messages that are sufficiently detrimental to important competing interests. A decade and a half ago, the U.S. Supreme Court created a category of speech it called true threats. The case involved three cross burnings, one at a KKK rally and two in the yard of a black family. In Virginia v. Black, the Court ruled that the First Amendment allows states to punish individuals who set crosses ablaze with the intent to intimidate. The Court said laws may constitutionally target a specific subset of fighting words, such as cross burnings, that is so “inextricably intertwined” with a clear and pervasive history of violence that it constitutes a threat. The Court said a burning cross is an
instrument of racial terror and imminent violence whose power to intimidate overshadows free speech concerns. In R.A.V., the Court had struck down a law that unconstitutionally targeted a subset of speech the city found particularly offensive.58

Writing for the majority in Virginia v. Black, Justice Sandra Day O’Connor reasoned that despite the inextricable connection between cross burnings and the KKK’s “reign of terror in the South,” history alone does not transform offensive speech into unprotected threats. Here the cross burning involved an intent to intimidate, which may be punished. For speech to become a punishable threat, a speaker must (1) direct the threat toward one or more individuals (2) with the intent of causing the listener(s) (3) to fear bodily harm or death.59 In this case, cross burning was constitutionally punishable because the intimidation was intended to create pervasive fear of violence in the targeted individual or group. In dissent, Justice Clarence Thomas said the law punished only illegal acts and was unrelated to First Amendment concerns: “Those who hate cannot terrorize and intimidate to make their point.”

In 2015, the Supreme Court remanded the First Amendment question of when internet posts constitute true threats punishable by law.60 The case of Elonis v. United States involved a Pennsylvania man convicted of making Facebook threats to his estranged wife and law enforcement officers. Anthony Elonis said he did not intend any threats and was composing “therapeutic” rap lyrics to express his depression and frustration after his wife took their children and left him.61 At trial, Elonis’ wife testified that she was terrified by the posts, had filed a protective order against him and feared for her life and that of her children. The jury convicted Elonis.

On appeal, the Third Circuit Court of Appeals identified both a subjective and an objective element to threats.62 The subjective element involves the speaker’s knowing communication of an intention to cause harm. The objective standard means that a reasonable person would view the communication as a threat. The court affirmed the conviction on the grounds that the lyrics clearly met the objective standard.

But the Supreme Court disagreed. A conviction for a true threat cannot rely on the recipient’s perception and the speaker’s mere negligence, it said.63 Conviction for making a threat, like any criminal conviction, requires a showing that the defendant intended to commit the crime or knew that a reasonable person would perceive the communication as a threat.64 “Wrongdoing must be conscious to be criminal. . . . [T]his principle is as universal and persistent in mature systems of law as belief in freedom of the human will,” the Court said.65
On remand, the Third Circuit reviewed the trial court's instructions to the jury, which said that a threat exists when a reasonable communicator would understand the receiver would perceive a threat. The court concluded that the instructions met the Supreme Court's requirement and reaffirmed Elonis' conviction. Elonis was released in 2016 after serving 44 months in jail.

In 2018, the Pennsylvania Supreme Court upheld the conviction of Jamal Knox, who performed under the name Mayhem Mal, for terrorist threats toward police officers for his rap song, “Fuck the Police.” The song, posted widely through Facebook and YouTube, names two Pittsburgh police officers and ends with the phrase “Let's kill these cops cuz they don't do us no good.” The named officers said the lyrics made them “nervous,” and one quit the police force. Defense attorneys argued that the rap song was pure political speech that “no reasonable person familiar with rap music would have interpreted as a true threat of violence.” Knox said the song was written from his rap persona and he had no intention to threaten or harm the officers. The state's high court ruled that Knox intended to threaten and intimidate. The U.S. Supreme Court declined to review the case in 2019.

In a 2018 case in Louisiana initiated by a complaint against an arresting police officer, a panel of the Fifth Circuit Court of Appeals overturned a conviction for threats under state law. The court found the law unconstitutional because its definition of threats encompassed both threats of force and lawsuits filed against public employees.

SYMBOLIC SPEECH

Much expression that might anger or upset people does not cross the line into incitement, fighting words or threats. Sometimes it does not even take the form of words. Nonverbal expression, in the form of burning flags, wearing armbands or marching through the public streets, is what the U.S. Supreme Court has called symbolic speech. The Court has said symbolic speech deserves First Amendment protection in some cases, but it has 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 his idea.” Only actions that are “closely akin to ‘pure speech’” are viewed as symbolic speech.

Some of the most vehement and heated debate in the 1960s involved symbolic speech. Amid the civil rights movement and protests against the Vietnam War, the Court held that the Constitution protected the rights of protest groups to express the most radical and unpopular
political ideas. However, there were limits, and the line between protected political protest and illegal activity, incitement or fighting words was not always obvious.

**Burning Speech**

In the first of these cases (which is discussed in Chapter 2), the Supreme Court affirmed the power of government to punish David O’Brien for burning his draft card in violation of a federal law intended to facilitate the military draft. The O’Brien ruling established intermediate scrutiny as the standard of judicial review of content-neutral laws that incidentally infringed protected speech. In affirming O’Brien’s conviction, the Court focused on why the government had enacted the law (intent) and how the law operated (effect) while acknowledging the expressive content of the public destruction of a draft card. 

Fast-forward 20 years, and the Court reviewed a case in which Gregory Lee Johnson had been convicted, sentenced to a year in prison and fined $2,000 for burning the American flag during a protest at the Republican National Convention in Dallas. In *Texas v. Johnson*, the Supreme Court used strict scrutiny to strike down a Texas law that made it a crime to desecrate the flag. The state of Texas said its ban on flag desecration preserved an important symbol of national unity and prevented breach of the peace. Johnson argued that the law violated his right to free speech. The Supreme Court agreed. Finding flag burning to be a form of symbolic speech, the Court struck down the Texas law as unconstitutionally content based.

A sharply divided Supreme Court held that the law failed to pass strict scrutiny because it served no compelling interest. The state’s interest in preserving the sanctity of the flag represented an unconstitutional attempt to punish ideas government disliked. The law’s sole purpose was to prohibit expression the state found offensive. “If there is a bedrock principle underlying the First Amendment,” Justice William Brennan wrote for the Court, “it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” The law was unconstitutional because it neither served a compelling interest nor used the least intrusive means to advance its goals.

The Constitution also generally protects exaggeration, hyperbole and excess in speech by looking to the context to determine whether the words should be taken on their face. For example, the Court said an anti-war protester’s comment to fellow marchers that “we’ll take the fucking street later” did not present the clear and present danger of violence required under the incitement test because it was unlikely to prompt any immediate action.

**DO MEDIA INCITE HARM?**

A series of Federal Trade Commission reports on violent entertainment marketed to children consistently cites research establishing “that exposure to violence in entertainment media alone does not cause a child to commit a violent act.” Although there is little agreement on how exposure to television, video game, music and movie violence influences youth aggression, some have tied excessive exposure to these media to mass murders. Lawsuits have claimed that injury resulted from imitating the violence in movies like “Natural Born Killers”
and video games like “Doom,” and courts have been asked to determine the level of media responsibility.81

Physical Harms

One lawsuit decades ago began when 13-year-old Ronny Zamora shot and killed his 83-year-old neighbor. Zamora’s parents sued, claiming the television networks had failed to exercise “ordinary care to prevent their son from being impermissibly stimulated, incited and instigated to duplicate the atrocities he viewed on television.”82 A federal district court said the networks did not have a duty to stop showing violent programs and could not be held responsible for the teen’s actions. To dictate a limit on violent content would violate the First Amendment rights of the networks and the public, the court held.83

If a court uses the incitement test when a member of the media is sued for causing physical harm, the plaintiff rarely wins. Plaintiffs generally fail to convince courts that media intentionally encouraged people to harm themselves or others. One case of media incitement involved a Hustler magazine article titled “Orgasm of Death,” describing autoerotic asphyxiation. The parents of a 14-year-old boy who hanged himself with a copy of Hustler open to the story sued Hustler. The Fifth Circuit Court of Appeals said Hustler was not liable and did not incite the boy’s actions.84 The magazine not only did not urge readers to perform the act described; it repeatedly warned against it.

Courts have not found that media incited violence even when media knew criminal activity might be related to their content. For example, two decades ago Paramount Pictures continued distributing the movie “The Warriors” despite knowledge of two killings near California theaters that showed the film. When a teenager was stabbed and killed by another youth after leaving “The Warriors,” the murdered boy’s father sued Paramount. The Massachusetts Supreme Court held that the film’s fictional portrayal of gang warfare did not constitute incitement because it did not advocate violent or unlawful acts.85

In a rare ruling of its kind, the Fourth Circuit Court of Appeals held a book publisher liable because it intended for criminals to buy and use the book “Hit Man: A Technical Manual for Independent Contractors” as a how-to for murder.86 After a killer mimicked the book’s detailed instructions to murder a woman, her son and the son’s nurse, the court said the First Amendment did not protect Paladin Press because it encouraged, aided and abetted a crime. “[E]very court that has addressed the issue” agrees the First Amendment does not necessarily prevent finding a mass medium liable for assisting a crime, even if that aid “takes the form of the spoken or written word.”87 Paladin Press settled the case for $5 million.88

Negligence

Plaintiffs suing the media for causing physical harm often argue that the media negligently distributed material that led to injury or death. When such suits are based on the tort of negligence (discussed in Chapter 4), the plaintiff must show that the media defendant had a duty
of due care, the defendant breached that duty and the breach caused the plaintiff’s injury. Although lawsuits have proliferated, courts rarely find the media negligent and liable for violent content.89

For example, one court found NBC was not negligent when a girl was raped after the network aired the film “Born Innocent.” Four days after the film aired, a 9-year-old was attacked and raped on a San Francisco beach in a manner similar to central events in the film. The girl’s parents sued NBC, claiming it was negligent in showing the movie when children could watch it. A state appellate court said the First Amendment barred any finding that NBC had a duty of care to the girl.90 To do otherwise, the court said, would cause NBC to engage in self-censorship.

**Foreseeability.** To determine a defendant’s duty of care, courts often ask whether the defendant should have foreseen that its product messages would cause harm. If a reasonable person would not foresee the harm, there was no duty.

Soldier of Fortune magazine ads promoting “GUN FOR HIRE . . . All jobs considered” preceded two murder attempts, one of which was successful. A federal district court rejected the magazine’s argument that the First Amendment protected its right to publish the ads.91 The court said free speech is not absolute, and a jury could find the ads “had a substantial probability of ultimately causing harm to some individuals.”92 The magazine had a duty of due care because it was foreseeable that the ads could lead to physical injury.

However, Soldier of Fortune could not foresee harm from an ad that read: “EX-MARINES—67–69 ’Nam Vets, Ex-DI, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas.”93 In response to the ad, Robert Black paid John Wayne Hearn $10,000 to kill Black’s wife. After Sandra Black's murder, her mother and son sued the magazine. The appellate court said the magazine had “no duty to refrain from publishing a facially innocuous classified advertisement when the ad’s context—at most—made its message ambiguous.”94 In a third case, a federal appellate court said Soldier of Fortune was obligated to determine whether the language of an ad, on its face, created an unreasonable risk of causing violent crime.95

The Sixth Circuit Court of Appeals held that video game manufacturers have no duty to protect against an individual’s independent decision to kill.96 Parents of a 14-year-old video game player who shot three of his peers at their high school sued video game producers, claiming the negligent distribution of violent video games made them liable for alleged harms to the couple’s son and his victims. The court held there was insufficient proof that the game producers should have foreseen that their products could prompt the shooting.97 Even if the gameplay involved shootings, it is “simply too far a leap from shooting characters on a video screen . . . to shooting people in a classroom,” the court said.98

**Proximate Cause.** If a defendant’s actions led to the plaintiff’s injury, the defendant caused the injury. But unless the defendant’s action was the proximate cause of the harm, courts will not hold the defendant liable. To determine proximate cause, courts decide whether there is a direct relationship between the defendant’s action and the plaintiff’s injury. Courts often refuse to find proximate cause if there is a weak linkage between the defendant’s action and the subsequent injury.
In one case, a mother sued the manufacturer of “Dungeons & Dragons” on the grounds that her son committed suicide when he lost touch with reality because of the game. A federal appellate court said the suicide was independent of the gameplay. Both the loss of reality and the decision to commit suicide were intervening events. Similarly, when a teenager committed suicide while listening to an Ozzy Osbourne album that includes the song “Suicide Solution,” the teenager’s parents sued. A California appellate court said the connection between the suicide and the song’s lyrics was too tenuous to show proximate cause.

The U.S. Supreme Court weighed in when it struck down a California law. In Brown v. Entertainment Merchants Association, a video game merchants’ group challenged a state law that prohibited sale of violent video games to minors and required package labeling of violent content. The law targeted only violent video games that (1) appealed to deviant or morbid interests, (2) were patently offensive under contemporary community standards and (3) lacked serious artistic or other value (see discussion of related obscenity standards in Chapter 10). The state said the law was intended to advance the important government interest in preventing psychological harm to minors.

But the Supreme Court said the law unconstitutionally singled out video games from other media because of the games’ interactivity and attractiveness to children. In Brown, the Court refused to create a new category of disfavored speech for video game violence. It said violent video games deserve full First Amendment protection and California’s attempt to do otherwise was both “unprecedented and mistaken.”

Reviewing the law under strict scrutiny, the Court found it facially unconstitutional. “It is difficult to distinguish politics from entertainment and dangerous to try. . . . Like the protected books, plays and movies that preceded them, video games communicate ideas and even social messages. . . . That suffices to confer First Amendment protection.”

In his concurring opinion, Justice Samuel Alito urged care when sweeping new technologies under the media umbrella. He wrote:

> In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. . . . We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar. And we should not hastily dismiss the judgment of legislators, who may be in a better position than we are to assess the implications of new technology.

In a rare decision after Brown, the Alabama Supreme Court allowed a civil lawsuit brought by the families of two murdered police officers to proceed against the makers of a video game. In the underlying case, the Alabama court upheld a 17-year-old’s conviction and death sentence for killing the officers during his arrest for carjacking. The teen used the defense
that his extensive play of “Grand Theft Auto” had caused post-traumatic stress and prompted the killings.\textsuperscript{108} The officers’ families wanted to hold the game makers liable.

### Harmful Images

The U.S. Supreme Court used its review of a federal statute making it a crime to profit from “depictions of animal cruelty”\textsuperscript{109} to reaffirm its power to define categories of speech and to determine which are, and are not, fully protected by the First Amendment. In \textit{United States v. Stevens}, the Supreme Court said Congress did not have the power to prohibit images of animal cruelty because the Constitution fully protects even violent and deeply disturbing images.\textsuperscript{110}

In reviewing the conviction of Robert J. Stevens for compiling and selling videotapes of dogfights in violation of the Animal Crush Video Prohibition Act, the Court said it is possible “there are some categories of speech that have been historically unprotected [that] have not yet been specifically identified or discussed . . . in our case law. But if so, there is no evidence that ‘depictions of animal cruelty’ is among them.”\textsuperscript{111} Neither Congress nor the Supreme Court has “freewheeling authority to declare new categories of speech outside the scope of the First Amendment,” the Court said. It found the law substantially overbroad and struck it down because it infringed fully protected speech.\textsuperscript{112}

### Other Harms

Any person or company involved with preparing or publishing news, entertainment and advertising may be sued for any number of legal claims. Media are not exempt when laws, such as contract laws, apply generally to any competent adult. Thus, when media make contractual agreements, they may be sued for breaching a contract.

For example, when documentary filmmakers interviewed an art critic for their film about censorship, the filmmakers signed a contract stating that the interview would not be distributed beyond a single British channel. After the film won numerous awards and was selected to open a prestigious festival, the critic sued. The filmmakers argued that the contract did not apply because they used only brief portions of the interview in the film. The court interpreted the contract to prevent reuse of the unedited interview footage, so the documentary with only interview excerpts could be exhibited wherever the producer wanted.\textsuperscript{113}

The U.S. Supreme Court’s 2018 decision in \textit{Masterpiece Cakeshop v. Colorado Civil Rights Commission} underscores why neutral laws of general applicability apply to individuals and media firms alike.\textsuperscript{114} The case involved a ruling of the Colorado Civil Rights Commission that a baker violated the state’s anti-discrimination law by refusing to bake a wedding cake for a same-sex couple. The baker said the wedding violated his profound religious beliefs and his choice not to bake the cake was protected by the First Amendment. The Court said it was “unexceptional” that the government’s power to enact anti-discrimination laws “protect[s] gay persons . . . [and] other classes of individuals in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.”\textsuperscript{115} However, the Court struck down the law as applied. Such laws may not violate a speaker’s freedom “to choose the content of his own message.”\textsuperscript{116}
In another recent decision, the Supreme Court ruled that a prior criminal conviction cannot justify government suppression of speech that does not meet either the Brandenburg or the Cohen standard. The Court ruled in State v. Packingham that a North Carolina law barring sex offenders from using social media websites like Facebook and Twitter was unconstitutional.117

Lester Packingham’s conviction of taking indecent liberties with a minor made him subject to the state law.118 After his release from prison, Packingham used Facebook to express his happiness at having a parking ticket dismissed and was arrested under the law intended to prevent sex offenders from soliciting victims online. He challenged his arrest as an unconstitutional abridgement of his First Amendment right to free speech, but the state supreme court ruled that the law was a constitutional limit on conduct, not a restriction of speech.119 The U.S. Supreme Court reversed, holding that the law was unconstitutionally overbroad and failed to demonstrate a compelling need to prevent online speech to minors.

In another case, a federal district court relied in part on Cohen to rule that a state may not broadly punish speech by convicted criminals.120 A Pennsylvania state law allowed prosecutors or crime victims to bring civil lawsuits to obtain an injunction to stop any “conduct” by a convicted criminal that perpetuates the harms of the crime and “causes a temporary or permanent state of mental anguish” to the victim.121 The Revictimization Relief Act took effect within weeks of a small private Pennsylvania college announcing that its commencement speaker would be alumnus Mumia Abu-Jamal, who had been convicted of killing a police officer.

Jamal challenged the act, and its application to him, as unconstitutionally vague, overbroad, content based and serving no compelling government interest. The trial court agreed and said Supreme Court precedent established that when a law’s action is triggered by “the impact an expression has on its listeners, [it] is the essence of content-based regulation.”122 The law’s explicit, unconstitutional intent was to prevent “expression that causes mental anguish in crime victims,” the court said, and imposed a permanent injunction against application of the law.

**NATIONAL SECURITY AND TRANQUILITY**

It is difficult to determine when speech threatens national security or what speech must be curbed to provide for the public peace and tranquility. Decisions tend to reflect the national mood and contemporary realities. During times of war or national unrest, courts often see radical speech and protest as more dangerous than they would during times of calm.123 The U.S. Supreme Court has not created legal rules to counterbalance the urge to stifle speech during times of instability.124 Because the country moves from peace to war and back, the relative freedom to express unpopular ideas also shifts, undermining the promised stability of the law.125

**Threats to National Security**

Government efforts to punish speech that threatens its authority or undermines the security of the nation did not end in 1801 when the Sedition Act (discussed in Chapter 2) expired.
Both federal and state legislatures have enacted laws to protect the public from speakers who would incite violence or the overthrow of government. Sometimes such laws infringe protected speech, but well-crafted laws that target speech related to illegal conspiracies, advocacy of terrorism and treason generally are constitutional.

In *Holder v. Humanitarian Law Project*, the U.S. Supreme Court upheld a federal ban on “material support” to terrorists even when the law prevented support of legal expressive activities. The *USA PATRIOT Act*’s ban defined “material support” as *any* service, training, expert advice or assistance to a designated terrorist organization. It encompassed some types of political organizing, activism and speech as illegal support for terrorism. The Humanitarian Law Project, a nonprofit organization, said the ban prevented it from training peaceful tactics to the Kurdistan Workers’ Party (PKK), which was a federally designated terrorist organization. The group said the ban was overbroad and had a *chilling effect* on speech and associations protected by the First Amendment. Government actions that discourage the exercise of a constitutional right cause a chilling effect.

In upholding the law as applied in this case, the Supreme Court deferred to the government’s judgment, “given the sensitive interests in national security and foreign affairs at stake.” The Court said the law was neither vague nor overbroad. Although “the scope of the material-support statute may not be clear in every application, . . . the statutory terms are clear in their application to plaintiffs’ proposed conduct,” the Court wrote. The law’s ban on training of the PKK constitutionally advanced the government’s compelling interest in “provid[ing] for the common defense,” the Court concluded.

Following the U.S. Supreme Court’s ruling, the First Circuit Court of Appeals upheld Tarek Mehanna’s conviction for terrorism for online postings of accurate translations of al-Qaida materials. The First Circuit held that Mehanna’s translations knowingly “coordinated” with and provided material support to a foreign terrorist organization. Although the conviction clearly targeted Mehanna’s online speech, the court said that congressional debate over the Patriot Act ensured that the law did not violate the First Amendment.

The Patriot Act was signed within weeks of the terrorist attack on the United States on September 11, 2001. Critics argue that the Patriot Act and laws increasing government surveillance to advance the war on terrorism threaten fundamental civil liberties. However, as Chief Justice William H. Rehnquist once said, “It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime.” Some Supreme Court decisions reflect Rehnquist’s view. For example, during the post–World War II Red Scare, the Court said the First Amendment did not stop some government laws requiring employees to swear loyalty oaths and reject communism. The Court also ruled that the Constitution permitted excluding a foreign economist and banning his speeches at U.S. universities because he was a Marxist.

When online content advances terrorism or other extreme harms, Section 230 of the Communications Decency Act may protect digital service providers from liability for third-party content. In 2016, the First Circuit Court of Appeals said the broad protections of the CDA clearly establish “the right to publish the speech of others in the information age.” The court dismissed a suit brought by three minors, who were victims of sexual trafficking,
against an online advertising site. The court said the difficult balance between protecting young women from “circumstances that evoke outrage” and protecting the freedom of speech advanced through online platforms must be struck in favor of the speech. The Supreme Court declined to review the case.

A federal district court judge similarly held that Section 230 of the CDA protected Twitter from a claim that it had materially contributed to the spread of Islamic State propaganda that led to the murder of a contractor in Jordan. The court dismissed the claim that Twitter’s “refusal to take any meaningful action” to deter IS pro-terrorist posts made it liable for the murder.

**SPEECH IN THE SCHOOLS**

There is nothing in the wording of the First Amendment to suggest that it protects the rights of minors, public school students or campus media differently from the rights of others. However, U.S. society has asserted unique interests in protecting and educating its youth. Sometimes courts have accepted the idea that the nation’s interest in developing its youth outweighs the free speech rights of public school students. Courts have struggled to determine both how and where to draw the line between advancing the important concerns of parents and educators and protecting the sometimes-conflicting rights of students to freedom of speech and association.

Nearly 40 years ago, the U.S. Supreme Court said students’ free speech rights prevented schools from removing books from the school library simply because someone might find them offensive. Over the objections of a library review committee, a school board removed 10 books from school libraries because some board members found them “objectionable,” “anti-American, anti-Christian, anti-Semitic and just plain filthy.” Several students sued, and the Supreme Court said the book removal violated the First Amendment.

Although schools must ensure that curriculum is age appropriate and of good quality, schools may not constitutionally remove library books to placate a hypersensitive few. When the readings are optional, individual student freedom of choice prevails. The Court said that “access [to controversial materials] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.” Decisions to remove books may not be made “in a narrowly partisan or political manner” and are more likely to be constitutional if they advance a curricular purpose.

In 2012, a U.S. district court judge required a public high school to stop using an internet filtering program that eliminated websites that expressed pro-LGBTQ concepts and values. The school’s filter tagged anti-gay sites under “religion,” which allowed access, but tagged pro-gay sites with “sex,” which triggered blocking. “These filters are a new version of book-banning or pulling books off the shelf,” a spokesperson for the American Library Association said.

More than 75 years ago, the U.S. Supreme Court applied its doctrine that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind” to students. Public school students who were
Jehovah's Witnesses challenged the mandatory flag salute and Pledge of Allegiance in school as a violation of their religious beliefs. In *West Virginia State Board of Education v. Barnette*, the Court agreed. Despite the important role of public schools in teaching students civic values and responsibilities, schools may not indoctrinate students into particular ideologies, the Court said. In *Barnette*, the Court held that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.”

**Public Forum Analysis**

The courts have used several different approaches to determine when student press and speech are protected. In many cases, the U.S. Supreme Court has viewed public schools and universities—including school-sponsored events, publications, funding and physical spaces—as limited public forums. Under public forum doctrine, and applying the *O'Brien* test (discussed in Chapter 2), schools may impose reasonable content-neutral time, place and manner regulations on student speech activities to advance educational objectives. What this means in practice is that schools and universities may adopt regulations to advance educational goals even if the rules incidentally limit students’ and teachers’ freedom of speech. School officials generally may not dictate the content of student speech except to prevent speech that would directly undermine the school’s educational mission. Courts have upheld public school restrictions on students’ clothing, the hours school facilities may be used by outsiders, the school-related expression of teachers and the content of school-sponsored student speech and publications.

In several other approaches, the Court looked to the age, impressionability and maturity of the students; the location of the expression; the content of the speech; and the specific educational goals of the institution to determine the case outcome. Political turbulence and social unrest play a part. As one Court observer noted, sometimes “the very concept of academic freedom is under fire.” Such case-specific decisions do not provide clear rules of law. The variety of tests yields different outcomes among primary, secondary and postsecondary schools as well as between a high school newspaper and a university student’s speech during an open public debate.

**The Tinker Test**

If *Barnette* declared students’ fundamental freedom from indoctrination, *Tinker v. Des Moines Independent Community School District* established school classes as a site that is “peculiarly the marketplace of ideas” where speech may be regulated only to prevent a “substantial disruption” to school activities. The U.S. Supreme Court’s *Tinker* test, as it is known, arose from a 1969 decision involving symbolic anti-war protest in school.

When a brother and sister in junior and senior high school wore black armbands, a popular protest to the Vietnam War, they were suspended for violating a new policy prohibiting black armbands. The students did not disrupt classes, and they sued, claiming the suspensions violated their right to free speech.
In what some call “the most important Supreme Court case in history protecting the constitutional rights of students,” the Court in *Tinker* agreed with the students. The Court held that the symbolic expression of the armbands was “akin to pure speech” and fully protected under the First Amendment. When novel or deviant issues are expressed, the First Amendment must weigh heavily in favor of the expression and against the bureaucratic urge to suppress, the Court said. The Constitution does not allow officials to suppress student expression that is unpleasant or discomfiting. Under the First Amendment, it is “unmistakable” that individuals do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Unless student expression substantially disrupts the school’s educational activities, school administrators lack authority to regulate the speech, the Court said.

For nearly four decades, the rule was clear: Only when speech inside or adjacent to the school during school hours disrupts school activities may it be punished. Then the Court’s ruling in *Morse v. Frederick* seemed to muddy the test. In *Morse*, the Court held that the “substantial disruption” rule established in *Tinker* was not limited to speech during school hours or in the school building.

The case began when high school senior Joseph Frederick displayed a banner reading “Bong Hits 4 Jesus” during a school field trip. Frederick said he did it for a laugh and to get himself on TV. The school’s principal, Deborah Morse, did not find it humorous and told him to remove the banner. When he refused, she tore down the sign and suspended him for violating a school policy that banned the advocacy of illegal drug use. Frederick sued, alleging that the principal had violated his right to free speech.

The district court sided with the principal, but the Ninth Circuit Court of Appeals reversed, ruling that school officials may not “punish and censor non-disruptive” speech by students at school-sponsored events simply because they object to the message. In a 5–4 ruling, the U.S. Supreme Court sided with the principal. The Court ruled that school officials may prohibit messages that advocate illegal drug use without running afoul of the First Amendment. For the majority, Chief Justice John Roberts wrote that students’ First Amendment protection does not extend to speech that directly contravenes an important school policy. The Court reasoned that the “special environment” and the educational mandate of the schools permitted officials to prohibit student speech that raises a “palpable” danger to established school anti-drug policy. The sanction was constitutional because it punished advocacy of illegal drug use.
In a critical concurrence, however, Justice Samuel Alito said student speech rights may be subject to infringement in schools because schools are “places of special danger” where mandatory attendance may subject students “to threats to their physical safety they would not otherwise face.” As Justice John Paul Stevens suggested in dissent, the resulting “ham-handed, categorical approach [to student freedom of speech] is deaf to the constitutional imperative to permit unfettered debate, even among high-school students.” It permits content-based discrimination. Since Morse, courts have relied on it to uphold school policies that prohibit speech related and unrelated to illegal activities.

The widely watched case of Taylor Bell, a high school senior in Mississippi, began when he posted rap lyrics on Facebook and YouTube intended to reach school officials. The lyrics alleged sexual misconduct with students by two named teachers and described violence against them. Bell said his charges against the teachers were true, and he was not at school and did not use school resources to post the lyrics. The Itawamba County School Board suspended and transferred Bell to another school for threatening, harassing, intimidating and making false claims against the teachers. The trial court ruled that the school had the authority to punish Bell’s speech, which he could reasonably foresee would substantially disrupt the school and did so.

On appeal, a panel of the Fifth Circuit Court of Appeals relied on Tinker and ruled that Bell’s off-campus speech from home outside of school hours was protected by the First Amendment because the school failed to show that it caused a substantial disruption. But rehearing the case of Bell v. Itawamba County School Board en banc, the Fifth Circuit affirmed Bell’s sanctions and found that the description of violent acts against two named teachers was intended to reach the school and could reasonably be foreseen to cause a substantial disruption. The U.S. Supreme Court declined to review the case.

In 2019, the U.S. Supreme Court denied certiorari to review the constitutionality of a Kentucky law that made it a crime to speak to a school employee in a way that “interferes with” school functions. The speech at issue involved neither students nor issues of public interest. Johnathan Masters, a graduate student and future candidate for state lieutenant governor, was found guilty of violating the law when he told a school principal he would “kick [the principal’s] ass” after the principal refused to allow Masters to conduct a study of the 450 students in kindergarten through twelfth grade in the Cloverdale school. Masters shouted at the principal in the foyer of the school and refused to leave despite the principal’s repeated requests.

The Kentucky Court of Appeals reviewed Masters’ $500 fine and guilty verdict under Chaplinsky’s fighting words doctrine. “Angrily telling someone you are going to physically harm them is precisely the type of speech that would incite a reasonable person to violence.
Not only that, such a threat of physical force against a principal during the school day foreseeably triggers a safety protocol which disrupts the orderly function of the classroom. Finding the law to be a reasonable time/place/manner restriction, the court said it was neither overbroad nor vague. It unanimously affirmed the lower court’s ruling.

**The Fraser Approach**

Decades ago, the U.S. Supreme Court was asked to determine the limits of students’ right to profane or offensive speech in public schools. The case of *Bethel School District v. Fraser* involved a speech by Matthew Fraser nominating a classmate for student government. Employing a number of metaphors for male sexual prowess, Fraser addressed nearly 600 high school students, including some 14-year-olds, who were required to attend the school-sponsored assembly. The assistant principal said the speech violated a school policy prohibiting obscene speech that “materially and substantially interferes with the educational process.” She suspended Fraser and prohibited his selection as graduation speaker.

Fraser challenged the action as a violation of his First Amendment rights. On review, the Supreme Court upheld the school’s decision. The Court said that when student speech occurs during a school-sponsored event, the student’s liberty of speech may be curtailed to protect the school’s educational purpose, especially when young students are in the audience. This is particularly true if the forum for the student speech suggests that the student is speaking for the school. The *Fraser* decision held that eliminating vulgarity and profanity from school events advanced the duty of schools to “inculcate . . . habits and manners of civility.” Rather than view student First Amendment rights as paramount, the Court said it was “perfectly appropriate” for a school to impose student sanctions to disassociate the school from speech that threatened its core purpose.

**The Hazelwood Test**

Two years later, the U.S. Supreme Court reaffirmed school authority over school-sanctioned activities and speech. In this case, students in the journalism class at Hazelwood East High School in St. Louis, Mo., published a student newspaper, Spectrum, under the supervision of a faculty adviser who reviewed the content. The principal also reviewed each issue before publication, but school policy said students enjoyed freedom of “responsible” speech.

After the principal removed two pages of the newspaper that included one story about teen pregnancy at the school and a second about the impact of divorce on students at the school, student editors sued. The principal said the targeted stories invaded the privacy of students and parents interviewed and contained material inappropriate for younger students. Other inoffensive stories were also eliminated by removal of the pages to expedite printing before the school year ended. The trial court rejected the students’ challenge, but the court of appeals reversed, saying the school could edit the newspaper’s content only to avoid legal liability, not to advance grammatical, journalistic or social values.

In *Hazelwood School District v. Kuhlmeier*, the Supreme Court again reversed and said school administrators, not student reporters and editors, have authority to determine the appropriate content of a school-sponsored student newspaper. When a school creates and
supervises a forum for student speech, such as a student assembly or a teacher-supervised student newspaper, the school endorses that speech and is not only permitted but required to control the content to achieve educational goals, the Court said. Schools must exercise their supervisory function to promote a positive educational environment in all “school-sponsored . . . expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.” In a footnote, however, the Court made clear that the decision did not apply to the university student press.

**Choosing the Proper Test**

The *Morse* decision recognizing a school’s authority to punish off-campus, school-related student speech led to conflicting rulings among U.S. circuit courts because it appeared to grant school officials new latitude to sanction nondisruptive speech. In recent years, courts of appeal demonstrate increased uncertainty about when *Tinker* applies and when *Fraser*, *Hazelwood* or *O’Brien* should dictate the outcome. For example, the Second Circuit Court of Appeals limited the application of *Tinker* to “a student’s personal expression . . . [that] happens to occur on the school premises.” It applied *Hazelwood* to rule that a middle school had authority to ban a class president from a scheduled speech unless she deleted a closing religious blessing because the speech constituted school-sponsored expression. In another case, the Third Circuit relied on *Fraser* to find that a middle school student had a good likelihood of winning a challenge to the school’s prohibition of breast-cancer-awareness bracelets reading “i ♥ boobies! (KEEP A BREAST).” The school had said the bracelets were “lewd, vulgar, profane or plainly offensive.” But the court said they likely were protected speech because they were nondisruptive and discussed an important social issue.

### POINTS OF LAW

**COURT REVIEW OF NON-UNIVERSITY-STUDENT SPEECH**

U.S. Supreme Court decisions generally approach non-university-student speech cases in one of three ways:

1. Is the speech disruptive? If the speech disrupts the functioning of the public school or violates the rights and interests of other students, it may be regulated under *Tinker*.  
2. Is the speech of low value? If the speech is lewd or if it conflicts with the school’s pedagogical goals or public values, it may be regulated under *Fraser*.  
3. Is the speech sponsored by the school or perceived to reflect the school’s official position and endorsement? If the speech is closely associated with the school’s activities, curriculum or policies, it may be regulated under *Hazelwood*.
The Tenth Circuit used *Tinker* as the basis for ruling that school officials did not violate the First Amendment when they prevented high school students from distributing rubber fetus dolls in school.\(^{181}\) And, again applying *Tinker*, the Fourth Circuit upheld student punishment for wearing a Confederate flag T-shirt to school because “school officials could reasonably forecast” that the shirt “would materially and substantially disrupt the work and discipline of the school.”\(^{182}\) In direct conflict, the Seventh Circuit Court of Appeals summarily affirmed the right of students to wear T-shirts critical of homosexuality but noted that *Tinker*’s “substantial disruption test [has not] proved a model of clarity in its application.” In a pair of rulings, the Third Circuit homed in on the difficulty of locating *Tinker*’s schoolhouse gate when a court must address the “metaphysical question of where [the] speech occurred when [the student] used the internet as the medium.”\(^{183}\)

Increased inconsistency among court decisions in the wake of the Fifth Circuit’s 2015 ruling in *Morse* “highlight[s] the murky state of student speech law” and suggests that existing tests may be too imprecise and too malleable to address concerns about student speech in the web era.\(^{184}\) The U.S. Supreme Court has not reviewed any of these cases. As a consequence, the standard for deciding the free speech rights of students in public schools is less than clear. In general, rules limiting student expression in and about public schools or school policies likely are constitutional if the policies neither (1) limit expressive content that is compatible with the school’s educational priorities nor (2) target specific content without a strong educational justification.

The Supreme Court has refused to grant university administrators “the same degree of deference” it grants to high school administrators to regulate student expression\(^ {185}\) because college students are “less impressionable than younger students”\(^{186}\) and because the special characteristics of public schools require that students’ rights are “not automatically coextensive with the rights of adults in other settings.”\(^ {187}\) The Court generally protects the free speech and free press rights of university students as an essential part of their educational experience. The university and, to some degree, its faculty control the content of the curriculum. Otherwise, university policies and procedures generally must provide a neutral platform for broad discussion of issues.\(^ {188}\)

**Campus Speech**

The U.S. Supreme Court has established that universities have a greater obligation to create and maintain forums for broad public discussion than do the public schools. In *Papish v. Board of Curators of the University of Missouri*, the Supreme Court established that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”\(^ {189}\) The Court said the university violated the First Amendment rights of 32-year-old journalism graduate student Barbara Papish when it expelled her for distributing an underground campus newspaper that contained a political cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice, and an article under the title, “M—f— Acquitted.”

The Supreme Court has distinguished universities from public schools and held that a university’s “mission is well served if students have the means to engage in dynamic discussions
of philosophical, religious, scientific, social and political subjects in their extracurricular
campus life outside the lecture hall.190 As a consequence, public universities not only may
but must support all messages without regard to content to enhance wide-open extracurricular
debate and free speech interests.191

In 2019, the U.S. Supreme Court declined to review an appeal from a group of students
who challenged University of South Carolina student speech and assembly policies both as
applied and as facially unconstitutional.192 University policies limit student speech to lim-
ited zones on campus, require advance authorization from the university and impose a vague
nondiscrimination/nonharassment policy that prohibits “unwelcome” speech and “sugges-
tive or insulting gestures or sounds.” The university had permitted the group to assemble to
display and discuss symbols, including a swastika, that had provoked campus controversies
elsewhere, but had interviewed the group’s leader briefly in response to student complaints
about the event.

The Fourth Circuit Court of Appeals affirmed the trial court ruling that the adminis-
tration’s minimally intrusive questioning after the fact posed no threat to the group’s First
Amendment rights. The group lacked standing to present a challenge to hypothetical future
application of the university’s nondiscrimination policies.

Almost 25 years ago, the U.S. Supreme Court held that public universities must fund stu-
dent groups on the basis of content-neutral policies.193 When a university’s funding “program
[in] designed to facilitate private speech,” the funding creates a public forum that prohibits
university control of the content of the speech.194 Writing in concurrence, Justice David Souter
said the power of school authorities “to limit expressive freedom of students . . . is confined to
high schools, whose students and their schools’ relation to them are different and at least arguably
distinguishable from their counterparts in college education.”195 Consequently, neither
university administrators nor students who contribute fees for student activities may discrimi-
nate among student groups because of the ideas they express.196

The Supreme Court recently reshaped this concept when it ruled in Christian Legal Society
v. Martinez that a California law school could deny funding and other benefits to an explic-
itly religious student group whose members were required to sign a statement of faith.197
The school’s failure to recognize Christian Legal Society as an official student group denied
the group access to university recruitment fairs, bulk emails and posting on school bulletin
boards—benefits that clearly implicate First Amendment rights. Yet the Court said the law
school’s denial based on its requirement that recognized student groups be open to “all com-
ers” was a reasonable, viewpoint-neutral means to advance school interests in nondiscrimina-
tory access for students. Alternative, nonuniversity means of communication “reduce[d] the
importance of [university] channels” in reaching law school students and adequately protected
the group’s speech interests.198

In what some saw as a radical expansion of Tinker, the Court relied on it to defer to the
judgment of law school administrators “in light of the special characteristics of the school
environment.”199 Writing in dissent, Justice Samuel Alito concluded that after the decision
there is “no freedom for expression that offends prevailing standards of political correctness
in our country’s institutions of higher learning.”200
REAL WORLD LAW
ARE CAMPUSES FREE-SPEECH-FREE ZONES?

In 2019, U.S. President Donald Trump signed an executive order barring federal grants to universities that fail to “avoid creating environments that stifle competing perspectives.”xxvi The order “encourag[ed] institutions to foster environments that promote open, intellectually engaging and diverse debate” and extended the Constitution’s free speech mandate to private universities that receive federal grants. It came after the president promised the Conservative Political Action Conference that he would address what he called a campus political climate that chills discourse.xxvii He said the order was intended to redress the “increasingly hostile” efforts of university “professors and power structures” to prevent students from “challenging far-left ideology.”

In recent years, violent student protests, walk-outs, sit-ins and canceled invitations have met proposed and actual events featuring speakers including Breitbart senior editor and “right-wing provocateur” Milo Yiannopoulos.xxviii Universities increasingly engage in what two First Amendment scholars have called “the new censorship.”xxix They adopt broad anti-harassment and anti-discrimination policies, create “safe spaces” free from allegedly harmful verbal confrontation or “micro-aggressions” and advocate for “trigger warnings” on sensitive or potentially disturbing speech.

The chairman of the College Republican National Committee endorsed the president’s executive order as “critical” because universities “have absolutely failed to protect free speech on campus.” More negative responses included statements that the order was redundant, lacked any enforcement mechanisms, was vague and subjective, and represented federal micromanagement of university affairs.xxx

Although student fees or university allocations generally fund student newspapers and yearbooks in whole or in part, the Supreme Court generally has viewed campus publications as forums for student expression in which universities may not control content. “Colleges and universities are supposed to be bastions of unbridled inquiry and expression,” as one writer put it, “but they probably do as much to repress speech as any other institution in young people’s lives.”201 The author said a recent study found that only about one-third of students and fewer than one in five faculty members strongly agreed that it is “safe to hold unpopular positions on campus.”

When Kansas State University officials confiscated a student yearbook they said contained some objectionable content, the en banc Sixth Circuit Court of Appeals ruled that the confiscation violated students’ First Amendment rights.202 Declining to apply Hazelwood because a university “yearbook [must] be analyzed as a limited public forum—rather than [the] nonpublic forum” of a high school newspaper, the court said the university had neither the need nor the authority to control the content of speech in the student yearbook.203

Despite the asserted differences between schools and universities, some courts apply Hazelwood to review restrictions on university-subsidized and -approved publications.204 One case began when a dean at Governors State University in Illinois required her preapproval of content before publication of the student newspaper. Student editors sued, claiming the action violated their First Amendment rights. The Seventh Circuit Court of Appeals, using Hazelwood, held that the student newspaper was a limited-purpose public forum beyond the control of the university’s administration.
The Ninth Circuit Court of Appeals found that editors of a conservative student newspaper at Oregon State University had a legitimate First Amendment claim to nondiscriminatory access to campus to distribute their publication.205 The case involved an independent student newspaper distributed through campus newspaper boxes. Under a new unwritten policy allegedly intended to clean up campus, university employees removed this newspaper’s distribution boxes, leaving those for USA Today and others. A written OSU policy established most of the campus as a public forum. The Ninth Circuit held that university constraints on free speech in the campus public forum were subject to the most stringent scrutiny. It held that the university’s “standardless policy” unconstitutionally, purposefully and arbitrarily singled out the independent newspaper.

Several court decisions establish greater latitude for colleges to punish speech by students. In *Tatro v. University of Minnesota*, the Minnesota Supreme Court upheld university sanctions on a student for “satirical commentary and violent fantasy” she posted on Facebook about a school cadaver.206 Students in anatomy lab were required to sign a policy that allowed only “respectful and discreet” comments about cadavers. On Facebook, the student said she liked working with cadavers because it provided opportunity for “lots of aggression to be taken out” with an embalming knife that she wanted to use to “stab a certain someone in the throat.”207 In response, the student received an F in the lab, was placed on probation and was required to have a psychiatric examination. She sued, arguing that the sanctions violated her freedom of speech.208 The university said it had authority to regulate any student speech “reasonably related to legitimate pedagogical concerns.”

Rather than rely on established tests to review the case, the state supreme court held that the university’s action did not violate the First Amendment because the rules were “narrowly tailored and directly related to established professional conduct standards.”209 The court said the core mission of the university program was to instill professional standards of ethics and behavior in its students.210 Therefore, the university could “constitutionally regulate off-campus conduct that violate[s] specific professional obligations,” although it could not “regulate a student’s personal expression at any time, in any place, for any claimed curriculum-based reason.”211

Although the Minnesota court in *Tatro* emphasized the narrowness of its ruling, a growing number of federal appeals courts has upheld the authority of colleges to punish or even expel college students, especially graduate students, for speech that violates the “professional standards” of their chosen field.212 These courts recognize that greater latitude is provided to college student speech than to the free expression of less mature students213 but split on whether to apply *Hazelwood* to these university speech cases.214

The Ninth Circuit Court of Appeals also crafted its own test to review sanctions on university student speech related to professional standards. In *Oyama v. University of Hawaii*, the Ninth Circuit affirmed the constitutionality of the university’s effective expulsion of a student based on his unprofessional and inappropriate speech.215 The student was denied a student teacher placement because he made disparaging remarks about students with disabilities and said he favored consensual sexual relations with children. The student sued, saying the punishment violated his First Amendment rights.
The Ninth Circuit said *Hazelwood* did not apply. It relied heavily on *Tatro* and found the university’s punishment constitutional because it “related directly to defined and established professional standards, was narrowly tailored to serve the University’s foundational mission of evaluating [student] suitability for teaching and reflected reasonable professional judgment.”

In 2016, the Eighth Circuit Court of Appeals relied squarely on *Hazelwood* in deciding *Keefe v. Adams*. After Craig Keefe posted angry comments on Facebook that made a fellow nursing student “extremely uncomfortable and nervous,” school administrators removed Keefe from the nursing program for “behavior unbecoming of the profession and transgression of professional boundaries.”

Turning *Hazelwood* on its head, the Eighth Circuit said a “university may have an even stronger interest in the content of its curriculum and imposing academic discipline than did the high school at issue in *Hazelwood*.” The court ruled that “college administrators and educators in a professional school have discretion to require compliance with recognized standards of the profession, both on and off campus, so long as their actions are reasonably related to legitimate pedagogical concerns.”

The Supreme Court denied certiorari in *Keefe*, allowing this and other rulings to stand that “leave[] college students with diminished free-speech protection in all forums . . . if their speech can be deemed unprofessional” even when it does not substantially disrupt school activities, according to experts.

Some university administrators try to influence the content of student media by pressuring faculty or staff advisers. In a recent example, the top editors of the University of Georgia’s student newspaper resigned en masse, claiming nonstudent managers hired to oversee The Red and Black had interfered with their editorial autonomy. A memo on content guidelines circulating among the paper’s publishing board questioned the journalistic value of “content that catches people or organizations doing bad things.” Within days of the student walkout, the university reiterated its support of student control of content and reinstated the student editors.

In an earlier fight over university student newspaper content, a federal district court ruled that the First Amendment did not prohibit Kansas State University from removing and reassigning the adviser of The Collegian. The adviser was dismissed amid controversy over the newspaper’s coverage of campus diversity issues and events. Student editors and the adviser sued, claiming that the adviser’s removal was unconstitutional censorship. The head of the journalism school said a content analysis of the newspaper supported the adviser’s removal, and university administrators said budget concerns drove the decision.
**Speech Codes**

In what some call a concession to political correctness and others consider an important step toward a more safe, tolerant and inclusive society, universities across the United States began adopting and strengthening campus speech codes in the 1980s. The codes vary widely but generally prohibit harassment, bigotry and discrimination on campus. Courts found the speech codes that targeted offensive or disfavored speech unconstitutional because they reduced exchange of ideas based on content. As one federal district court wrote, “The Supreme Court has consistently held that statutes punishing speech or conduct solely on the grounds that they are unseemly or offensive are unconstitutionally overbroad.” Nonetheless, campus hate speech codes continue to be adopted. One study found that despite declines, nearly 60 percent of the 400 universities examined maintained policies that “seriously infringe upon the free speech rights of students.” The universities argue that the codes are essential to protect civil discourse and advance their educational missions.

More recently, universities have revised and adopted anti-discrimination and anti-harassment policies that may implicate free speech. The rules implement federal Title VII civil rights prohibitions against workplace harassment, hostile work environments and discrimination. In one on-point case, the University of Wisconsin defended its Design for Diversity by asserting that Title VII required it to regulate hostile academic environments. The federal district court disagreed and held that Title VII does not supersede the First Amendment.

Faculty language that provokes student protest and outrage has led some universities to examine the boundary between faculty First Amendment freedoms and university priorities to provide a setting conducive to education and equity for all. In 2018, a DePaul University law professor was investigated after a group of students complained the professor used “the N word” in a class about provocation and self-defense. Some students had objected earlier to the professor’s use of “retard,” “faggot” and “bitch” in class. A University of Chicago law professor stopped using “the N word” in 2019 after his use of it in a class discussion about fighting words prompted student backlash and calls for sanctions. The university supported his right to use the term.

**EMERGING LAW**

A pending lawsuit brought by those injured in the 2017 “Unite the Right” rally in Charlottesville, Va., against the rally organizers asks the court to decide the extent to which the First Amendment protects those who associate to later commit violence. The federal judge denied a motion from Unite organizers to quash subpoenas for discovery in the case. The court accepted the “weighty” constitutional concerns raised by the Unite movement but said their attack on the plaintiffs and the resulting injuries were not accidental but a direct result of the plaintiffs’ support for minorities. The First Amendment did not protect the defendants, who included members of the KKK, several neo-Nazi groups and other white supremacists, from facing charges that they conspired to commit violence.
Amid the “rise in violent extremism perpetrated by white nationalists” who often display Confederate symbols, several states passed laws to remove historical monuments to the Confederacy. In 2018, a federal district court in Louisiana refused to honor an injunction request from the United Daughters of the Confederacy to stop the removal of Confederate monuments in New Orleans. In 2019, a court struck down a 2017 Alabama law prohibiting the alteration or removal of Confederate monuments, saying it unconstitutionally required citizens to associate with a state message supporting the Confederacy. “Just as the state could not force any particular citizen to post a pro-Confederacy sign in his or her front lawn, so too can the state not commandeer the city’s property for the state’s preferred message,” the court said. The state said it would appeal the ruling.

In a related Mississippi case, citizens sued the state arguing that the state flag bearing the Confederate emblem was “tantamount to hateful government speech [with] discriminatory intent and disparate impact.” The court said the Confederate emblem was a symbol “of slavery, lynchings, pain and white supremacy,” but it refused to order the state to stop using the flag because the plaintiffs had failed to show that the flag caused an injury that could be legally remedied. The Fifth Circuit Court of Appeals affirmed.

For study resources and a case archive, go to edge.sagepub.com/medialaw7e.

Thinking About It

The two case excerpts that follow highlight the U.S. Supreme Court’s attempts to balance the First Amendment freedom of speech with concerns for educational goals and personal safety. Both cases help identify the parameters of First Amendment protection. The first, *Tinker*, clarifies the extent to which important competing values—in this case, education of the young—may limit the freedom of speakers. The second, *Elonis*, helps define when words that express ideas, even in artistic form, may lose constitutional protection because they threaten others and engender fear.

- Consider what each decision, as well as the two taken together, demonstrates about the different categories of speech in the U.S. Supreme Court’s jurisprudence.
- In these two decisions defining the extent of First Amendment freedoms, does the Supreme Court focus on the nature of the speech, the intent of the law, the impact of the regulation or something else to reach its conclusion?
- To what extent does the Supreme Court’s decision in *Tinker* turn on the category of speech, the type of speaker, the location of speech or other factors involved?
- Does *Elonis* provide a workable definition of true threats and a clear test to determine when such speech is unprotected?
JUSTICE ABE FORTAS delivered the Court’s opinion:

... The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to “pure speech” which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. . . .

... On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. . . . Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The problem posed by the present case . . . does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to “pure speech.”

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interference, actual or nascent, with the school’s work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students. . . .

... Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of hazardous freedom—that this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.

... The record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. . . .
On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation’s part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student’s statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. . . . Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation’s involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights, which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .

. . . . A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. . . . [W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students’ activities would materially and substantially disrupt the work and discipline of the school. In the circumstances of the present case, the prohibition of the silent, passive “witness of the armbands,” as one of the children called it, is no less offensive to the Constitution’s guarantees. . . .

JUSTICE POTTER STEWART, concurring:

Although I agree with much of what is said in the Court’s opinion, and with its judgment in this case, I cannot share the Court’s uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults. . . . I continue to hold the view [that] . . . [a] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.
JUSTICE BYRON WHITE, concurring:
While I join the Court’s opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest. . . .

JUSTICE HUGO BLACK, dissenting:
The Court’s holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected “officials of state supported public schools . . .” in the United States is in ultimate effect transferred to the Supreme Court. The Court brought this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way “from kindergarten through high school.” Here, the constitutional right to “political expression” asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. . . .

. . . [T]he crucial . . . questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—“symbolic” or “pure”—and whether the courts will allocate to themselves the function of deciding how the pupils’ school day will be spent. While I have always believed that, under the First and Fourteenth Amendments, neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that anyone has a right to give speeches or engage in demonstrations where he pleases and when he pleases. . . .

I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students’ minds off their class work and diverted them to thoughts about the highly emotional subject of the Vietnam War. And I repeat that, if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. . . .

It may be that the Nation has outworn the old-fashioned slogan that “children are to be seen, not heard,” but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach. . . . Iowa’s public schools . . . are operated to give students an opportunity to learn, not to talk politics by actual speech, or by “symbolic” speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam War “distracted from that singleness of purpose which the State [here Iowa] desired to exist in its public educational institutions.”

This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough. . . . I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

JUSTICE JOHN HARLAN, dissenting:
I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.
The Law of Journalism and Mass Communication

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

**Elonis v. United States**

SUPREME COURT OF THE UNITED STATES


CHIEF JUSTICE JOHN ROBERTS delivered the opinion of the Court.

Federal law makes it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." 18 U. S. C. § 875(c). Petitioner was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.

Anthony Douglas Elonis was an active user of the social networking web site Facebook. . . . In May 2010, Elonis’ wife of nearly seven years left him, [and] . . . Elonis began “listening to more violent music” and posting self-styled “rap” lyrics . . . [that] included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were “fictitious,” with no intentional “resemblance to real persons.” Elonis posted an explanation to another Facebook user that “I’m doing this for me. My writing is therapeutic.”

Elonis’ co-workers and friends viewed the posts in a different light. Around Halloween of 2010, Elonis posted a photograph of himself and a co-worker at a “Halloween Haunt” event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his co-worker’s neck, and in the caption Elonis wrote, “I wish.” . . . [The] chief of park security was a Facebook “friend” of Elonis, saw the photograph, and fired him.

In response, Elonis posted a new entry on his Facebook page:

"Moles! Didn’t I tell y’all I had several? Y’all sayin’ I had access to keys for all the f***in’ gates. That I have sinister plans for all my friends and must have taken home a couple. Y’all think it’s too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I’m still the main attraction. Whoever thought the Halloween Haunt could be so f***in’ scary?” . . .

Elonis’ posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation of a satirical sketch that he and his wife had watched together. In the actual sketch, called “It’s Illegal to Say . . .,” a comedian explains that it is illegal for a person to say he wishes to kill the President, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the President. The posting was part of the basis for Count Two of the indictment, threatening his wife:

"Hi, I’m Tone Elonis.

Did you know that it’s illegal for me to say I want to kill my wife? . . .

It’s one of the only sentences that I’m not allowed to say. . . .

Now it was okay for me to say it right then because I was just telling you that it’s illegal for me to say I want to kill my wife. . . .

Um, but what’s interesting is that it’s very illegal to say I really, really think someone out there should kill my wife. . . .

But not illegal to say with a mortar launcher.

Because that’s its own sentence. . . .

I also found out that it’s incredibly illegal, extremely illegal to go on Facebook and say
something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you’d have a clear line of sight through the sun room. . . .

Yet even more illegal to show an illustrated diagram [of the house]. . . .

The details about the home were accurate. At the bottom of the post, Elonis included a link to the video of the original skit, and wrote, “Art is about pushing limits. I’m willing to go to jail for my Constitutional rights. Are you?”

After viewing some of Elonis’ posts, his wife felt “extremely afraid for [her] life.” A state court granted her a three-year protection-from-abuse order against Elonis (essentially, a restraining order). Elonis referred to the order in another post on his “Tone Dougie” page, also included in Count Two of the indictment:

“Fold up your [protection-from-abuse order]
and put it in your pocket
Is it thick enough to stop a bullet?
Try to enforce an Order
that was improperly granted in the first place
Me thinks the Judge needs an education
on true threat jurisprudence.
And prison time’ll add zeros to my settlement . . .
And if worse comes to worse
I’ve got enough explosives to take care of the State Police and the Sheriff’s Department.”

At the bottom of this post was a link to the Wikipedia article on “Freedom of speech.” . . . That same month, . . . Elonis posted [this] entry . . . :

“That’s it, I’ve had about enough
I’m checking out and making a name for myself

Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
And hell hath no fury like a crazy man in a Kindergarten class
The only question is . . . which one?

. . . A grand jury indicted Elonis for making threats to injure . . . in violation of 18 U. S. C. §875(c). In the District Court, Elonis moved to dismiss the indictment for failing to allege that he had intended to threaten anyone. The District Court denied the motion, holding that Third Circuit precedent required only that Elonis “intentionally made the communication, not that he intended to make a threat.” At trial, Elonis testified that his posts emulated the rap lyrics of the well-known performer Eminem . . . In Elonis’ view, he had posted “nothing . . . that hasn’t been said already.” The Government presented as witnesses Elonis’ wife and co-workers, all of whom said they felt afraid and viewed Elonis’ posts as serious threats.

Elonis requested a jury instruction that “the government must prove that he intended to communicate a true threat.” The District Court denied that request. The jury instructions instead informed the jury that

“A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.”

The Government’s closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—“it doesn’t matter what he thinks.” A jury convicted Elonis . . . [and] sentenced [him] to three years, eight months’ imprisonment and three years’ supervised release.

Elonis renewed his challenge to the jury instructions in the Court of Appeals, contending that the jury should have been required to find that he intended his posts to be threats. The Court of Appeals disagreed,
holding that the intent required by Section 875(c) is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.

We granted certiorari.

... This statute requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat.

Elonis argues that the word "threat" itself in Section 875(c) imposes such a requirement. According to Elonis, every definition of "threat" or "threaten" conveys the notion of an intent to inflict harm. ... For its part, the Government argues that Section 875(c) should be read in light of its neighboring provisions ... [that] expressly include a mental state requirement of an "intent to extort." According to the Government, the[se] express "intent to extort" requirements ... should preclude courts from implying an unexpressed "intent to threaten" requirement in Section 875(c).

... The most we can conclude from the language of Section 875(c) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(c), but did not identify what mental state, if any, a defendant must have to be convicted. ... The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." ... The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty. ... Although there are exceptions, the "general rule" is that a guilty mind is "a necessary element in the indictment and proof of every crime." We therefore generally interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.

This is not to say that a defendant must know that his conduct is illegal before he may be found guilty. The familiar maxim "ignorance of the law is no excuse" typically holds true. Instead, our cases have explained that a defendant generally must "know the facts that make his conduct fit the definition of the offense," even if he does not know that those facts give rise to a crime. ...

[In United States v. X-Citement Video (1994), we considered a statute criminalizing the distribution of visual depictions of minors engaged in sexually explicit conduct. We rejected a reading of the statute which would have required only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers. We held instead that a defendant must also know that those depicted were minors, because that was "the crucial element separating legal innocence from wrongful conduct." When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute "only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" ...]

Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat. ... The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating something is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat.

Elonis’ conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—awareness of some wrongdoing." Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes." Under these principles, "what [Elonis] thinks" does matter.

The Government is at pains to characterize its position as something other than a negligence
standard, emphasizing that its approach would require proof that a defendant “comprehended [the] contents and context” of the communication. . . . Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats. That is a negligence standard.

In light of the foregoing, Elonis’ conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis’ communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state. That understanding “took deep and early root in American soil” and Congress left it intact here: Under Section 875(c), “wrongdoing must be conscious to be criminal.” . . .

Our holding makes clear that negligence is not sufficient to support a conviction under Section 875(c), contrary to the view of nine Courts of Appeals. . . . The judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO, concurring in part and dissenting in part.

. . . The Court’s disposition of this case is certain to cause confusion and serious problems. . . . The Court holds that the jury instructions in this case were defective because they required only negligence in conveying a threat. But the Court refuses to explain what type of intent was necessary. Did the jury need to find that Elonis had the purpose of conveying a true threat? Was it enough if he knew that his words conveyed such a threat? Would recklessness suffice? The Court declines to say. Attorneys and judges are left to guess. . . .

This Court has not defined the meaning of the term “threat” in §875(c), but in construing the same term in a related statute, the Court distinguished a “true threat” from facetious or hyperbolic remarks. In my view, the term “threat” in §875(c) can fairly be defined as a statement that is reasonably interpreted as “an expression of an intention to inflict evil, injury, or damage on another.” Conviction under §875(c) demands proof that the defendant’s transmission was in fact a threat, i.e., that it is reasonable to interpret the transmission as an expression of an intent to harm another. In addition, it must be shown that the defendant was at least reckless as to whether the transmission met that requirement. . . . I would hold that a defendant may be convicted under §875(c) if he or she consciously disregards the risk that the communication transmitted will be interpreted as a true threat. . . .

There remains the question whether interpreting §875(c) to require no more than recklessness with respect to the element at issue here would violate the First Amendment. . . .

Elonis argues that the First Amendment protects a threat if the person making the statement does not actually intend to cause harm. . . .

Elonis also claims his threats were constitutionally protected works of art. Words like his, he contends, are shielded by the First Amendment because they are similar to words uttered by rappers and singers in public performances and recordings. . . . But context matters. “Taken in context,” lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person. Statements on social media that are pointedly directed at their victims, by contrast, are much more likely to be taken seriously. . . .

Threats of violence and intimidation are among the most favored weapons of domestic abusers, and the rise of social media has only made those tactics more commonplace. A fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech. . . .

We have sometimes cautioned that it is necessary to “extend[ing] a measure of strategic protection” to otherwise unprotected false statements of fact in order to ensure enough “breathing space” for protected speech. A similar argument might be made with respect to threats. But we have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity. Requiring proof of recklessness is similarly sufficient here.

Finally, because the jury instructions in this case did not require proof of recklessness, I would vacate the judgment below and remand for the Court of Appeals.
to decide in the first instance whether Elonis’ conviction could be upheld under a recklessness standard.

JUSTICE THOMAS, dissenting.

We granted certiorari to resolve a conflict in the lower courts over the appropriate mental state for threat prosecutions under 18 U. S. C. §875(c). . . . Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place. Lower courts are thus left to guess at the appropriate mental state for §875(c). All they know after today’s decision is that a requirement of general intent will not do. But they can safely infer that a majority of this Court would not adopt an intent-to-threaten requirement, as the opinion carefully leaves open the possibility that recklessness may be enough.

This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty. . . . Because the Court of Appeals properly applied the general-intent standard, and because the communications transmitted by Elonis were “true threats” unprotected by the First Amendment, I would affirm the judgment below. . . .

Because §875(c) criminalizes speech, the First Amendment requires that the term “threat” be limited to a narrow class of historically unprotected communications called “true threats.” To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely “political hyperbole”; “vehement, caustic, and sometimes unpleasantly sharp attacks”; or “vituperative, abusive, and inexact” statements. It also cannot be determined solely by the reaction of the recipient, but must instead be “determined by the interpretation of a reasonable recipient familiar with the context of the communication,” lest historically protected speech be suppressed at the will of an eggshell observer. There is thus no dispute that, at a minimum, §875(c) requires an objective showing: The communication must be one that “a reasonable observer would construe as a true threat to another.” And there is no dispute that the posts at issue here meet that objective standard. . . .

Our default rule in favor of general intent applies with full force to criminal statutes addressing speech. Well over 100 years ago, this Court considered a conviction under a federal obscenity statute that punished anyone “who shall knowingly deposit, or cause to be deposited, for mailing or delivery,” any “obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character.” In that case, as here, the defendant argued that, even if “he may have had . . . actual knowledge or notice of [the paper’s] contents” when he put it in the mail, he could not “be convicted of the offence . . . unless he knew or believed that such paper could be properly or justly characterized as obscene, lewd, and lascivious.” The Court rejected that theory . . . .

Applying ordinary rules of statutory construction, I would read §875(c) to require proof of general intent. To “know the facts that make his conduct illegal” under §875(c), a defendant must know that he transmitted a communication in interstate or foreign commerce that contained a threat. . . . A defendant like Elonis, however, who admits that he “knew that what [he] was saying was violent” but supposedly “just wanted to express [him]self,” acted with the general intent required under §875(c), even if he did not know that a jury would conclude that his communication constituted a “threat” as a matter of law. . . .

Requiring general intent in this context is not the same as requiring mere negligence. . . . [T]he defendant must know—not merely be reckless or negligent with respect to the fact—that he is committing the acts that constitute the . . . offense.

But general intent requires no mental state (not even a negligent one) concerning the “fact” that certain words meet the legal definition of a threat. . . .

Elonis also insists that we read an intent-to-threaten element into §875(c) in light of the First Amendment. But our practice of construing statutes “to avoid constitutional questions . . . is not a license for the judiciary to rewrite language enacted by the legislature.” . . .

Elonis does not contend that threats are constitutionally protected speech, nor could he: “From 1791 to the present, . . . our society . . . has permitted restrictions upon the content of speech in a few limited areas,” true threats being one of them. Instead, Elonis claims that only intentional threats fall within this particular historical exception. . . .

Elonis also insists that our precedents require a mental state of intent when it comes to threat prosecutions under §875(c). . . .
We generally have not required a heightened mental state under the First Amendment for historically unprotected categories of speech. For instance, the Court has indicated that a legislature may constitutionally prohibit "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction," without proof of an intent to provoke a violent reaction. Because the definition of "fighting words" turns on how the "ordinary citizen" would react to the language, this Court has observed that a defendant may be guilty of a breach of the peace if he "makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended," and that the punishment of such statements "as a criminal act would raise no question under [the Constitution]." . . . I see no reason why we should give threats pride of place among unprotected speech.
[D]ebate on public issues should be uninhibited, robust and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

—U.S. Supreme Court Justice William Brennan

Montgomery, Ala., police commissioner L.B. Sullivan (second from right) sued The New York Times for libel in the 1960s. The U.S. Supreme Court decision in New York Times Co. v. Sullivan is one of the most important legal cases in the history of U.S. constitutional law.