

NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 004 - FOLDER 011 DC

Elena Kagan Law Review 7 [4]

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Sarah Wilson

Subseries:

OA/ID Number: 14686

FolderID:

Folder Title:

Elena Kagan Law Review 7 [4]

Stack:

V

Row:

13

Section:

2

Shelf:

11

Position:

1

n288. The Supreme Court's obscenity and indecency cases do not require a contrary conclusion. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a state law that prohibited the sale to persons under 17 of sexually explicit materials that, while nonobscene as to adults, were defined to be obscene as to minors. The Court held that the statute served the state's compelling interests both in facilitating parental control over their children's exposure to such material and in protecting the well-being of society's youth. In regard to the latter interest, the Court conceded the lack of scientific evidence that viewing sexually explicit materials is injurious to minors. However, it reasoned that, because the proscribed material was obscene (under the now-obsolete "variable obscenity" standard), the Constitution required only "that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641.

Since *Ginsberg*, the Court has often assumed that indecency is harmful to children, but its decisions have not relied on this mere supposition. For example, when, in *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the Court upheld the FCC's power to regulate an indecent radio broadcast, it cited to both interests identified by the Court in *Ginsberg*. *Pacifica Foundation*, 438 U.S. at 749. Most significantly, the Court's decision could have rested fully on Congress' interest "in supporting 'parents' claim to authority in their own household.'" *Id.* (quoting *Ginsberg*, 390 U.S. at 639). In *Sable Communications v. FCC*, 492 U.S. 115 (1989), the Court observed that the state has a compelling interest in protecting minors from the influence of indecent materials, *id.* at 126, en route to invalidating a ban on dial-a-porn services for being overly burdensome.

In *New York v. Ferber*, 458 U.S. 747 (1982), the Court upheld a state prohibition on the distribution of child pornography on the grounds that "the prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 757. Even though *Ferber* did not challenge this determination, the Court cited to an extensive social science literature purporting to establish "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Id.* at 758.

In sum, Supreme Court precedent does not indicate that the mere allegation that television violence harms children would satisfy or alter the state's usual burden to demonstrate that a content-based speech regulation would alleviate a real harm.

- - - - -End Footnotes- - - - -
[*1553]

2. Prong Two: Is the Regulation Precisely Drawn? - Assuming that the substantial elimination of violent television would accomplish a compelling state interest in reducing societal violence, a regulation enacted in furtherance of that objective must be precisely drawn to restrict only that programming which will likely induce antisocial aggression. A content-based ban on high-value speech "can be narrowly tailored ... only if each activity within the proscription's scope is an appropriately targeted evil." n289 When it comes to television violence, however, separating out the harmless from the harmful will prove a daunting task.

- - - - -Footnotes- - - - -

n289. Frisby v. Schultz, 487 U.S. 474, 485 (1988).

- - - - -End Footnotes- - - - -

At this stage of the constitutional scrutiny, more so than at the compelling interest prong, existing social science data are inadequate. The many studies employ widely disparate definitions of "violence" as the independent variable (that is, on the antecedent side) in the violence hypothesis. n290 Such definitions include "the use of physical force against persons or animals, or the articulated, explicit threat of physical force to compel particular behavior on the part of that person" and "that which is physically or psychologically injurious to another person or persons whether intended or not, and whether successful or not." n291 While the diversity of operational definitions might be unfortunate, the task is not simply to agree upon any single one so long as it is not unconstitutionally vague. The heart of the problem is that available research does not supply a basis upon which one could determine with adequate certainty whether a particular "violent" program will cause harmful behavior.

- - - - -Footnotes- - - - -

n290. In our earlier discussion, see supra notes 262-64 and accompanying text, we have rejected Krattenmaker and Powe's "definitional" or "irrelevance" objection to the violence hypothesis insofar as it condemned the lack of a precise and legally meaningful definition of "aggression" as the dependent variable in the hypothesis. Quite clearly, Krattenmaker and Powe intended as well to advance the critique now presented in text. But as we explained, Krattenmaker and Powe seemed to conflate these two distinct "definitional" critiques. The latter form of the objection now addressed does not undermine the validity of the claim that television violence does cause antisocial aggressive behavior. In other words, it is the independent legal requirement that a speech restriction not be overbroad that gives the latter objection its force.

n291. See Prettyman & Hook, supra note 6, at 330 n.55 for a compilation and critique of several competing definitions.

- - - - -End Footnotes- - - - -

In fact, researchers have identified a large and varied assortment of aspects of the relationship between program and viewer that influ- [*1554] ence whether and to what extent the program might contribute to aggressive behavior. n292 These include the extents to which the violence is presented as justified, effective, unpunished, socially acceptable, gratuitous, realistic (yet fictional), humorous, and motivated by a specific intent to harm. The effects of a particular presentation will also depend upon the extent to which actual viewers like and associate with the aggressor or the victims. Significantly, it is not the case that all violent programming is harmful, with the above factors relevant only for distinguishing the more harmful from the less. n293 Some genres of violent programming might not, as a general matter, be harmful. n294 More fundamentally, a program characteristic harmful in the abstract might be neutralized when combined with other features into a single whole. As one prominent adherent of the violence hypothesis put it:

- - - - -Footnotes- - - - -

n292. See, e.g., Belson, supra note 238, at 520-28; Pearl, supra note 2, at 241; see generally Comstock, supra note 226, at 183-96.

n293. In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), the Court stated unanimously that courts should defer to legislative line-drawing when the varieties of speech swept within a broad prohibition were all harmful, and differed only in degree. Id. at 263; id. at 268 (Rehnquist, C.J., dissenting).

n294. See, e.g., Belson, supra note 238, at 520 (finding "little or no support" for a causal link between television violence presented as part of cartoons, science fiction, slapstick comedy, or most sporting events, and serious violent behavior).

- - - - -End Footnotes- - - - -

Experimental effects are straightforward. Real life effects are not because the elements so carefully disengaged in the experiments are commingled in real life. What we have, then, is an empirically tested theory, a valid theory, a theory with wide applicability, but nevertheless a theory requiring subtle and thoughtful application that takes into account the portrayal, the real life setting and circumstances, and the state and characteristics of the viewer. n295

- - - - -Footnotes- - - - -

n295. Comstock, supra note 226, at 196.

- - - - -End Footnotes- - - - -

The seemingly insurmountable obstacle is that government lacks the ability to actualize the requisite subtlety into legislation. The problems are two-fold. Broad and indiscriminate application of the operational characteristics already mentioned will sweep too broadly in practice. Additionally, even partial reliance upon such qualitative and unusually fuzzy terms as "gratuitous," "socially acceptable," and "effective" will almost surely prove unconstitutionally vague. n296 For the same reasons, the First Amendment prohibits the government from circumventing the need for narrow and precise lines by delegating discretion to administrative agencies to identify the offending programs on an ad hoc basis under generally worded guidelines. n297

- - - - -Footnotes- - - - -

n296. Cf. Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) ("We are quite sure that the pejorative description 'outrageous' does not supply" a principled or objective standard.).

n297. See, e.g., City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1513 n.19 (1993); Grayned v. City of Rockford, 408 U.S. 104, 113 n.22 (1972) (condemning "broadly worded licensing ordinances which grant ... standardless discretion to public officials") (citing cases).

- - - - -End Footnotes- - - - -
[*1555]

This is not to insist that the state could craft no standard that would both employ clear and precise terms and bring within its scope only programming actually likely to cause violent behavior. However, any regulation of television violence confronts an inherent tradeoff between precision and effectiveness. The risk is that any restriction in this area that is neither overbroad nor vague will leave unregulated so much violent programming that it will no longer accomplish a compelling interest. Until someone can demonstrate otherwise, we must conclude that a full or partial ban on television violence cannot, in clear and precise terms, simultaneously restrict enough violent programming to be effective and restrict no more programming than is actually harmful.

3. Prong 3: Is the Regulation the Least Burdensome Means? - A content-based regulation is the "least burdensome means" unless the court can identify a less burdensome alternative that would comparably accomplish the state's interest. If we assume that the influence of television violence is significantly greater upon children and adolescents than it is upon adults, n298 a total ban on television violence would almost certainly not be the least burdensome means to reduce societal violence. Because "the government may not reduce the adult population ... to ... only what is fit for children," n299 Congress would be required to tailor its limitations upon violence more closely to the hours when children can be expected in the audience. n300

- - - - -Footnotes- - - - -

n298. In fact, although it is generally agreed (among those who accept the violence hypothesis) that children are especially susceptible to the influence of television violence, there is considerable uncertainty over the extent to which adults are also affected. See, e.g., Comstock, supra note 226, at 235; Centerwall, supra note 265, at 3060; Huesmann et al., supra note 234, at 196-97; Pearl, supra note 2, at 241; Wood et al., supra note 244, at 380.

However, because we do not rely on the "least burdensome means" prong of exacting scrutiny in reaching our ultimate conclusion that any and all prohibitions of television violence are unconstitutional, we need not sort whether, and how significantly, television violence affects adults.

n299. Sable Communications v. FCC, 492 U.S. 115, 128 (1989) (internal quotations omitted).

n300. The conclusion that a ban on certain types of television violence is more burdensome than a comparable zoning or channelling rule assumes that the objects of the speech restriction are discrete programs: instead of banning each harmful program outright, the argument runs, the state could channel them to specified hours. By recharacterizing the objects of the restriction in compound terms as given-programs-at-given-timeslots, this same objection could be restated as a conclusion that the ban is overbroad: it restricts speech that is not harmful, e.g., a violent program at 3:00 a.m.

The apparent artificiality of the latter approach is reduced somewhat in the event that a producer were to create a given violent program with the specific

intention of airing it at a given timeslot. Of course, the approach in text makes better intuitive sense and creates no difficulties. Whether we term banning (a) more burdensome than zoning or (b) overbroad, the essence of the inquiry is the same: if zoning could accomplish the state's interest with comparable effectiveness, then the ban would fail the "narrowly tailored" prong of exacting scrutiny.

- - - - -End Footnotes- - - - -
[*1556]

Whether a zoning regulation would be the least burdensome means is a more difficult question. Of course, within the family of all possible time or channel prohibitions, the particular regulation adopted must be the least burdensome - a determination that requires a delicate balancing of the tradeoffs between burden and effectiveness. n301 Assuming that the regulation chosen is the least burdensome of all possible zoning rules, the question is whether a less burdensome type of regulation could achieve the government's interest with similar success.

- - - - -Footnotes- - - - -

n301. Whether and how the Court should assess whether the challenged regulation is "least burdensome," other than via an impressionistic balancing, is uncertain. See *Sable*, 492 U.S. at 131-32 (Scalia, J., concurring).

- - - - -End Footnotes- - - - -

This question cannot be answered with confidence absent a record that would provide a basis for predicting the likely consequences of a range of regulatory alternatives upon children's viewership of violent programming. Most commentators have speculated, however, that the presumably less onerous n302 alternatives of lockboxes, balancing rules, and violence ratings or advisories would have slight overall impact on children's viewing habits because the parental supervision upon which they rely is often a fiction. n303 For the sake of argument we accept this as true. Consequently, a reasonably drawn violence zoning rule - say, a prohibition upon violent programming during prime time weekdays and on Saturday mornings - would be the least burdensome means to achieve the government's compelling interest in combatting the societal violence produced by television violence. n304

- - - - -Footnotes- - - - -

n302. The burden imposed by a zoning rule depends, of course, upon the hours that it leaves available for violent programming. It is conceivable that a zoning rule which leaves an especially large window open for violent programming could be less burdensome than an especially onerous disclosure rule. For purposes of present analysis we assume otherwise.

n303. See, e.g., Spitzer, *supra* note 53, at 117-18; Krattenmaker & Powe, *supra* note 14, at 1273-76; Kim, *supra* note 3, at 1412-13 & n.125; Edmund L. Andrews, 4 Networks Agree to Offer Warnings of Violence on TV, *N.Y. Times*, June 30, 1993, at A1, B7 (quoting skeptics of the networks' violence advisory).

n304. But see *Martin v. Struthers*, 319 U.S. 141, 144-47 (1943) (striking down statute restricting door-to-door canvassing on First Amendment grounds and

observing that the state's purported interest in crime reduction could be served by leaving residents with the choice whether to admit the caller).

- - - - -End Footnotes- - - - -

4. Prong Four: Is Speech Restriction Necessary? - Assume that an appropriately drawn zoning regulation might be the least burdensome means to achieve a compelling government interest in curbing societal violence. Assume further - and most improbably - that the government could advance a definition of the proscribed fare which is both limited to the violence that is actually harmful and not itself vague. It remains to determine whether such a regulation would be necessary. [*1557]

Broadcasters contend that it would not be. They argue that the government could do a great deal before regulating speech to combat societal violence with equal or greater effectiveness. Opponents of television violence regulations complain that broadcasters are being scapegoated merely because government is unwilling or unable to tackle more serious social problems. At the very least, before Congress regulates television violence, goes a frequent refrain, it should finally enact serious gun control. n305

- - - - -Footnotes- - - - -

n305. See, e.g., Kolbert, supra note 91, at C18.

- - - - -End Footnotes- - - - -

That may be so. But it is beside the point. The final prong of exacting scrutiny does not inquire whether other policies are available that could serve the government's interest as (or more) effectively. It asks whether an alternate policy could render the speech restriction redundant or gratuitous. To be sure, when a speech restriction serves to eradicate a problem in toto, the two questions may amount to the same thing. But where, as here, a content-based regulation of speech makes only a partial contribution to a government interest (and yet that partial contribution is itself compelling), it is not rendered unnecessary by the availability of other mechanisms that would likewise make partial contributions to alleviating the same problem. Government could undertake innumerable policies to reduce societal violence - in addition to gun control, it could, for example, expand jobs programs, drug rehabilitation, and HeadStart - but the mere fact that such programs lie partially or fully unrealized does not make regulation of television violence "unnecessary" within the meaning of First Amendment jurisprudence.

In order to answer the question whether governmental banning or zoning of television violence is necessary to curtail that media's contribution to societal violence, we need to know how television violence influences viewers to behave aggressively. We need, that is, a psychological theory that accounts for the violence hypothesis. Unfortunately, there is more disagreement in the psychological community over how television violence causes aggression than whether it does. Even the catalogue of theories regarding how media violence affects viewers differs from one commentator to the next. n306 All in all, though, five distinct theories appear most prominently in the literature: catharsis, arousal, instruction, disinhibition, and social learning.

-Footnotes-

n306. See, e.g., Belson, supra note 238, at 528-29; Comstock, supra note 226, at 235-36; Spitzer, supra note 53, at 96-97; Prettyman & Hook, supra note 6, at 326-30; Kim, supra note 3, at 1390-93.

-End Footnotes-

According to the catharsis hypothesis, persons feeling aggressive impulses can partake vicariously in a portrayal of violent behavior and thereby feel less need to act aggressively themselves. n307 The arousal [*1558] theory holds that the viewing of any type of exciting scene (including, but not limited to, episodes involving violence) will provoke a state of physiological arousal, which itself may induce highly energetic behavior (again, including but not limited to aggression). n308 The instructional theory, perhaps the most mundane of the hypotheses, posits that viewers learn and replicate specific behaviors or techniques they see on television. This is the theory relied upon by plaintiffs in most tort suits for media-induced harms: A did X because he saw it on television. n309

-Footnotes-

n307. See generally Violence & the Media, supra note 7, at 453-72 (Appendices III-D & III-E).

n308. See, e.g., Comstock, supra note 226, at 191-93.

n309. See Campbell, supra note 14, at 438-40 (discussing cases).

-End Footnotes-

The disinhibition hypothesis assumes that inhibitions against aggressive and violent conduct are largely socially constructed and enforced. Continual viewing of violent behavior by others tends to make viewers, especially children, more comfortable with violence and suffering, thereby counteracting the inhibitory effect of formal and informal social sanctions against violent behavior. n310 Lastly, according to social learning theory, children learn traits and characteristic ways of behavior from their environments. Television violence teaches children that aggression is an effective, satisfactory, and acceptable way to resolve problems. n311

-Footnotes-

n310. See, e.g., Spitzer, supra note 53, at 96.

n311. See, e.g., Comstock, supra note 226, at 236; Huesmann et al., supra note 234, at 197.

-End Footnotes-

For the sake of this analysis, we can reject the first three theories, for each is inconsistent with the presupposition that regulation of television violence would yield a sufficiently large diminution in societal violence so as to accomplish a compelling government interest. This is most apparent with

regard to the catharsis theory because it predicts that viewing violence would reduce aggressive behavior. Indeed, psychologists have rejected the theory largely because it is contrary to empirical evidence. n312 But it is also true, if less obviously so, for the arousal and instructional hypotheses. Although neither proposes that media violence would reduce violent behavior, neither can account for a large enough causal effect to justify a regulation of television violence in the first place. The arousal theory fails to support the state's interest as compelling for two reasons. First, it suggests that violent programming causes no more aggressive behavior than do other types of existing programming. Second, because states of arousal are short-lived and nonaggregative, the arousal theory does not support the conclusion that television programs (of any sort) would constitute much of a social problem. n313 The instructional theory, for its part, is [*1559] incompatible with our animating premise because it only explains why a particular crime or violent act is committed. By failing to explain why one would act criminally or violently to begin with, it does not support the central thrust of the violence hypothesis, namely that television violence causes an overall increase in antisocial aggression.

-Footnotes-

n312. See Prettyman & Hook, supra note 6, at 326 n.32.

n313. For these reasons, George Comstock concluded that, although the arousal hypothesis "may account almost wholly or play a major role in some short-term effects ... it is far from the whole story." Comstock, supra note 226, at 193.

-End Footnotes-

This leaves only the disinhibition and social learning theories. Both are essentially long-term developmental accounts of the way that a steady diet of television violence can encourage children to respond to social problems in an aggressive manner. It is precisely their status as developmental theories which suggests that government need not silence the violent speech. Unlike, say, defamation, the harm supposed to be produced by television violence is not completed upon receipt of the communication. Indeed, studies show that public officials, educators, and parents, together, can counteract the effects of television violence upon children by, among other things, ensuring that children watch less television, reinforcing anti-aggressive prosocial norms, and encouraging children to adopt a more detached and critical appreciation of the ways in which television programs may influence them to feel and behave. n314 All of this can be done with government programs short of bans on televised violence.

-Footnotes-

n314. See, e.g., Huesmann et al., supra note 234, at 196; Pearl, supra note 2, at 245.

-End Footnotes-

The question, thus, is whether a theoretical account of the violence hypothesis in terms of developmental learning renders government efforts to prohibit televised violence (in toto or at certain times) unnecessary within the meaning of the First Amendment's exacting scrutiny. The answer depends in

large part on how strictly we are to read "necessary." As we have noted, the Supreme Court has relayed mixed signals.

Construed leniently, the "necessary" prong would present no obstacle to government regulation of television violence. Were it possible to distinguish between harmless and harmful violence, we think that most courts would indeed endorse a lenient construction. A court is unlikely to foreclose Congress from curbing the showing of precisely identified media material that was known to cause serious harm, even if the harm were to materialize only over time.

But a different result would likely obtain if the "necessary" prong is to be construed and applied strictly. The social science data indicating that television violence does not cause viewers to behave aggressively via some sort of extraordinary psychological process akin to hypnosis or addiction n315 would then become critical. Because televi- [*1560] sion violence appears to cause aggressive antisocial behavior by developing attitudes and habits over an extended period of time, its effects can be combatted through concerted and sustained public and parental intervention programs that avoid bans on television programming. This is not to claim naively that such efforts will eliminate all harms that television violence might cause. It is to suggest, however, that a strict reading of the "necessary" prong would require government to attempt to address televised violence through other remedial options available to it before it could curb speech.

- - - - -Footnotes- - - - -

n315. See Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199, 200 (S.D. Fla. 1979) (rejecting a tort claim against the television networks brought by a young man who alleged that he was "completely subliminally intoxicated" by 10 years of watching television violence to shoot and kill his elderly neighbor); see generally Spitzer, supra note 53, ch. 4 (critiquing similar theories of television's hypnotic effect).

- - - - -End Footnotes- - - - -

Of course, given that proposals to ban or zone violent programming cannot satisfy the requirement that content-based restrictions of speech be precisely drawn, disputes regarding the proper construction of the "necessary" prong need not be resolved for present purposes.

B. Balancing

Under an analog to the Fairness Doctrine, Congress could direct programmers to provide a "balanced" program schedule in order to counteract the dangerous influences of television violence. For example, programmers could be required simply to air an hour of nonviolent programming for each hour of violent programming. The price of one hour of violent cartoons might be two episodes of Mister Rogers. In a more nuanced scheme, the government could require that programs depicting violence in such a way as likely to cause their viewers to aggress be matched with programs that, while violent, present violent behavior in a "socially responsible" manner. That is, for each program that portrays violence as, for example, effective, or socially acceptable, the programmer would be obligated to present violence as, respectively, ineffective or morally unacceptable. n316

-Footnotes-

n316. What this underlines, incidentally, is that most regulations of violence - any that would distinguish between, say, Terminator and Boyz "N the Hood (to use our earlier examples) - are really viewpoint-based restrictions, not content-based. For present purposes, however, this is a distinction without a difference.

To be sure, it is common wisdom that the First Amendment places a heavier burden upon viewpoint-based regulations than upon content-based ones. See generally Smolla, supra note 54, 3.02[2][c]. Indeed, much language in Supreme Court opinions supports this claim. See, e.g., Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2481 (1994) (Ginsburg, J., dissenting in part) ("The 'must-carry' rules Congress has ordered do not differentiate on the basis of 'viewpoint,' and therefore do not fall in the category of speech regulation that Government must avoid most assiduously."); R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992) (noting that "the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination"); id. at 2568 (Stevens, J., concurring) ("We have implicitly distinguished between restrictions on expression based on subject matter and restrictions based on viewpoint, indicating that the latter are particularly pernicious.") (emphasis omitted).

In some contexts, the distinction between viewpoint-discrimination and content-discrimination makes a doctrinal difference. For example, content-based regulations of government-related conduct or property, outside of a public forum, are routine and essential. Because, say, a public school or university must be able to limit the content or subject matter of expression in the classroom, speech restrictions in such situations need be viewpoint-based in order to trigger heightened scrutiny. See, e.g., Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985). But the Court usually applies the same doctrinal rules - most exacting scrutiny - both to content-based and viewpoint-based regulations. See, e.g., Boos v. Barry, 485 U.S. 312, 319-21 (1988) (expressly recognizing that a content-based statutory ban on picketing was viewpoint-neutral, yet applying exacting scrutiny to invalidate the law); FCC v. League of Women Voters of Cal., 468 US 364, 383-84 (1984); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"). And "it is to the holdings of ... cases, rather than their dicta, that we must attend." Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1676 (1994). The principal difference between content-based and viewpoint-based regulations, we propose, is simply that there are so few situations in which a viewpoint-based distinction could serve a compelling government interest.

-End Footnotes-

[*1561]

Despite a few early appeals for the application of the fairness doctrine to televised violence, n317 there seems to be little enthusiasm for a violence-balancing law in Congress. And for good reason. First, it raises, of course, the same concerns about overbreadth and vagueness as do any governmental proposals to separate the harmful violence from the innocuous. Second, a requirement that programmers present a "balanced" menu of violent and nonviolent offerings simply would not address the problem. Few doubt that there is plenty

of wholesome fare on television for those who want it. n318 And variety will only improve in the 500-channel cable universe of the near future. n319 The challenge is to make nonviolent programming more attractive to more viewers. Whether the government can aid producers in that task is a controversial question. n320 But a legislative mandate that programmers simply put more of it on the air will not accomplish a compelling government interest.

-Footnotes-

n317. See, e.g., Albert, supra note 16, at 1327-33; Thomas Barton, Essay - Fighting For Their Lives: The Applicability of the Fairness Doctrine to Violence in Children's Television Programming, 82 W.Va. L. Rev. 285 (1979).

n318. See, e.g., Spitzer, supra note 53, at 118; Krattenmaker & Powe, supra note 14, at 1274.

n319. See Information Superhighway, supra note 50, at 1081-82.

n320. See, e.g., Kim, supra note 3, at 1429-41 (evaluating a variety of structural proposals aimed at decreasing the influence of advertisers and increasing the influence of both viewers and the "creative" wing of the television industry).

-End Footnotes-

C. Labelling and Disclosure Laws

Most commentators, assuming that a violence-disclosure regulation would be designed to serve the state's compelling interest in reducing societal violence, have dismissed such labelling regulations as ineffectual. The problem as these critics see it is that many children who might be most influenced by televised violence (either to commit violent acts or to suffer developmental harm themselves) lack effective parental supervision. As George Gerbner argued, "The notion of parental control is an upper-middle-class conceit." n321

-Footnotes-

n321. Kolbert, supra note 91, at C18.

-End Footnotes-

[*1562]

We accept these criticisms in part: disclosure would serve the state's interests in reducing societal violence and protecting the emotional and psychological well-being of youth too minimally to satisfy the compelling interest prong of exacting First Amendment scrutiny. But, as the analysis of lockout technology in Part II explained, those two objectives do not exhaust the range of potential state interests relating to the nation's television habit. Part II concluded that lockboxes would pass constitutional scrutiny as a means to further the state's interest in facilitating parental supervision over all aspects of their children's television viewing. Congress could mandate violence-disclosure - be it in the form of a "V"-rating or an advisory of the sort the networks recently adopted - in order to serve the similar yet narrower interest in facilitating parental control over their children's viewing of violent programming in particular. n322

-Footnotes-

n322. Cf. Krattenmaker & Powe, supra note 145, at 133 (finding no "reason to believe that parental supervision will address the problem as critics have defined it") (emphasis added). This is because critics have defined the problem principally in terms of reducing societal violence; they have failed to consider that facilitating parental supervision can be a valuable end in itself.

-End Footnotes-

Such a regulation could not be dismissed out of hand as an "upper-middle-class conceit" just because not all parents share the interest or opportunity. Rather, as a content-based regulation, it must be analyzed under the prongs of exacting scrutiny. n323 Because the constitutional analysis would depend so heavily upon the precise details of the regulatory scheme, it is impossible at this point to replicate the detailed examination undertaken in subpart V.A.

-Footnotes-

n323. The fact, if true, that in enacting a labelling scheme the government were to be motivated not to censor violence, but rather to notify parents and viewers, does not change the level of scrutiny. Because the regulation is content-based, it elicits most exacting scrutiny. The fact that government might act with benign intentions is irrelevant. See, e.g., Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 117 (1991) (citing cases).

-End Footnotes-

The initial question is whether the state has a compelling interest in facilitating parental control over their children's viewing of television violence. One might think this question was already answered, for we have concluded that the social science evidence that television violence harms children is insufficient to justify a full or partial governmental ban on television violence. But these are two very different questions. Indeed, they are in fundamental tension. Were there sufficiently convincing data that television violence harms children, the state most assuredly would not have an interest in facilitating parental decision-making over whether, when, and how often, their children watch violent television. n324 It is only because persuasive evidence that [*1563] television violence harms children is lacking that the state may reasonably assert an interest in facilitating parental supervisory choice. n325 This is not the end of the inquiry, however.

-Footnotes-

n324. This is not to say that the state might not choose to rely on parental intervention as a means to accomplish its compelling interest in protecting children from a given harm. Thus, for example, it would not be illogical for Congress to enact some form of lockbox regulation and to justify the enactment in terms of an alleged compelling interest in safeguarding children's emotional well-being. The constitutionality of such a regulation would then depend, inter alia, on both the sufficiency of evidence demonstrating a threat to children's emotional health and the likelihood that parents would use the device as Congress intended.

n325. Ginsberg v. New York, 390 U.S. 629 (1968), and New York v. Ferber, 458 U.S. 747 (1982), well illustrate this point. In Ginsberg, the Court upheld a state ban on the sale of certain sexually explicit material to children, relying in part on the state's interest in assisting parents in child-rearing. It noted specifically that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." 390 U.S. at 639. It also acknowledged the lack of scientific support for the conclusion that the regulated material was actually harmful to children. Id. at 641.

In Ferber, the Court upheld a state prohibition against the distribution of child pornography. This time the Court expressed utter confidence that the material at issue was harmful to minors. 458 U.S. at 758. The opinion makes no mention of any supposed government interest in furthering parental discretion.

- - - - -End Footnotes- - - - -

As we have noted, n326 whether a particular interest is "compelling" is probably the most subjective and least constrained of the inquiries generated under exacting scrutiny. Nonetheless, Supreme Court precedent provides considerable guidance. As the Court wrote in Ginsberg, "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." n327 The fundamental status of parenthood means "that parents and others ... who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." n328 Because many parents reasonably believe that television violence can affect their children adversely, we believe that the state's interest in facilitating parents' ability to control how much violent programming their children watch is compelling. The state's compelling interest lies not in protecting children, but in protecting parenting. n329

- - - - -Footnotes- - - - -

n326. See supra subsection IV.B.2.(a).

n327. Ginsberg, 390 U.S. at 639.

n328. Id.

n329. For this reason the state could not legitimately rationalize a banning or zoning regulation as a means to further the state's interest in facilitating parental control. Absent persuasive evidence that television violence is harmful to children, the state must respect parents' wishes to expose their children to violent programming. See Action for Children's Television v. FCC, 11 F.3d 170, 183-86 (D.C. Cir. 1993) (Edwards, J., concurring), vacated, and reh'g en banc granted, 15 F.3d 186 (D.C. Cir. 1994).

This observation produces a noteworthy asymmetry. Both distribution curbs (banning or zoning) and parental advisories might plausibly advance the state's interest in preventing whatever harm television viewing might cause (either to viewers or to society). But only the latter form of regulation could conceivably further the state's interest in facilitating parents' supervisory responsibilities.

- - - - -End Footnotes- - - - -

Whether some form of disclosure system would accomplish the state's interest is a separate matter. It is probable that not every possible type of labelling rule would significantly improve parents' super- [*1564] visory ability. But it is as likely that some type of advisory rules, especially if enacted in conjunction with a complementary blocking system, could make a substantial contribution. Assume, then, that a properly drafted disclosure regulation would accomplish the state's compelling interest in substantially improving parents' ability to determine how much violence - and of what sort - their children can watch. That law must still satisfy the remaining prongs of exacting scrutiny.

In this case, the requirement that such a regulation be narrowly tailored should not prove to be an obstacle. Because, as we have noted, there is no way at present to distinguish between harmless and harmful violent programming, any notice requirement purporting to discriminate between the two will fail scrutiny under the First Amendment. But the government's interest in facilitating parental supervision can be achieved without the need to distinguish between harmful and harmless violence. Parents are entitled to know if there is any violent content in programming so that they can assess whether and how to regulate the television watching of their children. It does not matter that some parents might elect to forbid their children from watching a show containing harmless violence, or that some parents may elect to set no rules; that is their right. Indeed, parents may do what the government may not do - adopt an overbroad prophylactic rule banning their children from watching any program with violent content to ensure against any possible harmful effects. The point is that a regulation requiring notice undoubtedly will facilitate parenting, so most such regulations will be narrowly tailored to satisfy a compelling government interest. And we can see no reasonable argument that notice regulations are not "necessary" under exacting scrutiny. Thus, we agree with Krattenmaker and Powe's conclusion that a labelling requirement seems unobjectionable under the First Amendment. n330 We are on riskier ground than they, however, because we reject their view that such a requirement is content-neutral.

- - - - -Footnotes- - - - -

n330. Krattenmaker & Powe, supra note 14, at 1276-77.

- - - - -End Footnotes- - - - -

VI. Conclusion

Regulation of televised violence, if it is to be done, should address programming by broadcasters and cable operators alike. Although regulation of broadcast television alone could perhaps be sustained under present doctrine that treats regulations of the broadcast media with greater solicitude, such an approach would hardly address the problems that proponents of regulation identify. Indeed, the positive effect of a broadcast-only law would probably be so slight that it might well prove unconstitutional for failing to serve even a "sub- [*1565] stantial" government interest (especially if, as seems likely, it would spur increased viewership of cable's more violent program fare).

In assessing the current legislative proposals designed to address televised violence, we think that the banning, zoning, balancing, and labelling

regulations are content-based. We recognize that there are legal commentators who have argued that a governmental ban on violent programs during narrowly identified children's viewing hours would be a content-neutral restriction and would pass intermediate scrutiny. We think that this claim fails under probing inquiry. The important question, then, is whether the various content-based regulations can withstand the exacting scrutiny necessary to pass muster under the First Amendment. We have some doubts about regulations that would require labelling, but we think the answer is otherwise clear.

Solid social science data indicate a causal connection between antisocial violent conduct and exposure to portrayals of violence on television. We think that Congress can act on these data, and that a court would accept the data as adequate to support even content-based regulations. The problem we see, however, is that the existing data do not supply a basis upon which one may determine with adequate certainty which violent programs cause harmful behavior, and exacting scrutiny requires that any content-based regulation be precisely drawn to restrict only that programming that will likely induce antisocial aggression. When it comes to televised violence, we cannot imagine how regulators can distinguish between harmless and harmful violent speech, and we can find no proposal that overcomes the lack of supporting data.

In short, assuming that we are correct in our assessment of what is content-based, and assuming that broadcast media and cable media are treated alike, we think that the banning, zoning, and balancing proposals cannot survive scrutiny under the First Amendment. At bottom, the point here is that "violence on television ... is protected speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us." n331 As Judge Kozinski has noted in a related context, "unless and until the Supreme Court speaks otherwise, we are bound to the view that the constitutional wall against government censorship protects this nether region of public discourse as fully as the heartland of political, literary and scientific expression and debate." n332

-Footnotes-

n331. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986).

n332. United States v. United States Dist. Court, 858 F.2d 534, 542 (9th Cir. 1988).

-End Footnotes-

[*1566]

For the proponents of regulation, the best hope would appear to be "V-Chip" and similar proposals that would require manufacturers to equip television sets with both program-blocking and ratings-blocking capabilities so that viewers could block shows either program-by-program or by ratings category. We think that legislation of this type easily can be written to be content-neutral and, thus, avoid the requirements of exacting scrutiny under the First Amendment. The safest course for Congress, obviously, will be to enact a regulation that neither requires "transmission" of ratings nor imposes any specific ratings categories. Even with these limitations, however, a "V-Chip" bill, especially one with some labelling requirement, should go a long way toward facilitating

parental guidance of television-watching by minors. It is doubtful that broadcasters and cable operators could ignore viewer demands for the creation and transmission of a ratings system. The ultimate effect of any such system on antisocial violence remains to be seen.

VII. Postscript by Judge Edwards

As a constitutional scholar, long-time law teacher, and fervent advocate of the First Amendment, I am not surprised by the conclusions that I have reached. But, as a father and step-father of four children, the husband of a trial judge in Washington, D.C. who works with the perpetrators and victims of juvenile violence every day, and an Afro-American who has watched the younger generation of his race slaughtered by the blight of violence and drugs in the inner-cities of America, I am disappointed that more regulation of violence is not possible. Like many parents of my vintage, I believe, in my gut, that there is no doubt that the trash that our children see as "entertainment" adversely affects their future, either because they mimic what they see or become the potential victims in a society littered with immorality and too much callous disregard for human life. It is no answer for a parent like me to know that I can (and will) regulate the behavior of my children, because I know that there are so many other children in society who do not have the benefit of the nurturing home that I provide. If I could play God, I would give content to the notion of "gratuitous" violence, and then I would ban it from the earth. I am not God, however, so I do not know how to reach gratuitous violence without doing violence to our Constitution.

LENGTH: 39584 words

ARTICLE: Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance

Leslie Gielow Jacobs*

-----Footnotes-----

*Associate Professor of Law, McGeorge School of Law, University of the Pacific. B.A. 1982, Wesleyan University; J.D. 1985, University of Michigan. Thanks to Alan Brownstein, Joshua Dressler, and John Sims for providing helpful criticism on earlier drafts of this Article, and to Paul Fuller for his help in computerizing the diagrams.

-----End Footnotes-----

SUMMARY:

... Many federal and state statutes contain penalty enhancement sections that are targeted at eliminating specific conduct, but that have the additional impact of affecting free speech when applied to civilly disobedient lawbreaking. ... For the proposition that physical assault is not expressive conduct, the Mitchell Court cited Roberts v. United States Jaycees, remarking on the constitutionality of anti-discrimination legislation that "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection," and NAACP v. Claiborne Hardware Company, noting in the context of an economic boycott designed to coerce local merchants to respect civil rights that "[t]he First Amendment does not protect violence." ... In fact, penalty enhancement provisions, as applied to the segregable class of expressive conduct, have the same effect as would a provision that enhanced the punishment for any crime if it was committed "for the purpose of political protest." ... In the few instances where protesters engage in or credibly threaten personally directed violence through their political expression so that their targets reasonably "fear" for their safety, the government interest in punishing the additional harms that come from concerted action may justify a penalty enhancement. ... Yet crucial to the balance in any particular RICO application is the recognition that civil disobedience has expressive value in the clarified free speech clause model. ...

TEXT:
[*185]

Many federal and state statutes contain penalty enhancement sections that are targeted at eliminating specific conduct, but that have the additional impact of affecting free speech when applied to civilly disobedient lawbreaking.

Professor Jacobs criticizes the current free speech clause model, which does not distinguish between expressive and nonexpressive lawbreaking. Professor Jacobs then suggests clarifications to the current free speech clause model, which bring the social value of civilly disobedient lawbreaking into the constitutional balance. She concludes that the constitutionality of penalty enhancements, as applied to acts of civil disobedience, should depend upon a particularized balance that weighs the government's interest in uniform penalty enhancement against the lawbreaking's expressive value.

I. Introduction

Breaking the law can be a powerful means of expression its emotive appeal n1 and breadth of impact n2 are far greater than if the message were [*186] delivered by lawful means. n3 Still, the free speech clause of the First Amendment holds no sanctuary for violators. n4 So long as a law is directed at eliminating harmful conduct rather than suppressing disfavored ideas, n5 the government may punish n6 or hold civilly responsible, n7 those who break it. n8 The fact that a particular criminal's purpose in breaking the law was to publicize an [*187] injustice is no defense to the prosecution. n9 Rather, accepting the penalty is part of the dissident's speech. n10 "Is your law's moral grounding just in light of the sacrifice that I am willing to endure in order to register my opposition to it?" the convicted protesters dramatically ask the majority as they are led off to jail. n11

-Footnotes-

n1 See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (stating in the context of word choice that "[w]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated").

n2 See, e.g., *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200, 1205 n.9 (D. Utah 1986) ("While the mass media often pays little attention to unorthodox or unpopular ideas, dramatic displays of action capture media attention when words alone will not."); Dan Harrie, S.L. Councilwoman Leads Protest of JEDI Women at Capitol, Salt Lake Trib., Feb. 15, 1996, at A9 (quoting councilwoman who participated in House gallery protest to say, "Sometimes you have to do this kind of thing to get their attention, and we got their attention"); Dan Levy, A Decade of AIDS Activism Changed America And ACT-UP, S.F. Chron., Mar. 22, 1997, at A1 ("Angered by widespread indifference and prejudice against people with AIDS, the activist group [ACT-UP] used high-impact media tactics to radically alter the way government and the pharmaceutical industry responded to the epidemic."); Marilyn Martinez, Learning the Ropes of Civil Disobedience, L.A. Times, Dec. 7, 1996, at B1 (citing an environmental activist for the observation that "[p]articipation by celebrities [in the protests] seems to have helped by landing issues on the evening news").

n3 See, e.g., John Hart Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev.

1482, 1489-90 (1975) ("[Much] of the effectiveness of [draft card burner] O'Brien's communication . . . derived precisely from the fact that it was illegal. Had there been no law prohibiting draft card burning, . . . he might have attracted no more attention than he would have by swallowing a goldfish.").

n4 See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) ("While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered."); Adderly v. Florida, 385 U.S. 39, 48 (1966) (rejecting the assumption, in the context of a peaceful trespass protest at the county jail, "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please"); Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1349 (3d Cir. 1989) (instructing the jury that "[t]he same constitution that protects the defendants' right to free speech, also protects the Center's right to abortion services and the patients' rights to receive those services").

n5 See Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (distinguishing statutes "aimed at conduct unprotected by the First Amendment" from government actions "explicitly directed at expression" for purposes of constitutional analysis); United States v. O'Brien, 391 U.S. 367, 377 (1968) (establishing a four-part test for examining government actions ostensibly directed at conduct but which incidentally impact expression, the application of which hinges on determining that "the governmental interest is unrelated to the suppression of free expression"); see also *infra* notes 57 69 and Diagram A.

n6 Civil disobedient protestors may be subject to state criminal prosecution, such as for disorderly conduct, trespass, or some more specific property crime, or federal criminal prosecution, when their protest activities fall within the definition of federal crimes. See Bruce Ledewitz, Perspectives on the Law of the American Sit-in, 16 Whittier L. Rev. 499, 533-69 (1995) (listing the forms of state and federal liability for nonviolent sit-ins).

n7 Protest activities may lead to state tort liability, which may include liability for punitive damages, see, e.g., Operation Rescue-National v. Planned Parenthood of Houston & Southeast Tex., Inc., 937 S.W.2d 60 (1996) (awarding actual and punitive damages based upon a jury finding of liability for civil conspiracy, tortious interference, and invasion of privacy and property rights) or civil liability under state or federal statutes, see 18 U.S.C. 1961 1968 (1984) (providing for civil liability); 8 U.S.C. 248 (1970) (same).

n8 See discussion *infra* Part II.B (detailing how the government usually wins under the lenient O'Brien standard).

n9 See, e.g., National Org. for Women v. Scheidler, 968 F.2d 612, 616 (7th Cir. 1992) ("Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior." (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1981))); see also United States v. Schoon, 971 F.2d 193 (9th Cir. 1991) (articulating a four-pronged test for invocation of the necessity defense and reasoning that violators who engage in indirect civil disobedience cases, breaking a law that is not the direct object of protest, will never qualify). But see Kenneth R. Bazinet, UPI, Apr. 16, 1987, available in LEXIS, Nexis Library, UPI File

(reporting the acquittal of Amy Carter and Abbie Hoffman of trespass and disorderly conduct during a protest of illegal CIA activities based upon the necessity defense).

n10 See, e.g., United States v. Dorell, 758 F.2d 427, 432 (9th Cir. 1985) (imposing punishment on a civil disobedient, noting "the validation of [the protest's] sincerity that lawful punishment provides"); Steven M. Bauer & Peter J. Eckerstrom, Note, The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience, 39 Stan. L. Rev. 1173, 1184 89 (1987) (summarizing the reasons that have been advanced as to why willingness to accept punishment is a necessary element of civil disobedience); Editorial, Press-Enterprise (Riverside, Cal.), Dec. 5, 1996, at A10 (commenting upon recent student protests at University of California, Riverside, and noting "[t]he fundamental rule . . . that those who do the crime of conscience are prepared to do the time").

n11 See, e.g., John Rawls, A Theory of Justice 366 (1971). Rawls states that: By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way [as a persistent and deliberate violation of the public conception of justice], or whether, in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority. Id.

- - - - -End Footnotes- - - - -

Thus, the Constitution does not protect civil disobedients from imposition of punishment for their crimes. n12 Such a constitutional principle would subvert the rule of law upon which this constitutional democracy is based. n13 But what of enhanced punishment for the illegal act based upon the perpetrator's motive or means? Does it follow that augmenting punishments in particular instances [*188] that may include civil disobedience poses no greater constitutional problem than does imposing the base penalty for the unlawful action?

- - - - -Footnotes- - - - -

n12 See, e.g., Curtis Publ'g Co. v. Butts, 388 U.S. 130, 148 (1967) (noting that freedom of speech does not include freedom to trespass).

n13 See, e.g., Dorrell, 758 F.2d at 435 (Ferguson, J., concurring) ("Regardless of the means chosen, those who practice civil disobedience do not challenge the rule of law or the incidents of an ordered society."); United States v. Berrigan, 283 F. Supp. 336, 339 (D. Md. 1968) ("No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief.").

- - - - -End Footnotes- - - - -

According to current constitutional doctrine, n14 various types of penalty enhancements-whether through victim-targeting or means-targeting statutory provisions or general state law punitive damages rules-are presumptively constitutional because their underlying trigger is unlawful conduct

unprotected by the First Amendment's free speech guarantee. n15 As the reasoning goes, simply enhancing a legitimate punishment does not pose any additional constitutional problem so long as the overall enhancement is not aimed at suppressing a particular point of view. n16

-Footnotes-

n14 See discussion infra Part II.B (explaining and diagramming the current free speech clause model).

n15 See *Wisconsin v. Mitchell*, 508 U.S. 476, 486-87 (1992) (citing the fact that the penalty enhancement statute at issue aimed at unprotected conduct as one reason for its validity); see also discussion infra Part II.B (explaining how Mitchell's analysis of the hate crime penalty enhancement provision at issue provides a framework that establishes the presumptive constitutionality of other types of penalty enhancements).

n16 See *Mitchell*, 508 U.S. 485, 488 (acknowledging that "the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim," but distinguishing the statute's legitimate motive target from illegitimate punishment based upon "mere disagreement with offenders' beliefs or biases").

-End Footnotes-

Consider the following examples, however:

1. A group of state university students decide to protest the almost all-white faculty composition, which they believe to be the result of hiring decisions in violation of state and federal statutory and constitutional anti-discrimination guarantees. As a means of protest, they choose a white professor whom they believe to epitomize the faculty's racial composition and quietly walk into his office and sit. n17 When asked to leave, they refuse. They are arrested for [*189] trespass, which bears a maximum penalty of three months' imprisonment or a \$ 500 fine under state law. However, because they "[i]ntentionally select[ed] the . . . property . . . affected by the crime . . . because of the race [of the] . . . occupant of that property," their ordinary misdemeanor penalty is "revised" to a maximum fine of \$ 10,000 or a maximum one year of imprisonment. n18

-Footnotes-

n17 Building occupation is a common means of student protest. See, e.g., Ann Imse, *Illiff Chapel No Sanctuary for Students*, *Rocky Mountain News*, May 31, 1997, at 4A (noting that divinity school students occupy chapel to protest tenure denial and racism); Edmund Lee, *Race and Class: Inside the Columbia Student Movement*, *Village Voice*, Apr. 23, 1996, at 12 ("Some 100 students are slumped around the marble-and-oak lobby of Columbia University's main college building, which they have occupied and blockaded for three days, the culmination of a school year's worth of agitation and protest for an ethnic studies department."); Amy Wallace & Diana Marcum, *Prop. 209 Foes Seize Building at UC*

Riverside, L.A. Times, Nov. 12, 1996, at A3 (stating that students occupy building to protest implementation of anti-affirmative action initiative). Choosing the place of protest for its symbolic significance is almost always a part of trespass protest. See, e.g., Jerry Miller, Anti-Nuclear Rally Planned at Seabrook; Acts of Civil Disobedience May Draw Arrests Saturday, Union Leader, Apr. 24, 1997, at A4 (quoting an anti-nuclear group member, who said of their planned protest at a nuclear plant that "[a]cts of civil disobedience are symbolic acts. . . . Obviously we won't be able to shut the plant down").

n18 Wis. Stat. 939.645 (1996), which was upheld in Wisconsin v. Mitchell, 508 U.S. 476 (1992).

- - - - -Footnotes- - - - -

2. Members of a nationwide anti-abortion women's organization decide to protest the injustice of a Constitution that permits abortion. n19 As a means of protest, they gather in large groups, kneel, and pray in front of abortion clinic entrances. n20 They purposely trespass on clinic property for their prayer in order to advertise the conflict between earthly and heavenly law. n21 Moreover, they notify the media in advance of their planned protest targets in order to maximize the publicity for their message. n22 Every time the group holds a prayer vigil, the clinics are forced to shut down, at least for the hours required [*190] to arrest the protesters and often for the entire day. n23 Clinics targeted for protests lose additional business as clients cancel appointments on nonadvertised days of protest for fear that such protests will nevertheless occur. In one particular incident, the members are arrested and convicted under the Freedom of Access to Clinic Entrances Act (FACE) n24 of obstructing access to the clinic. n25 Whereas the state law trespass penalty would have been a maximum three months in jail or \$ 500 fine, n26 the federal maximum penalties, because these individuals have been convicted of the same offense once before, are \$ 25,000 or eighteen months imprisonment, or both. n27 Because they caused both clinic employees and patients to give up their rights to perform and obtain medical services out of fear, the two trespasses constitute Hobbs Act violations, n28 which together form a "pattern of racketeering activity" n29 under the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970. n30 In addition to establishing the criminal liability, RICO trebles the civil damages that the clinic may recover from the protesters. n31

- - - - -Footnotes- - - - -

n19 This hypothetical combines facts from a number of reports of abortion protests.

n20 See, e.g., Woodall v. Reno, 47 F.3d 656, 657 (4th Cir. 1995) ("Plaintiff Concerned Women for America (CWA) alleges that it is 'the nation's largest pro-family women's organization, with . . . 600,000 members.' CWA says that some of its members pray peacefully 'in front of abortion clinic entrances and nonviolently discourage access to the entrances.');

Veneklase v. City of Fargo, 904 F. Supp. 1038, 1043 (D.N.D. 1995) (protesters pray outside clinic administrator's home); Horizon Health Ctr. v. Felicissimo, 135 N.J. 126, 132 (1994) (weekly prayer vigils outside clinic entrance used as a means of protest); Kenneth Jost, Justices Split on Abortion Protest Zones, The

Recorder, Oct. 17, 1996, at 1 (describing abortion protest injunction case as "aris[ing] from a campaign by New York anti-abortion groups in Rochester and Buffalo that stretched over several years [and] included . . . prayer vigils").

n21 See, e.g., Terry v. Reno, 101 F.3d 1412, 1414 (D.C. Cir. 1996) ("[P]rotesting against abortion 'serves a higher and more compelling purpose than that served by traditional laws against trespass and blocking access to facilities.'"); Anne Kronhauser, An Activist to Her Bone, 1990 Legal Times, July 9, 1990, at 1 ("Anti-abortion protestors believe that a higher divine law permits, even requires, that they disobey judicial orders, and the hard core continues to do so."); Alex Martin, Liers' War on Abortion, Newsday, May 7, 1990, at 3 (quoting an abortion protester: "I told the judge that I would not obey him, but I would obey God's law, and he got very mad at me"); Keith H. Sueker, Anti-Abortion Activists Must Obey Man's Law as Well as God's, Pittsburgh Post-Gazette, May 25, 1993, at B2 (responding to anti-abortion groups' members' claims of "a divine authority that supersedes the law").

n22 See, e.g., Abortion Clinics Gird for Four Days of Protest, St. Louis Post-Dispatch, July 25, 1995, at 8A (noting that abortion clinics prepared for announced-in-advance protests).

n23 See, e.g., Terry, 101 F.3d at 1414 (Anti-abortion protesters participated in "sit-ins" that "did have the effect, temporarily, of interfering with and blocking access to abortion facilities.").

n24 8 U.S.C. 248 (1970).

n25 See Planned Parenthood Ass'n of Southeastern Pa., Inc. v. Walton, 949 F. Supp. 290, 293 (E.D. Pa. 1996) ("[P]rotesters blocking a clinic door as they pray might violate the Act's prohibition on physical obstruction." (quoting American Life League v. Reno, 47 F.3d 642, 653 (4th Cir. 1995))).

n26 See, e.g., Thirty Abortion Opponents Arrested at Arkansas Clinic, N.Y. Times, July 9, 1994, at 10 (noting that this would incur the state law criminal trespass penalty for blocking access to an abortion clinic).

n27 18 U.S.C. 248(b) (1970).

n28 See, e.g., National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 253 n.2 (1994) (noting that these were the allegations in the underlying case, but not reaching the issue of whether they stated a Hobbs Act claim).

n29 18 U.S.C. 1962(c) (1984).

n30 Id. 1961 1968.

n31 Id. 1964(a).

- - - - -End Footnotes- - - - -

3. On the same day as the abortion clinic incident above, a group of six women walk into their own Catholic church in which, with the pastor's permission, a national group dedicated to church reform is scheduled to hold a

meeting. n32 As a means of protesting the organization's reform goals, the [*191] women pray loudly, recite the rosary, and cut the microphone cords, thereby delaying the start of the 200-person meeting. n33 Because the same people had disrupted a similar meeting at a nearby location, police are in attendance, observe the disruption, and arrest the protesters. n34 Like the clinic protesters, the Catholic women are charged with violating FACE, n35 which, although its title refers to "clinics," also imposes its enhanced penalties upon anyone who "by physical obstruction . . . interferes with or attempts to . . . interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship." n36 Although this is only their second such protest, they will be subject to the enhanced "second offense" penalties for the latter action if they are first convicted of the earlier disruption. The two trespasses, aimed at "extorting" the reform organization's right to conduct its business n37 through "force" n38 or "fear," n39 might qualify as Hobbs Act violations and, because "patterned," n40 subject the women to criminal and civil RICO liability. n41

-Footnotes-

n32 This hypothetical is based upon news reports of several such protests by six women calling themselves Les Femmes de Verite (Women of Truth) that took place in the fall of 1995, disrupting meetings of Call to Action, a group that advocated Catholic Church reforms. See Glen Elsasser, Catholic Tradition, Reform Collide, Chi. Trib., Nov. 24, 1995, at 3; Jim Keary, Six of Seven Protesters Must Stand Trial, Wash. Times, Sept. 20, 1995, at C7 [hereinafter Keary, Six of Seven]; Jim Keary, Women Say Church OK'd Trespassing, Wash. Times, Oct. 20, 1995, at C8.

n33 The facts of the actual event are disputed: [T]he arresting officer described a chaotic scene The parish education minister testified that she was spit upon and that wires to a microphone were cut amid the screaming of such epithets as "baby killer" and "gay lover" [The defendants] denied that their actions broke up the meeting, while acknowledging that they talked openly and recited the rosary. Elsasser, supra note 32, at 3.

n34 See Keary, Six of Seven, supra note 32, at C7.

n35 The actual defendants were charged and tried only for state law trespass, which bears maximum penalties of a year in jail and a \$ 2500 fine. See Elsasser, supra note 32, at 3.

n36 18 U.S.C. 248(a)(2) (1970).

n37 See Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1350 (3d Cir. 1989) ("Rights involving the conduct of business are property rights [under the Hobbs Act].").

n38 Cutting the microphone cord might qualify as "force."

n39 Coercive speech plus trespass may meet the "fear" requirement. See Antonio J. Califa, RICO Threatens Civil Liberties, 43 Vand. L. Rev. 805, 828 29 n.122 (1990).

n40 Only two protests can possibly meet the "pattern" requirement if further protests are likely to occur. See Town of West Hartford v. Operation Rescue,

726 F. Supp. 371, 373, 375 (D. Conn. 1989) (finding that two protests had already occurred and that "[t]he Center has been shown to be a likely target for repetition of the demonstrations"), vacated, 915 F.2d 92 (2d Cir. 1990).

n41 The hypothetical protesters might not meet RICO's "enterprise" requirement. Although the definition includes "any individual . . . or group of individuals associated in fact," 18 U.S.C. 1961(4) (1984), lower courts have honed the characteristics to require an ongoing, structured organization that has an existence "beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." United States v. Riccobene, 709 F.2d 214, 224 (3d Cir. 1983). See also id. at 222 ("Enterprise" requires an organized structure.); United States v. Turkette, 452 U.S. 576, 583 (1981) ("Enterprise" must have some other purpose than only committing the predicate acts.); United States v. Lemm, 680 F.2d 1193, 1199 (8th Cir. 1982) ("Enterprise" requires a common purpose.).

- - - - -End Footnotes- - - - -
[*192]

4. Six members of a group dedicated to environmental preservation decide to protest what they believe to be too lax United States Forest Service logging policies. n42 As a means of protest, they enter a Forest Service-owned logging road, climb onto privately owned logging equipment, chain themselves to it, and affix a banner depicting trees being turned into sawdust. n43 The demonstration is widely publicized. n44 Because of the protesters' actions, part of the private company's logging operations are suspended for most of one day. n45 The protesters are arrested, convicted of criminal mischief, sentenced to two weeks in jail, and required to pay a \$ 250 fine and full restitution to the private company. n46 The company files a civil trespass to chattels action. n47 The protesters concede liability for compensatory damages although they dispute the amount. n48 The jury returns a verdict for the company, awarding approximately \$ 5700 in compensatory damages. n49 Because it also finds it appropriate to "punish" and "deter" the protesters and discourage them and others from engaging in "wanton misconduct," n50 the jury also awards \$ 25,000 in punitive damages. n51

- - - - -Footnotes- - - - -

n42 See Huffman & Wright Logging Co. v. Wade, 857 P.2d 101 (1993).

n43 The banner also proclaimed "FROM HERITAGE TO SAWDUST-EARTH FIRST!" Id. at 105.

n44 See id.

n45 See id.

n46 See id.

n47 The company alleged that defendants committed a trespass by "intentionally and wrongfully interfering with and depriving Plaintiff of the use and possession of logging equipment." Id.

n48 See id.

n49 The exact amount is \$ 5717.34, whereas the company had asked for \$ 7818.26. See id. at 105 06.

n50 Id. at 118 (Unis, J., dissenting) (reciting the standards under which the jury awarded punitive damages).

n51 See id. at 106.

- - - - -End Footnotes- - - - -

These particular applications of presumptively valid penalty enhancement provisions should be troubling. While it is true that the enhancements apply to unlawful, constitutionally unprotected conduct that causes nonspeech-related [*193] harms, in another important respect the above examples are different than the prototypes that prompted the various types of enhancements. Specifically, in the above examples the characteristics that trigger application of the enhancements are not accurate proxies for individually or socially "bad" behavior above and beyond the base act of lawbreaking. In fact, in the above instances, the triggering characteristic acts in reverse, identifying and more harshly punishing particular acts from among the many instances of the same type of unlawful conduct because of its expressive motivation. That a speech purpose can be the reason for an enhanced penalty in a certain, identifiable class of cases should prompt free speech clause scrutiny of the enhancement in these applications;

Part II describes the current state of the law under which penalty enhancements atop civil disobedience presumptively pose no free speech clause problem. Part II.A describes and diagrams the Court's current free speech clause model. Part II.B places civil disobedience within it. Part II.C explains the judicial analysis of penalty enhancements that flows from the current free speech model. This section also details the Court's recent analysis of a hate crime enhancement and demonstrates how its reasoning has been applied by lower courts to find other types of penalty enhancements-the federalizing enhancement of FACE and RICO, and state law punitive damages awards-to satisfy the free speech clause guarantee, even as applied to political protests.

Part III describes and diagrams a clarified free speech model under which civil disobedience is recognized as socially valuable expression and under which penalty enhancements added to such activities receive the scrutiny that the free speech clause's spirit requires. Part III.A identifies three ambiguous points in the current free speech clause model and proposes analytically coherent clarifications that create a clarified free speech clause model. Parts III.B and III.C, respectively, locate civil disobedience and penalty enhancements within this clarified model.

Part IV explains how penalty enhancements apply to civil disobedience under the clarified free speech clause model. Part IV.A argues that numerous factors in the constitutional balance presumptively protect civil disobedience from penalty enhancement. Nevertheless, a government showing that the expressive act at issue indeed results in special noncommunicative harms, distinguishing it from the base acts of lawbreaking that lack the enhancement trigger, or that a strong interest in uniform enforcement of the enhancement may justify it in a particular application. Part IV.B balances civil disobedience's expressive value with the government's interest in the context of the various types of penalty enhancements discussed in the Article.

[*194]

II. Civil Disobedience and Penalty Enhancements Within the Current Free Speech Clause Model

A. The Current Free Speech Model

Constitutional theory divides the realm of potentially protected "speech" under the free speech clause of the First Amendment into two fundamental categories. The first category, speech or pure speech, n52 covers expression through words, either verbally or in writing; n53 it also covers activities that in many manifestations are means of communication, even though that is not always their purpose. n54 The line between speech and conduct has evolved over the years, mostly by means of pronouncement. n55 Its exact boundaries continue to be "sometimes hazy." n56

- - - - -Footnotes- - - - -

n52 The Court tends to use these terms interchangeably. Compare Procunier v. Martinez, 416 U.S. 396, 411 (1974) (describing O'Brien's draft card burning as involving "'conduct' rather than pure 'speech'") with United States v. O'Brien, 391 U.S. 367, 376 (1968) (distinguishing "speech" and "conduct").

n53 See Gerald Gunther, Individual Rights in Constitutional Law 957 58 (5th ed. 1991); see also Texas v. Johnson, 491 U.S. 397, 404 (1989) (assuming that the First Amendment "speech" protection extends to the "spoken or written word").

n54 See Laurence H. Tribe, American Constitutional Law 829 30 (2d ed. 1988) (listing these activities as "outdoor distribution of leaflets or pamphlets; door-to-door political canvassing; solicitation of contributions, wherever it takes place; mailbox-stuffing; picketing; civil rights demonstrations and boycotts; communicating with government; putting up outdoor posters or signs").

n55 Compare Cox v. Louisiana, 379 U.S. 559, 563 64 (1965) (Protest demonstration is conduct.) with Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (Protest demonstration is a "pristine and classic form" of free speech activity.); compare O'Brien, 391 U.S. at 376 (stating that draft card burning is conduct) with Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 505 (1969) (wearing black armbands to protest the Vietnam War is "closely akin to pure speech").

n56 Brown v. Hartlage, 456 U.S. 45, 55 (1982); see also Tribe, supra note 54, at 827 ("[T]he Supreme Court has never articulated a basis for its distinction; it could not do so, with the result that any particular course of conduct may be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit.").

- - - - -End Footnotes- - - - -

The other broad category, conduct, breaks down into two subcategories, expressive conduct and nonexpressive conduct. n57 To be expressive, conduct must at least be intended to communicate a message. n58 But this alone is not [*195] sufficient. n59 The message must be reasonably likely to be understood by an audience. n60 Nude dancing in a private club, when claimed by its performers and audience to convey a message, may be expressive conduct, although "only marginally so." n61 Physical assault, however, cannot "by any stretch of the imagination" be constitutionally protected expressive conduct despite the fact that its perpetrator may intend to convey a message that an audience might reasonably understand. n62 Thus, like the boundary between speech and conduct, the line between expressive and nonexpressive conduct remains murky.

- - - - -Footnotes- - - - -

n57 See Arcara v. Cloud Books, Inc., 478 U.S. 697, 703, 705 (1986) (distinguishing cases "involving governmental regulation of conduct that has an expressive element" from activities that "manifest[] absolutely no element of protected expression").

n58 See Spence v. Washington, 418 U.S. 405, 410 11 (1974) (per curiam) (requiring as the first prong of its two-prong test for symbolic conduct that there be "[a]n intent to convey a particularized message").

n59 See O'Brien, 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

n60 See Spence, 418 U.S. at 410 11 (requiring as the second in its two-prong test for symbolic conduct a likelihood "that the message would be understood by those who viewed it").

n61 Barnes v. Glen Theater, Inc., 501 U.S. 560, 566 (1991).

n62 See Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993).

- - - - -End Footnotes- - - - -

Free speech clause analysis differs according to the category of activity affected by government action. Government restriction of speech activities n63 generally triggers more rigorous scrutiny than government restriction of conduct. n64 The exception is when the government, although ostensibly regulating conduct, targets its expressive element. n65 This governmental purpose [*196] to restrict expression invokes the more rigorous "speech"

analysis in the constitutional framework. n66

-Footnotes-

n63 Government restriction of individual speech must be distinguished from speech by the government, either through its figureheads or through funding of expression, which, because it does not "abridge [individual's] freedom of speech," does not invoke free speech clause review. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."); Rust v. Sullivan, 500 U.S. 173, 193 (1991). In Rust, the Supreme Court stated that: The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. Id.

n64 See Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

n65 See id. (noting that the government may not "proscribe particular conduct because it has expressive elements"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (applying its lenient balancing test to a government regulation that incidentally restricts expressive conduct when "the governmental interest is unrelated to the suppression of free expression"); Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1176, 1202 (1996) (noting that the requirement that a government regulation of conduct be unrelated to the suppression of free expression is "a precondition for the application of the test in the first instance").

n66 See, e.g., United States v. Eichman, 496 U.S. 310, 317 18 (1990) (observing that because the Flag Protection Act of 1989 "suffer[ed] from the . . . fundamental flaw [of] suppress[ing] expression out of concern for its likely communicative impact . . . [it] must be subjected to 'the most exacting scrutiny'" (quoting Boos v. Barry, 485 U.S. 312, 321 (1988))).

-End Footnotes-

According to the Court's articulations, even when the government does not target its expressive element, there is a difference between the analysis of expressive and nonexpressive conduct. n67 In fact, the Court has claimed to apply the same balancing test to government actions that restrict expressive conduct as it does to government actions that restrict the time, place, or manner of speech activities without respect to their content. n68 In application, however, there is a real difference between the balancing test used for content neutral speech restrictions and restrictions of expressive conduct, but there is no real difference between the analysis of expressive and nonexpressive conduct restrictions. n69

-Footnotes-

n67 If conduct is nonexpressive, it is not "speech" and therefore does not trigger free speech clause analysis. See Mitchell, 508 U.S. at 484 86 (implying that because a physical assault cannot be expressive conduct, a penalty for that act alone would not trigger free speech clause analysis). If conduct is at least presumptively expressive, the Court purports to balance the government's interest in regulating the conduct against the "incidental restriction on alleged First Amendment freedoms." O'Brien, 391 U.S. at 377.

n68 See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) ("[T]he [O'Brien] test 'in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.'" (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984))).

n69 See, e.g., Ely, supra note 3, at 1488 89 (distinguishing between "serious balancing" that occurs when a content neutral law restricts "relatively familiar" means of expression, which the Court categorizes as speech, from the highly deferential standard that applies to activities that the Court categorizes as expressive conduct); Keith Werhan, The O'Briening of Free Speech Methodology, 19 Ariz. St. L.J. 635, 641 (1987) (noting that the expressive conduct analysis offers "little more than the minimal rational-basis test applied in economic due process cases").

- - - - -End Footnotes- - - - -

Where conduct is deemed expressive, three prongs remain in the articulated test: whether the action is within the government's power, whether the action serves an important or substantial governmental purpose, and whether the incidental restriction of speech is no greater than necessary to serve the [*197] government's purpose. n70 The first prong is implicit in any constitutional inquiry. n71 And, although the second and the third prong sound more demanding than the rational basis standard, which requires only a legitimate government purpose and a reasonable means/end fit, in the Court's application they are not. n72 The judicial inquiry as to purpose does not extend beyond its legitimacy. n73 Once the legitimacy of a conduct-directed purpose is established, the means, unless perversely chosen without regard to their end, will undoubtedly be reasonably tailored to serve it. n74 This final conclusion then justifies the restriction of expression that, because the government action is not [*198] targeted at expression, is only "incidental." n75 Thus, once it is determined that a government regulation of conduct is not directed at expression, whether the conduct is expressive or nonexpressive does not significantly affect the analysis. The inquiry in both instances approximates the deferential rational basis standard.

- - - - -Footnotes- - - - -

n70 See O'Brien, 391 U.S. at 377.

n71 See Dorf, supra note 65, at 1202 ("Prong one [of the expressive conduct test] is not properly part of First Amendment law, because all regulation must be within the government's constitutional power.").

entirely suppress unprotected speech n81 and may suppress less protected speech subject to a less [*199] rigorous balancing inquiry n82 because the Court has determined that the particular type of speech within these limited categories is of lesser social value than fully protected speech. n83

-Footnotes-

n76 See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

n77 See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992) ("As a facially content-based restriction on political speech in a public forum, [a Tennessee law creating a 100-foot solicitation-free zone around polling places] must be subjected to exacting scrutiny"); *R.A.V.*, 505 U.S. at 395 ("[T]he 'danger of censorship' presented by a facially content-based statute requires that the weapon be employed only where it is 'necessary to serve [an] asserted [compelling] interest.'" (quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (plurality opinion))).

n78 See *Perry Educators' Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (distinguishing between quintessential public forums and limited public forums, to which strict scrutiny review of content discriminations apply, and nonpublic forums, which the government "may reserve . . . for its intended purposes, communicative or otherwise, as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view").

n79 These categories include speech that incites imminent lawless action, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969), fighting words, see *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), libel, see *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964), and obscenity, see *Miller v. California*, 413 U.S. 15 (1973).

n80 These categories include sexually explicit speech, see *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Young v. American Mini-Theaters*, 427 U.S. 50 (1976), and commercial speech, see *Central Hudson Gas v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

n81 See *R.A.V.*, 505 U.S. at 383 (clarifying that content discriminations beyond the "distinctively proscribable content" that defines the class of unprotected speech invoke free speech clause scrutiny); *Chaplinsky*, 315 U.S. at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

n82 See, e.g., *Central Hudson*, 447 U.S. at 569-70 ("'The critical inquiry' is whether the Commission's complete suppression of [commercial] speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest.").

n83 See *R.A.V.*, 505 U.S. at 383 ("[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content"); *Chaplinsky*, 315 U.S. at 572 (stating that such

expression is "of such slight social value as a step to truth than any benefit that may be derived from them is clearly outweighed by the social interest in order and morality").

- - - - -End Footnotes- - - - -

Only a compelling interest and means narrowly tailored to meet it will justify a content-based regulation of protected speech. n84 Almost every government action will fail this demanding test. n85 Where a government action is content-neutral, regulating the time, place, or manner of speech rather than its message, the analysis is a balancing test n86 that weighs the legitimacy and importance of the government interest, n87 the availability and adequacy of alternate means for the government to promote the interest, n88 the speech-reducing impact of the government action, n89 the availability and adequacy of alternate means of speech, n90 traditions associated with the place of [*200] expression has it traditionally been open for public communications? n91 and the affect of the regulation on discrete groups does the restriction disproportionately silence speakers without the means to pay for more expensive modes of communication? n92 Government actions fall on either side of this test with reasonable frequency. n93 Diagram A graphically portrays the current free speech clause model. [*201] Diagram A

[SEE TABLE IN ORIGINAL]

- - - - -Footnotes- - - - -

n84 See *Boos v. Barry*, 485 U.S. 312, 321 (1988).

n85 See *R.A.V.*, 505 U.S. at 382 (holding that "content-based restrictions are presumptively invalid"). But see *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding a state law 100-foot no-solicitation zone around polling places under the strict scrutiny standard).

n86 See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 526-27 (1981) (Brennan, J., concurring) (assuming that an ordinance banning almost all outdoor billboards is content-neutral, it is still necessary "to assess the 'substantiality of the governmental interests asserted' and 'whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment" (quoting *Schad v. Mt. Ephram*, 452 U.S. 61, 70 (1981); *Martin v. City of Struthers*, 319 U.S. 141, 143-49 (1943))).

n87 See, e.g., *Schneider v. State*, 308 U.S. 147, 161 (1939) (noting the need "to appraise the substantiality of the reasons advanced in support of the regulation").

n88 See *id.* at 162 ("There are obvious methods of preventing littering [other than prohibiting the distribution of leaflets]."); *Martin*, 319 U.S. at 146-48 (noting that rather than prohibiting any door-to-door solicitation for the purpose of [distributing] handbills, "the city [c]ould make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed").

n89 See City of Ladue v. Gilleo, 512 U.S. 43, 54 (1994) ("Ladue has almost completely foreclosed a venerable means of communication that is both unique and important.").

n90 See id. at 56 (noting that "even regulations [of] time, place, or manner [must] 'leave open ample alternative channels for communication'" (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984))); Metromedia, 453 U.S. at 562-63 (Burger, J., dissenting) ("The messages conveyed on San Diego billboards [can] . . . reach an equally large audience through a variety of other media . . ."); Kovacs v. Coopers, 336 U.S. 77, 89 (1949) (noting that the anti-noise ordinance at issue did not "restrict the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers").

n91 See City of Ladue, 512 U.S. at 58 ("A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to speak there."); Kovacs, 336 U.S. at 87 ("City streets are recognized as a normal place for the exchange of ideas . . ."); Hague v. C.I.O., 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

n92 See City of Ladue, 512 U.S. at 57 (Residential signs "are an unusually cheap and convenient form of communication."); Martin, 319 U.S. at 146 (Door-to-door solicitation "is essential to the poorly financed causes of little people.").

n93 See City of Ladue, 512 U.S. at 58-59 (invalidating residential no-sign); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994) (upholding and invalidating parts of an injunction against anti-abortion protesters under an elevated time, place, and manner standard); Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding anti-noise ordinance); Metromedia, 453 U.S. at 517-21 (invalidating no-billboard ordinance).

- - - - -End Footnotes- - - - -

[*202]

B. The Place of Civil Disobedience in the Current Free Speech Model

Civil disobedience is expression conveyed through the means of breaking the law. n94 Although words may be part of civil disobedience, its most fundamental message is the symbolic statement that comes from deliberately illegal action. n95 Thus, according to the Court's speech/conduct dichotomy, lawbreaking is conduct. n96

- - - - -Footnotes- - - - -

n94 See, e.g., Rawls, supra note 11, at 366 ("One may compare [civil disobedience] to public speech . . ."); Ernest van den Hagg, Disobedience and the Law, 21 Rutgers L. Rev. 27, 27 (1966) ("[C]ivil disobedience [occurs] when

a law is deliberately disobeyed to publicly demonstrate opposition, on moral grounds, to laws or policies of the government.").

n95 See Peter Meijes Tiersma, Nonverbal Communication and the Freedom of "Speech", 1993 Wis. L. Rev. 1525, 1586 (differentiating "ordinary violations of law" from "disobedience [that is] communicative").

n96 See United States v. O'Brien, 391 U.S. 367, 382 (1968) (analyzing draft card burning as conduct).

- - - - -End Footnotes- - - - -

Exactly how the Court's analysis would proceed after this initial categorization is less clear. Under its two-pronged test that looks to speaker intent and audience perception, n97 civil disobedience should, by definition, be expressive conduct. n98 The Court's recent implication that physical assault cannot be expressive conduct, n99 however, casts doubt on this conclusion because it could be read to lump "other types of potentially expressive activities that produce special harms distinct from their communicative impact" n100 into this conclusion-specifically, all acts that break a nonspeech-directed law. n101 Thus perhaps civil disobedience would be classified as per se nonexpressive [*203] conduct because it produces the noncommunicative harms that stem from the functional act of breaking the law, n102 and the free speech clause inquiry would be over. n103

- - - - -Footnotes- - - - -

n97 See Spence v. Washington, 418 U.S. 405, 408-15 (1974).

n98 See, e.g., Morris Keeton, The Morality of Civil Disobedience, 43 Tex. L. Rev. 507, 508 (1965) ("[The] act of civil disobedience [is] . . . an act of deliberate and open violation of law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in the society.").

n99 See Wisconsin v. Mitchell, 508 U.S. 476, 483 (1993).

n100 Id. at 484 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

n101 Like the Supreme Court, lower courts seem often to merge the expressive/nonexpressive and protected/unprotected categorizations. See, e.g., National Org. for Women v. Scheidler, 968 F.2d 612, 616 (7th Cir. 1992) ("Although the defendants' acts generated publicity which they may have hoped would influence governmental actors, this tangential contact is not sufficient to invoke First Amendment protection for otherwise criminal behavior."). Although concurring in the reversal of the decision on appeal, Justices Souter and Kennedy echoed the theme that illegal action is outside the First Amendment without distinguishing between the expressive/nonexpressive and protected/unprotected categorizations. See National Org. for Women v. Scheidler, 510 U.S. 249, 264 (1994) (repeatedly stating that the application of RICO to acts of political protest would pose a constitutional problem if it chilled "fully protected" activity).

n102 Even trespassory protests that result in no property damage invade property rights, which is a distinct, noncommunicative harm. The interest in exclusive possession of land is distinct from the interests in physical integrity and actual enjoyment of the land. . . . The rightful possessor may insist that others not enter the land even if the possessor is not physically present on the land, is not using it, and is not harmed in any tangible way by another's entry or use. Dan B. Dobbs, Law of Remedies 786-87 (2d ed. 1993).

n103 See Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986) (noting that free speech clause analysis does not apply "to a statute directed at imposing sanctions on nonexpressive activity"). The minimum economic due process rational basis scrutiny would remain, as it does for any government action.

- - - - -End Footnotes- - - - -

But under the current free speech model, the distinction between expressive and nonexpressive conduct does not really matter. Even if the Court was willing to view civil disobedience as expressive conduct, free speech clause analysis would terminate almost as quickly. n104 As noted above, the only question that triggers any substantial level of analysis of conduct-directed government action is whether that action is directed at the speech component of the impacted conduct. n105 If so, the government's action becomes highly suspect. If not, judicial deference kicks in-the action is valid according to an inquiry that is the functional equivalent to rational basis scrutiny. n106

- - - - -Footnotes- - - - -

n104 This perhaps explains why the Court so carelessly lumped the expressive/nonexpressive and the protected/unprotected categorizations together in Mitchell careful analysis of the first question did not matter because the conclusion that the conduct was ultimately unprotected was so clear.

n105 See supra notes 65 66 and accompanying text.

n106 See discussion supra Part II.A.

- - - - -, - - -End Footnotes- - - - -

This expressive conduct model leaves no place to consider or weigh the value of the speech lost when the government prohibits civilly disobedient lawbreaking. n107 Only a government speech-directed motive prompts substantial analysis. The civil disobedient's protest, however, is not that the law broken is unconstitutionally speech-directed. To the contrary, it is most often a nonspeech-directed government action that the civil disobedient protests. A motivating reason for the protest may well be the precision of fit between the government's ends and means and the law's effectiveness in bringing about its intended nonspeech-related result. Moreover, the means of lawbreaking is often [*204] a concession that current legal limits on the scope of government power are insufficient to constrain it in the way the civil disobedient believes appropriate. n108 Thus, the same factors that motivate the civil disobedient's protest are what validate the government action in the current free speech

clause analysis.

-Footnotes-

n107 See, e.g., Werhan, supra note 69, at 641 ("There is no speech side to the Court's balance.").

n108 See, e.g., Gene Warner, Activists Will Take Case to Public with Lecture About Government Abuse, Civil Disobedience, Buffalo News, Mar. 23, 1997, at 6B (Civil disobedience advocates lecture on the topic "When the law is wrong, when the government is a bully, what can you do?").

-End Footnotes-

C. The Place of Various Types of Penalty Enhancements Within the Current Free Speech Clause Model

Several broad principles from the current free speech model guide judicial analysis of penalty enhancement provisions. The first is that judicial scrutiny under the free speech clause is appropriate only if the government action genuinely impacts expression. Under the speech/conduct dichotomy, penalty enhancement provisions apply to base conduct that breaks a preexisting law. In most instances, such lawbreaking is not expression. Rather, it is individually and socially harmful activity engaged in for nonspeech-related reasons that the government has the right and responsibility to punish and deter. Thus, in most applications, penalty enhancements work upon base acts of lawbreaking that have neither the purpose nor the effect of suppressing expression.

A second principle from the current free speech model that guides judicial analysis of penalty enhancements is that a governmental intent to suppress expression is the most fundamental constitutional evil. n109 Thus, even when an act of lawbreaking is allegedly expression, if, as will almost always be the case, its definition is expression-neutral, government intent to suppress expression will be lacking. n110 According to the current free speech model, all that will remain is the far lesser evil of an unintended impact on expression. n111 [*205] Moreover, because the base act is illegal for nonspeech-related reasons, it presumptively results in nonspeech-related harms that the government may lawfully prohibit. Under the current free speech clause model, these legitimate governmental objectives fulfilled by defining certain acts as unlawful outweigh any alleged impact on expression resulting from those definitions.

-Footnotes-

n109 See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) ("The principal inquiry . . . in speech cases . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."); see also Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413,

413-517 (1996) (arguing "that First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives").

n110 See, e.g., *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

n111 See, e.g., *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.").

- - - - -End Footnotes- - - - -

The third important analytical principle from the current free speech clause model is that the breadth of scope of a penalty enhancement provision helps insulate it from constitutional challenge. n112 Although a broad penalty enhancement provision may suppress more potentially expressive actions than a more narrow one, its breadth provides the crucial guarantee that the government did not purposely target particular viewpoints for suppression. n113

- - - - -Footnotes- - - - -

n112 See, e.g., *James Weinstein, Hate Crime and Punishment: A Comment on Wisconsin v. Mitchell*, 73 Or. L. Rev. 345, 363-64 (1994) (distinguishing an enhancement "that expressly refers to the defendant's views on abortion, a highly charged political issue" or one "that expressly referred to crimes committed in opposition to the United States' military's reprisals against Iraq" from "the Wisconsin law at issue in Mitchell" that "does not refer to political ideology, but rather to selection of the victim on the basis of race, religion, or other protected status" and therefore may include those who act from other than racist motives).

n113 See *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("[A]n exemption from an otherwise permissible regulation of speech may represent a government 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978))); *Carey v. Brown*, 447 U.S. 455, 459-71 (1980) (asserting that regulatory distinctions between different kinds of speech may violate the Equal Protection Clause); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-102 (1972) (same).

- - - - -End Footnotes- - - - -

Both these principles and the facts to which penalty enhancements are usually applied combine to form a strong judicial presumption that particular penalty enhancements are consistent with the Constitution's free speech guarantee.

1. Hate Crime Penalty Enhancement Statutes

The Court recently reviewed the quintessential penalty enhancement-a legislative decision to augment the punishment for certain acts when the perpetrator commits them for a particular reason. The state statute at issue in Wisconsin v. Mitchell n114 provided for greater penalties for a range of previously defined crimes n115 when the actor "intentionally selects" his victim "because of" [*206] certain physical characteristics, including race. n116 Under the Wisconsin statute, motive translates into enhanced punishment.

- - - - -Footnotes- - - - -

n114 508 U.S. 476 (1993).

n115 These crimes range from low level misdemeanors such as trespass, for which the maximum penalty increases to a fine of \$ 10,000 and imprisonment of up to one year, to felonies, for which the maximum fine may be increased by up to \$ 5000 and the maximum length of imprisonment increased by up to five years. See Wis. Stat. 939.645 (1989 1990).

n116 More fully, the Wisconsin penalty enhancement statute increases the punishment whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the . . . race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property." Wis. Stat. 939.645 (1989 1990), cited in Mitchell, 508 U.S. at 480.

- - - - -End Footnotes- - - - -

The United States Supreme Court upheld the statute against a claim that the motive-based enhancement unconstitutionally penalized free expression. n117 First, the Court noted in an ambiguous conflation of two constitutional concepts n118 that the base act of assault to which the penalty enhancement attached was not "expressive conduct protected by the First Amendment." n119 It then severed the enhancement from the unprotected base act for constitutional analysis, n120 noting that the state supreme court had found its motive trigger to unconstitutionally punish "offenders' bigoted beliefs." n121

- - - - -Footnotes- - - - -

n117 The Wisconsin Supreme Court had accepted this argument. See State v. Mitchell, 485 N.W.2d 807, 811 (Wis. 1992) (stating that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought").

n118 See Frederick Schauer, Free Speech: A Philosophical Enquiry 89 91 (1982) (emphasizing the difference between constitutional coverage and protection); Tiersma, supra note 95, at 1528 ("If conduct is covered by the First Amendment, it comes within its scope and at least some constitutional scrutiny is called for. Once conduct is covered, however, the courts must still determine the

level of protection it will receive." (citing Schauer, supra, at 89 91)).

n119 Mitchell, 508 U.S. at 484.

n120 Id. at 485 ("[A]lthough the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all.").

n121 Id.

- - - - -End Footnotes- - - - -

In rejecting the state supreme court's analysis, the Court's reasoning evidences the general principles of the current free speech clause model. The Court relied upon the speech/conduct distinction in several ways. First, the Court found a constitutionally relevant difference between a criminal defendant's abstract beliefs, which the government may not punish, n122 and motive connected to unlawful action. n123 Motive is relevant to judges in setting [*207] the level of punishment for an offense because some reasons for acting are "good" and others "bad." n124 Moreover, motive may be a proxy for purposeful lawbreaking, which according to "[d]eeply ingrained . . . legal tradition" ought to be more severely punished. n125 The Court noted that motive plays the same role in the penalty enhancement statute as it does in state and federal anti-discrimination statutes: In both instances motive correlates to the "reason . . . for acting," n126 a legitimate basis for distinguishing between the same functional conduct.

- - - - -Footnotes- - - - -

n122 See id. ("[A] defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." (citing Dawson v. Delaware, 503 U.S. 159 (1992))).

n123 See id. at 486 (distinguishing evidence of group membership that "proved nothing more than . . . abstract beliefs" from the same evidence when it showed "racial animus toward the victim" and was therefore "related to" the crime).

n124 Id. at 485 ("[I]t is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives." (quoting 1 W. LeFave & A. Scott, Substantive Criminal Law 3.6(b), at 324 (1986))).

n125 Id. (quoting Tison v. Arizona, 481 U.S. 137, 156 (1987)).

n126 Id. at 487.

- - - - -End Footnotes- - - - -

Second, the Court distinguished its previous decision invalidating a local hate crime ordinance as unconstitutionally message-directed and content-

based, n127 which had formed the basis for the state supreme court's holding. n128 While the invalid ordinance "was explicitly directed at expression," the penalty enhancement statute was "aimed at conduct unprotected by the First Amendment." n129

-Footnotes-

n127 See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

n128 See State v. Mitchell, 485 N.W.2d 807, 815 (Wis. 1992) (relying upon R.A.V. to characterize the Wisconsin statute as "criminaliz[ing] bigoted thought with which [the legislature] disagrees").

n129 Mitchell, 508 U.S. at 487 (citing R.A.V., 505 U.S. 377). The St. Paul ordinance prohibited the display of a symbol that one knows or has reason to know "arouses anger, alarm or resentment in others" on the basis of certain, specified characteristics, including race. The defendant in that case had placed a burning cross on an African American family's lawn. The Court assumed that the ordinance applied only to "fighting words," which, as a constitutionally unprotected category of speech, the city could proscribe entirely. However, because St. Paul proscribed only a subset of fighting words based upon the content of their message, the Court invalidated the ordinance. See R.A.V., 505 U.S. at 391 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.").

-End Footnotes-

Third, the Court credited the state's assertion that racially motivated crimes are likely to "inflict greater individual and social harm" than the same conduct engaged in based upon other motivations. n130 These harms and the State's desire to redress them "provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or [*208] biases." n131 This reason translates into an assurance that the penalty enhancement comports with what the current model deems the crux of the free speech guarantee-that the government not act with a speech-suppressing motive.

-Footnotes-

n130 Mitchell, 508 U.S. at 488 ("[B]ias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.").

n131 Id.

-End Footnotes-

These reasons end the Court's analysis. However, another of the current model's broad principles implicitly underlies its result. Most likely the Court did not perceive the Wisconsin statute to discriminate between political points of view. n132 Although undoubtedly aimed to prevent hate crimes, the penalty

enhancement was broad enough to encompass crimes motivated by other than "bigoted thought." n133 As with the existence of special harms that flow from the motivation, the breadth of motive under the current model provides an important guarantee that the government is not engaging in purposeful, viewpoint discriminatory action.

- - - - -Footnotes- - - - -

n132 See, e.g., Alan E. Brownstein, Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests, 29 U.C. Davis L. Rev. 553, 631 (1996) ("It is hard to believe that the Court would uphold a [viewpoint discriminatory penalty enhancement, although] . . . the reasoning of Mitchell technically leaves this issue open . . .").

n133 See, e.g., id. at 630 ("[T]he law in Mitchell . . . would seem to involve content discrimination not viewpoint discrimination, to the extent that it involves discrimination related to expression at all."); Weinstein, supra note 112, at 364 ("Far from referring to any identifiable political or social ideology, such as white separatism or black nationalism, the Wisconsin statute does not even require that the defendant act with a racist motive. Racial motive will suffice.").

- - - - -End Footnotes- - - - -

Beyond theory, the facts before the Mitchell Court most likely contributed to its broad pronouncements. The defendant in that case was convicted of the base crime of aggravated battery n134 for inciting a group of African American friends to attack a young boy because he was white. Aggravated battery is a crime because it produces significant individual and social harms. Physical assault is not normally a means of expression, nor was it a means of expression in this particular case. Moreover, even if it is a means of expression in a particular instance, the governmental interest in preventing the resulting harms would outweigh the free speech right. Thus, there was nothing about the particular base activity that would render it constitutionally protected in that case or in any conceivable manifestation. Moreover, the motive that led to the penalty enhancement-targeting the victim because of his race-plausibly showed purposefulness of action, which is a traditional reason for enhancing punishment, as well as the possibility of greater social harms than physical [*209] assaults motivated by other reasons. n135 Quite simply, where a group of men and teenagers beat a young boy unconscious out of racial hatred, neither the base act nor the penalty enhancement justify free speech clause protection.

- - - - -Footnotes- - - - -

n134 Mitchell, 508 U.S. at 480 (citing Wis. Stat. 939.05 & 940.19(1m) (1989 1990)).

n135 The facts of the case well illustrate at least one of the additional social harms alleged to flow from race-targeted actions-provoking retaliatory action, as the assault itself seems to have been in "retaliation" for the race-based assault depicted in the film, Mississippi Burning. See id.

- - - - -End Footnotes- - - - -

2. Federalizing Statutes

a. Target-Specific Enhancement: The Free Access to Clinic Entrances Act

Like the Wisconsin penalty enhancement statute, the Freedom of Access to Clinic Entrances Act (FACE) augments the punishment for certain conduct because of the actor's motive. FACE prohibits the use of "force or threat of force" or "physical obstruction" that "intentionally injures, intimidates, or interferes . . . with any person because that person . . . has been . . . obtaining or providing reproductive health services." n136 FACE's penalties for the targeted conduct that falls within its provisions are generally more severe than existing state law penalties. n137 In fact, enhancing the penalties was the purpose for federalizing the class of state law crimes. n138

- - - - -Footnotes- - - - -

n136 18 U.S.C. 248(a)(1) (1994) (emphasis added). Despite its name, a late amendment protects access to places of religious worship in the same ways. See id. 248(a)(2).

n137 FACE generally authorizes fines of \$ 15,000 or one- year jail terms, or both, for first violations and \$ 25,000 or three-year jail terms, or both, for subsequent violations. If bodily injury results, FACE authorizes imprisonment of up to ten years, and if death results, it authorizes an unlimited term. See id. 248(b). For "nonviolent physical obstruction" the fines are somewhat reduced-\$ 10,000 or six months, or both, for first violations and \$ 25,000 or 18 months, or both, for subsequent violations. See id. It also authorizes private civil actions for fees and damages according to proof or in a statutory amount of \$ 5000 per violation. See id. 248(c)(1).

n138 See S. Rep. No. 103-117, at 20 (1993) (noting that the "problem with reliance on state and local laws is that the penalties for violations of these laws are often so low as to provide little if any deterrent effect").

- - - - -End Footnotes- - - - -

The lower courts that have reviewed FACE have found its penalty enhancements valid according to the general principles that underlie the current free speech clause model. n139 Most crucially, in the courts' perceptions, the [*210] trigger for FACE liability is actions, n140 most of which were already unlawful for nonspeech-based reasons. n141 These actions are not normally means of expression and have "physical consequences that are independent of symbolic significance." n142 These nonspeech-related harms justify the government's initial decision to make the base functional acts unlawful. Thus, like the base state law penalties, the federalizing enhancement applies to constitutionally

unprotected conduct. n143 The crucial question then with respect to the additional punishment that the federal law provides is whether it unconstitutionally discriminates as to viewpoint. Here, the reviewing courts have explicitly relied upon the breadth of FACE's motive trigger to uphold its provisions. That FACE's penalty enhancements apply to actions beyond those that prompted its enactment is important evidence that it complies with the free speech guarantee. n144

-Footnotes-

n139 See, e.g., Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996); United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995); Woodall v. Reno, 47 F.3d 656 (4th Cir. 1995); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995); Planned Parenthood of Southeastern Pa. v. Walten, 949 F. Supp. 290 (E.D. Pa. 1996); United States v. Lucero, 895 F. Supp. 1421 (D. Kan. 1995); United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995); United States v. Brock, 863 F. Supp. 851 (E.D. Wis. 1994); Riely v. Reno, 860 F. Supp. 693 (D. Ariz. 1994); Cook v. Reno, 859 F. Supp. 1008 (W.D. La. 1994); Council for Life Coalition v. Reno, 856 F. Supp. 1422 (S.D. Cal. 1994).

n140 See, e.g., Terry, 101 F.3d at 1418 (FACE "prohibits three types of conduct: use of force, threat of force, and physical obstruction."). But see Brownstein, supra note 132, at 556 84 (arguing that FACE's threat prohibition impacts pure speech and therefore that the constitutional analysis does not fall squarely within Mitchell's reasoning, proposing an alternate analysis that ultimately reaches the same conclusion as the courts).

n141 FACE criminalizes three types of activities- "force," "threat[s] of force," and "physical obstruction." 18 U.S.C. 248(a) (1994). Acts of force would already be unlawful under state laws prohibiting acts of violence to persons or property. Threats of force would already be unlawful under various state laws prohibiting intimidation and harassment. Physical obstruction would be unlawful under trespass laws to the extent it interferes with property rights. Perhaps some acts of physical obstruction would not have a state law equivalent.

n142 Soderna, 82 F.3d at 1375.

n143 See Terry, 101 F.3d at 1418 ("[FACE] does not target protected speech.").

n144 See, e.g., id. at 1419 (FACE "would apply to an individual who spray paints the words 'KEEP ABORTION LEGAL' on a facility providing counseling regarding abortion alternatives as well as to the individual who spray paints the words 'DEATH CAMP' on a facility providing abortion services." (quoting Reily, 860 F. Supp. at 702)); Dinwiddie, 76 F.3d at 923 ("FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, 'We are underpaid!' rather than 'Abortion is wrong!'").

-End Footnotes-

By contrast to its theoretical breadth, the facts to which FACE has been applied have largely paralleled those specifically envisioned by its proponents. That is, in most applications, FACE's motive-based enhancements plausibly correlate to knowing violations of individual rights n145 as well as identifying [*211] actions with greater potential for individual and social harm. n146 Moreover, the lower courts reviewing the constitutionality of FACE are armed with its legislative history detailing the acts of sabotage and violence that prompted the statute. n147 Where the facts in their particular cases involve personally directed violence or threats of violence, they parallel the egregious facts cited by Congress. In these contexts, the social value of political protest motivation pales in comparison to the individual and social harm of the actual or threatened violence. n148

-Footnotes-

n145 See Planned Parenthood of Southeastern Pa. v. Walton, 949 F. Supp. 290, 293 (E.D. Pa. 1996) (noting that FACE's stated purpose is "to protect and promote public safety and health and activities affected interstate commerce by establishing Federal criminal penalties and civil remedies for certain violent, threatening, obstructive and destructive conduct that is intended to injure, intimidate or interfere with persons seeking to obtain or provide reproductive health services" (quoting Pub. L. No. 103-259, 2, 108 Stat. 694, 694 (1994))).

n146 See Dinwiddie, 76 F.3d at 923 (noting that "[w]hat FACE's motive requirement accomplishes is the perfectly constitutional task of filtering out conduct that Congress believes need not be covered by a federal statute[, namely the] slew of random crimes that might occur in the vicinity of an abortion clinic").

n147 See S. Rep. No. 103-117, at 3 (1993) ("From 1977 to April 1993, more than 1,000 acts of violence against abortion providers were reported in the United States. These acts included at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, two kidnappings, 327 clinic invasions, and one murder.").

n148 See, e.g., Dinwiddie, 76 F.3d at 917 18 (Defendant physically assaulted a clinic employee with an electric bullhorn, physically obstructed patients from entering the clinic, and issued threats through the bullhorn, such as "[Y]ou have not seen violence yet until you see what we do to you." She issued over fifty such threats to a clinic doctor. She was "a well-known advocate of the viewpoint that it is appropriate to use lethal force to prevent a doctor from performing abortions." Citing the viewpoint and defendant's conduct, the lower court issued a permanent injunction ordering defendant not to violate FACE, and the appellate court upheld it.).

-End Footnotes-

Although "physical obstruction" may be nonviolent in particular manifestations, n149 both the history of violent interference and threatening intimidation with clinic patients and personnel and the frequent tendency of potentially peaceful acts of physical obstruction to include threats and physical contact n150 affect the perceived validity of enhancing the penalty for the entire class of physically obstructive acts. An "enough is enough" attitude pervades a [*212] number of lower court opinions. n151 The means of

obstruction through which a few people create an obstacle less easily removable than the many people who may engage in the conventional sit-in seems also to influence the judicial attitude. n152 Moreover, and especially with reference to peaceful modes of obstruction, courts cite the mixed motivation for the conduct as support for its prohibition: Clinic blockaders often acknowledge that the primary purpose of their conduct is to stop lawful activity, with expression as a dual, and often secondary, objective. n153

- - - - -Footnotes- - - - -

n149 See, e.g., *United States v. Soderna*, 82 F.3d 1370, 1373 (7th Cir. 1996) (noting a clinic blockade in which "defendants offered no resistance; there was no violence; there were no threats of violence, or even displays of anger, on the part of the defendants or their supporters, who were picketing in the vicinity").

n150 See S. Rep. No. 103-117, at 7 (1993) ("[H]uman barricades often involve pushing, shoving, destruction of equipment and other violent acts as blockaders try to keep patients and staff from entering the clinic.").

n151 See, e.g., *Soderna*, 82 F.3d at 1376 ("A group cannot obtain constitutional immunity from prosecution by violating a statute more frequently than any other group."); *Dinwiddie*, 76 F.3d at 924 ("[FACE] forbids physical interference with people going about their own lawful business. It is difficult to conceive of any such statute that could not survive this level of scrutiny.").

n152 See *Soderna*, 82 F.3d at 1374 (describing nonviolent clinic blockading by means of welding oneself into vehicles as "distasteful or worse" (quoting *United States v. Wilson*, 73 F.3d 675, 689 (7th Cir. 1995) (Coffey, J., dissenting))).

n153 See, e.g., S. Rep. No. 103-117, at 11 (1993) ("Anti-abortion activists have made it plain that [their] conduct is part of a deliberate campaign to eliminate access [to abortion] by closing clinics and intimidating doctors."); *Soderna*, 82 F.3d at 1375. The Seventh Circuit stated in *Soderna* that: The difference between communication and obstruction was well expressed by one of the defendants in this case when he told the judge, "What we did, we weren't there to protest abortion. If I wanted to protest abortion, I would write my Senator or my congressman. We were there to save innocent human life. Id. See also Paul R. Davis & William C. Davis, *Civil Disobedience and Abortion Protests: The Case for Amending Criminal Trespass Statutes*, 5 *Notre Dame J.L. Ethics & Pub. Pol'y* 995, 1010 (1991) (stating that Operation Rescue's founder Randall Terry "indicates the short-term goal of Operation Rescue as stopping as many abortions as a direct result of the 'rescues' as possible, and the long-term goal as being a constitutional amendment prohibiting abortion" (citing *Rescuer of the Unborn*, *New American*, Nov. 7, 1988, at 20)).

- - - - -End Footnotes- - - - -

Consequently, both the broad principles that underlie the current free speech model and the facts to which FACE most frequently applies lead to the unbroken string of holdings that its penalty enhancements comply with the Constitution.

b. Patterned Activity/Concerted Action Enhancement: RICO

The RICO crime is "participat[ing], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." n154 An [*213] "enterprise" can be an individual or a group. n155 A "pattern" requires "at least two" predicate acts of racketeering activity. n156 Racketeering activity is defined as activity that violates any one of multiple listed state and federal criminal acts, including the Hobbs Act. n157 The Hobbs Act criminalizes actual or attempted extortion that affects interstate commerce. n158 "Extortion" is "the obtaining of property from another" through "the wrongful use of actual or threatened force, violence, or fear." n159 Although courts have noted that even "coercive" speech is entitled to constitutional protection, n160 they have found illegal action, such as trespass or destruction of property, to transform protected speech activity into "wrongful" conduct under the Hobbs Act. n161 "Property" has been interpreted to include a broad range of intangible rights, including the right to "make business decisions" n162 and the right "to democratic participation" in a union. n163 In the context of abortion clinic protests in particular, "property" may include both the right to employment at the clinics and the right to obtain services from them. n164 Patterned activity under RICO leads to criminal penalties more severe than the individual criminal acts would warrant under [*214] state law or other federal provisions n165 or to civil liability for treble damages. n166

- - - - -Footnotes- - - - -

n154 18 U.S.C. 1962 (1994).

n155 See id. 1961(4).

n156 See id. 1961(5).

n157 See id. 1961(1)(B) (listing 18 U.S.C. 1951 (1994)).

n158 The Hobbs Act states that: Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. 18 U.S.C. 1951(a) (1994).

n159 See id. 1951(b)(2).

n160 See, e.g., Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342, 1349 (3d Cir. 1989) ("The mere fact, also, that the defendants or some of their protests may be coercive or offensive, does not diminish the First Amendment right to protest.").

n161 See McMonagle, 868 F.2d at 1349 ("The jury's award of damages under RICO was based on the destruction of the Center's medical equipment during one of the [four] incidents of forcible entry into the Center. This award establishes

that the jury found that Defendants' actions went beyond mere dissent and publication of their political views.").

n162 See United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980); Jakubik v. United States, 585 F.2d 667, 673 (4th Cir. 1978).

n163 United States v. Local 560 of Int'l Bhd. of Teamsters, 780 F.2d 267, 282 (3d Cir. 1985).

n164 See National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 253 & n.2 (1994) (noting that these were the allegations before the lower court, but not reaching the question whether they met the Hobbs Act definitional requirements).

n165 Compare the normal state law sanctions for trespass to RICO's heavy penalties.

n166 See 18 U.S.C. 1964(c) (1994).

- - - - -End Footnotes- - - - -

Like the other penalty enhancements, RICO's pattern trigger fits comfortably as a legitimate reason for enhanced punishment within the current free speech clause model. n167 RICO applies exclusively to conduct already criminalized because of the nonspeech-related individual and social harms that it produces. All of these unlawful activities, including Hobbs Act extortion, usually have selfish ends other than communication. n168 The enhancement depends upon repeated conduct, usually undertaken in concert with others. Like motive, repetition and concerted action are traditional, accepted bases for increasing the level of punishment because they are plausible proxies for culpability and greater individual and social harm. n169

- - - - -Footnotes- - - - -

n167 Justice Souter, joined by Justice Kennedy, concurred in Scheidler "to stress that the Court's opinion does not bar First Amendment challenges to RICO's application in particular cases." Scheidler, 510 U.S. at 263. But nothing in the concurrence signaled disagreement with Mitchell's sharp speech/conduct distinction. Rather, the concurrence restated the Mitchell dichotomy, distinguishing RICO's appropriate application to "ideological entities whose members commit acts of violence we need not fear chilling" from its unconstitutional application to "entities engaging in vigorous but fully protected expression." Id. at 264.

n168 RICO is part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified in various sections of 18 U.S.C.). The name explains its initial target. Congress enacted the Hobbs Act to criminalize "the use of robbery and extortion" in labor disputes. See 91 Cong. Rec. 11,900 (daily ed. Dec. 12, 1945) (statement of Rep. Hancock). A Supreme Court decision overturning union members' convictions for using threats of violence to obtain wages without working prompted the legislation. See United States v. Local 807, Int'l Bhd. of Teamsters, 315 U.S. 521 (1942).

n169 See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982) (noting the "special dangers . . . associated with conspiratorial activity").

- - - - -End Footnotes- - - - -

Moreover, RICO's means-based penalty enhancements, severed from the conduct to which it applies, more easily satisfy the crucial requirement of viewpoint neutrality than do motive-based enhancements. While motive-based penalty enhancements tend to penalize particular beliefs when they form the basis for action, RICO encompasses a wide variety of substantive reasons for acting. n170 Specifically, RICO, with Hobbs Act violations as the predicate acts, broadly penalizes patterned- purposeful, sustained, often concerted-action for the purpose of inducing an individual to give up a wide range of rights.

- - - - -Footnotes- - - - -

n170 See Scheidler, 510 U.S. at 262 (rejecting the argument that the free speech clause requires that RICO be interpreted to apply only to "predicate acts" undertaken with an economic motive).

- - - - -End Footnotes- - - - -

Moreover, as with the other types of enhancements, the facts of most RICO cases confirm the inference that its penalty enhancements do not usually [*215] significantly impact socially valuable expression. Organized crime's purpose is to make money, not to speak. Its effect is to "drain[] billions of dollars from America's economy" n171 without countervailing social value. The fact that the activities are "patterned" increases their social harm. n172 The same is true of the securities and general commercial fraud cases that form the bulk of civil RICO applications. n173 The underlying acts are unlawful, which translates into socially harmful and prohibitable. Aggregating the acts only makes them worse from a social harm standpoint.

- - - - -Footnotes- - - - -

n171 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat. 922) 1073, 1073.

n172 See id. ("[O]rganized crime in the United States is a highly sophisticated, diversified, and widespread activity.").

n173 See Report of the Ad Hoc Civil RICO Task Force of the A.B.A. Section of Corporation, Banking and Business Law 1, 55 56 (1985) (noting that 40% of civil RICO cases surveyed involved securities fraud and 37% involved general commercial fraud).

- - - - -End Footnotes- - - - -

Finally, although several Justices have "caution[ed] courts applying RICO to bear in mind the First Amendment interests that could be at stake," n174 their primary concern was the possibility that "fully protected First Amendment activity" could "amount to Hobbs Act extortion" or meet the definition of "one of the other, somewhat elastic RICO predicate acts." n175 Although they did not "catalog [all] the speech issues that could arise in a RICO action against a protest group," n176 their comments presumed the current free speech clause model. Therefore, their caveat with respect to the conduct that may qualify as a predicate act under RICO would not appear to extend to conduct that is unlawful because of nonspeech-related harms that it causes, such as civilly disobedient lawbreaking.

- - - - -Footnotes- - - - -

n174 Scheidler, 510 U.S. at 265 (Souter, J., and Kennedy, J., concurring).
n175 Id. at 264.
n176 Id. at 265.

- - - - -End Footnotes- - - - -

3. Punitive Damages

The purpose of punitive damages is to punish and deter "extreme departures from acceptable conduct." n177 They are awarded on top of compensatory damages, often creating a windfall for the plaintiff that courts tolerate "as a means of securing public good through a kind of quasi-criminal punishment in the civil suit." n178 Unlike the statutory penalty enhancements that supply explicit maximums or multipliers, punitive damages are discretionary in amount, with the jury usually instructed to award a sum of money appropriate [*216] to accomplish the judgment's punitive and deterrence goals. n179

- - - - -Footnotes- - - - -

n177 Dobbs, supra note 102, 3.11(1), at 452.
n178 Id. at 457.

n179 Dobbs states that: If the judge decides that the facts warrant submission of the case to the jury on the punitive damages issue, the jury's discretion determines (a) whether to make the award at all, and (b) the amount of the award, as limited by its purposes [which almost always include (a) punishment or retribution and (b) deterrence], subject only to review as other awards are reviewed. Id. at 453.

- - - - -End Footnotes- - - - -

Punitive damages apply to a broader range of types of conduct than the statutory penalty enhancements, which narrow the types of conduct to which they apply according to specified characteristics. Punitive damages can apply to almost any type of tort, n180 when, in the jury's judgment, the defendant's motive for acting was so bad as to require punishment on top of compensation for the actual damages caused by the conduct.

-Footnotes-

n180 Punitive damages do not generally apply to breach of contract actions because of the broad common law policy judgment that entering into contracts is socially desirable conduct that should not be deterred by the threat of a punitive award for breaching. See id. 12.5(2), at 452.

-End Footnotes-

There are some constitutional limits on punitive damages awards. Detailed rules limit the chilling effect of libel awards on speech about public issues. n181 In addition, grossly excessive awards for tortious speech or conduct may violate due process, n182 but, as a general matter, awards of substantial extracompensatory damages for conduct deemed by a jury to be very bad and thus deserving of punishment and deterrence comport with the Constitution. n183

-Footnotes-

n181 See New York Times v. Sullivan, 376 U.S. 254, 279 80 (1964) (To recover any damages, including punitive damages, a public official or public figure must prove the allegedly libelous statement is false in fact and that the defendant acted with knowledge of or reckless disregard as to its falsity.); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (To recover punitive damages where the defamation deals with an issue of public concern, a private person must meet the New York Times standard.).

n182 See BMW of North America v. Gore, 517 U.S. 559 (1996). The jury in this case awarded \$ 4000 compensatory damages and \$ 4 million in punitive damages to a plaintiff because BMW did not inform him that his new car had been repainted. The Court found the punitive award excessive in a number of respects: the egregiousness of the defendant's conduct, the ratio of compensatory damages to punitive damages, and the criminal penalties for the type of misconduct.

n183 See Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (Punitive damages awards do not generally violate the Constitution, but may in particular cases.).

-End Footnotes-

There is no reason to believe that the current constitutional framework would attach any special level of scrutiny to punitive damages awards for torts [*217] committed for the purpose of expression. n184 The Oregon Supreme Court recently rejected just such a free speech clause claim. n185 In that case, detailed more fully in hypothetical four above, members of an environment

group boarded a private company's logging equipment, located on a government access road, to protest federal forest preservation policies. The court relied upon the general principles gleaned from the current free speech clause model to uphold the jury's award of punitive damages on top of compensatory damages for equipment damage and lost logging time. n186 "[T]he tort of trespass to chattels is aimed at conduct not protected by . . . the First Amendment," n187 which, in that case, "produced a special cognizable harm (an interference with plaintiff's possessory interest in its property), distinct from any communicative impact." n188

-Footnotes-

n184 See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) ("[L]osses proximately caused by unlawful conduct may be recovered" when such conduct is mixed with "nonviolent, protected activity.").

n185 See Huffman & Wright Logging Co. v. Wade, 857 P.2d 101 (1993).

n186 The court's primary discussion concerned the free speech guarantee of the state constitution. See id. at 106 12.

n187 See id. at 112.

n188 See id. (citing Adderly v. Florida, 385 U.S. 39, 47 (1966)).

-End Footnotes-

In addition to the speech/conduct distinction, the breadth of the possible applications of the tort played a role in the court's analysis. n189 On its face, the trespass to chattels tort does not target expression. n190 Neither are its usual applications to expression. n191 Thus, the government was not targeting expression or any particular point of view in defining the tort. Moreover, as to the jury's consideration of viewpoint, defendants were entitled to, but failed to request, a limiting instruction. n192 Yet even with such an instruction, a properly instructed jury "could have awarded punitive damages based on the predicate of defendants' trespassory conduct alone [independently of any accompanying expression of views]." n193 Thus, an award of punitive damages based upon "the [*218] character of defendants' conduct" and "defendants' motives" n194 comports with the Constitution's free speech guarantee. n195

-Footnotes-

n189 Although the bulk of the court's discussion concerns state constitutional law, the same general principles seem to apply to its federal constitutional law conclusions.

n190 See Huffman, 857 P.2d at 110 ("The content of speech is not an element of the tort.").

n191 See id. ("[T]his tort cannot readily be committed by speech, even if speech accompanies the trespass.").