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The Freedom of Speech and Bad Purposes

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ABSTRACT

Can otherwise constitutionally protected speech lose its protection because of the speaker's supposedly improper purpose? The Supreme Court has sometimes said "no"—but sometimes it has endorsed tests (such as the incitement test) that do turn on a speaker's purpose. Some lower courts have likewise rejected purpose tests. But others hold that, for instance, a purpose to annoy or distress can turn otherwise protected speech into criminal "harassment," or that a selfish purpose can strip protection from otherwise protected government employee speech. This Article analyzes purpose tests in First Amendment law, and concludes that such tests are on balance unsound; the protection of speech should not turn on what a factfinder concludes about the speaker's purposes.

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INTRODUCTION

You want to say something. You are sure its content is constitutionally protected: This isn't speech that is understood to lack First Amendment value, such as defamatory falsehoods, obscenity, or child pornography. But could you still be restricted from saying it because you have a certain purpose—for instance, because your goal is to affect a political campaign, to get revenge on someone, to promote your own professional or financial self-interest, or to help unknown listeners commit crimes?

At times, the U.S. Supreme Court has said that speech can't be stripped of First Amendment protection because of the speaker's purpose. "[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection," wrote Chief Justice Roberts in his *FEC v. Wisconsin Right to Life, Inc.* lead opinion, and the concurrence agreed.[1] The Court has rejected purpose-based tests before in libel and emotional distress cases.[2] Some lower courts have done the same in threat cases, sexually motivated photography cases, and government employee speech cases.[3]

Yet many lower courts have been willing to adopt tests that do turn on a speaker's motivation, for instance:

a. Government employee speech: When is government employee speech "on a matter of public concern," and thus potentially protected against employer retaliation? Some circuits answer by considering whether the employees had the purpose to just improve their own working conditions, rather than to promote the public interest.[4]
b. Crime-facilitating speech: When does speech that informs people how to commit crimes lose First Amendment protection? The Fourth

1. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007) (Roberts, C.J., joined by Alito, J.) (quoting MARTIN H. REDISH, MONEY TALK$: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001)). The three concurring Justices agreed, reasoning that "test[s] that [are] tied to the public perception, or a court's perception, of . . . intent" are "ineffective to vindicate the fundamental First Amendment rights" of speakers. *Id.* at 492 (Scalia, J., concurring in part and concurring in the judgment).
2. *See infra* Part IV.A.2.
3. *See* United States v. White, 670 F.3d 498, 511 (4th Cir. 2012), *overruled as to other matters by* Elonis v. United States, 135 S. Ct. 2001, 2012 (2015) (concluding, as a statutory matter, that the government must prove recklessness or knowledge in threats cases, as opposed to the negligence that *White* would have allowed, but not endorsing a purpose test); *Ex parte* Thompson, 442 S.W.3d 325, 338 (Tex. Crim. App. 2014); Chappel v. Montgomery Cty. Fire Prot. District No. 1, 131 F.3d 564, 575 (6th Cir. 1997); Sullivan v. River Valley Sch. Bd., No. 181913, 1998 WL 1988912, at *1 (Mich. Ct. App. Nov. 6, 1998).
4. For more details on all these categories, see Parts II.A–II.H, respectively.

Circuit and the Justice Department have concluded that such speech is unprotected when the speaker has the purpose to promote crimes (rather than, say, to simply inform the public about how the crimes are being committed).

c. Criminal harassment: When may annoying or distressing speech said about a person be punished as criminal harassment, or restrained by an antiharassment order? Many state and federal criminal harassment statutes draw the line at speakers who have the purpose to annoy or distress the subjects of their speech. Some courts have upheld those statutes on the grounds that speech said with this bad purpose is constitutionally unprotected.
d. Sexually motivated speech and photography: When may public photography of unconsenting subjects be criminally punished? Likewise, when may communication to minors be punished? Some laws draw the line at speakers who have the purpose to sexually arouse someone, whether themselves or listeners. These laws have faced a mixed reception in court.
e. Revenge porn: When may distributing pictures of people naked or having sex, without the subjects' consent, be punishable? Some state laws punish such speech but only when the distributors seek to humiliate the subjects or damage the subjects' reputation, thus excluding distributors who have other purposes (such as making money by selling sex videos of now-famous ex-partners).
f. Right of publicity: When may someone sue because a fictional character was named after him? The Missouri Supreme Court has held that the person has a good right-of-publicity claim when the author has the primary purpose to make money, as opposed to having the primary purpose of self-expression.
g. Interference with business relations: When may a person sue a speaker who is urging others to boycott or fire the person? Some courts allow such claims under the "interference with business relations" tort when the speaker primarily seeks to damage the target, rather than having some worthier goal (such as economic competition).
h. Threats: When may a statement that a reasonable person would perceive as threatening be punished as a threat? Some courts draw the line at speech spoken with the purpose of putting the target in fear.

And there is some Supreme Court authority supporting such purpose tests, despite the above-quoted language in *Wisconsin Right to Life*. The *Brandenburg v. Ohio* incitement test, for instance, provides that speech can be restricted if it is "*directed* to inciting or producing imminent lawless action and is likely to incite or produce such action."[5] *Hess v. Indiana* held that "directed to" here means intended to persuade people to act illegally.[6]

Likewise, membership in a political group that engages in some illegal acts can lead to government-imposed penalties only when the member had a "knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims."[7] This too has generally been understood as requiring a purpose to aid the illegal aims. And in one mid-1960s case, the Supreme Court concluded that demonstrating outside a courthouse with the purpose to influence judges or jurors may be made a crime. The Court did not opine on whether such demonstrations can likewise be outlawed even when they were engaged in with the mere knowledge that they would influence judges or jurors, but it seems possible that the purpose/knowledge distinction was indeed constitutionally significant here.[8]

In this Article, I will argue that the Court's statement in *Wisconsin Right to Life* is generally correct: A speaker's purpose ought not be seen as stripping First Amendment protection from otherwise protected speech.[9] Generally speaking, I will argue, a speaker's purpose doesn't affect the value of the speech to listeners or to public debate.[10] Tests that ostensibly turn on the speaker's purpose are likely to unacceptably deter even speech that is said without such a purpose.[11] And a speaker's purpose doesn't affect the harm caused (or not caused) by the speech.[12] Purpose tests might make more sense in laws that focus on the speaker's purpose

5. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).
6. Hess v. Indiana, 414 U.S. 105, 109 (1973).
7. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919–20 (1982) (civil liability); Healy v. James, 408 U.S. 169, 185–86 (1972) (university action with regard to students); United States v. Robel, 389 U.S. 258, 265 (1967) (government employment); Scales v. United States, 367 U.S. 203, 229 (1961) (criminal punishment).
8. Cox v. Louisiana, 379 U.S. 559, 566–67 (1965).
9. This is a separate question from whether a person's purpose to communicate should be relevant in deciding whether that person's non-speech conduct is treated as symbolic expression. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); Larry Alexander, *Free Speech and Speaker's Intent*, 12 CONST. COMMENT. 21, 21–22 (1995) (criticizing this inquiry). This purpose to communicate will usually be clearly evident, and in any event raises quite different questions from those posed in this Article.
10. *See infra* Part IV.A.
11. *See infra* Part IV.B.
12. *See infra* Part IV.C.

to himself engage in other misconduct in the future—but even there such tests are likely to unduly chill speech.[13]

If we conclude that some speech is so harmful, valueless, or traditionally unprotected that it ought to lose First Amendment protection, that should generally happen even when the speaker has a mental state below purpose, such as knowledge. (I argue that legislatures ought to do this as to revenge porn.[14]) But if we conclude that the speech should be constitutionally protected even when the speaker knows that the speech causes a certain kind of harm—for instance, when a chemistry book publisher knows that some people are misusing the book to make bombs—then that speech should be protected even when a factfinder concludes that the speaker had a bad purpose.

I. KNOWLEDGE VS. PURPOSE

A. Negligence, Recklessness, and Knowledge Requirements in Other Areas of First Amendment Law

At the outset, let me make clear which mens rea issues I will be discussing, and which I will set aside. Many First Amendment doctrines require some showing of negligence, recklessness, or knowledge as to some particular fact.[15] First Amendment libel law famously requires "actual malice" (i.e., recklessness or knowledge of falsehood) for liability in some situations and negligence in others.[16] Obscenity and child pornography doctrines also require at least negligence as to the nature of the material.[17]

These doctrines, however, deal with situations where the substance of the speech is seen as constitutionally valueless, but speakers may be unaware of certain facts that make it valueless. In order to prevent overdeterrence of speech—the famous "chilling effect"—the Court has protected speakers who have made reasonable mistakes about such facts, or perhaps even unreasonable but sincere mistakes.

13. *See infra* Part IV.E.
14. *See infra* Part IV.C.2.
15. Leslie Kendrick has recently discussed these mens rea tests. *See generally* Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255 (2014); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013). I focus here, though, on tests that turn on the speaker's purpose, and not on the speaker's negligence, recklessness, or knowledge; for more on why I think there's a difference here, see the remainder of this Part.
16. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
17. New York v. Ferber, 458 U.S. 747, 765 (1982); Smith v. California, 361 U.S. 147, 150–51 (1959).

For instance, the Court has held that "there is no constitutional value in false statements of fact," at least when the false statements tend to injure another's reputation:[18]

> Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[19]

But "though the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate."[20] And because of this danger, even the constitutionally valueless falsehoods are protected unless the speaker knew the statement was false, or was reckless or (in some cases) negligent about that possibility.[21]

The same is true for the ban on holding booksellers liable for selling obscenity unless they know or have reason to know the contents of the books. The Court took the view that "obscene speech and writings are not [constitutionally] protected,"[22] because obscenity is of "slight social value"[23] and "utterly without redeeming social importance."[24] But it held that, despite this lack of constitutional value, strict liability for distributing obscenity was improper, because such strict liability would "tend seriously" "to restrict the dissemination of books which are not obscene . . . by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold":[25]

> "Every bookseller would be placed under an obligation to make himself aware of the contents of every book in his shop. . . ." . . . The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly.[26]

18. *Gertz*, 418 U.S. at 340; United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (plurality opinion) (quoting *Gertz*, 418 U.S. at 340) (limiting this statement to certain classes of falsehoods, including defamatory falsehoods); *id.* at 2553 (Breyer, J., concurring) (likewise).
19. *Gertz*, 418 U.S. at 340 (citations omitted).
20. *Id.*
21. *Id.* at 342, 347.
22. *Smith*, 361 U.S. at 152.
23. Roth v. United States, 354 U.S. 476, 485 (1957) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)).
24. *Id.* at 484.
25. *Smith*, 361 U.S. at 152.
26. *Id.* at 153 (internal citation omitted).

Again, the underlying content was seen as constitutionally unprotected. But the government had to show at least negligence (and possibly recklessness)[27] about the facts that made the book obscene—here, the content of the book—because otherwise even constitutionally protected speech might be chilled. And the Court likewise required at least negligence as to the facts before someone could be held liable for distributing child pornography, another category of substantively unprotected speech.[28]

B. Purpose Requirements

Purpose is used in the speech restrictions I'm discussing in this Article in a way almost opposite to how knowledge, recklessness, or negligence are used in libel law, obscenity law, or child pornography law. With libel, obscenity, and child pornography, speech that is seen as substantively lacking in First Amendment value is nonetheless protected if a speaker lacks a sufficiently culpable mens rea. In the purpose cases, speech that is seen as substantively having First Amendment value is stripped of protection if a speaker has a purpose that the Court views as culpable.

Thus, for instance, speech that describes how crimes can be committed can often be quite valuable.[29] It consists of true factual statements, and ones that are relevant to important public debates about how better to fight crime, or how to define what constitutes crime. Likewise, photographing people in public places, even without their consent, can be part of valuable news reporting, can help illustrate social trends, and can document police or citizen misconduct.[30] And speech that encourages listeners not to do business with particular people or institutions has often been part of important reform movements.[31]

Even if some such speech (for instance, speech about acquaintances or small business owners) is seen as being merely on a matter of private concern, it is still presumptively protected by the First Amendment, at least when the government is acting as sovereign rather than as employer.[32] Yet in all these instances, the

27. *Id.* at 154 (declining to decide what mental state was required for liability, though making clear that strict liability is impermissible).
28. New York v. Ferber, 458 U.S. 747 (1982).
29. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1111–27 (2005).
30. *See, e.g.*, ACLU v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).
31. *See, e.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886, 910 (1982); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).
32. "*Most* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from Government

question is whether such otherwise valuable speech should lose its First Amendment protection because the speaker has a supposedly bad purpose.

And the restrictions cover speakers who tend to be well aware of some probable effect of speech. Someone who is distributing an ad that mentions a candidate will likely expect that the ad may influence some people to vote against the candidate. A chemistry textbook publisher may well know that some people use the book to make bombs. (The police might have informed the publisher, for instance, that the book was found in bombmakers' labs.[33])

A photographer may know that some people in his audience will find a photograph to be sexually arousing. A blogger who is harshly criticizing a politician may well know that the politician will be annoyed, alarmed, or severely distressed by the speech. Likewise for a woman who is harshly criticizing her ex-boyfriend on her Facebook page.

The question in all these cases is: Should the law distinguish those who merely know that speech will very likely cause some result from those who specifically want to bring about that result? That is a question that the cases adopting a negligence or "actual malice" test have not had occasion to answer.

Nor is it apt in most such cases to simply argue that "each person intends the natural consequences of his actions."[34] This presumption may make sense for most crimes and torts, for which a mens rea of recklessness or knowledge usually suffices—each person knows the natural consequences of his actions (the loose usage of "intent" that tort law often uses, and criminal law sometimes uses[35]). But when the law really aims to distinguish intent from mere knowledge, and the

regulation." United States v. Stevens, 559 U.S. 460, 479 (2010) (internal citations omitted). "[S]peech on private matters" does not "fall[] into one of the narrow and well-defined classes of expression [such as obscenity] which carries so little social value . . . that the State can prohibit and punish such expression by all persons in its jurisdiction." Connick v. Myers, 461 U.S. 138, 147 (1983).

33. Keay Davidson, *Bombs Easy—But Risky—to Make; Ingredients Are Common, Recipes Available*, S.F. EXAMINER, Apr. 20, 1995, at A-12 (discussing bombmakers' using chemistry textbooks); David Unze, *Suspected Meth Lab Found in Search Near Paynesville*, ST. CLOUD TIMES, Dec. 6, 2000, at 2B (same as to drugmakers).

34. *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 513 (1979); Staten v. State, 813 So. 2d 775, 777 (Miss. Ct. App. 2002).

35. *See, e.g.*, United States v. Linares, 367 F.3d 941, 948 (D.C. Cir. 2004); RESTATEMENT (THIRD) OF TORTS (phys. & econ. harm) § 1 (2005). As Justice Holmes noted, "[T]he word intent as vaguely used in ordinary legal discussion means no more than knowledge . . . that the consequences said to be intended will ensue. . . . But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be . . . obvious to the actor[] that the consequence will follow . . . but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive . . . ." Abrams v. United States, 250 U.S. 616, 626–27 (1919) (Holmes, J., dissenting).

prohibited conduct involves speech that can have both socially beneficial effects and harmful effects, the presumption is not apt.

II. SPEECH RESTRICTIONS THAT DO USE PURPOSE TESTS: LOWER COURTS

I've mentioned some kinds of purpose-based speech restrictions that some legislatures and lower courts have endorsed; here are more details on each kind.

A. Government Employee Speech

To be protected against employer retaliation, government employee speech must be on a matter of public concern.[36] (Even if the speech is on a matter of public concern, it may still be restricted in some situations,[37] but I set that aside here.) What constitutes speech on matters of public concern, the Court has held, is a matter of the "content, form, and context" of the speech.[38]

This definition could be seen as referring just to what is said and how, where, and when it is said. But some lower courts have also focused on why the speech is said, "consider[ing] the motive of the speaker to learn if the speech was calculated to redress personal grievances or to address a broader public purpose."[39]

B. Crime-Facilitating Speech

The Supreme Court has never decided when speech can be restricted on the grounds that the speech conveys information that can help people commit crimes, or escape punishment for committing crimes. (I have called this "crime-facilitating speech."[40]) Lower court cases have not reached a consensus on this issue, and in particular on what mens rea is required. Several federal circuit cases have held that speech that purposefully informs people how to commit tax

36. *Connick*, 461 U.S. at 146.
37. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
38. *Connick*, 461 U.S. at 146.
39. Workman v. Jordan, 32 F.3d 475, 482–83 (10th Cir. 1994); *see also, e.g.*, Foley v. Univ. of Hous. Sys., 355 F.3d 333, 341 (5th Cir. 2003); Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990).
40. Volokh, *supra* note 29; *see* Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., respecting the denial of certiorari) ("Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech."); U.S. DEP'T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (1997), http://cryptome.org/abi.htm [https://perma.cc/YTZ6-ZZYZ] (asserting the same).

evasion, illegal immigration, drugmaking, and contract killing is constitutionally unprotected.[41] But three federal circuit cases have not required a showing of purpose, and have held that speech that merely knowingly facilitates bombmaking, bookmaking, or illegal circumvention of copy protection is constitutionally unprotected.[42]

Legislatures at times assume that crime-facilitating speech may be punished, at least in some instances, even when the speaker doesn't intend to facilitate crime.[43] Other statutes, though, do require such an intention.[44] In recent years, the U.S. Department of Justice seems to have taken the view that published crime-facilitating speech may generally be restricted if it is intended to facilitate crime, but not if such an intention is absent.[45] But some federal statutes

41. *See* United States v. Raymond, 228 F.3d 804, 815 (7th Cir. 2000) (tax evasion); Rice v. Paladin Enters., Inc., 128 F.3d 233, 243, 266 (4th Cir. 1997) (contract killing); United States v. Aguilar, 883 F.2d 662, 685 (9th Cir. 1989) (illegal immigration), *superseded by statute as noted in* United States v. Gonzalez-Torres, 273 F.3d 1181 (9th Cir. 2001); United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) (tax evasion); United States v. Holecek, 739 F.2d 331, 335 (8th Cir. 1984) (tax evasion); United States v. Barnett, 667 F.2d 835, 842–43 (9th Cir. 1982) (drugmaking); United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) (tax evasion); Wilson v. Paladin Enters., Inc., 186 F. Supp. 2d 1140, 1144 (D. Or. 2001) (contract killing).

42. Universal City Studios, Inc. v. Corley, 273 F.3d 429, 457 (2d Cir. 2001) (circumvention of copy protection); United States v. Mendelsohn, 896 F.2d 1183, 1186 (9th Cir. 1990) (bookmaking); United States v. Featherston, 461 F.2d 1119, 1122 (5th Cir. 1972) (bomb-making). *Mendelsohn* involved the distribution of computer object code, which might not be protected by the First Amendment in any event; but the court held that even if code was potentially covered by the First Amendment, distribution of such material with the knowledge that it would likely be used for bookmaking could be punished.

43. *See* 18 U.S.C. § 3486(a)(6)(A) (2012) (prohibiting disclosure by any person of the issuance of certain document production orders in investigations of health care violations and child abuse, though only if a court so orders, and only for "up to 90 days"); Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(l)(J) (2012) (same as to subpoenas for certain education records, but without the 90-day limitation); 50 U.S.C. § 1861(a), (d) (2000 & Supp. 2001) (same as to "investigation[s] to obtain foreign intelligence information . . . or to protect against international terrorism or clandestine intelligence activities"); WASH. REV. CODE § 19.86.110 (2004) (same, but without a time limit, as to investigations of unfair or anticompetitive business practices, though only if a court so orders); TEX. CODE CRIM. PROC. art. 18.21, §§ 4, 7, 8 (1965) (prohibiting disclosure by any person of searches or subpoenas "involving access to stored electronic communications," if the court determines that such a disclosure may "endanger[] the life or physical safety of an individual," lead to "flight from prosecution," "destruction of or tampering with evidence," or "intimidation of a potential witness," or "otherwise seriously jeopardiz[e] an investigation or unduly delay[] a trial").

44. *See, e.g.*, 18 U.S.C. § 1510(b) (2000) (prohibiting disclosure of subpoenas by officers of financial institutions when done "with the intent to obstruct a judicial proceeding"); DEL. CODE ANN. tit. 11, § 2412(a) (2004) (prohibiting disclosure by any person "of an authorized interception or pending application . . . in order to obstruct, impede or prevent such interception"); MINN. STAT. ANN. § 609.4971 (West 2003) (prohibiting the disclosure of certain subpoenas "with intent to obstruct, impede, or prevent the investigation for which the subpoena was issued").

45. *See* U.S. DEP'T OF JUSTICE, *supra* note 40, at pt. VI.B; Government's Motion for Reversal of Conviction at 6–7 & n.3, United States v. McDanel, CA No. 03-50135 (9th Cir. Oct. 14, 2003)

do not fit this understanding.[46] Whether purpose-focused tests are constitutional is thus important to determining when crime-facilitating speech can be restricted.

C. Criminal Harassment

Many telephone harassment statutes punish unwanted calls made to people with the purpose to "abuse," "annoy," "harass," or "offend."[47] Such laws have generally been upheld by lower courts, often precisely because they require such a purpose.[48]

Telephone harassment laws have historically banned offensive speech *to* a particular person who is abused, annoyed, harassed, or offended. But increasingly, similar laws—sometimes still called harassment laws and sometimes "stalking" or "cyber-stalking" laws[49]—have been read as restricting speech to the public *about* a particular person, when the speech is intended to abuse, annoy, harass, or offend. A federal district court held such a statute to be unconstitutional as applied,[50] and First Amendment objections have led to some such statutes being blocked or repealed.[51] But other courts have upheld such statutes at least in some circumstances.[52] The question whether speech about people may be restricted because it is said with a purpose to offend, seriously distress, abuse, annoy, or harass remains unresolved.

D. Improper Photography and Communications to Minors

Some states ban certain kinds of speech when it is communicated with the purpose of sexual arousal or gratification. Minnesota and Texas, for instance, have banned the communication of sexually themed material—including nonobscene material—to minors, if this is done "with [the] intent to arouse or gratify

(taking the position that communicating such information may violate the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A), (e)(8) (2000), but only if the speaker intended to facilitate security violations, rather than intending to urge the software producer to fix the problem).

46. *See, e.g.*, the federal statutes cited *supra* note 43.
47. *See, e.g.*, 47 U.S.C. § 223(a)(1)(C), (E) (2006); LA. STAT. ANN. § 14:285(A)(2) (2004); N.C. GEN. STAT. § 14-196(a)(3) (2011)*; see also* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731 (2013).
48. *See, e.g.*, City of Montgomery v. Zgouvas, 953 So. 2d 434, 443 (Ala. Crim. App. 2006).
49. *See* Volokh, *supra* note 47, at 740–44.
50. United States v. Cassidy, 814 F. Supp. 2d 574 (D. Md. 2011).
51. *See* Volokh, *supra* note 47, at 739–40 nn.37–38.
52. *See, e.g.*, United States v. Osinger, 753 F.3d 939 (9th Cir. 2014).

the sexual desire" of any person.[53] Texas's highest criminal court struck down the Texas statute on First Amendment grounds,[54] but Minnesota courts haven't yet considered the Minnesota statute.

Likewise, a Texas statute criminalized photographing or video recording people in public places without those people's consent, if that was done "with [the] intent to arouse or gratify the sexual desire" of the photographer or a third party.[55] Texas's highest criminal court struck down that law, reasoning that a purpose to do "something that, if accomplished, would constitute protected expression"—here, the purpose to create nonobscene photographs—"cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression."[56]

E. Bans on Posting Nude or Sexual Photographs of People Without Their Consent ("Revenge Porn")

Several states have recently outlawed distributing nude or sexual photographs of people without their consent. This material is sometimes labeled "revenge porn," because people sometimes distribute such images of ex-lovers—images either taken surreptitiously or taken consensually but only for private use within the relationship—to get revenge.

Some such statutes focus only on the content of the material, not on the speaker's purpose.[57] These statutes, for instance, would also cover people who sell nude or sexual pictures of an ex-lover after the ex-lover becomes famous, with no purpose other than to make money. But other statutes require a particular purpose, such as an "inten[t] to cause substantial emotional harm to the depicted person"[58] or "intent to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships."[59]

53. MINN. STAT. ANN. § 609.352 (2014); *Ex parte* Lo, 424 S.W.3d 10, 17 n.23 (Tex. Crim. App. 2013) (quoting then-existing TEX. PENAL CODE § 33.021(b)(1)).
54. *Lo*, 424 S.W.3d at 14.
55. *Ex parte* Thompson, 442 S.W.3d 325, 333 (Tex. Crim. App. 2014) (quoting then-existing TEX. PENAL CODE § 21.15(b)(1)).
56. *Id.* at 338.
57. *See, e.g.*, CAL. PENAL CODE § 647(j)(4)(A) (West 2016); CAL. CIV. CODE § 1708.85 (West 2016).
58. GA. CODE ANN. §§ 16-11-90(a)(1), (b)(1) (2011).
59. HAW. REV. STAT. ANN. § 711-1110.9(1)(b) (West 2015). "Intent" here means conscious purpose. HAW. REV. STAT. ANN. § 702-206(1)(a) (1985).

F. Right of Publicity

The right of publicity is generally said to bar commercial use of others' names or likenesses without their permission.[60] Yet the First Amendment protects many commercially sold items that use others' names or likenesses without their permission—consider newspapers with stories about current scandals, documentaries that mention real people, unauthorized biographies, and fictional works that include real people as characters. Even if the right of publicity is constitutional as to some uses (for instance, T-shirts or coffee mugs that depict famous people[61]), it must be unconstitutional as to others.[62]

Different states draw the line differently.[63] In particular, Missouri has drawn the line by focusing on the speaker's purpose:

> [T]he use of a person's identity in news, entertainment, and creative works for the purpose of communicating information or expressive ideas about that person is [constitutionally] protected "expressive" speech. On the other hand, the use of a person's identity for purely commercial purposes, like advertising goods or services or the use of a person's name or likeness on merchandise, is rarely protected.[64]

Missouri juries must therefore be instructed that they should find for the plaintiff only if the defendant used the name "with the intent to derive" or "for the purpose of deriving" a commercial advantage,[65] as opposed to the commercial advantage being "incidental" to some "different purpose."[66]

60. *See, e.g.*, *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268, 1273 n.4 (9th Cir. 2013).
61. *See, e.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (concluding that T-shirts and prints with charcoal drawings of the Three Stooges are constitutionally unprotected).
62. *See, e.g.*, Matthews v. Wozencraft, 15 F.3d 432, 439–40 (5th Cir. 1994) (finding a fiction book and movie based on a real person's life story constitutionally protected); Seale v. Gramercy Pictures, 949 F. Supp. 331, 337–38 (E.D. Pa. 1996) (likewise), *aff'd without op.*, 156 F.3d 1225 (3d Cir. 1998); Moore v. Weinstein Co., 545 F. App'x 405, 408 (6th Cir. 2013) (finding unauthorized biographies constitutionally protected); Montgomery v. Montgomery, 160 S.W.3d 524, 530 (Ky. 2001) (likewise).
63. *See* Brief of 31 Constitutional Law and Intellectual Property Law Professors as *Amici Curiae* in Support of Petitioner, Electronic Arts, Inc. v. Davis, No. 15-424 (U.S. Nov. 4, 2015), 2015 WL 7008796 (discussing five different approaches to the First Amendment limits on the definition of right of publicity law; there are still more differences if one includes statutory choices by various state legislatures).
64. Doe v. TCI Cablevision, 110 S.W.3d 363, 373 (Mo. 2003) (citations omitted).
65. *Id.* at 375.
66. *Id.*

G. Interference With Business Relations

Some courts have held that the tort of interference with economic advantage can consist of otherwise lawful conduct—including otherwise constitutionally protected speech—when that speech is said for a supposedly improper purpose (usually revenge).

A Washington court, for instance, concluded that even nondefamatory speech urging people not to patronize the plaintiff could lead to an interference with business relations claim, if the speaker has "an improper purpose" of "destroy[ing] [plaintiff's] reputation."[67] A Minnesota trial court likewise concluded that even nondefamatory speech that urged a university to fire an employee could be actionable interference with business relations, in part because "it was [the speaker's] goal to get [the employee] fired."[68]

Many other courts, however, have rejected the "bad purpose" theory of the interference with business relations tort.[69] In those states, only interference through improper means (such as constitutionally unprotected threats or defamation) could be actionable.

And some other courts have held that otherwise protected speech (even if not other conduct) that interferes with business relations is protected, regardless of purpose. The Minnesota trial court decision, for instance, was reversed on appeal because of the First Amendment. That a speaker's "underlying goal in conveying [the] information" about the employee's "involvement in mortgage fraud" "was to get [the employee] fired" did not strip the speaker of his "constitutional right to publish this information."[70]

67. Life Designs Ranch, Inc. v. Sommer, 364 P.3d 129, 139 (Wash. Ct. App. 2015). The court rejected the interference claim solely on the grounds that it required the plaintiff to show that customers were indeed discouraged from patronizing the business, and the plaintiff hadn't shown this. *See also* RESTATEMENT (SECOND) OF TORTS § 767 cmt. d ("[If] the actor was motivated . . . [solely] by a desire to interfere with the other's contractual relations[,] . . . the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.").

68. Moore v. Hoff, No. 27-CV-09-17778, 2011 WL 9717359, at *5 (Minn. Dist. Ct. Aug. 22, 2011), *rev'd*, 821 N.W.2d 591 (Minn. Ct. App. 2012).

69. *See, e.g.*, Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937 (Cal. 2003); Speakers of Sport, Inc. v. ProServ, Inc., 178 F.3d 862 (7th Cir. 1999) (Illinois law); Great Escape, Inc. v. Union City Body Co., 791 F.2d 532 (7th Cir. 1986) (Indiana law); Rutland v. Mullen, 798 A.2d 1104 (Me. 2002); Lyon v. Campbell, 707 A.2d 850, 860 (Md. Ct. Spec. App. 1998); Nazeri v. Missouri Valley Coll., 860 S.W.2d 303 (Mo. 1993); Trade'n Post, LLC v. World Duty Free Americas, Inc., 628 N.W.2d 707 (N.D. 2001); Avilla v. Newport Grand Jai Alai LLC, 935 A.2d 91, 99 (R.I. 2007); Wal-Mart Stores, Inc. v. Sturges, 52 S.W.3d 711, 727 (Tex. 2001); Eldridge v. Johndrow, 345 P.3d 553, 564 (Utah 2015); Peace v. Conway, 435 S.E.2d 133 (Va. 1993); DAN B. DOBBS ET AL., LAW OF TORTS § 639 (2d ed. 2015) (from which I drew many of these citations).

70. Moore v. Hoff, 821 N.W.2d 591, 597, 599 (Minn. Ct. App. 2012).

H. Threats

The Ninth and Tenth Circuits, as well as three state supreme courts, have held that speech can only fall within the "true threats" exception if the speaker has the purpose of making the target fear a violent attack.[71] The Supreme Court concluded in *Elonis v. United States*—based on a concession by the parties—that the federal threats statute does not require such a purpose, but only requires knowledge (or perhaps even recklessness) that the target would be put in fear.[72] But *Elonis* was a purely statutory decision,[73] and didn't formally overrule any of these First Amendment-based decisions.

Nonetheless, these purpose-requiring lower court decisions stemmed from an earlier Supreme Court threats case, *Virginia v. Black*, which had language that seemed to call for a purpose test.[74] Now that the Supreme Court's latest threats case seems to endorse a lesser mens rea—even as a statutory matter—it seems likely that lower courts will reconsider their position, which in any event was a minority view among lower courts even before *Elonis*.[75]

III. SPEECH RESTRICTIONS THAT DO USE PURPOSE TESTS: THE SUPREME COURT

In spite of decisions like *Wisconsin Right to Life*, even the Court has at times endorsed some kinds of purpose-based speech restrictions.

A. Incitement

The clearest example is the incitement test, under which speech loses First Amendment protection if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[76] The Court has treated "directed to inciting or producing" as meaning "intended to" incite or produce,[77] apparently in the sense of having the purpose of inciting or producing.

71. United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011); United States v. Heineman, 767 F.3d 970, 975 (10th Cir. 2014); O'Brien v. Borowski, 961 N.E.2d 547, 557 (Mass. 2012); State v. Grayhurst, 852 A.2d 491, 515 (R.I. 2004); State v. Miles, 15 A.3d 596, 599 (Vt. 2011).
72. 135 S. Ct. 2001, 2012 (2015).
73. *See id.*
74. 538 U.S. 343, 359–60 (2003).
75. *See Heineman*, 767 F.3d at 979 (acknowledging that the purpose-based test, which the court adopted, was a minority view among federal circuits).
76. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
77. Hess v. Indiana, 414 U.S. 105, 108–09 (1973).

Indeed, one of the foundational opinions on which *Brandenburg v. Ohio* indirectly rests—Justice Holmes's dissent in *Abrams v. United States*[78]—made much of the distinction between knowledge and purpose. This was in part based on a statutory argument; the statute in *Abrams* only punished urging the "curtailment of production of things necessary to the prosecution of the war" "with intent by such curtailment to cripple or hinder the United States in the prosecution of the war":[79]

> [W]hen words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.
>
> It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.[80]

But part of Justice Holmes's analysis also seemed to treat the First Amendment as independently requiring purpose to cause harm:

> [B]y the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . .
>
> [But i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.
>
> Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.

78. 250 U.S. 616 (1919).
79. *Id.* at 617.
80. *Id.* at 626–27 (Holmes, J., dissenting).

> Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable.
>
> But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime . . . . It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged. . . .
>
> I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact. I also think that there is no hint at resistance to the United States as I construe the phrase.[81]

Justice Holmes's opinion was a step in the direction of greater speech protection. But, as Part IV.B will discuss, it might not have been much of a step, given the possibility that bad purposes would be broadly inferred by prosecutors, judges, and juries, especially when political passions ran high. The practical narrowness of the modern *Brandenburg* incitement test probably has more to do with the narrowness imposed by the actus reus component—the requirement of imminent likely harm—than by the mens rea requirement that the speaker had the purpose to produce such harm.

B. Joining Association With Purpose to Advance Unlawful Ends

The Court has also held that purpose is relevant to the constitutionality of denying various benefits (passports, employment, and the like) to those who join a political organization that has some illegal purposes (such as the Communist Party). Joining such an organization with the "specific intent of assisting in achieving the unlawful ends of the organization" can lead to loss of government benefits or even to imprisonment.[82] But joining such an organization with the

81. *Id.* at 627–29.

82. Elfbrandt v. Russell, 384 U.S. 11, 15 (1966); *see* Scales v. United States, 367 U.S. 203 (1961). Some cases have required that the purpose of promoting the association's criminal ends has to be proved "*strictissimi juris*," which is to say through especially unambiguous proof. *See* Noto v. United States, 367 U.S. 290, 299 (1961); United States v. Spock, 416 F.2d 165, 173–74 (1st Cir. 1969); Steven R. Morrison, *Strictissimi Juris*, 67 ALA. L. REV. 247 (2011). This requirement, however,

"'lawful and constitutionally protected purposes'" of promoting the "'legitimate aims of such an organization'" is constitutionally protected.[83]

Yet the rule is different when it comes not to membership, but to more substantive assistance—even just assistance in the form of advice and education—and to organizations, especially foreign organizations, that not only have the purpose of promoting illegal conduct (such as violent revolution), but that actually engage in illegal conduct. *Holder v. Humanitarian Law Project* held that providing training to such organizations, including training in the form of mere speech to organization members, can be criminalized.[84]

And even the dissent in *Holder* would have allowed such speech to be punished when the speaker knows that his speech is aiding the violent activity of the organization, or has the purpose of so aiding. "Where the activity fits into these categories . . . , the act of providing material support to a known terrorist organization bears a close enough relation to terrorist acts that . . . it likely can be prohibited notwithstanding any First Amendment interest."[85] The dissenters deliberately chose not to limit their proposal to speech said with a bad purpose, because they did not want to "require the Government to undertake the difficult task of proving which, as between peaceful and nonpeaceful purposes, a defendant specifically preferred; knowledge is enough."[86]

C. Demonstrations Near Courthouses Intended to Influence Judges

Demonstrations in public places, including demonstrations aimed at pressuring people into action (through means other than threats of violence), are generally constitutionally protected.[87] But in *Cox v. Louisiana*, the Supreme Court upheld a statute that barred picketing outside courthouses, when that picketing was done with (among other intentions) "the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty."[88]

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has not been applied outside the case of membership in groups that have both legitimate and illegitimate purposes. *See, e.g.*, United States v. Sanders, 211 F.3d 711, 721–23 (2nd Cir. 2000); United States v. Markiewicz, 978 F.2d 786, 812–13 (2nd Cir. 1992); United States v. Montour, 944 F.2d 1019, 1024 (2nd Cir. 1991).

83. *Id.* at 15–16 (quoting Noto v. United States, 367 U.S. 290, 299–300 (1961)); *see also* Aptheker v. Sec'y of State, 378 U.S. 500, 512 (1964) (likewise quoting *Noto*).

84. 561 U.S. 1 (2010).

85. *Id.* at 57 (Breyer, J., dissenting).

86. *Id.*

87. *See, e.g.*, NAACP v. Claiborne Hardware, 458 U.S. 886, 910 (1982); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

88. 379 U.S. 559, 560 (1965).

Two decades later, *United States v. Grace* struck down a ban on carrying signs on sidewalks outside the U.S. Supreme Court.[89] While the Court didn't discuss *Cox* in detail, Justice Marshall's separate opinion noted that the statute in *Grace*, unlike the one in *Cox*, "is not limited to expressive activities that are intended to interfere with, obstruct, or impede the administration of justice";[90] and presumably this was part of the reason the Court thought the *Cox* law differed from the *Grace* law.

Cox has at times been defended as involving a content-neutral restriction,[91] and indeed on its face the statute in *Cox* didn't distinguish among speech based on its content. But under *Reed v. Town of Gilbert*, the restriction in *Cox* should be seen as content-based: It "defin[es] regulated speech by its function or purpose," but is ultimately imposed "based on the message a speaker conveys,"[92] since the tendency to influence courts would normally stem at least partly from the message of the speech.[93]

IV. THE TROUBLE WITH PURPOSE TESTS

Purpose tests have thus been adopted by some Supreme Court decisions, and they seem quite popular with legislatures and some lower courts. Nonetheless, there is a strong argument against them, and in favor of the *Wisconsin Right to Life* position—"a speaker's motivation is entirely irrelevant to the question of constitutional protection."[94]

That argument is supported not only by the Supreme Court's First Amendment cases that specifically reject purpose tests, but also by broader First Amendment principles. First, such purpose tests suppress even speech that has First Amendment value. Indeed, the social value of the speech (for instance, to the marketplace of ideas, to the search for truth, or to self-government) generally turns on the content of the speech, not on the speaker's purpose.[95]

89. 461 U.S. 171 (1983).
90. *Id.* at 186 (Marshall, J., concurring in part, as to the matter discussed in the text, and dissenting in part, as to another matter).
91. *See generally* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000) (describing *Cox* as applying the relaxed standard of review used for content-neutral "time, place, and manner restrictions" on speech).
92. 135 S. Ct. 2218, 2227 (2015).
93. One can imagine situations where the sheer size of a demonstration tends to influence courts, because it intimidates judges or jurors. But the law was not limited to large demonstrations, and would have applied even to a lone picketer.
94. FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).
95. *See infra* Part IV.A.

Second, such purpose tests risk deterring even speech that is said without the forbidden purpose. Because a speaker's purpose can be so hard to accurately identify—and because multiple purposes are so often intertwined—even people who lack a purpose to (say) promote crime, advance their own self-interest, or emotionally distress the subject of their speech may be reluctant to speak for fear that a jury will find that they had the forbidden purpose.[96]

Third, the harm caused by speech also generally turns on the content of the speech, not on the speaker's purpose.[97]

The purpose of speech is thus generally a poor basis for regulating the speech. Restrictions based on purpose are hard to see as being narrowly tailored to compelling government interests, the test usually used for evaluating content-based speech restrictions.[98] And the speaker's purpose ought not be used as one of the elements for defining the scope of First Amendment exceptions, whether existing exceptions, new exceptions, or exceptions developed under the rubric of the "speech integral to unlawful conduct" exception.[99]

To be sure, by narrowing the scope of the restriction, a purpose requirement chills speech less than the same test would if it had a less demanding mens rea requirement, such as knowledge. But, for reasons I'll describe below, the chilling effect remains substantial, because of the difficulty in accurately ascertaining purpose. And whatever net advantage may stem from the reduced chilling effect is proportionally offset by the loss of protection for the interests that the government seeks to serve.

Sometimes, though, the purpose of speech tells us something about the danger that the speaker will commit nonspeech crimes in the future. A person's joining an organization with the purpose of furthering its criminal goals, for instance, might suggest that the person will do dangerous things if given certain kinds of government jobs. Likewise, a person's sending emails to a child with the purpose of enticing the child into sex might suggest that the person will try to have sex with children in the future.[100]

In these situations, purpose tests may make more sense. But they still risk restricting and deterring valuable speech, and should thus be avoided—at least unless the actus reus of the restriction is so narrow that even misjudgments about the mens rea are unlikely to do much harm.

96. *See infra* Part IV.B.
97. *See infra* Part IV.C.
98. *See infra* Part V.A.
99. *See infra* Part IV.C; Eugene Volokh, *Speech Integral to Criminal Conduct*, 101 CORNELL L. REV. (forthcoming 2016).
100. *See infra* Part IV.E.

Finally, some purpose tests are old, well-settled, narrow, and relatively rarely used. The *Brandenburg v. Ohio* incitement test offers one example. Even if in principle such tests are unsound in relying on a purpose inquiry, it's unlikely that the Court will want to revisit them. And given the tests' narrowness and rare application, they don't seem to pose practically significant dangers for free speech. But if my analysis below is right, then these tests shouldn't be used as justifications for developing further purpose-based tests.

A. Purpose Is Largely Irrelevant to the Value of Speech

1. Value to Listeners and to Public Debate

When speech has value to listeners, that value is independent of the speaker's purpose. "A test focused on the speaker's intent," Chief Justice Roberts reasoned in *Wisconsin Right to Life*, "could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another."[101] This result is "bizarre" partly because the identical ads would equally contribute to public debate—why then treat the two kinds of ads differently?

And the same is true with purpose tests more generally. Say you are a government employee who has been fired for your speech. If your speech is not on a "matter of public concern," then it lacks any protection at all against the government as employer.[102] "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," the Court has concluded, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[103]

Yet whether such speech sufficiently relates to matters of "concern to the community" doesn't turn on whether you are primarily intending to improve your own working conditions, or on whether you have a more public-spirited goal. If you claim your boss has been wasting money, discriminating against employees, or otherwise mistreating employees, that speech may or may not be sufficiently

101. FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 468 (2007); *see also* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1178 (1982) (likewise criticizing arguments for restricting speech based on the speaker's purpose); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 218–21 (likewise).

102. City of San Diego v. Roe, 543 U.S. 77, 80 (2004); Connick v. Myers, 461 U.S. 138 (1983).

103. *Connick*, 461 U.S. at 146.

significant to warrant First Amendment protection. (As the Court pointed out, there are real costs to such protection in government workplaces, since then "virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case."[104]) But the level of "concern to the community" should be independent of whether your motives were selfish. Indeed, much valuable speech stems from selfish motives.

Likewise, consider the right of publicity, for which the Missouri Supreme Court announced a purpose test in *Doe v. TCI Cablevision*.[105] Say you are an author, and you name a character in your book after a celebrity. Maybe you named the character "for the purpose of deriving" a commercial advantage.[106] Maybe you named him "for the purpose of communicative information or expressive ideas."[107] Maybe you had a mix of purposes. But the literary value of the speech (or lack of such value) is likely to be unrelated to your purposes. Indeed, both copyright law[108] and the free market more generally[109] operate on the principle that selfish purposes can produce public gain; and selfish purposes are often intermixed with creative ones.

And the value of speech is likely unrelated to the speaker's purpose even when the speaker's purpose is more unpleasant than mere self-interest. For instance, many critics of government officials, businesspeople, and others dislike the target of their criticism. (They may have good reason for that dislike.) Their speech might be at least partly animated by an intent to annoy, offend, or distress their target. But the speech (so long as it avoids false factual assertions) may also be useful to listeners who are evaluating the target's behavior.

Similarly, consider a critic of the Digital Millennium Copyright Act's ban on circumventing technological copy protection, or of a statute that requires "ballistic fingerprinting" of guns.[110] The critic thinks the laws should be

104. *Id.* at 149.
105. 110 S.W.3d 363, 373 (Mo. 2003).
106. *Id.* at 375.
107. *Id.* at 373.
108. "'[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.'" Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (quoting Harper & Row v. Nation Enterps., 471 U.S. 539, 558 (1985)). And the premise of patent law is that, in Abraham Lincoln's words, it "add[s] the fuel of interest to the fire of genius." ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 11 (Roy P. Basler ed., 1989).
109. In Adam Smith's words, a producer "promote[s] the public interest" even while "intend[ing] only his own gain"—"by pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote [the societal interest]." 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 273 (Paris, James Decker, 4th ed. 1801).
110. *See generally* Volokh, *supra* 29.

repealed, because they are easily circumvented and therefore sacrifice freedom or privacy with little real payoff. But the critic also thinks the laws are so illegitimate that it's good for people to violate them—perhaps because such violations, if frequent enough, will lead to the laws' being repealed or at least no longer enforced.

The critic therefore writes a blog post explaining just how easy the laws are to circumvent, and to prove his case shows simple instructions for circumventing them (e.g., by using some technological trick to avoid copy protection, or by using a wire brush on the barrel of a gun to change its "fingerprint"). That post might help show the weakness of the law, even though it might also help people violate the law. But the post would be valuable to analyzing the merits of the law regardless of whether the speaker's purpose was purely to get the law changed, or also to get people to violate the law while it remains on the books.[111]

2. The Gradual Rejection of Purpose Tests in Libel Law

The best example of a retreat from purpose tests, animated largely by the view that even ill-motivated speech can be valuable, comes in libel law. Historically, American libel law has turned in large part on a speaker's purposes. The early movement to make the defense of truth relevant in libel cases generally limited the argument to truth said with good intentions—indeed, the good intentions were seen as the exculpating element, and truth was an evidence of those intentions. Chancellor Kent's highly influential opinion in *People v. Croswell* (1804), for instance, reasoned thus:

> As a libel is a defamatory publication, made with a malicious intent, the truth or falsehood of the charge may, in many cases, be a very material and pertinent consideration with the jury, in order to ascertain that intent. . . . [W]hat can be a more important circumstance than the truth of the charge, to determine the goodness of the motive in making it . . .? To shut out wholly the inquiry into the truth of the accusation, is to abridge essentially the means of defence. It is to . . . convict [the defendant], by means of a presumption, which he might easily destroy by proof that the charge was true, and that . . . his motive could have been no other than a pure and disinterested regard for the public welfare.[112]

111. For more on this, see Volokh, *supra* note 29, at 1116, 1151–54 (copyright); *id.* at 1117 & n.100, 1178 (ballistic fingerprinting).

112. 3 Johns. Cas. 337, 377–78 (N.Y. Sup. 1804) (Kent, J.) (emphasis added) (adopting the test proposed by Alexander Hamilton, one of Croswell's lawyers).

And Kent went on to conclude that truth said with good motives should therefore be an absolute defense in libel cases: "[T]he liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals."[113]

Though Kent's opinion was not adopted by the court (which split 2-2), the New York Legislature passed a statute to this effect the following year,[114] and many 1800s and 1900s state constitutions followed suit.[115] The same rule applied to the expression of opinions, and to seditious libel cases; thus, in *Respublica v. Dennie* (1805), the Pennsylvania Supreme Court reasoned that speech harshly critical of democracy might be a seditious libel, if said with a bad intention:

> [T]here is a marked and evident distinction between [constitutionally protected] publications, and those which are plainly accompanied with a *criminal intent*, deliberately designed to unloosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power, by the known constituted authorities. . . . "The liberty of the press consists in publishing the truth, from *good motives* and for *justifiable ends*, though it reflects on government or on magistrates." . . . It is true, it may not be easy in every instance, to draw the exact distinguishing line. To the jury, it peculiarly belongs to decide on the *intent* and *object* of the writing.[116]

As late as *Beauharnais v. Illinois* (1952), the Court accepted the legitimacy of the good motives limitation on the defense of truth:

> As to the defense of truth, Illinois in common with many States requires a showing not only that the utterance state the facts, but also that the publication be made "with good motives and for justifiable ends." . . . The teaching of a century and a half of criminal libel prosecutions in this country would go by the board if we were to hold that Illinois was not within her rights in making this combined requirement.[117]

Though *Beauharnais* was a group libel case, its rationale rested on the analogy between group libel and individual libel.[118]

113. *Id.* at 393–94 (emphasis in original).
114. 1805 N.Y. Laws c. 90, § 2, *reprinted in Croswell*, 3 Johns. Cas. at 412.
115. *See, e.g.*, CAL. CONST. of 1849, art. I, § 9; NEB. CONST. of 1875, art. I, § 5; W. VA. CONST. of 1872, art. III, § 8 (West, Westlaw current with laws of the 2015 Regular Session).
116. 4 Yeates 267 (Pa. 1805). The court expressly adopted the test urged by Alexander Hamilton in *Croswell*.
117. 343 U.S. 250, 265–66 (1952) (citations omitted).
118. *Id.* at 254–58.

But just twelve years later, this teaching of one hundred and fifty years of American libel law was indeed discarded, in *Garrison v. Louisiana*, at least where speech was about public officials and on matters of public concern. *Garrison* came eight months after *New York Times v. Sullivan*, which famously required a mens rea as to falsehood: A defendant could only be held liable if the defendant knew or was reckless about the falsity of the accusation. And in *Garrison*, the Court rejected a separate mens rea test that stripped even true statements of protection if they were said with a bad purpose.

The Court acknowledged that, historically, such a purpose was indeed seen as negating a truth defense.[119] Yet the Court went on to stress that speech could be valuable regardless of the speaker's bad purposes:

> [W]here the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth. . . . " It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter true, the end is justifiable, and that, in such case, must be sufficient." . . . [E]ven if [a speaker] did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. . . . " [I]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives."[120]

A focus on the speaker's purpose, the Court thus concluded, would penalize speech that has value despite its bad purpose. Courts have since applied these principles to public-concern speech even about private figures,[121] and (largely) to private-concern speech as well.[122] And *Hustler v. Falwell* quoted this language in holding that speech was protected even if it purposefully inflicted emotional distress: "In the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment," presumably

119. 379 U.S. 64, 70–72 (1964) (citation omitted).

120. *Id.* at 72–74 (citations omitted).

121. *See* Tollett v. United States, 485 F.2d 1087, 1098 (8th Cir. 1973); Gottschalk v. State, 575 P.2d 289, 296 (Alaska 1978); People v. Ryan, 806 P.2d 935, 940 (Colo. 1991); Shaari v. Harvard Student Agencies, Inc., 691 N.E.2d 925, 929 (Mass. 1998); State v. Powell, 839 P.2d 139, 143 (N.M. Ct. App. 1992); Parmelee v. O'Neel, 186 P.3d 1094, 1101 (Wash. Ct. App. 2008), *rev'd on other grounds*, 229 P.3d 723 (Wash. 2010).

122. *See, e.g.*, Mink v. Knox, 613 F.3d 995, 1006 (10th Cir. 2010); Weston v. State, 528 S.W.2d 412, 416 (Ark. 1975); Brown v. Kelly Broad. Co., 771 P.2d 406, 429 (Cal. 1989); State v. Turner, 864 N.W.2d 204, 209 (Minn. Ct. App. 2015); State v. Helfrich, 922 P.2d 1159, 1161 (Mont. 1996); Commonwealth v. Armao, 286 A.2d 626, 632 (Pa. 1972).

because they "contribute to the free interchange of ideas and the ascertainment of truth" despite their malign purposes.[123] (*Snyder v. Phelps* makes clear that the holding of *Hustler* applies to public-concern speech about private figures as well.[124])

These Supreme Court cases have discussed only speech on matters of public concern; but their logic applies equally to speech on other matters, too. Perhaps a statement about private matters—for instance, a Facebook post by a woman telling her friends that she broke up with her boyfriend because he cheated on her—might have less constitutional value, even if it's true (though I've argued that such speech on "daily life matters" should indeed be seen as valuable[125]).

But again that value is independent of the speaker's purpose. Whether the woman wanted to expose her boyfriend's perfidy to get revenge on him, or just to warn her friends away from trusting him, her statement has precisely the same amount of value to her readers.

3. Purpose as Proxy?

A bad purpose might sometimes be seen as a rough proxy for the low value of speech. We might suppose, for instance, that someone who is speaking with the purpose of annoying a person will tend to choose speech that solely annoys, without informing or persuading.

But this is at most a very rough proxy. Say, for instance, that a speaker hates a political official or religious figure, and wants him to feel annoyed or distressed. One way of causing such distress is to persuade the public that the target of the speech is foolish or malevolent. The speaker thus might seek to accomplish his purpose through speech that has real value to listeners, as *Garrison* and *Hustler* suggested.

If speech genuinely lacks First Amendment value (for instance, because it's a true threat of violence, or unwanted speech to a single listener who doesn't want to hear it[126]), then it should be restricted for that reason. But if the speech is indeed potentially valuable to listeners, it doesn't lose that value because of the speaker's bad intentions.

123. 485 U.S. 46, 53 (1988) (quoting Garrison v. Louisiana, 379 U.S. 64, 73 (1964)).
124. 131 S. Ct. 1207, 1215–17 (2011).
125. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1088–95, 1098–1101 (2000).
126. *See* Volokh, *supra* note 47, at 740–44.

B. Purpose Tests Chill Even Speech Said Without the Forbidden Purpose

I've argued above that valuable speech doesn't lose its value just because it's said with a particular purpose. But beyond that, purpose tests can deter speech even when the speaker lacks the forbidden purpose, because identifying a speaker's true purpose is so error-prone.

1. Risk of Error by Jurors, Judges, and Prosecutors

a. *Garrison* and *Wisconsin Right to Life*

The Court relied heavily on this chilling effect concern in *Garrison v. Louisiana*, the libel case that rejected liability based on a speaker's hostile purposes:

> Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred . . . .Under a rule . . . permitting a finding of [criminal liability] based on an intent merely to inflict harm . . . "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded."[127]

And the Court in *FEC v. Wisconsin Right to Life, Inc.* made a similar argument.[128] When *Wisconsin Right to Life* was decided, corporations (including many nonprofit corporations) were barred from spending corporate funds to support or oppose candidates for office ("express advocacy").[129] Corporations remained free to spend their funds on other speech, including speech about politics ("issue advocacy").

But how to distinguish restricted electoral advocacy from protected issue advocacy? Say an ad published by a nonprofit corporation tells Wisconsin residents, "A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple 'yes' or 'no' vote. . . . Contact Senators Feingold and Kohl and tell them to oppose the filibuster."[130] Is that protected corporate speech urging people to petition the government for redress of grievances? Or is it restrictable corporate speech subtly urging people to vote against Senators Feingold and Kohl?

127. 379 U.S. 64, 73 (1964).
128. 551 U.S. 449, 467–69 (2007).
129. That has since changed because of *Citizens United v. FEC*, 558 U.S. 310 (2010).
130. *Wisconsin Right to Life.*, 551 U.S. at 458–59 (quoting the ad involved in that case).

Various places to draw this line are possible, but in *Wisconsin Right to Life* the chief proposal from the government turned in part on purpose: "The FEC, intervenors, and the dissent below contend . . . the constitutional test for determining if an ad is the functional equivalent of express advocacy [is] whether the ad is intended to influence elections and has that effect."[131] And this, according to Chief Justice Roberts's lead opinion (joined by Justice Alito), was impermissible, in part because it would deter speech regardless of its purpose:

> [A]n intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion." . . ."First Amendment freedoms need breathing space to survive." An intent test provides none.[132]

The remainder of the majority—Justices Scalia, Kennedy, and Thomas, who signed on to Justice Scalia's concurrence in the judgment—agreed with the Chief Justice's argument. "[T]est[s] that [are] tied to the public perception, or a court's perception, of . . . intent," they reasoned, are "ineffective to vindicate the fundamental First Amendment rights" of those against whom the intent-based law is applied.[133] Any effort to distinguish restricted speech from unrestricted speech "based on intent of the speaker would 'offe[r] no security for free discussion,' and would 'compe[l] the speaker to hedge and trim.'"[134]

b. Knowledge vs. Purpose Tests, in *Garrison*

Of course, all speech restrictions create some risk of misjudgment by the factfinder, and thus create some chilling effect. Justice Black's concurrence in *New York Times Co. v. Sullivan* raised those objections, in arguing that libel lawsuits should be categorically forbidden in public-official/public-concern cases.[135] "'Malice,' even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove."[136] Likewise, Justice Goldberg's concurrence

131. *Id.* at 465 (Roberts, C.J., lead op., joined by Alito, J.).
132. *Id.* at 468–69 (citations omitted).
133. *Id.* at 492 (Scalia, J., concurring in part and in the judgment, joined by Kennedy and Thomas, JJ.).
134. *Id.* at 495 (citation omitted).
135. 376 U.S. 254, 293 (1964) (Black, J., concurring in the judgment).
136. *Id.*

argued for per se protection partly because "[t]he requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard."[137] And, from Justice Douglas a few months later, in *Garrison v. Louisiana*: "If malice [in the *New York Times v. Sullivan* sense] is all that is needed, inferences from facts as found by the jury will easily oblige."[138]

Yet the Court didn't accept the concurrences' invitations to abolish libel law altogether. Indeed, Justice Brennan's *Garrison* opinion, while rejecting a "bad intent" test (partly on chilling effect grounds), reaffirmed that false statements about government officials could be punished if said with knowledge or recklessness about their falsehood. "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity."[139]

Justice Brennan, then, thought that the *New York Times v. Sullivan* test provided "the 'breathing space' that [freedoms of expression] 'need . . . to survive.'"[140] He must have recognized that, despite the *New York Times* test, some speakers would fear that a combination of two errors might happen:

(1) They would be mistaken as to the truth of the statement (inadvertently saying as true something that proved false) or the jury would be mistaken as to the truth (inadvertently finding to be false something that was true).
(2) At the same time, the jury would mistakenly find that they (the speakers) knew the statement was false, or was reckless about it.

Such a fear might indeed deter people from speaking. But this struck Justice Brennan, and the other Justices in the majority, as a sufficiently minor risk.

On the other hand, a bad-motive test was seen as unduly chilling: "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred."[141] And I think Justice Brennan was likely correct on this, because a speaker's purpose is unusually difficult to identify—harder still than the speaker's knowledge.

137. *Id.* at 298 n.2 (Goldberg, J., concurring in the judgment).
138. 379 U.S. 64, 81 (1964) (Douglas, J., concurring in the judgment).
139. *Id.* at 75 (majority op.).
140. *Id.* at 74 (quoting *New York Times*, 376 U.S. at 271–72).
141. *Id.* at 73.

c. Particular Difficulties With Determining Purpose

A speaker denounces a politician or a businessman whom he has long battled. Is the speaker trying to enlighten the public about the target's sins? Trying to make the target feel annoyed or distressed? Both? Say the speaker admits to trying to drive the politician out of office, a consequence that will both help change public policy and upset the politician. Is his purpose to drive the politician out or to cause distress?

These purposes are hard to tease apart, partly because they are so closely psychologically related, even if they are conceptually distinguishable. And because of this, a jury (or a prosecutor or judge) can easily misjudge a speaker's purpose.

This can be a problem even in criminal cases, where the purpose has to be proved beyond a reasonable doubt. But it is especially likely in civil cases, where the jury finds purpose by a preponderance of the evidence[142] (or, in some situations, by clear and convincing evidence[143]).

Indeed, determining purpose often requires us to ask not just "What did the person know?" (the question in knowledge or recklessness tests), but "What kind of person is he?" Is he a patriot or a supporter of the enemy (or even an America-hater)?[144] Is she a good friend who only wants to warn her friends away from an untrustworthy man, or is she a scorned woman seeking revenge?[145] Does he believe in following the law, or is he the sort of person who would try to get others to disobey the law?[146] Is she the sort of government employee who complains out of public-mindedness, or is she just selfishly trying to make her own job conditions better?[147] Is he a creative artist who needs to express himself, or a crass materialist who's mostly in it for the money?[148]

142. *E.g.*, Rattray v. City of Nat'l City, 51 F.3d 793, 801 (9th Cir. 1995) (concluding that falsity, as opposed to actual malice, in libel cases need only be proven by a preponderance of the evidence); Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969) (same).

143. *E.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (requiring that actual malice be proven by clear and convincing evidence in libel cases); People v. Mitchell Bros. Santa Ana Theater, 180 Cal. Rptr. 728, 730 (Ct. App. 1982) (same as to obscenity in civil injunction cases).

144. This is what the inquiry would be under a pure *Debs* test, as interpreted by Justice Holmes in *Abrams*, so long as there was no imminence element that would act as an objective constraint. *See supra* Part III.A.

145. That is the inquiry in some lower courts under "harassment" or restraining order statutes. *See supra* Part II.C.

146. That would be the inquiry under the Justice Department's theory as to crime-facilitating speech. *See supra* Part II.B.

147. That is the inquiry under some circuits' tests for government employee speech. *See supra* Part II.A.

148. That is the inquiry under the Missouri Supreme Court's right of publicity test. *See supra* Part II.F.

And these evaluations of a speaker's character are especially hard because of our normal tendency to assume the best purposes among those we agree with, and the worst among those we disagree with. This may have taken place in some of the World War I antiwar speech cases. Eugene Debs's speech condemning the draft, for instance, didn't clearly call on people to violate the draft law.[149] I suspect his conviction stemmed partly from some jurors' assumption that socialists are a suspicious, disloyal, un-American sort, whose ambiguous words generally hide an intent to promote all sorts of illegal conduct.[150]

Likewise, consider *United States v. Pelley*, a 1942 case that concluded that a pro-Nazi critic of the U.S. war effort must have acted with "the hope of weakening the patriotic resolve of his fellow citizens in their assistance of their country's cause."[151] Why draw that inference, as opposed to drawing the inference that, say, the critic was sincerely trying to spare his countrymen the pain and loss of war? Because, the court concluded, "[n]o loyal citizen, in time of war, forecasts and assumes doom and defeat . . . when his fellow citizens are battling in a war for their country's existence, except with an intent to retard their patriotic ardor in a cause approved by the Congress and the citizenry."[152] The possibility that even a patriotic citizen might think a war misguided seems to have been ignored.

Similarly, when a speaker harshly criticizes someone you approve of, it's easy to believe not just that the speaker is wrong but that he's deliberately trying to annoy, harass, or distress. When a speaker harshly criticizes someone you disapprove of, it's easy to infer that the speaker must be animated purely by a desire to speak the truth and inform the public. People who have unpopular views might thus often be convicted of having a purpose to annoy even when they lack such a purpose—and might often be deterred from engaging in harsh but justified criticism for fear of being convicted.

In a case involving restrictions aimed at communist sympathizers, Justice Stewart noted the danger that people faced with a vague legal standard will apply the standard in a way that condemns those whose views they loathe. "It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human."[153] Likewise,

149. Debs v. United States, 249 U.S. 211 (1919).

150. *See id.* at 215; *see also* U.S. DEP'T OF JUSTICE, *supra* note 40, at text accompanying n.75 (acknowledging that in a similar mens rea inquiry—the determination of whether a speaker is reckless—a jury may be tempted to find liability because it "is hostile to the message conveyed in the information and does not believe that it serves any social utility to distribute such information").

151. 132 F.2d 170, 177 (7th Cir. 1942).

152. *Id.*

153. Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286–87 (1961).

people are often ready to attribute many a bad purpose to those whose ideas they sharply oppose.

2. Need to Consider Speaker's Past Expression

Moreover, a purpose test will tend to deter well-intentioned speech even if judges, jurors, and prosecutors try to set aside their prejudices and look instead to objective evidence. The most reliable such objective evidence of speakers' purposes is often their past political statements and affiliations.[154] If the author of an article on infringing websites has in the past written that copyright is an immoral restraint on liberty, and that free copying helps advance knowledge, then this past work is evidence that he wrote the new article with the intent to help people infringe. The same is true if the author of an article on how marijuana is grown is active in the medical marijuana movement. But if the authors are apolitical, or have publicly supported copyright law or drug law, then that's evidence that they intended simply to do their jobs as reporters or scholars.[155]

Considering people's past statements as evidence of their intentions is rational, and not itself unconstitutional[156] or contrary to the rules of evidence.[157] The inferences in the preceding paragraph make sense, and are probably the most reliable way to determine the speaker's true intentions.

Indeed, where purpose is an element of the offense, such evidence of the speaker's past speech is often required. For instance, in *Haupt v. United States*, a 1947 treason case, the prosecution relied on the theory that Haupt helped his son (a Nazi saboteur) with the intention of aiding the Nazis and not just from

154. *Cf.* Brief for the United States at 32–44, Debs v. United States, 249 U.S. 211 (No. 714), *in* 19 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 601, 637–49 (Philip B. Kurland & Gerhard Casper eds., 1975) (arguing that the Socialist Party platform, which expressed opposition to the war and to the draft, was properly admitted to show that Debs's facially ambiguous words were indeed intended to advocate draft resistance).

155. Much of the analysis in this section is borrowed from Volokh, *supra* note 29, at 1185–92, and Volokh, *supra* note 47, at 773–76.

156. Wisconsin v. Mitchell, 508 U.S. 476, 488–89 (1993); Haupt v. United States, 330 U.S. 631, 642 (1947).

157. As the cases discussed in the text show, intent is commonly proved by a person's past statements; and even if the statements are treated as character evidence, they would be admissible because character evidence may be used to show intent. *See, e.g.*, FED. R. EVID. 404(b); United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983) (allowing the admission of prior racist acts, coupled with the defendant's statement explaining their racial motivation, as evidence of racist motive in a subsequent case). And because the statements are indeed powerful evidence of motivation, they would be admissible despite the risk that they may prejudice the jury against a defendant; evidence law generally allows the exclusion of such statements only when "its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403 (emphasis added).

"parental solicitude."[158] The Court stressed that the jury properly considered Haupt's past statements "that after the war he intended to return to Germany, that the United States was going to be defeated, that he would never permit his boy to join the American Army, that he would kill his son before he would send him to fight Germany, and others to the same effect."[159] Indeed, the jury had to hear such evidence—how else could they evaluate Haupt's true purpose for helping his son?

Likewise, in *Pelley*—a World War II prosecution for spreading false reports with the intent to interfere with the war effort—the government relied on, among other things, Pelley's pro-German statements in a 1936 third-party presidential campaign, and on "his genuine admiration of the Hitler regime."[160] And in hate crime prosecutions, evidence of a person's past racist statements may be introduced to show that he intentionally attacked someone because of the victim's race, rather than for other reasons.[161]

But the inferences are imperfect. The anticopyright or pro-medical-marijuana reporter may genuinely oppose illegal conduct at the same time that he opposes the underlying law. He may be writing his article simply because he finds the subject matter interesting and thinks readers ought to know more about how the law is being violated, perhaps because this will show them that the law needs to be changed. And if the factfinder's inference is indeed mistaken, then the error is particularly troublesome: A person would be convicted because of his political beliefs, and not because of his actual intention to help people commit crimes.[162]

158. 330 U.S. 631, 641 (1947).

159. *Id.* at 642.

160. United States v. Pelley, 132 F.2d 170, 176 (7th Cir. 1942).

161. *See, e.g.*, United States v. Allen, 341 F.3d 870, 885–86 (9th Cir. 2003) (holding that it was proper for the prosecution to introduce "color photographs of [the defendants'] tattoos (e.g., swastikas and other symbols of white supremacy), Nazi-related literature, group photographs including some of the defendants (e.g., in 'Heil Hitler' poses and standing before a large swastika that they later set on fire), and skinhead paraphernalia (e.g., combat boots, arm-bands with swastikas, and a registration form for the Aryan Nations World Congress)"); United States v. Dunnaway, 88 F.3d 617, 619 (8th Cir. 1996) (likewise); People v. Slavin, 1 N.Y.3d 392 (2004) (likewise).

162. Independent judicial review, see Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), will do little to prevent such errors. In First Amendment cases, appellate courts and trial courts are indeed required to independently review findings that speech is unprotected. *See generally* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Appellate and Summary Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998). But while courts independently review the application of legal standards to the facts that the jury has found, *id.* at 2442, and independently determine whether the jury had sufficient evidence to make the finding that it did, *Bose*, 466 U.S. at 511, they generally do not reexamine juries' findings of credibility. *See* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688–89 (1989); *Bose*, 466 U.S. at 499–500. So if a journalist testifies that he had no intention of helping people infringe copyright or make

For all these reasons, a purpose test tends to deter speakers who fear that they might be assumed to have bad purposes. Say you are an outspoken supporter of legalizing some drug, because you think it can help people overcome their psychiatric problems.[163] Would you feel safe writing an article describing how easily people can illegally make the drug, and using that as an argument for why it's pointless to keep the drug illegal, when you know that your past praise of the drug might persuade a jury that the article is really intended to facilitate crime?[164]

Likewise, say that you often write about the way drugs are made, perhaps because you're a biochemist or a drug policy expert. Would you feel safe publicly announcing that you also think drugs should be legal and people should use them, given that you know such speech could be used as evidence if you are prosecuted or sued for your writings on drugmaking?[165]

More likely, if you're the drug legalization supporter, you'd be reluctant to write the article about drug manufacturing; if you're the biochemist, you'd be reluctant to write the article favoring legalization. There would be just too much of a chance that the two pieces put together could get you sued or imprisoned.

This deterrent effect would also likely be greater than the similar effect of hate crimes laws or treason laws. As the *Wisconsin v. Mitchell* Court pointed out, it seems unlikely that a speaker would "suppress[] his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits . . . [a serious] offense against person or property."[166] Few of us plan on committing

drugs, and the jury concludes—based partly on his past anticopyright or pro-drug political statements—that he's lying, appellate courts will not meaningfully review this conclusion.

163. *See, e.g.*, Rachel Zimmerman, *FDA Permits Test of Ecstasy as Aid in Stress Disorder*, WALL STREET J., Nov. 6, 2001, at B1; Rick Doblin, *A Clinical Plan for MDMA (Ecstasy) in the Treatment of Post-Traumatic Stress Disorder (PTSD): Partnering With the FDA*, 34 J. PSYCHOACTIVE DRUGS 185 (2002), http://www.maps.org/research/mdmaplan.html [https://perma.cc/Z73W-YSHH] (describing the study); *Multidisciplinary Association for Psychedelic Studies*, MAPS, http://www.maps.org [https://perma.cc/U83H-ZDVQ] (Oct. 12, 2004 version) ("MAPS's mission is to sponsor scientific research designed to develop psychedelics and marijuana into FDA-approved prescription medicines, and to educate the public honestly about the risks and benefits of these drugs.").

164. Even if you are only giving information to support your argument for changing the law and stress in your article that you do not want readers to violate the law, the jury may still conclude that you are lying about your motives.

165. Note that in these situations, the deterrent effects that I describe may be especially strong. The hypothetical speaker is no hothead or fool, who may think little about legal risk. He's a scholar—an educated, thoughtful, reflective person with a good deal to lose from a criminal conviction or even a criminal prosecution, and with time to consider whether publishing is safe or dangerous. He may thus rationally fear the law's deterrent effect, even though the same attributes (his thoughtfulness and rationality) may make his speech especially valuable to public debate.

166. 508 U.S. 476, 489 (1993).

violence or vandalism, and we can largely avoid any deterrence of our speech simply by obeying the laws banning violence or vandalism.[167]

But a purpose-based law that restricts not conduct, but speech, would be much more likely to deter protected speech. Citizens might well suppress their pro-drug legalization beliefs for fear that evidence of such beliefs will be introduced against them at trial if they publish information about how drugs are made—especially if discussing drugmaking is part of their job or academic mission.

Likewise, say you have long battled a politician, a religious figure, a journalist, an academic, a lawyer, or a businessperson, and each of you has hurt the other politically and economically. You now want to harshly criticize the person, not because of any desire to annoy, embarrass, or harass the person but simply because of a desire to inform the public of the person's latest misbehavior.

Yet you know that a prosecutor, judge, and jury might infer that you are motivated by a desire to annoy the other person, simply because such a desire is common in situations like this (even if you know it's absent in your own mind). If a criminal harassment law punishes speech intended to annoy, harass, or seriously distress a person, you might reasonably worry that a factfinder will infer such an intention from your past writings even if you know that your only purpose is to inform the public.

When a speech restriction is greatly narrowed by its actus reus elements, these deterrent effects may be especially low. For instance, in incitement cases, any serious inquiry into intent is often made unnecessary by the requirement that the speech be intended to and likely to incite *imminent* crime. It is this, I think, that has kept the incitement exception narrow. There will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime.

Had the imminence requirement not been part of the test, though—had the test simply been intent plus likelihood—a jury could often plausibly decide that a speaker, especially a speaker known for hostility to a particular law, was intending to persuade people to violate the law at some future time. Concerned about this, many speakers would avoid any statements to which a jury might eventually impute an improper intent.

167. Moreover, for other crimes that require intent, such as attempt or conspiracy, there will often be powerful corroborating evidence of intent other than the defendant's past political statements—for instance, the defendant's getting a share of the crime's proceeds, or the defendant's having taken physical steps that strongly point towards the defendant's purpose being to commit a crime. Proof that someone is involved in a conspiracy to distribute marijuana will rarely rest on the person's past pro-marijuana statements. But when the crime itself consists solely of speech, the defendant's political opinions will often be the strongest evidence of his purpose.

This is one reason the intent-plus-likelihood test developed in *Schenck v. United States* and *Debs v. United States* has been criticized:[168] "[T]o be permitted to agitate at your own peril, subject to a jury's guessing at motive, tendency and possible effect, makes the right of free speech a precarious gift."[169] And it might be one reason that the Court rejected the intent-plus-likelihood test in favor of the *Brandenburg v. Ohio* intent-plus-imminence-plus-likelihood test.

C. Purpose as Largely Irrelevant to the Harm Caused by Speech

1. Generally

So far, I've argued that purpose tests tend to restrict and deter valuable speech. Even a bad purpose doesn't strip valuable content of its value. And trying to punish speech that has a bad purpose also tends to deter a good deal of speech that lacks such a purpose.

But beyond this, the harm caused by speech generally doesn't turn on the speaker's purpose, either. Speech that damages reputation, inflicts emotional distress, or gives people information that helps them commit crime yields these harms regardless of the speaker's purposes.

This may explain why two recent Supreme Court cases specifically rejected calls to read speech-restrictive statutes as having a mens rea of purpose. The first case was *Holder v. Humanitarian Law Project* (2010).[170] Federal law bans people from providing "material support or resources" to foreign organizations that the Secretary of State has determined to engage in terrorism. The prohibition expressly extends to "training" and "expert advice or assistance," which often consist of speech.[171] And the prohibition may extend even to well-intentioned speech, such as teaching the groups "how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief."[172]

168. *See, e.g.*, ZECHARIAH CHAFEE, FREE SPEECH 78 (1941); Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 424–27; *see also* James Parker Hall, *Free Speech in War Time*, 21 COLUM. L. REV. 526, 532–35 (1921) (acknowledging this risk that the intent-plus-likelihood test would unduly deter even well-intentioned speakers, but concluding that the World War I cases were correctly decided despite this risk).

169. Ernst Freund, *The* Debs *Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13.

170. 561 U.S. 1 (2010).

171. *Id.* at 19.

172. *Id.* at 15.

The Humanitarian Law Project challenged the law, arguing in part that the law could only be applied to people who had the "specific intent to further the organization's terrorist activities."[173] But the Court held that that the statute actually required only a showing of "knowledge about the organization's connection to terrorism,"[174] and that the statute was constitutional even though it omitted a purpose requirement.[175]

Moreover, even the dissenting Justices—who would have read the statute more narrowly in order to uphold it—didn't think that a showing of purpose to promote terrorism was constitutionally necessary. Rather, they said that they "would read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions."[176] That test would be satisfied by a showing of knowledge, even without a bad purpose, though specific knowledge of the effects of the speaker's own speech and not just (as the majority concluded) of the organization's terrorist activities. And the dissenters defended their conclusion by arguing that "this reading does not require the Government to undertake the difficult task of proving which, as between peaceful and nonpeaceful purposes, a defendant specifically preferred; knowledge is enough."[177]

Elonis v. United States (2015), which dealt with threats, likewise rejected a purpose test.[178] A federal statute bans transmitting threats to injure someone, and lower courts had split on the mens rea that this requires. A few courts read the statute as requiring a showing of purpose to put the target in fear. Others had instead required only a showing of negligence as to the possibility that the target would be put in fear, and allowed liability so long as a reasonable person would perceive the statement as threatening.[179]

The Court rejected the negligence approach, because the Court had "long been reluctant to infer that a negligence standard was intended in criminal statutes."[180] Instead, the Court concluded that either recklessness or knowledge would be the right mens rea. (Because the recklessness versus knowledge question hadn't been sufficiently briefed, the Court left that issue for lower courts.)

173. *Id.* at 17.
174. *Id.* at 16–17.
175. *Id.* at 25.
176. *Id.* at 56 (Breyer, J., dissenting).
177. *Id.* at 57.
178. 135 S. Ct. 2001 (2015).
179. *Id.* at 2011.
180. *Id.* (citation omitted).

But the Court did not accept the purpose test, despite the fact that the Ninth and Tenth Circuits had adopted it.[181] And while the stated reason for not requiring purpose was that the parties before the Court had so conceded,[182] presumably the Justices would have discussed the matter in more detail if they thought there was a strong argument for a purpose mens rea (especially since an earlier precedent, *Virginia v. Black*, had language that had been read as pointing in favor of a purpose mens rea).[183]

Elonis was just a statutory decision, and the Court didn't decide what mental state the First Amendment requires in threats cases. Elonis was convicted under the negligence test, and the Court's statutory interpretation required that he be retried, so the Court didn't have to reach the constitutional question. Lower courts thus remain split on whether, as a First Amendment matter, a purpose mens rea is required, or whether even negligence might suffice (for instance, for state threat statutes). Nonetheless, *Elonis* does suggest that the Court is generally not enthusiastic about purpose tests for speech restrictions.

And many other First Amendment doctrines likewise avoid focusing on the speaker's purpose. For instance, while the Court has rejected strict liability in obscenity and child pornography, it has focused on what people knew or should have known about the properties of the speech—such as the content of the obscene material, or the age of a child depicted in child pornography—and not on what they sought to accomplish using the speech.[184]

Similarly, a speaker's mens rea is probably relevant in fighting words cases. For instance, a foreigner who is deceived by a practical joker into saying something that proves to be insulting would likely not be punishable on a fighting words theory.[185] But a purpose to start a fight is not required in fighting words cases. The defendant may be convicted so long as his speech consists of "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction,"[186] whether or not they were intended to provoke such a reaction.

181. *See supra* note 71.
182. *See Elonis*, 135 S. Ct. at 2012.
183. 538 U.S. 343, 359–60 (2003).
184. New York v. Ferber, 458 U.S. 747, 765 (1982); Smith v. United States, 361 U.S. 147, 150–51 (1959).
185. *See, e.g.*, Monty Python, *The Hungarian Phrasebook Sketch*, MONTYPYTHON.NET, http://www.montypython.net/scripts/phrasebk.php [https://perma.cc/YK9J-8LY5] (last visited Apr. 4, 2016).
186. Cohen v. California, 403 U.S. 15, 20 (1971).

2. An Example: "Revenge Porn"

For a timely illustration of how purpose is irrelevant to harm, consider revenge porn. As Part II.E noted, some state statutes ban distributing photographs of people naked (or having sex) without their permission, but only when the poster seeks to distress the person being depicted. Such behavior is indeed harmful, and I think narrow restrictions on it are justifiable.[187]

But the behavior is harmful regardless of the poster's purpose. Consider four photos of women having sex, posted by ex-boyfriends who had the women's consent to take the photos for private enjoyment but not for distribution:

(1) The first is posted because the ex-boyfriend wants to humiliate the woman, as revenge for her having left him.
(2) The second is posted because the woman has become a celebrity, and the ex-boyfriend has made thousands of dollars from selling the photo. The ex-boyfriend knows that the woman will be seriously distressed, but distressing her isn't his purpose. Indeed, he mildly regrets hurting her this way, but the money matters more to him than her feelings.
(3) The third is posted because the ex-boyfriend, who is also in the photograph, is an exhibitionist who gets sexually excited by displaying such photographs of himself having sex with someone else.
(4) The fourth is posted on an online discussion group because the ex-boyfriend wants to brag about what an attractive ex-girlfriend he had.

The purposes for posting the different photos are different. Only poster 1 has the purpose to inflict emotional distress. Even if we suspect that humiliating the posters' exes is at least part of the purpose of the posters in examples 2 through 4, it's unlikely that prosecutors could prove this beyond a reasonable doubt, if the reasonable doubt standard is properly applied.

Yet all four actions are equally harmful. They are likely to equally seriously distress the women who are depicted. They equally invade their privacy. I doubt that any of the women would say, "Oh, he posted that photo, but he only wanted to make money / get sexual pleasure / brag, and not to distress me, so it's no big deal."

To be sure, only example 1 fits within the colloquial label "revenge porn." But this just shows that the label isn't quite sound. Revenge porn is bad because it's nonconsensual—at least one of the participants didn't agree to the distribution of the material—and not because its purpose is revenge. The label "revenge

187. *See* Eugene Volokh, *Florida "Revenge Porn" Bill*, VOLOKH CONSPIRACY (Apr. 10, 2013, 7:51 PM), http://volokh.com/2013/04/10/florida-revenge-porn-bill [https://perma.cc/NG5D-XRGG].

porn" stuck because it's vivid, and because most nonconsensual porn probably is motivated by revenge. But for purposes of legal analysis, there's no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person.

3. Another Example: Incitement

Indeed, we can see the problems of the purpose test even in the First Amendment test in which purpose is most firmly embedded: the test for incitement, which is generally rendered as requiring a showing that the speaker had the purpose of promoting imminent unlawful behavior, and the speech was likely to promote such behavior.[188]

Say that four people give speeches to mobs in front of draft offices or abortion clinics, and the speeches identically urge the mob to storm the place and burn it down. And say there are four motivations involved:

(1) The first speaker wants the mob to burn down the place, because he is ideologically committed to the cause.
(2) The second speaker is just paid money to give the speech. Indeed, he would rather that the mob not listen to him (though he knows it might)—his payment is independent of whether the mob acts, and if the mob acts, he is more likely to get into legal trouble.[189]
(3) The third speaker is trying to impress a woman whom he loves, and who is ideologically committed to the cause. But again, he would rather that the mob not listen to him: The woman would appreciate his speech even if the mob doesn't act; and, if the mob acts, both he and the woman are more likely to get prosecuted.
(4) The fourth speaker is trying to infiltrate the group—perhaps he belongs to a rival organization, and is seeking to build credibility with group members so they will eventually tell him their secrets. He would again prefer that the mob not act, though, as with the others, he is willing to risk the mob's acting.

Again, the speech in all these situations is equally harmful. Perhaps speakers 2 to 4, who don't have the purpose of egging on the mob, might be subtly less effective, because the mob will sense the speakers' insincerity. But that won't always be so: The speakers might be made eloquent by their other motivations, and in any event their charisma or rhetorical gifts might make them more effective despite their (hidden) lack of belief.

188. *See supra* Part III.A.
189. A speaker can be prosecuted for unsuccessful incitement, but successful incitement is much more likely to draw a prosecutor's attention.

4. Another Example: Mirror Sites

When a book or website is suppressed (through an injunction, the threat of civil liability, or the threat of criminal punishment), some people put up "mirror sites" duplicating that material. Their motivation is often benign, whether or not one should think that their actions are justified. Often, their only goal is to strike what they see as a blow against censorship.[190] Sometimes, they want to provide the public with the information needed to understand the initial suppression. If some book is being banned, they reason, it's hard to tell whether the ban is justified without being able to see the book; the mirror site solves that problem.[191]

190. *See, e.g.*, Russ Kick, *About the Memory Hole*, MEMORY HOLE (July 10, 2002), http://www.thememoryhole.org/about.htm [https://perma.cc/887T-8F7S] (describing a broad-ranging mirror site for a wide variety of documents that people have been trying to delete or suppress); Russ Kick, *CDC Deletes Sensitive Portion of Ricin Factsheet*, MEMORY HOLE (Oct. 28, 2003), http://www.thememoryhole.org/feds/cdc-ricin.htm [https://perma.cc/8FJ4-DLLG] (reporting the substance of a subsequently redacted CDC report that said that "[a]mateurs can make [the deadly gas] ricin from castor beans" because "[r]icin is part of the waste 'mash' produced when castor oil is made"); *MPAA Continues Intimidation Campaign*, 2600NEWS (Mar. 12, 2000), http://www.2600.com/news/view/article/331 [https://perma.cc/XKL6-KBEL] ("We joined in the mirroring campaign to lend our support to those who had been subjected to hollow threats and harassment from the DVD industry, but were forced into compliance due to circumstances beyond their control. . . . Our modest mirror list has grown substantially and continues to grow, despite mirrors being removed from time to time. The success of the DeCSS mirroring campaign demonstrates the futility of attempts to suppress free speech on the Internet."); Karin Spaink, *The Nuremberg Files: Motivation and Introduction*, NUREMBERG FILES (Feb. 25, 1999), http://www.xs4all.nl/~oracle/nuremberg/index.html [https://perma.cc/5GQC-8NGE] ("While I strongly hold that every woman should have an abortion if she needs one, I do not think that other opinions about the subject should be outlawed or fined, no matter how harshly they are put. Yet this is precisely what happened in the case of the Nuremberg Files."). The Nuremberg Files site was shut down because it was found to have threatened abortion providers' lives, but it also listed their names and home addresses, which might have facilitated crimes against them; the names and addresses are faithfully mirrored on the mirror site. See also Kristin R. Eschenfelder & Anuj C. Desai, *Software as Protest: The Unexpected Resiliency of U.S.-Based DeCSS Posting and Linking*, 20 INFO. SOC'Y 101, 109–13 (2004), which describes many sites' posting of the DeCSS code or links to such posted code; my sense is that the purpose of many of these sites is simply to express their creators' hostility to the attempts to suppress DeCSS.

191. *See* David S. Touretzky, *What the FBI Doesn't Want You to See*, RAISETHEFIST.COM, http://www-2.cs.cmu.edu/~dst/raisethefist [https://perma.cc/E2SL-KF4R] (last modified Sept. 7, 2004) ("I don't share [the politics of Sherman Austin, the creator of the Reclaim Guide bomb-making information site involved in *United States v. Austin*, No. CR-02-884-SVW (C.D. Cal. Sept. 26, 2002)]. I'm a registered Republican, a proud supporter of President Bush (despite the USA PATRIOT Act), and I have nothing but contempt for the mindless anarchism people like Austin mistake for political thought. My reason for republishing the Reclaim Guide is to facilitate public scrutiny of the law under which Austin was charged, and the government's application of the law in this particular case."); David S. Touretzky, *Gallery of CSS Descramblers*, CS.CMU.EDU, http://www-2.cs.cmu.edu/~dst/DeCSS/Gallery [https://perma.cc/EV67-SX3S] (last modified July 10, 2004) ("If code that can be directly compiled and executed may be suppressed under the DMCA, as Judge Kaplan asserts in his preliminary ruling, but a textual description of the same

Consider, for instance, the controversy over the *Hit Man* murder manual. The Fourth Circuit held that the publishers of the manual could be held liable for distributing the book, so long as they had the purpose to promote murder.[192] The book was harmful, the court concluded, because it could help teach would-be killers; but that alone wasn't sufficient to justify liability—it was the malign purpose, according to the court, that stripped the book of constitutional protection.[193]

But following this decision, many sites put up copies of *Hit Man* online. A Google search for *hit man manual for independent contractors* will find several, right there on the front page of the Google results.

And this actually made the material more available, and thus more dangerous. When *Hit Man* was just a book sold by Paladin Press, people had to pay for it. They had to wait for it to come by mail. And they had to provide their mailing address, which might later be used to track them down. Now, the book is available for free, instantly, and anonymously (especially if one uses easily available anonymizer sites). Yet under the purpose test, the mirror sites aren't subject to liability, because they lack the forbidden purpose.

The material in the book and on the mirror sites is the same. The value is largely the same: The chief value of *Hit Man* is likely the entertainment it provides to readers who enjoy fantasizing about what it would be likely to be a hit man, just as some people fantasize about being pirates without actually planning to commit piracy; the book sold 13,000 copies, and it seems very unlikely that most of those buyers were would-be contract killers who would learn their craft from a book such as this.[194]

The possible harmful uses of the book and the mirror sites are the same. Indeed, as noted above, the mirror sites may be more harmful because they are more easily available, though that might make them more valuable as well (since they offer entertainment for more people)—the greater availability thus likely doesn't affect the harm-versus-value ratio.

I'm not arguing here for lowering the mens rea in such cases, and thus for letting speakers be punished for posting mirror sites or otherwise distributing speech that they know helps criminals commit crimes. As I've argued in detail elsewhere, much speech conveys such crime-facilitating information, while at the

algorithm may not be suppressed, then where exactly should the line be drawn? This web site was created to explore this issue, and point out the absurdity of Judge Kaplan's position that source code can be legally differentiated from other forms of written expression.").

192. Rice v. Paladin Enters., Inc., 128 F.3d 233, 234 (4th Cir. 1997).

193. *Id.* at 243, 266.

194. For more on this, see Volokh, *supra* note 29, at 1123–24.

same time being valuable to law-abiding readers. The speech might, for instance, teach people how to do legal things (e.g., using explosives for lawful purposes). It might explain how crimes are committed, and thus how they can be prevented. It might show that some laws might be futile.[195] And it might simply be entertaining, which is itself seen as a constitutionally valuable function of speech.[196] I think the better solution is to protect most such speech regardless of purpose, with some exceptions that also don't turn on purpose.[197]

The mirror site example simply shows that purpose-based tests are poor mechanisms for sorting the harmful crime-facilitating speech from the valuable. Indeed, they may sometimes be counterproductive mechanisms.

5. The Limited Relevance of Purpose Tests in Other Areas of the Law

a. Homicide

Purpose tests seem familiar from other areas of the law, especially criminal law. But many such seeming purpose tests actually use purpose only to draw gradations of culpability: Conduct done with a certain purpose is seen as especially culpable, but conduct done without that purpose remains punishable.

Murder is one classic example. Murder is often described as "intentional homicide" or "homicide with malice aforethought," and some states do require purpose to kill for first-degree murder. But knowing homicide (for instance, if someone bombs a building, knowing that people will be killed but sincerely regretting that) is also murder. Indeed, even extremely reckless homicide counts as "depraved heart" murder.[198]

Purpose may thus be used by homicide law to draw a gradation within the zone of punishable conduct. It is not used to distinguish punishable conduct from unpunishable conduct.

b. Complicity

Complicity is another example. A culpable purpose, and not mere knowledge or recklessness, is sometimes required for aiding and abetting liability. Selling a gun to someone with the purpose of helping him commit a crime makes

195. *Id.* at 1116.
196. *Id.* at 1162.
197. *Id.* at 1217–18.
198. MODEL PENAL CODE § 210.2.

the seller liable for the crime under an aiding and abetting theory. The same conduct done merely with the knowledge that the buyer will commit a crime, or will very likely commit a crime, is generally not seen as aiding and abetting, at least under the Model Penal Code.[199]

Likewise, harboring an enemy agent in wartime, with the purpose of aiding the enemy, would be treason, which can be seen as a specialized form of aiding and abetting. Harboring the same enemy agent because he is your son, and you have the purpose of protecting your son against arrest and execution, would not be treason.[200] Indeed, modern treason law is a particular form of aiding and abetting law, though aiding and abetting of the enemy that is making war on the nation, rather than of a criminal who is committing a particular crime.

But though the Model Penal Code and many common-law jurisdictions do generally require purpose for aiding and abetting liability, some states take a different view, under which knowledge that one is helping commit a crime generally suffices.[201] Still other states make it a crime to knowingly help another commit a crime, but label it criminal facilitation, a less serious crime than aiding and abetting.[202] Some states even criminalize recklessly helping another commit a crime.[203] Federal courts have long been split on whether purpose or knowledge is required for complicity.[204]

And even jurisdictions that may usually require purpose for complicity liability may require knowledge for certain crimes. For instance, knowingly aiding prostitution is a crime in some states.[205] Knowingly aiding online solicitation of children is a crime in others.[206] Merely knowingly being present at a dogfight is a crime in still others,[207] presumably on the theory that such presence promotes the underlying crime of organizing the dogfight.

199. MODEL PENAL CODE § 2.06(3)(a).
200. Haupt v. United States, 330 U.S. 631, 641–42 (1947).
201. *See, e.g.*, IND. CODE ANN. § 35-41-2-4 (West 2004) ("A person who knowingly or intentionally aids . . . another person to commit an offense commits that offense."); W. VA. CODE § 17C-19-1 (2004) (likewise); WYO. STAT. ANN. § 6-1-201(a) (Michie 2004) (likewise); People v. Spearman, 491 N.W.2d 606, 610 (Mich. Ct. App. 1992) (treating knowing help as aiding and abetting), *overruled as to other matters*, People v. Veling, 504 N.W.2d 456 (Mich. 1993). *See generally* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169 (1988).
202. *See* ARIZ. REV. STAT. ANN. § 13-1004 (West 2004); 9 GUAM CODE ANN. § 4.65 (2004); KY. REV. STAT. ANN. § 506.080 (West 2004); N.D. CENT. CODE § 12.1-06-02 (2003); TENN. CODE ANN. § 39-11-403 (2004).
203. N.Y. PENAL LAW §§ 115.00–.08 (McKinney 2004).
204. Rosemond v. United States, 134 S. Ct. 1240, 1253 (2014) (Alito, J., concurring in part and dissenting in part) (noting this split).
205. N.Y. PENAL LAW §§ 230.15–.20 (McKinney 2004) (prohibiting knowing aiding of prostitution).
206. *See, e.g.*, ALA. CODE § 13A-6-123 (2015).
207. *See, e.g.*, ALA. CODE § 3-1-29 (2015).

Knowingly or recklessly helping someone else interfere with court-ordered child custody is a crime in some states.[208] Under California law, it appears that knowledge liability would be proper when the person is aiding a "[h]einous" crime as opposed to merely a "[v]enial" one.[209] Informing a particular person how to make a bomb, knowing that he plans to make a bomb (even if you have no specific purpose to help him do so), is a federal crime.[210]

Likewise, knowingly providing assistance to a foreign terrorist organization is a crime even if you don't have the purpose of advancing the organization's terrorist goals, but are just trying to promote the organization's supposedly humanitarian wing, or are trying to teach the organization's members about international law.[211] One might view this as a different approach to the problem that is also covered by the law of treason. Generally, when a citizen or permanent resident helps the enemy in time of war, that constitutes the exceptionally serious crime of treason only if the actor has a purpose to help the enemy.[212] But when a person helps designated foreign terrorist enemies in particular ways—such as offering money or training—that is the somewhat less serious crime of assisting foreign terrorist organizations, regardless of any purpose to help those organizations' terrorist conduct.[213]

And purpose is not necessary for complicity liability in tort law. The Restatement (Second) of Torts, for instance, provides that an aider is liable if he "knows that the [aided person's] conduct constitutes a breach of duty and gives substantial assistance or encouragement to the [aided person] so to conduct himself."[214]

Indeed, aiders can often be held liable for aiding others' torts simply on a negligence theory.[215] That is the theory behind the doctrine of negligent entrustment, under which a defendant is held liable for helping someone commit a tort by giving the person a car, gun, or something else.[216] It is the theory behind the doctrines of negligent hiring and supervision, under which employers are

208. ARK. CODE ANN. § 5-26-502 (2013); FLA. STAT. ANN. § 787.03 (2015).
209. People v. Lauria, 59 Cal. Rptr. 628, 633–35 (Ct. App. 1967) (dictum).
210. 18 U.S.C. § 842(p)(2)(B) (2012).
211. *See supra* Part IV.C.1.
212. *See* United States v. Bailey, 444 U.S. 394, 405 (1980).
213. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 16–17 (2010).
214. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979); *see, e.g.*, Halberstam v. Welch, 705 F.2d 472, 482 (D.C. Cir. 1983).
215. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 876(c) (1979).
216. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 19 cmts. e & f, Reporters' Note (2005).

held liable for providing employees a position in which they can more easily commit torts.[217]

Negligent complicity is the theory behind the know-or-have-reason-to-know standard for contributory liability under the tort of copyright infringement.[218] It is the theory behind the government's power to civilly forfeit landlords' property if the landlords negligently allowed it to be used for drug transactions.[219] And the list could go on.

So the law of complicity makes clear that whether conduct is free from government-imposed liability doesn't generally turn on its purpose—though whether conduct is viewed as culpable enough to lead to criminal rather than civil liability sometimes does turn on its purpose (depending on the aided crime and on the jurisdiction).

D. Purpose and Culpability

A recent article by Leslie Kendrick, *Free Speech and Guilty Minds*, has suggested that purpose might be relevant, not to the value of speech to public debate, but to the legitimacy of speech as an expression of the speaker's autonomy.[220] "Speakers who intend to cause harm by speaking lose their ability to claim that the government has no good reason to interfere with their speech," the article argues, at least under speaker autonomy theories of the First Amendment.[221]

Guilty Minds offers two specific examples to illustrate this point: The Thief's Accomplice ("A speaker recites the combination of a safe, with the intention that the listener use the combination to open the safe and steal the contents") and The Soliciting Burglar ("A speaker places a post online seeking a lookout for a burglary").[222] In such situations, the article argues, a speaker "cannot assert an autonomy claim for avoiding regulation" because "[l]iability does not show disregard for his rational agency, nor does it seem disrespectful of his communicative projects," which consist entirely of promoting theft.[223]

But I don't think this argument ultimately supports a First Amendment distinction between purpose to cause harm and knowledge that one is causing harm

217. *Id.*
218. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir. 2001).
219. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 748–49 (1992); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689–90 (1974).
220. Kendrick, *supra* note 15.
221. *Id.* at 1286.
222. *Id.* at 1286–87.
223. *Id.* at 1287.

(or perhaps knowledge that one is likely to cause harm, which roughly corresponds to recklessness). Indeed, *Guilty Minds* elsewhere suggests that speech might be restrictable not just based on the speaker's purpose but based on the speaker's knowledge or recklessness, "where a grave risk of harm actually does exist."[224] And there are three good reasons for First Amendment law to choose either to punish speech based on the speaker's knowledge or recklessness, or not to punish the speech at all, even when the speaker has a particular purpose.

First, the very examples that *Guilty Minds* article uses to illustrate the propriety of punishing speech said with a purpose to cause harm actually counsel in favor of a knowledge or recklessness test, not a purpose test. Consider a variant of the Thief's Accomplice hypothetical: A speaker recites the combination of a safe, knowing that the listener will use the combination to open the safe and steal the contents. But the speaker (who isn't promised a cut of the loot) is doing this solely because he feels indebted to the listener, who is a longtime friend, or because he has been paid by the listener. The speaker would sincerely prefer that the listener abandon his project, because the listener's actually opening the safe would make it likely that the speaker will eventually get caught.

The speaker thus doesn't have the purpose (or, in the *Guilty Minds* formulation, the "specific intent") to cause harm. He simply knows that the harm is almost certain to flow from his actions. But it's hard to see why there would be a First Amendment distinction between this speaker and the purposeful Thief's Accomplice. As Part IV.C.5 noted, tort law and many criminal law rules don't draw such a distinction, and would indeed hold the merely knowing Thief's Accomplice liable. And though some other criminal law rules choose to limit accomplice liability to the purposeful aiders, I see no reason to constitutionalize that limitation.[225]

Likewise, consider a variant of the Soliciting Burglar proposal: The burglar, hoping to avoid detection, asks a computer expert to post the request for help in an anonymized way. Again, the expert isn't getting a cut of the loot, and would prefer that the burglar abandon his plans, thus saving everyone the risk of being caught. The expert does what the burglar asks just out of friendship, or because he's being paid by the burglar. But the expert knows that his speech (it's his speech, too, because he's the one who'll actually post the message) is likely to help further a crime. Whatever distinctions may or may not be drawn by the law of solicitation and complicity, there seems to be no constitutionally significant distinction between this person and the purposeful Soliciting Burglar.

224. *Id.* at 1290 (emphasis omitted).
225. *See* Volokh, *supra* note 29, at 1142–46.

Second, as *Guilty Minds* is careful to note, even if speech said with the purpose to cause harm loses protection on an autonomy theory, "[t]he speech may still be protected for other reasons,"[226] such as because of listener interests.[227] And indeed, much speech from ill-intentioned people is nonetheless protected because of its value to listeners.

Consider, for instance, *Lamont v. Postmaster General*, the very first Supreme Court case striking down a federal law on First Amendment grounds.[228] The law in *Lamont* provided that mail from foreign countries that the government determines to be "communist political propaganda" "issued by or on behalf of" certain foreign governments would not be delivered to the recipient unless the recipient specifically requested it.[229] As Justice Brennan's concurrence noted, it wasn't at all clear that "political propaganda prepared and printed abroad by or on behalf of a foreign government" was protected by "the First Amendment rights of the [foreign] senders."[230] But the First Amendment rights of those who would read the mail justified protecting the speech.[231] Likewise, when domestic speakers' speech has value to listeners, it should generally be protected even when the speakers' intentions may be reprehensible.

Third, as Part IV.B argued, determining a speaker's purpose will often be very difficult, and purpose-based tests can thus deter the speech even of well-intentioned speakers. Thus, even focusing chiefly on speakers' autonomy interests, purpose-based tests can interfere with the rightful autonomy of speakers whose intentions are good, but who fear that a prosecutor, judge, and jury will misinterpret those intentions.

E. Where Purpose May Have Some Relevance to Harm: Predictive Restrictions

1. Attempt and Preparation

Sometimes, purpose—specifically, the purpose to engage in a future criminal act—may be relevant not because it shows the harm of the act, but because it shows the potential harmfulness of the actor.

226. Kendrick, *supra* note 15, at 1286.
227. *Id.* at 1288.
228. 381 U.S. 301 (1965).
229. *Id.* at 302–03.
230. *Id.* at 307–08 (Brennan, J., concurring).
231. *Id.* at 308; *id.* at 305 (majority op.) (striking down the law because it limits "the unfettered exercise of the addressee's First Amendment rights").

The classic example is attempt. Say Don goes to a secluded place where he expects Vic will be, with the purpose of killing Vic, but Vic doesn't show up. In many states, Don can be punished for attempt,[232] not because his actions were harmful, but because he has shown himself to be the sort of person who is willing to try to commit murder. If he isn't locked up now, he's likely to try again, and next time he might succeed.

Burglary, another crime that generally requires a purpose—breaking into a place with the purpose of committing a felony in that place—can be seen as a specialized form of attempt.[233] Again, a burglar has shown himself to be a more dangerous person than someone who breaks into a place without such a purpose: If he isn't stopped, he seems likely to try to commit a similar felony again in the future.

The same can apply to attempts that involve speech, or other speech crimes that are steps towards commission of still more crimes. Say that someone emails a fifteen-year-old, trying to set up a meeting at which the speaker hopes they will have sex. The fifteen-year-old refuses, and reports the email to the police. The email may likewise qualify as attempt under the criminal law, because of the speaker's purpose.[234] And such "attempt speech" is also likely constitutionally unprotected by the First Amendment.[235]

Yet the speech itself, absent that purpose, wouldn't have been harmful. (Trying to set up a meeting with a fifteen-year-old for legitimate purposes is not a

232. *See, e.g.*, MODEL PENAL CODE § 5.01(1)(c), (2)(a)–(b) (allowing criminal punishment for attempt when the defendant has made "a substantial step in a course of conduct planned to culminate in his commission of the crime," including "lying in wait, searching for or following the contemplated victim of the crime" or "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission"); CONN. GEN. STAT. ANN. § 53a-49 (2012) (adopting the substantial step approach to attempt); 18 PA. CONS. STAT. ANN. § 901 (2008) (likewise); *see also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 11.4 n.67 (2d ed. 2003) (citing twenty-three states as following this test).

233. *See, e.g.*, DeGidio v. State, 289 N.W.2d 135, 136–37 (Minn. 1980); People v. Gaines, 546 N.E.2d 913, 915 (N.Y. 1989). Under the Model Penal Code approach, for instance, "unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed" is one substantial step that would constitute attempt to commit the underlying crime. MODEL PENAL CODE § 5.01(2)(d). Burglary is defined simply as entering, without permission, "a building or occupied structure . . . with purpose to commit a crime therein." MODEL PENAL CODE § 221.1(1). Historically, burglary evolved as a separate crime long before modern approaches to attempt. But conceptually, burglary and attempt are closely related. *See* MODEL PENAL CODE AND COMMENTARIES § 221.1, at 62–63.

234. *See, e.g.*, MODEL PENAL CODE § 5.01(1)(c), (2)(b) (allowing criminal punishment for attempt when the defendant has made "a substantial step in a course of conduct planned to culminate in his commission of the crime," including "enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission").

235. *See* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. (forthcoming 2016) (manuscript at Part III.A.2) (on file with author).

crime.) The purpose is what shows that the speech can lead to danger, because the speaker is dangerous: He wants to commit statutory rape. And even though the danger didn't materialize this time, because the recipient rejected the invitation, the speaker is likely to try again with someone else.[236]

For this reason, punishing certain kinds of speech engaged in with the purpose to personally engage in some future constitutionally unprotected act does make some sense. These laws include bans on communication with children with the intent to groom them for sex, or with the intent to lure them somewhere where they can be attacked.[237] They include bans on possessing harmful information, such as people's names, birthdays, and social security numbers, with the intent to commit theft or fraud using that information.[238] And they include general attempt laws, as applied to speech (e.g., emailing a prospective victim to set up a meeting, at which the emailer intends to attack the victim).[239]

In some situations, even these kinds of laws can risk producing serious chilling effects, of the sort discussed in Part IV.B. Consider, for instance, a statute that bans "communicating about the techniques of 3-D printing of guns with the purpose to illegally distribute 3-D-printed guns." This law might deter even speakers who are asking experts questions about such techniques for lawful purposes—for instance, to help construct an argument that gun laws are now so easily evaded that they aren't worth trying to enforce.

Likewise, consider someone who thinks that the age of consent is set too high, and that sex with fourteen-year-olds is morally proper (even though he's not personally interested in having sex with fourteen-year-olds, or is interested but is willing to comply with age of consent laws that ban such sex so long as those laws are on the books). This person might be reluctant to express these views for fear that future innocent conversations with minors will be interpreted as having the purpose of grooming the minors for sex.

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236. *See* T.M. SCANLON, MORAL DIMENSIONS 13 (2007) (discussing the "predictive significance" of intent); Kendrick, *supra* note 15, at 1268 (criticizing Scanlon's position).

237. *See, e.g.*, 720 ILL. COMP. STAT. § 5/10-5.1 (2015); State v. Backlund, 672 N.W.2d 431, 440 (N.D. 2003); State v. Robins, 646 N.W.2d 287, 319–20 (Wis. 2002); People v. Williams, 551 N.E.2d 631, 634 (Ill. 1990); *see also* People v. Foley, 731 N.E.2d 123, 130 (N.Y. 2000) (upholding a conviction for sending sexually themed material to a minor in a way that "importune[s], invite[s] or induce[s]" the minor to engage in illegal sexual conduct).

238. *See, e.g.*, Horhn v. State, No. 01-14-00738-CR, 2015 WL 7300558 (Tex. App. Nov. 19, 2015) (upholding such a statute against First Amendment challenge).

239. *Cf.* Aikens v. Wisconsin, 195 U.S. 194, 206 (1904) (Holmes, J.) ("The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.").

Nonetheless, at least these purpose-based laws do focus on speakers who genuinely pose a greater danger. If the actus reus of the offense is suitably narrowly defined, so that the risk of punishing or deterring valuable speech is modest enough, punishing speakers who have a purpose of committing a further crime may be sensible.

2. Group Membership and Employment

Government actions based chiefly on predicting future harm are especially common when the government acts as employer, or in other similar capacities. Saying that one would like to bomb some unspecified abortion clinics at some unspecified time in the future, for instance, is constitutionally protected speech. But such speech may well be good reason not to hire the speaker as a security guard in a government-owned building in which an abortion clinic is a tenant.

Indeed, this may be the best functional explanation of cases such as *Elfbrandt v. Russell* and *Aptheker v. Secretary of State*.[240] The law in *Elfbrandt* required all state employees to swear that they didn't knowingly belong to any group that has as "one of its purposes" the overthrow of the state government. The Court struck that down, on the grounds that the law didn't require a showing of a "'specific intent' to further illegal action."[241]

And the employees' purposes in belonging to the group, the Court held, were important because they bore on whether the employees would "pose [a] threat," either as citizens or as public employees."[242] Membership in a group with a malign purpose wasn't itself particularly harmful—but it was evidence of whether the member was dangerous, and in particular whether giving him a government job might put him in a position where he was still more dangerous.

Likewise, the law in *Aptheker* barred members of communist organizations from getting passports. The Court struck the law down, relying partly on the fact that the law applied even to people who were members of a group but lacked "commitment to its [criminal] purpose."[243] Absence of such a commitment to a criminal purpose, the Court concluded, "bear[s] on the likelihood that travel by such a person would be attended by the type of activity which Congress sought to control."[244] Again, the purpose doesn't make the otherwise

240. 384 U.S. 11 (1966); 378 U.S. 500 (1964); *see also* Keyishian v. Bd. of Regents, 385 U.S. 589 (1967) (following *Elfbrandt* in a similar fact pattern).
241. *Eflbrandt*, 384 U.S. at 17.
242. *Id.*
243. *Aptheker*, 378 U.S. at 510.
244. *Id.*

First-Amendment-protected activity (membership in a group) harmful as such. Rather, it suggests that the person engaging in the activity is dangerous.

V. HOW THE PROBLEMS WITH PURPOSE TESTS FIT WITHIN EXISTING DOCTRINE

A. Strict Scrutiny

If I'm right about the above, most purpose-based speech restrictions should fail strict scrutiny (the test usually applied to content-based restrictions on otherwise protected speech), possibly except when the restriction focuses on purposes that reveal the speaker is likely to himself commit other crimes in the future.[245]

First, to be narrowly tailored to a compelling government interest, a law must focus on speech that especially implicates that interest. If the law punishes some speech on the grounds that the speech undermines a compelling interest, and fails to punish other speech that undermines the interest to the same extent, the law is generally seen as unconstitutionally underinclusive.[246]

Part IV.C argued that a speaker's purpose is generally unrelated to the harm that the speech may cause to the government interest. If that's right, then purpose-based speech restrictions are generally not narrowly tailored.

Second, the few Supreme Court cases that have upheld content-based speech restrictions on the grounds that they pass strict scrutiny have generally stressed the narrowness of the restriction, and its limited effect on constitutionally protected speech. *Holder v. Humanitarian Law Project*, for instance, upheld a statute banning speech that helps foreign terrorist groups. But it did so only after stressing that it was limited to speech coordinated with those groups, and didn't affect speech independent of those groups—even when that speech praised the terrorists, and thus helped them gather supporters, fighters, and resources.[247] Likewise, *Williams-Yulee v. Florida Bar* upheld a ban on judicial candidates' personally soliciting funds—but only after stressing that:

> By any measure, [the ban] restricts a narrow slice of speech. . . . [The ban] leaves judicial candidates free to discuss any issue with any person

245. *See supra* Part IV.E.

246. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231–32 (2015); Florida Star v. B.J.F., 491 U.S. 524, 540 (1989); Carey v. Brown, 447 U.S. 455, 465 (1980); First Nat'l Bank v. Bellotti, 435 U.S. 765, 793 (1978); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975).

247. 561 U.S. 1, 5–6, 23–24, 26, 31–32, 36, 39 (2010).

> at any time . . . . They cannot say, "Please give me money." They can, however, direct their campaign committees to do so.[248]

If the analysis in Parts IV.A and IV.B is correct, then purpose-based speech restrictions do restrict a good deal of valuable speech, either by forbidding it or by deterring it. (As the Court noted in *Reno v. ACLU*, the tendency of a speech restriction to deter even speech that the restriction may not clearly cover helps contribute to its breadth.[249]) Indeed, the lead opinion and the concurrence in *Wisconsin Right to Life* reasoned this way in holding that a purpose-based restriction on speech intended to affect an election failed strict scrutiny.[250] And the Texas Court of Criminal Appeals reasoned the same way in striking down, under strict scrutiny, a ban on taking photographs in public with the purpose of sexual arousal.[251]

B. Crafting Tests for First Amendment Exceptions

The value of the speech that a restriction forbids or deters, and the harm that the restriction avoids, are also relevant to crafting the scope of First Amendment exceptions. In recent years, the Court has taken the view that only historically endorsed First Amendment exceptions are permissible, and that the Court can't just craft new exceptions by balancing the harm and value of speech.[252] But the Court must still define the boundaries of those exceptions, and that is a process in which the Court has never felt limited by history.

For instance, the historical exceptions for obscenity and libel have been sharply narrowed by the Court, in part by considering the value of the speech being restricted, the tendency of the restrictions to chill more speech, and the harm that the restrictions seek to avoid.[253] More recently, Justice Breyer's and Justice Kagan's controlling concurrence in the judgment in *United States v. Alvarez*[254] considered these very factors in determining the scope of protection offered to knowingly false statements of fact.[255] And this is especially so, as I've argued

248. 135 S. Ct. 1656, 1670 (2015).
249. 521 U.S. 844, 870–72 (1997).
250. *See supra* text accompanying notes 128–134.
251. *See Ex parte* Thompson, 442 S.W.2d 325, 338 (Tex. Crim. App. 2014) (same).
252. *See* United States v. Stevens, 559 U.S. 460, 469–72 (2010); Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734–35 (2011); United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (plurality op.).
253. *See, e.g.*, Miller v. California, 413 U.S. 15 (1971); Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
254. 132 S. Ct. at 2551 (Breyer, J., concurring in the judgment).
255. *See also* Ginsberg v. New York, 390 U.S. 629 (1968) (relaxed definition of obscenity for material distributed to children); Redrup v. New York, 386 U.S. 767, 769 (1967) (per curiam) (implying that material may be especially likely to be found obscene when it "assault[s] . . . individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid

elsewhere, for the "speech integral to unlawful conduct" exception—a broad historically recognized exception that has been used recently to justify restrictions on solicitation of crime, on child pornography, and on certain kinds of threats.[256]

Many of the proposed purpose tests are connected to existing exceptions. Some restrictions on crime-facilitating speech might be seen as falling within the "speech integral to unlawful conduct" exception. The right of publicity, in one form or another, might fit within a historically recognized exception.

Bans on nonconsensual porn might be justifiable under the obscenity exception, specially adapted to situations where the depicted people didn't consent. (Obscenity doctrine already provides for a more relaxed substantive definition of obscenity when the material is distributed to people other than consenting adults, especially children but perhaps also unwilling viewers. It's possible that this doctrine should be similarly adapted to situations where the material depicts unwilling participants.) Restrictions on threats, and for government employee speech, might likewise fit within historically recognized exceptions.

But when defining these tests, the Court (and lower courts) should stay away from focusing on the speaker's purpose. The content of speech should matter; the speaker's purpose should not.

C. Purpose Tests in Well-Established Exceptions vs. in Newly Proposed Exceptions

Of course, all this having been said, some well-established First Amendment doctrines—including the famous *Brandenburg v. Ohio* incitement doctrine—do indeed consider the speaker's purpose. And though the Court has recently been frowning on purpose tests, as the *Wisconsin Right to Life* decision shows, I doubt the Justices are inclined to redefine those existing doctrines.

This is especially so because most of these doctrines have a generally narrow actus reus—consider, for instance, the requirement that speech, to be incitement, be likely to cause imminent criminal conduct. This means that speech is rarely restricted, and rarely chilled under such doctrines. The Court rarely has occasion to reconsider them, and doesn't feel much pressure to do so. I suspect the Justices think the doctrines ain't broke, despite their possible conceptual inconsistency with *Wisconsin Right to Life*, and thus don't need fixing.

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exposure to it"); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting) (so interpreting *Redrup*).

256. *See* Volokh, *supra* note 235.

Nonetheless, if I'm right that purpose tests are generally unsound, courts should draw the line at these old, firmly established purpose tests, and avoid adopting new such tests. Just as in recent years, the Court has been reluctant to borrow by analogy from the obscenity exception[257]—an old and well-established exception, but one that is in tension with much of modern First Amendment law—so the Court should avoid borrowing purpose elements by analogy as well.

CONCLUSION

Speech is generally harmful or valuable because of what the speaker says, not because of the speaker's purposes. Purpose-based tests thus often suppress valuable speech (given that the speaker's purposes don't strip the speech of value). And they often deter even speakers who lack the forbidden purpose, because purpose is unusually hard to reliably identify.

Purpose-based tests also often underrestrict harmful speech. For instance, banning the distribution of nonconsensual pornography only when the distributor has the purpose to distress the subject will leave untouched a lot of equally harmful nonconsensual pornography. If the content of speech is indeed harmful and valueless enough to be banned, it should be banned without regard to the speaker's purpose. And if the content is indeed valuable enough to be protected, it should be protected without regard to the speaker's purpose.

257. *See, e.g.*, *Stevens*, 559 U.S. at 479–80 (rejecting the borrowing of the "serious value" prong from obscenity law into bans on depictions of cruelty to animals); *Brown*, 131 S. Ct. at 2735–36 (rejecting the borrowing of the obscene-as-to-minors test from obscenity law to depictions of violence that are distributed to minors).