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THE MECHANICS OF FIRST AMENDMENT AUDIENCE ANALYSIS

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ABSTRACT

When the government seeks to regulate speech based on its content, it generally assumes that listeners will process the speech in a manner that produces social harm. Because the chain of causation for such speech-based harm runs through the filter of an audience, courts must constantly make judgments regarding the audience's reception of such speech. How will the speech be interpreted by the audience? To what extent will the speech cause the audience either to suffer direct emotional harm or to react physically to the speech in a harmful manner? Although this sort of inquiry—which I refer to as "audience analysis"—is integral in resolving a broad range of First Amendment issues, there has been little, if any, holistic examination of its general position and role within First Amendment jurisprudence.

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In this Article, I first seek to introduce a degree of theoretical and doctrinal clarity to this aspect of speech causation. After tracing the primary causal paths by which speech may give rise to social harm on account of its content, I observe that each of these paths requires courts to make judgments regarding the audience's comprehension of, or sensitivity to, the speech in question. I then outline how such analysis currently fits within First Amendment doctrine. Depending on the case, audience analysis can take place either at the front end, in the process of categorizing "borderline" speech, or at the back end, in the application of more generalized scrutiny analysis. These sorts of analyses often look very different from each other, and I delineate the different ways in which courts have approached them.

I then propose that audience analysis should generally be governed by a simple principle: courts should seek to determine, as accurately as possible, the extent to which the targeted audience would foreseeably process the regulated speech in a manner that produces social harm. In other words, courts should strive to conduct audience analysis based on a predictive view of how the targeted audience will likely process the speech, rather than on a strong normative view of how an idealized "rational audience" should process the speech. I argue that this basic principle should shape the tests that courts adopt to define low-value speech, promote greater solicitude for analyzing empirical data in scrutiny-stage audience analyses, and ultimately produce a more transparent jurisprudence that will provide courts with a clearer picture of the actual costs of speech in a wide range of circumstances.

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INTRODUCTION

First Amendment doctrine is built on the fundamental premise that unfettered speech is valuable, either because it leads to certain social benefits or because it is an integral aspect of human autonomy and self-realization.[1] But free speech, of course, also comes at a cost. Speech is capable of inflicting significant harm upon others: it can drive people to act in socially destructive ways, destroy reputations, or bring about serious emotional damage.[2] The First Amendment has practical meaning only insofar as we are willing to absorb—to a greater extent than we would with nonspeech—these social harms in return for the value associated with uninhibited speech.[3] As a result, much of First Amendment jurisprudence is, at its root, a balancing analysis that requires courts to weigh the value of speech against the resultant harms.[4]

As modern First Amendment doctrine has developed over the past century, courts analyzing content-based speech restrictions have focused most of their attention on the value side of the ledger. The all-encompassing term "speech" in the constitutional text has by now been subdivided into a multitude of categories and subcategories, each corresponding to a different level of First Amendment value and protection. Courts have paid comparatively little attention, however, to the harm side of things.[5] In particular, courts'

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1. *See infra* notes 9-11 and accompanying text.

2. *See* Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1106 (1979) (observing that speech can "offend, injure reputation, fan prejudice or passion, and ignite the world").

3. *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 8 (1982) ("When there is a Free Speech Principle, a limitation of speech requires a stronger justification, or establishes a higher threshold, for limitations of speech than for limitations of other forms of conduct. This is so even if the consequences of the speech are as great as the consequences of other forms of conduct.").

4. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 792-93 (2d ed. 1988) ("[D]eterminations of the reach of first amendment protections ... presuppose some form of 'balancing' whether or not they appear to do so. The question is whether the 'balance' should be struck for all cases in the process of framing particular categorical definitions, or whether the 'balance' should be calibrated anew on a case-by-case basis."); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 (1982) ("[A]ny general rule of first amendment interpretation that chooses not to afford absolute protection to speech because of competing social concerns is, in reality, a form of balancing.").

5. *See* Frederick Schauer, *Is It Better to Be Safe than Sorry?: Free Speech and the*

approaches to issues of speech causation—the processes by which speech translates into potentially regulable social harms—have remained relatively undeveloped and inconsistent.

When the government seeks to regulate speech based on its content, speech causation is inextricably tied to judgments courts must make regarding the audience of speech. Content-based restrictions are generally premised on the assumption that the audience will somehow translate the speech into social harm; it might, for example, be persuaded to do something harmful as a result of the speech, or it might suffer direct psychological harm as a result of the speech.[6] In other words, the chain of causation linking the speech the government seeks to regulate to the social harm must flow through an intermediary in the form of an audience because the extent to which the speech causes harm depends on how the audience processes the speech. Courts' determinations of how an audience might process speech—which I refer to as "audience analysis"—play a significant role across a wide range of First Amendment issues, but there has been little holistic analysis of the general characteristics and mechanics of such analysis.[7]

This Article has two primary aims. First, I seek to introduce a degree of clarity to this aspect of speech causation by highlighting the theoretical significance of audience analysis and detailing how such analysis fits within the doctrinal architecture of the First Amendment. Second, I propose that audience analysis should generally be governed by a simple principle: courts should seek to determine, as accurately as possible, the extent to which the

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Precautionary Principle, 36 PEPP. L. REV. 301, 302, 304-05 (2009).

6. *See* Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 97-104.

7. Significant scholarly debate regarding speech-based harms and the ways in which audiences process speech has arisen in the context of particular subsets of speech regulation, most notably pornography and hate speech. *See, e.g.*, Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 18-19 (1985) (discussing the ways in which audiences process pornography in a manner that produces social harm); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2335-41 (1989) (discussing the harms resulting from hate speech). Such discussions have tended to focus on the constitutional salience of specific harms and the particular means by which the state may legitimately regulate those harms. None of the discussions, to my knowledge, has isolated audience analysis in the abstract and explored, on a holistic level, the mechanics and governing principles of such analyses as applied throughout First Amendment jurisprudence.

regulated speech would foreseeably be processed by the targeted audience in a manner that produces social harm. In other words, courts should generally strive to make judgments regarding the audience's comprehension of, and sensitivity to, speech based on a predictive view of how the targeted audience will *likely* process the speech, rather than on a strong normative view of how an idealized "rational audience" *should* process the speech. I argue that this basic principle should shape the tests that courts adopt to define low-value speech, promote greater solicitude for analyzing empirical and social science data in scrutiny-stage audience analyses, and ultimately produce a more transparent jurisprudence that will provide courts with a clearer picture of the actual costs of speech across a wide range of circumstances.

In Part I, I discuss the theoretical significance of audience analysis in evaluating content-based restrictions on speech. First, picking up on recent work from Professor Frederick Schauer,[8] I outline the major causal paths by which speech may give rise to harm on account of its content. All of these causal paths, by nature, require courts to make basic judgments regarding the audience of the speech in question. These audience judgments can be boiled down to two basic categories: comprehension judgments and sensitivity judgments. As I demonstrate, at least one of these judgments must be made for a court to evaluate the content-based harm resulting from particular speech.

In Part II, I explain how audience analysis fits within the architecture of First Amendment doctrine. Depending on the case, the analysis can take place either at the front end, in the process of categorizing the speech in question, or at the back end, in the application of scrutiny analysis. These sorts of audience analyses can look very different from each other, and in delineating these differences, I focus on the two paradigmatic modes of analysis that commonly arise within First Amendment jurisprudence. In the first, audience analysis is conducted in order to determine, as a matter of ex post categorization, whether particular statements made by a particular speaker ought to be designated "low-value" speech undeserving of First Amendment protection. In the second, audience

8. *See* Schauer, *supra* note 6.

analysis is conducted on a more generalized level within First Amendment "scrutiny" analysis, in which the goal is to evaluate the extent to which government regulation of a particular subset of constitutionally protected speech actually serves to advance the government's asserted regulatory interests.

In Part III, I address the question of how courts should conduct audience analysis. I describe two general approaches that courts might take: they could premise such analysis around a strong normative ideal, such as a "rational," sophisticated, thick-skinned audience, or they could simply seek to predict, as accurately as possible, the extent to which the targeted audience would actually process the speech in a harmful manner. I argue that courts should generally focus their analyses on accurately predicting how the targeted audience will foreseeably process the speech, rather than on envisioning how a hypothetical, idealized audience *should* process the speech. If the general goal of First Amendment doctrine is to identify the optimal balance between the value and harms of speech, then it is only by focusing audience analysis on the question of actual foreseeability that courts can properly calibrate the scope of First Amendment protection in a given case.

In Part IV, I explore some ramifications of this theoretical discussion on the ways in which courts currently conduct audience analysis. I propose that courts, in delineating tests for low-value speech, ought to frame audience analyses in clearly predictive terms rather than in terms that might invite a highly normative approach; I suggest that the "reasonable speaker" framework adopted by some courts in the true threats context could serve as a sensible model. Furthermore, with respect to more generalized scrutiny-stage analyses, I endorse the Supreme Court's apparently increasing expectation of and solicitude for empirical evidence in conducting audience analysis, and I argue that courts should generally err on the side of empirical rigor rather than intuitive judgment in undertaking such analyses.

Finally, I conclude with some thoughts as to why it is important that courts frame and calibrate audience analysis around the general goal of accurately estimating the likely harms that will result from the targeted audience's processing of speech. My goal in this Article is not to argue for a general expansion or contraction of

First Amendment protection; indeed, it may well be that adopting the principles I propose will not have a substantial effect on the results that courts reach. But knowing how much speech costs in a wide variety of contexts—even if we might conclude that other factors, such as the value of the speech, ultimately trump those costs—has inherent value, both as a matter of judicial transparency and as a matter of developing a more refined First Amendment jurisprudence. With a clearer sense of the actual costs of speech under different circumstances, courts will be better equipped to judge exactly when the value of unfettered speech should be preserved.

I. THE THEORETICAL SIGNIFICANCE OF THE FIRST AMENDMENT AUDIENCE

First Amendment doctrine is premised on the idea that unfettered speech is valuable, either as an essential aspect of human autonomy[9] or insofar as it translates into a number of broad social benefits, like aiding in the pursuit of truth[10] or promoting a system of democratic self-governance.[11] But First Amendment doctrine is also premised on an understanding that speech value must be evaluated against the harms that might result from the speech.[12] Thus, at least as a purely descriptive matter, the core of First Amendment doctrine is, in essence, a balancing inquiry: does the value of this speech outweigh the social harms associated with it?[13]

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9. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 232-34 (1992); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-15 (1972).

10. *See, e.g.*, JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

11. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT 25-27 (1948).

12. *See* TRIBE, *supra* note 4, at 792-93; Redish, *supra* note 4, at 624.

13. I do not mean to imply here that modern First Amendment doctrine must be conceptualized in purely consequentialist or utilitarian terms. Rights-based theories of free speech do not necessarily require that free speech rights trump regulatory interests at all costs; rather, such rights may be conceptualized simply as "shields" that place on the state a heightened burden to justify its regulation—a position that accords with the scrutiny framework that is central to modern First Amendment doctrine. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 52-53 (1998) ("Rights ...

Of course, we do not live in an idealized world of all-knowing judges who can precisely calculate the net social utility of speech regulations.[14] In reality, evaluating the value and costs of speech involves many complicating factors. For example, uncertainty as to where doctrinal lines are drawn or the possibility of judicial error might risk chilling valuable speech,[15] which might in turn lead to broad structural decisions such as adopting bright-line categorical rules rather than ad hoc balancing approaches.[16] Or courts may tend to undervalue the usually far-reaching and systemic benefits of speech compared to the typically more immediate social harms produced by that speech, which might call for ex ante doctrinal adjustments.[17] But at least as a broad, theoretical matter, the primary goal of modern First Amendment jurisprudence is to calibrate the scope of First Amendment protection correctly by identifying the correct balance between the value of speech and the social harms caused by that speech.[18]

In practice, the Supreme Court has focused its attention primarily on sorting out the value side of the equation. With respect to content-based restrictions on speech, the development of First Amendment doctrine over the past century has largely been the development of an extensive jurisprudence categorizing speech into

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are not trumps in the sense that they exclude all consideration of consequences. Instead, they are at most 'shields' against weak or unacceptable reasons for government action."); Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429-30 (1993).

14. *Cf.* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 740 (2002) ("[B]ecause the image of balancing costs and benefits exaggerates the precision that is attainable in the First Amendment area, ... I prefer to call the approach that I espouse to free speech issues the 'pragmatic' approach rather than the 'balancing' or 'cost benefit' approach.").

15. *See, e.g.*, Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 685 (1978).

16. *See* Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 PEPP. L. REV. 273, 275-76 (2009).

17. *See* Posner, *supra* note 14, at 744 ("[T]he costs of freedom of expression are often more salient than the benefits, and their salience may cause the balance to shift too far toward suppression."); Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157, 2168 (2005) (observing that the First Amendment is "about imposing constraints on even reasonable, well-intentioned, and empirically justified restrictions on speech, and about doing so in the service of deeper or longer-term values").

18. Of course, balancing speech value and harm is not the *only* question relevant to First Amendment analysis. For example, the particular means that the government chooses to regulate harmful speech also plays a significant role in determining the contours of First Amendment protection.

numerous categories and subcategories, each associated with varying degrees of First Amendment value. For example, the Court has established that obscenity carries no First Amendment value;[19] that commercial speech carries less value than truthful political speech;[20] that speech on matters of public concern is more valuable than speech on purely private matters;[21] and so forth.

But the Court has given relatively short shrift to the issue of speech-based *harm*. And crucial in understanding the nature of speech-based harm is the issue of causation: How exactly does speech bring about the harm in question?[22] In this Part, I will first walk through some of the basic mechanics of speech causation. In a broad sense, speech can lead to harm in a variety of different ways, whether from influencing listeners to commit harmful acts or from directly inflicting harm onto the listener. I then highlight the conceptual significance of the First Amendment audience. Regardless of which particular mechanism of speech-based causation is involved, nearly every content-based assessment of speech-based harm necessarily includes some sort of judgment regarding the audience and the manner by which it will process the speech in question. Although the particular judgments obviously vary from case to case, they can be boiled down to two basic categories: audience comprehension judgments and audience sensitivity judgments.

A. The Mechanics of Speech Causation

There is no single manner by which speech causes harm; speech-based harms can be produced in a variety of ways. In a recent article, Frederick Schauer identified three particular categories of harm, which he termed "harms of advocacy," "harms of verbal assault," and "participant harms."[23] Schauer's framework is a useful starting point for unraveling the complexity of speech causation,

19. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973).

20. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980).

21. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011).

22. *See, e.g.*, Schauer, *supra* note 5, at 301-04 (describing the significance of causation questions in First Amendment theory and doctrine).

23. *Id.* at 97-104.

and in this Section, I will summarize Schauer's classification of speech-based harm mechanisms, with some slight modifications. I will focus in particular on three categories of harm, each of which operates based on a distinct causal mechanism: reactive harm, direct harm, and dissemination-based harm.[24]

1. Reactive Harm

Speech can cause harm because it influences the listener to *react* to the speech in a certain way. That is, the speech spurs the listener to undertake some action, which is what directly causes harm either to the listener himself or to a third party.[25] The incitement cases represent a paradigmatic example of this mechanism of harm.[26] If, for example, a speaker exhorts his audience to take "revengeance" against a particular minority group, the presumed harm that would serve as the basis for state regulation is the possibility that such speech would spur the listeners to undertake violent assaults on persons and property.[27] Or if Ozzy Osbourne releases a song extolling the virtues of suicide, then the possibility exists that a listener may be persuaded by the speech to inflict harm on himself.[28]

Schauer refers to these harms as "harms of advocacy";[29] I prefer to call them "reactive harms" because, as Schauer himself notes, the causal mechanism in question does not necessarily require that the speaker advocate for the resultant harm or even intend that the harm occur.[30] The nub of this particular harm mechanism is that it requires the reader to process the speech and to physically react to it in a manner that produces harm.[31] In cases of reactive harm, the

24. Of course, many potential disputes exist as to what types of harm may be the legitimate subject of government regulation in the speech context. I am not generally concerned with this issue for purposes of this Article, *see infra* text accompanying notes 139-40; suffice it to say, plenty of harms exist that all will agree are relevant to evaluating the appropriate scope of First Amendment protection.

25. Schauer, *supra* note 6, at 98.

26. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 446 (1969) (per curiam); Whitney v. California, 274 U.S. 357, 371-72 (1927); Abrams v. United States, 250 U.S. 616, 624 (1919).

27. *See Brandenburg*, 395 U.S. at 446.

28. McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 190-91 (Ct. App. 1988).

29. Schauer, *supra* note 6, at 97.

30. *Id.* at 98-99.

31. *See id.* at 98.

consequences of the listener's reaction represent the harm sought to be regulated by the government. Reactive harms therefore include both harms resulting from audiences *agreeing* with the speaker's message—like the harm feared in *Brandenburg v. Ohio*[32]—and harms resulting from audiences *disagreeing* with the speaker's message—like in the so-called "heckler's veto" cases.[33] And these harms might not result from advocacy at all; the speech in question may be a set of instructions,[34] a basis for imitation,[35] or even an interactive video game.[36] The distinguishing characteristic of reactive harms is that they involve the *active participation* of the listener, who will translate the information communicated to him into harmful action.

2. Direct Harm

Under this mechanism of speech-based harm, speech inflicts psychological harm on the listener in the direct manner that a physical attack would inflict physical harm. Whereas reactive harms result from the listener undertaking some sort of physical action in response to the speech, direct harms require no such action. Instead, they are inflicted on the listener simply as a result of the speech itself.[37] This causal mechanism can be seen clearly in the context of "true threats." If I credibly threaten to physically injure someone, my speech would cause harm in the form of a direct infliction of fear and discomfort on the listener, regardless of whether I follow through with the act; psychological harm would be inflicted on the listener simply as a result of his processing of my

32. 395 U.S. at 444-45.

33. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111, 111-12 (1969); Feiner v. New York, 340 U.S. 315, 317-19 (1951).

34. *See, e.g.*, Rice v. Paladin Enters., 128 F.3d 233, 239 (4th Cir. 1997). In *Rice*, a man murdered three people in a contract killing, following "detailed factual instructions on how to murder and to become a professional killer" found in a book entitled *Hit Man: A Technical Manual for Independent Contractors*. *Id.*

35. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018-19 (5th Cir. 1987) (death caused by autoerotic asphyxiation as described by magazine article); Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888, 891 (Ct. App. 1981) (rape inspired by a scene in a television movie).

36. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732-33 (2011).

37. Schauer, *supra* note 6, at 100-01.

speech. The same dynamic would apply in the context of "fighting words"[38] or any sort of highly offensive speech.[39]

This form of harm parallels what Schauer refers to as "harms of verbal assault."[40] Schauer's formulation is helpful insofar as it characterizes speech, when used in this context, as more akin to a cudgel or a fist than a means of advocacy or imparting information.[41] I prefer the term "direct harm," however, which emphasizes the specific mechanism by which this speech translates into harm. The *listener*—the one who is directly exposed to the speech—is harmed simply as a result of hearing and processing the speech.

3. Dissemination-Based Harm

Speech can also cause harm to third parties simply because of the *content* of the information disseminated. In other words, the mere fact that the speech was communicated to an audience might cause a third party to suffer harm. If, for example, one discloses embarrassing private facts about another person to the general public, the harm does not result from the listener processing the information and acting on it in a particular way, but from the mere fact that the information was disseminated to the listener, often with the general assumption that the information disclosed will continue to be passed on to others.[42]

What distinguishes dissemination-based harms from reactive harms is the role of the listener in the chain of causation. Rather

38. *E.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

39. *See, e.g.*, Snyder v. Phelps, 131 S. Ct. 1207, 1214 (2011); Cohen v. California, 403 U.S. 15, 16 (1971).

40. *See* Schauer, *supra* note 6, at 100-01.

41. *Id.* As many commentators have noted, the mechanism by which speech causes social harm—for example, whether it causes harm by persuading a listener to do something versus whether it does so by directly inflicting psychological trauma—might be deemed a significant determinant of the speech's value. *See, e.g.*, David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991) (describing the "persuasion principle," wherein "the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful"). For present purposes, however, I am not concerned with questions of speech value; rather, my sole concern is delineating and describing the different causal mechanisms by which speech might cause harm on the basis of its content.

42. *See* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 722 (1996).

than being rooted in the direct reaction the listener takes to the speech—the listener translating speech to a particular harmful act—dissemination-based harm is rooted in the mere fact that the information has been injected into the realm of public knowledge and discussion. In its purest form, this mechanism applies primarily to the sorts of privacy-based harms inherent in publicly disclosing private facts about another.[43] But this mechanism also plays a key role in understanding the harms that result from defamatory speech, which can be conceptualized as a hybrid of reactive harms and dissemination-based harms. Defamatory speech harms are reactive insofar as they are ultimately rooted in how a direct or remote listener translates the speech in question into harmful action (that is, lowering one's opinion of someone). But they are also premised on dissemination to the extent that the harm rests on public disclosure of the information; the direct listener's only role in causing the harm may be as a conduit of the information, which will then get passed on to others who bring about the harm.

4. Other Harms

There are other causal means by which speech can lead to social harm. Harm can result from conditions formed by the creation or dissemination of speech. Schauer, for example, discusses "participant harms," which are produced by the creation of a particular type of speech, such as the animals harmed in producing the "crush videos" in *United States v. Stevens*[44] or the children harmed in producing child pornography in *New York v. Ferber*.[45] Speech can also cause harm by creating or perpetuating particular social attitudes that lead to harmful effects,[46] or it might do so in the form of speech-acts, in which the utterance of the speech is coextensive

43. *See* RESTATEMENT (SECOND) OF TORTS § 652D (1976).

44. 559 U.S. 460, 465 (2010); Schauer, *supra* note 6, at 103.

45. 458 U.S. 747, 758 (1982); Schauer, *supra* note 6, at 103-04.

46. *See, e.g.*, Catharine A. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 323-24 (1984) ("[P]ornography causes attitudes and behaviors of violence and discrimination which define the treatment and status of half of the population."); Matsuda, *supra* note 7, at 2337 (observing that hate speech causes victims to suffer emotional distress and to "curtail their own exercise of speech rights"). Although many of these speech-based harms would be reactive or direct in nature, other harms would result from the general shifting of social mores that renders harmful behavior more socially acceptable.

with a particular act.[47] Speech may cause harm by purely physical means—for example, being kept up at night by a loud concert.[48]

But the bulk of content-based regulations are targeted towards speech's capacity to cause reactive harm, direct harm, or dissemination-based harm. And for each of these causal mechanisms, the audience's processing of the speech constitutes an integral link in the chain of causation. Speech cannot cause reactive harm without the audience translating the speech into action; it cannot cause direct harm without the audience internalizing the speech in a harmful manner; and it cannot cause dissemination-based harm without the audience grasping harmful content from the speech presented to it. Thus, in order to determine the extent to which particular speech causes regulable social harms, courts must make judgments as to how the speech would be processed by the audience.

B. Audience Judgments in First Amendment Analysis

When courts are tasked with evaluating the reactive harms, direct harms, or dissemination-based harms caused by speech, they must necessarily analyze how the speech will interact with the audience. Although the specific audience judgments that courts must make vary from case to case, all of these judgments fall into two broad categories: judgments concerning how audiences will *comprehend* the speech in question and those concerning how *sensitive* audiences will be to such speech.

1. Comprehension

In essentially all cases dealing with content-based speech regulation, courts must make judgments as to how the audience will *interpret* the speech in question. Whether the harm in question is reactive harm, direct harm, or dissemination-based harm, it cannot occur unless the audience comprehends the speech in a particular manner. In many cases, of course, this is a simple issue; there are only so many ways shouting "Fire!" in a crowded theater may be interpreted. But inherent to any analysis of content-based harm is

47. For example, an order of excommunication or declaring someone ineligible for benefits.
48. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989).

a basic judgment as to how the speech in question might be understood by the audience.

For example, in *Morse v. Frederick*, a high school student was disciplined for holding up a fourteen-foot banner with the phrase "BONG HiTS 4 JESUS" at a school event.[49] Writing for the Court, Chief Justice Roberts emphasized that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest";[50] as a result, whether the speech was protected effectively rested on how it might be interpreted.[51] Although noting that the message was "cryptic," the Court found "plainly ... reasonable" the school principal's interpretation that the banner would be viewed as "promoting illegal drug use."[52] The Court observed that "the phrase could be interpreted as an imperative: '[Take] bong hits…,'" or could be read as a celebration of drug use.[53] The Court therefore upheld the school's punishment of the student. In dissent, Justice Stevens stated that the Court's argument "practically refutes itself."[54] In his view, the phrase was simply a "nonsense message, not advocacy," noting that "it takes real imagination to read a 'cryptic' message … with a slanting drug reference as an incitement to drug use."[55]

Comprehension issues also lie at the heart of cases involving defamation by implication, in which courts must similarly make judgments as to how the audience will interpret the allegedly defamatory speech in question.[56] For example, in *Memphis Publishing*

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49. 551 U.S. 393, 397-98 (2007).

50. *Id.* at 407 (quoting Veronia Sch. Dist. v. Acton, 515 U.S. 646, 661 (1995)).

51. *See id.* at 401.

52. *Id.*

53. *Id.* at 402.

54. *Id.* at 444 (Stevens, J., dissenting).

55. *Id.*

56. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 782 (5th ed. 1984) ("A publication may be defamatory upon its face; or it may carry a defamatory meaning only by reason of extrinsic circumstances."). *See generally* Clay Calvert, *Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique*, 16 N. ILL. U. L. REV. 111, 133 (1995); Elizabeth Blanks Hindman, *When Is the Truth Not the Truth? Truth Telling and Libel by Implication*, 12 COMM. L. & POL'Y 341, 361 (2007). Comprehension issues may arise in evaluating truth or falsity of a statement, or they may arise in evaluating whether a statement is defamatory—that is, whether it would so "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977); *see* DAN B. DOBBS, THE LAW OF TORTS § 404, at 1131 (2000) ("The meaning of words, pictures or other communicative elements is critical not only on the issue of defamatory quality but also on the

Co. v. Nichols, the defendant published an article that stated, in relevant part:

> Officers said the [shooting] took place Thursday night after the suspect arrived at the Nichols home and found her husband there with Mrs. Nichols. Witnesses said the suspect first fired a shot at her husband and then at Mrs. Nichols, striking her in the arm, police reported.[57]

Although all of the facts in the article were true on their face, the court held that, as a matter of law, the article was capable of leading the reader to conclude, by implication, that Nichols had an affair with the suspect's husband.[58] By contrast, in *Loeb v. New Times Communications Corp.*, the court deemed the plaintiff's allegations of defamation by implication "strained, unreasonable, and unjustified."[59] Among other things, the article published by the defendant stated that the plaintiff's legal career "abruptly ended when he failed to make it through Harvard Law School";[60] the court rejected the plaintiff's argument that this statement implied that "he was forced to leave law school because of academic failure" when he had actually left voluntarily.[61]

In all of these examples, regulable harm resulted from the speech only to the extent that the audience would interpret the speech to hold a harmful meaning. There are numerous other cases that revolve around audience comprehension judgments, dealing with subsets of speech such as true threats[62] and incitement.[63] That this issue has emerged in many First Amendment harm analyses is unsurprising; speech is often slippery and can be subject to a wide range of interpretations. But in nearly every First Amendment case analyzing content-based regulations of speech, courts must make some sort of judgment, whether explicit or implicit, as to how the

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issue of truth or falsity.").

57. 569 S.W.2d 412, 414 (Tenn. 1978).

58. *Id.* at 419.

59. 497 F. Supp. 85, 90 (S.D.N.Y. 1980) (quoting Tracy v. Newsday, Inc., 155 N.E.2d 853, 855 (N.Y. 1959)).

60. *Id.* at 89.

61. *Id.*

62. *See, e.g.*, United States v. Maisonet, 484 F.2d 1356 (4th Cir. 1973).

63. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919).

audience will comprehend the speech in question, because the chain of causation between speech and harm will depend on the audience interpreting the speech in a certain way.

2. Sensitivity

In cases dealing with reactive harms and direct harms, courts must make judgments not only regarding the audience's comprehension of the speech in question, but also regarding its *sensitivity* to the speech.[64] That is, they must make a judgment as to how the speech—assuming that it is understood by the audience in a particular way—will *affect* the audience.

The particular audience sensitivity judgments that courts must make differ based on whether a case involves reactive harms or direct harms. In cases involving reactive harms, courts must determine the extent to which audiences will translate the speech in question into harmful action. What will the speech influence the audience to do, and how likely is it that they will do it?

The Supreme Court's incitement cases illustrate the sorts of audience sensitivity judgments courts must make in cases involving reactive harms. Both the traditional "clear and present danger" test[65] and the present-day *Brandenburg* test[66] require courts to make some judgment as to the extent to which the advocacy in question would translate into harmful action. Thus, for example, in *Frohwerk v. United States*, Justice Holmes, writing for the Court, upheld the conviction of a newspaper publisher who had published articles encouraging people to resist the draft.[67] In doing so, Holmes

64. By definition, dissemination-based harms rest only on the fact that certain information has been communicated, so the audience need only understand the speech for the harm to have occurred. *See supra* text accompanying notes 42-43.

65. This test, formulated by Justice Holmes in *Schenk v. United States*, held that dangerous advocacy could be regulated when the speech is "used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent." 249 U.S. 47, 52 (1919).

66. Bradenburg v. Ohio, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

67. 249 U.S. 204, 205, 210 (1919). The Court's decision was presumably based on the "clear and present danger" standard, which, although not specifically mentioned in *Frohwerk*, had been set forth by Holmes only a week earlier in *Schenk*. *See Schenk*, 249 U.S. at 52.

bemoaned the lack of a complete factual record, such as the circulation size of the newspaper in question,[68] but ultimately premised the Court's decision on the possibility that "the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out."[69] Thus, the Court's judgment rested on the theoretical possibility that at least certain audiences would be sufficiently sensitive to translate the speech into harmful action.

Holmes's views would soon change dramatically. In his famous dissent in *Abrams v. United States*—in which the Court upheld the criminal conviction of a leaflet publisher—Holmes stated that "nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so."[70] Thus, Holmes in *Abrams* was willing to make what was, on its face, a very different judgment regarding the sensitivity of the audience,[71] presuming that the audience was not so sensitive as to be swayed to harmful action by a "silly leaflet by an unknown man."[72]

These sorts of audience sensitivity judgments regarding listeners' likely physical response to speech are relevant to all cases involving reactive harms. Thus, such judgments—whether explicit or implicit—play a key role in determining the extent to which, for example, violent video games,[73] a book instructing readers how to become a contract killer,[74] or the wearing of protest armbands in a school setting[75] may be constitutionally regulated.

The audience sensitivity judgments that courts must make in cases involving *direct* harm are slightly different in character. In

68. *Frohwerk*, 249 U.S. at 209.

69. *Id.*

70. 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

71. *See* Steven J. Heyman, *The Dark Side of the Force: The Legacy of Justice Holmes for First Amendment Jurisprudence*, 19 WM. & MARY BILL RTS. J. 661, 679-82 (2011) (speculating as to the reasons for the change in Holmes's views).

72. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

73. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735-38 (2011).

74. *See* Rice v. Paladin Enters., 128 F.3d 233 (4th Cir. 2000).

75. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (deeming the suspension of students for wearing armbands at school unconstitutional in the absence of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities").

these cases, the relevant question is not the extent to which the audience will physically react to speech, but the audience's *psychological vulnerability* to speech. That is, to what extent is the audience likely to suffer emotional harm as a direct result of assaultive speech?

Take, for example, the famous case of *Cohen v. California*, in which Cohen was arrested for disturbing the peace because he wore a jacket bearing the words "Fuck the Draft" in a Los Angeles courthouse.[76] The Supreme Court premised its reversal of Cohen's conviction in part on its judgment regarding the audience's sensitivity to the offensive speech in question. In reaching its decision, the Court downplayed the extent to which the audience of Cohen's speech—people within the Los Angeles courthouse—would or should incur emotional harm as a result of the offensive content of the speech, asserting that the audience "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[77] By contrast, in *Lehman v. Shaker Heights*, a plurality of the Court upheld a city ban on posted political advertisements on the city's public transportation, observing that "[u]sers would be subjected to the blare of political propaganda."[78] In a concurring opinion, Justice Douglas observed that "the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen."[79] Thus, an essential component of the Court's decisions in *Cohen* and *Lehman*—two cases dealing with direct harm—was a judgment regarding the audience's vulnerability to emotional harm resulting from the speech in question.

Like in cases involving reactive harms, cases dealing with direct harms necessarily require courts to make some sort of judgment, whether implicitly or explicitly, regarding the audience's sensitivity to the speech in question—specifically, the audience's psychological vulnerability to the speech. Such judgments thus play a central role

76. 403 U.S. 15, 16 (1971).

77. *Id.*

78. 418 U.S. 298, 304 (1974) (plurality opinion).

79. *Id.* at 307 (Douglas, J., concurring) (quoting Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting)).

in evaluating the harms resulting from, for example, commercial speech,[80] true threats,[81] or fighting words.[82]

3. Summary

In the vast majority of cases in which the government regulates speech on the basis of its content, the speech-based harm that the government seeks to regulate occurs through the intermediary of an audience in the form of reactive harms, direct harms, or dissemination-based harms. Thus, in order to properly measure and analyze these harms, courts must necessarily make judgments regarding the relationship between the audience and the speech. In nearly all cases, the court must consider how the audience will *comprehend* the speech in question, and in cases involving reactive and direct harms, it must also consider how that speech will *affect* the audience, either by spurring the audience to harmful action or by inflicting psychological harm.

II. AUDIENCE ANALYSIS WITHIN THE ARCHITECTURE OF FIRST AMENDMENT DOCTRINE

Courts' judgments regarding the First Amendment audience play a significant role in calibrating the balance between the value of free speech and the social harms that are caused by such speech. Whenever speech is regulated based on its content, the chain of causation leading to the associated harms typically runs through an audience, and courts cannot calculate the harm caused by the speech in question without making judgments as to how audiences will process the speech.

In this Part, I discuss how audience analysis is conducted within the framework of current First Amendment doctrine. A court evaluating a content-based speech regulation under the First Amendment must necessarily make two separate judgments. First, the court must categorize the speech in question, either by placing it in a predefined speech-value category or by creating a new

80. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71-72 (1983).

81. *See, e.g.*, Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 616, 622-23 (8th Cir. 2002).

82. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942).

category or subcategory. The court must then apply the scrutiny analysis corresponding to the speech category in question. Thus, for example, in a challenge to a content-based ordinance banning direct-mail advertising of contraceptives, the court must first determine whether the speech in question is commercial speech or fully protected core speech. Then, based on the category, the court must apply the corresponding scrutiny analysis (the intermediate-scrutiny *Central Hudson* test for commercial speech or strict scrutiny for core speech).[83]

Depending on the nature of the case, audience analysis can occur at either the categorization or the scrutiny stage, and the sorts of analyses that courts undertake can vary widely. To illustrate these differences, I focus on two paradigmatic modes of audience analysis. In the first, audience analysis is conducted in order to determine, as a matter of ex post categorization, whether particular statements made by a particular speaker ought to be categorized as low-value speech undeserving of First Amendment protection. In the second, audience analysis is conducted as part of a more generalized scrutiny-stage analysis, with the goal of determining the extent to which government regulation of a particular subset of constitutionally protected speech actually serves to advance the government's asserted regulatory interests. I walk through these two modes of audience analysis in turn.

A. Case-Specific Audience Analysis in Categorizing "Borderline Speech"

In May 1994, Richard Egan, an FBI agent, investigated a complaint filed by Kevan Fulmer, who had alleged that his former father-in-law and his brother had failed to disclose assets at bankruptcy and committed fraud.[84] During the investigation, Egan stayed in constant communication with Fulmer, who Egan described as "polite, articulate," and "tense."[85] Fulmer frequently discussed the strained relationship he had with his family, characterizing his father-in-law and brother as "vicious" people who had "used the

83. *See Bolger*, 463 U.S. at 64-74.
84. United States v. Fulmer, 108 F.3d 1486, 1489 (1st Cir. 1997).
85. *Id.*

courts to keep him away from his family."[86] After conducting his investigation, Egan informed Fulmer that the record did not support a prosecution, a decision that Fulmer protested.[87]

Three months later, Egan received the following voicemail from Fulmer:

> Hi Dick, Kevan Fulmer. Hope things are well, hope you had an enjoyable Easter and all the other holidays since I've spoken with you last. I want you to look something up. It's known as misprision. Just think of it in terms of misprision of a felony. Hope all is well. The silver bullets are coming. I'll talk to you. Enjoy the intriguing unraveling of what I said to you. Talk to you, Dick. It's been a pleasure. Take care.[88]

Fulmer was indicted for threatening a federal officer.[89] Egan testified that he was "shocked" by the "chilling" and "scary" message.[90] In particular, he believed that the term "silver bullets" used by Fulmer indicated a threat of violence.[91] His supervisor testified that Egan appeared "clearly upset, concerned, [and] agitated."[92] Fulmer, for his part, presented two witnesses who testified that Fulmer had used the phrase "silver bullets" to describe "a clear-cut simple violation of law"—specifically, "information that he was going to provide to banks proving the illegality of some of [his brother's] transactions."[93]

After the jury returned a verdict against Fulmer, he appealed to the First Circuit. The court applied a "reasonable speaker" standard for judging whether the statement constituted a threat, stating that "a defendant may be convicted for making a threat [when] he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made."[94] Finding the evidence sufficient to sustain a jury verdict on this basis, the court

86. *Id.*
87. *Id.* at 1489-90.
88. *Id.* at 1490.
89. *Id.* at 1489; *see* 18 U.S.C. § 115(a)(1)(B) (2006).
90. *Fulmer*, 108 F.3d at 1490.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1491.

observed that "a conviction under this statute, based on a finding that the statement was a true threat, would not violate Fulmer's constitutionally protected right to speech."[95]

In *Fulmer*, the audience analysis undertaken by the jury and the reviewing court took place, as a doctrinal matter, within the first step of First Amendment analysis—in deciding whether the speech in question should be categorized as one of the low-value categories of speech afforded no special protection under the First Amendment (here, true threats).[96] Under the test adopted by the First Circuit, the initial judgment regarding the categorical *value* of the speech rested directly on judgments regarding the *harm* that might be caused by the speech. That is, whether Fulmer's speech was classified as an unprotected true threat was based on the extent to which the speech might be processed by the audience in a harmful way—how the audience might comprehend the speech and how sensitive it might be to suffering psychological harm as a result.

Fulmer represents one paradigmatic mode of audience analysis: the highly context-specific, ex post, "borderline speech" case in which particular speech falls somewhere along the boundary between low-value speech and protected core speech. The relevant question in *Fulmer* was whether the specific statement made by Fulmer to Egan, within the particular context in which it was made, constituted a true threat that can be freely regulated under the

95. *Id.* at 1493.

96. The Supreme Court has not clearly delineated a constitutional definition for unprotected true threats. Prior to the Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003), lower courts had generally defined "true threats" based on some form of objective standard. *See, e.g.*, United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973) (whether "an ordinary, reasonable recipient who is familiar with the context of the [speech] would interpret it as a threat of injury"). In *Black*, the Court stated, somewhat ambiguously, that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359. Some courts and commentators have read *Black* to require that the speaker subjectively intend the speech to be a threat. *See, e.g.*, United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005) ("We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 217. However, "[f]ollowing *Black*, the vast majority of courts continued to use one of the objective intent standards that saturated the pre-*Black* landscape." Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1261 (2006); *see also id.* at 1261-64 (collecting cases).

First Amendment. This sort of inquiry is necessarily fact-intensive: What exactly does "silver bullets" mean? What was the relationship between Fulmer and Egan? How much should it matter that Egan actually felt threatened by Fulmer's voicemail message?

This sort of context-specific audience analysis arises in all cases in which a speaker faces liability based on speech that falls within the hazy interstices between low-value and protected speech. Beyond true threats, all categories of low-value speech are defined, at least in part, in terms of the extent to which the audience will process the speech in a harmful manner.[97] *Brandenburg*, for example, dictates that speech cannot constitute incitement unless it is "likely to incite or produce [imminent lawless] action."[98] *Miller v. California* dictates that speech is obscene only if "the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest."[99] And *Cohen* characterizes "fighting words" as those "which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[100] The same is true of fraud and defamation, both of which, under the common law, require some causal link between the allegedly harmful speech and an actual or presumed social harm.[101]

Audience analysis can thus occur in the context of categorizing particular utterances—specifically, in determining whether borderline speech should be categorized as freely regulable low-value speech or protected core speech.[102] In this mode of audience

97. By "low-value speech," I mean the categories of speech for which courts have granted little to no special protection under the First Amendment. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 468-69 (2010) (setting forth some of these categories). This does not include partially protected speech such as commercial speech or speech in public schools. *See infra* notes 117-18.

98. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

99. 413 U.S. 15, 24 (1973).

100. Cohen v. California, 403 U.S. 15, 20 (1971).

101. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."); KEETON ET AL., *supra* note 56, § 108, at 749-54 (discussing the reliance requirement in fraud cases).

102. *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 159-61 (1974) (obscenity); *Cohen*, 403 U.S. at 20 (fighting words); Hatfill v. N.Y. Times Co., 416 F.3d 320, 331 (4th Cir. 2005) (defamation by implication); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1022-23 (5th Cir. 1987) (incitement).

analysis, courts must make an ex post, context-specific judgment as to how the audience might process the speech in question in order to properly categorize the speech. Once the classification determination has been made, the rest of the analysis is usually straightforward. If, for example, speech is deemed low-value incitement, then it has, by definition, negligible First Amendment value and can generally be regulated freely;[103] on the other hand, if it is deemed to be core protected speech, then strict scrutiny applies, which will almost always mean that the speech is insulated from criminal or civil liability.[104]

B. Generalized Audience Analysis Within the Scrutiny Framework

Fulmer illustrates one paradigmatic mode of audience analysis—the ex post, context-specific analysis of a particular utterance that occurs in categorizing borderline speech. The Supreme Court's decision in *Edenfield v. Fane*[105] illustrates the other paradigmatic mode of audience analysis: a highly generalized "scrutiny" analysis of how an audience might process a designated subset of protected speech that the government has sought to regulate.

In *Edenfield*, Florida's Board of Accountancy established a rule that generally prohibited CPAs from "direct, in-person, uninvited" client solicitations.[106] Scott Fane, a CPA licensed in Florida, sued the Board for declaratory and injunctive relief, arguing that the rule violated the First Amendment.[107] Characterizing the regulated speech as commercial speech, the Court applied the intermediate scrutiny standard set forth in *Central Hudson*.[108] In determining whether the Board met its burden under the third prong of the *Central Hudson* test—"whether the challenged regulation advances

103. *See* Richard C. Ausness, *The Application of Product Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 641 (2000) ("[C]ourts will normally uphold restrictions, or even complete prohibitions, of low-value speech as long as the government can show a rational basis for its actions.").

104. *See, e.g.*, Patricia Millett et al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 38 (2010) ("[I]n the First Amendment context, the Court has adhered closely to the late Professor Gunther's famous maxim that strict scrutiny is 'strict' in theory and fatal in fact.") (internal quotation marks omitted).

105. 507 U.S. 761 (1993).

106. *Id.* at 764.

107. *Id.* at 763-64.

108. *Id.* at 765-67.

[the government's regulatory] interests in a direct and material way"[109]—the Court examined the evidence presented by the Board to support its assertion that those subjected to uninvited in-person solicitations from CPAs would suffer a loss of privacy and be at risk of fraud or deception.[110]

In scrutinizing the Board's evidence, the Court noted that the state's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[111] It noted that the Board "present[ed] no studies that suggest personal solicitation of prospective business clients by CPA's creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear."[112] The Court criticized the Board's primary reliance on "conclusory statements" in a single affidavit from a former member of the Board.[113] And it cited other evidence regarding personal solicitation by CPAs suggesting that the Board's concerns were off-base.[114] As a result of this analysis, the Court held that "[t]he Board has not demonstrated that, as applied in the business context, the ban on CPA solicitation advances its asserted interests in any direct and material way," and it struck down the regulation.[115]

The Court's audience analysis in *Edenfield* differs from the analysis undertaken in *Fulmer* in multiple ways. First, as a doctrinal matter, the analysis arises not as a function of the initial speech categorization process, but rather at the back-end scrutiny stage of the analysis. As noted above, all low-value speech categories are defined, at least in part, based on the speech's capacity to cause harm when processed by the audience.[116] But when these categories of low-value speech do not come into play, speech is presumed to have some degree of First Amendment protection, and when the government seeks to regulate such speech based on content,

109. *Id.* at 767.
110. *Id.* at 770-73.
111. *Id.* at 770-71.
112. *Id.* at 771.
113. *Id.*
114. *Id.* at 772-73.
115. *Id.*
116. *See supra* notes 97-101 and accompanying text.

audience analysis occurs within the application of either intermediate or strict scrutiny.[117] Both standards call for the government to assert its regulatory interest (that is, the social harm resulting from the speech that it wishes to prevent) and to establish a causal connection between the regulated speech and the asserted interest.[118]

Second, the underlying issue in *Edenfield* is not borderline speech—speech that implicates the hazy borders surrounding doctrinal or regulatory speech categories.[119] Here, there is no question that the regulation targets commercial speech—a category that, unlike the low-value speech categories, is defined purely in terms of the speech's substance rather than its potential to cause harm—and the scope of the regulation is similarly defined, on its face, purely in terms of substance rather than the potential harmful effects of the speech. Unlike in *Fulmer*, the goal of the Court's audience analysis in *Edenfield* is to determine whether the government is justified in regulating a clearly delineated subset of speech;

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117. Outside of the low-value speech categories, speech is generally categorized purely in terms of its substance rather than in terms of its capacity to cause harm. For example, commercial speech is "usually defined as speech that does no more than propose a commercial transaction." United States v. United Foods, Inc., 533 U.S. 405, 409 (2001). And core protected speech does not generally have an established definition; rather, it is best conceptualized as the default category for all speech that is not defined to be low-value (such as fighting words) or partially protected (such as commercial speech). *See, e.g.*, Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 801 n.3.

118. If the speech the government seeks to regulate does not fall into a special category of lesser-protected speech, then strict scrutiny applies, under which the regulation can survive only if it is "narrowly drawn to effectuate a compelling state interest." *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983). Whether the regulation serves "a compelling state interest" is, of course, a function of whether it covers speech that will be processed by the audience in a manner that produces regulable social harm. *See* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2422 (1996) ("For a law to be narrowly tailored, the government must prove to the Court's satisfaction that the law actually advances the interest."). If the speech is deemed to be commercial speech, or if the speech regulation occurs within certain institutional contexts, then some form of intermediate scrutiny applies. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562-66 (1980) (commercial speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513-14 (1969) (speech in public schools). Although the specific formulations of these standards vary, they also invariably include an analysis of whether the audience will process the regulated speech in a harmful manner. *See, e.g.*, *Cent. Hudson*, 447 U.S. at 566 (requiring a determination of "whether the regulation directly advances the governmental interest asserted").

119. *See supra* Part II.A.

to frame this in another way, the government has "frozen" a chunk of speech out of public discourse, and the Court's job is to scrutinize the government's harm calculus in undertaking such regulation.

Finally, the posture of *Edenfield* necessitates an audience analysis that is far more generalized than the sort of analysis conducted in *Fulmer*. The Court did not need to delve, ex post, into any particular case-specific facts or contextual detail in undertaking its analysis, and there was no dispute regarding either the constitutional categorization of the regulated speech or the clarity of the regulation's coverage.[120] Thus, unlike in *Fulmer*—in which the jury or court would have to evaluate the various contextual details surrounding the statement itself, Fulmer's relationship with Egan, Egan's disposition, and so forth—the *Edenfield* Court looked only to the regulation itself, and its inquiry was simply to test the general connection between that regulation and the government's asserted interest.[121]

This sort of generalized, scrutiny-based audience analysis naturally arises in cases involving challenges to clear, content-based regulations on protected speech. This includes not only cases that, like *Edenfield*, deal with government regulations of commercial speech,[122] but also cases involving strict scrutiny review of regulations targeting fully protected speech—for example, cases dealing with regulations on violent video games[123] or on campaign-related speech in close proximity to polling areas.[124]

Thus, audience analysis can arise at either the categorization stage or the scrutiny stage of First Amendment analysis, and such analysis can occur in two paradigmatic modes. Sometimes this analysis is conducted in a highly case-specific and contextualized manner: Should this particular speech, uttered in these particular circumstances, be categorized as low-value speech? And other times, this analysis is conducted on a much more generalized level: Does

120. *See supra* Part II.A.

121. *See supra* Part II.A.

122. *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553 (2001); Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 63 (1983).

123. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).

124. *See* Burson v. Freeman, 504 U.S. 191, 193 (1992).

government regulation of a designated subset of protected speech actually advance its regulatory goals?

I now move on to the question of *how* courts should perform such audience analyses. In Part III, I compare two broad approaches that courts might take, ultimately concluding that the fundamental goal of audience analysis should be to forecast, as accurately as possible, the extent to which the targeted audience will actually process the speech in a harmful manner. And in Part IV, I explore how this basic proposition might influence the ways in which courts currently conduct audience analysis.

III. THE THEORETICAL GOALS OF FIRST AMENDMENT AUDIENCE ANALYSIS

How should courts conduct audience analysis? Broadly speaking, there are two general approaches that courts might take. On the one hand, courts could premise such analysis around a particular normative ideal—for example, a "rational," sophisticated, thick-skinned audience. On the other hand, they could simply seek to predict, as accurately as possible, the extent to which the targeted audience would actually process the speech in a harmful manner.

Although, as I will discuss later, these two approaches represent different directions on a spectrum rather than distinct modes of analysis, I argue that the baseline for First Amendment audience analysis should generally be an actual, foreseeable audience rather than a hypothetical, idealized one. If First Amendment jurisprudence is, at its core, an exercise of balancing the value of speech against its associated social harms, then only by ascertaining, as accurately as possible, the extent to which audiences will actually process speech in a harmful manner can courts correctly calibrate the scope of First Amendment protection in a given circumstance.

A. Idiosyncratic Audiences and the Shortcomings of Pure Effects-Based Tests

To begin our exploration of the potential approaches that courts might take in conducting audience analysis, let us return to the facts of *Fulmer*. As you will recall, that case ultimately turned on the question of whether Fulmer's message to Egan that "[t]he silver

bullets are coming" constituted a true threat for First Amendment purposes.[125] If so, then, as low-value speech, it would be freely subject to criminal punishment. If not, it would presumably be fully protected speech, and under strict scrutiny, the prosecution would almost certainly fail. As discussed above, whether speech constitutes a true threat is generally premised on the extent to which the speech causes social harm—here, fear and intimidation in the mind of the audience.[126]

So how might a court calculate the harm resulting from Fulmer's speech? The most direct approach might be to simply look at the real-world effects of the speech and base its categorization decision on how the listener *actually* processed the speech. So the court might simply note that Egan actually understood the speech to be threatening and actually felt threatened as a result. On this basis, it could classify Fulmer's speech as a true threat that does not warrant any constitutional protection; after all, the severe harm suffered by Egan would presumably trump the limited speech value of Fulmer's voicemail message.

Although this seems straightforward enough, courts have not adopted this sort of pure actual-effects test in cases like *Fulmer* for obvious reasons. People can process speech in a wide variety of ways, and it is often impossible to predict, ex ante, how exactly particular audience members might respond to the speech. For example, suppose that someone delivers a formal lecture about the virtues of healthy eating to an audience. A particularly excitable and hotheaded audience member somehow interprets the speech as an incitement to "fight back" against unhealthy foods and as a result vandalizes a nearby fast-food restaurant.[127] Basing the liability of the speaker on the actual harm incurred in such a case would appear fundamentally unfair, since the harm resulted from the listener's highly idiosyncratic response to the speech—one that nobody, including the speaker, reasonably could have expected. One way to illuminate this point is to reframe the issue in tort terms. Although there would be little doubt that the speech was a cause-in-

125. United States v. Fulmer, 108 F.3d 1486, 1490-93 (1st Cir. 1997).

126. *See supra* notes 97-101 and accompanying text.

127. Of course, such speech would not, in fact, be punishable under the *Brandenburg* standard, which requires express incitement. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). My purpose here is simply to examine audience analysis on a theoretical level.

fact of the harm,[128] there would also be little doubt that the speech was not a *proximate cause* of the harm.[129] Rather, the listener's highly idiosyncratic response to the speech would likely be deemed a superseding cause of the harm that resulted, since it would be normatively unfair to attribute such harm to the speaker's actions.[130]

Furthermore, apart from purely normative concerns, a pure actual-effects test that does not account for idiosyncratic audience responses would create massive chilling effects. If I could be potentially liable for anyone's idiosyncratic reaction to my speech, then I would certainly be hesitant to speak ex ante.[131] Thus, any sort of ex post audience analysis premised solely on the audience's actual, historical processing of the speech would incur a massive social cost: if speakers have to adjust their speech, ex ante, to account for all possible idiosyncratic responses to that speech, then a significant amount of valuable speech will be left unsaid.

So when a court is tasked with judging, ex post, whether certain speech should be regulable as low-value speech, it cannot look solely to what actually happened because it has to account for the problem of idiosyncratic audience response. And of course, there may be no actual consequences to look at in a particular case; for instance, the speaker could be charged with violating a criminal threat statute before the target of the threat is even made aware of it.[132] Thus,

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128. A person's conduct cannot be deemed the cause of an event "if the event would not have occurred but for that conduct." KEETON ET AL., *supra* note 56, § 41, at 266. Causation in fact is thus, on its face, a purely empirical question: was the act in question an essential part of the causal chain leading to the harmful result?

129. Unlike determinations of but-for cause, which are empirical in nature, determinations of proximate cause are based on normative considerations—the extent to which legal responsibility ought to extend for the consequences of tortious actions. *See, e.g.*, Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1073 (2001). Proximate cause effectively acts as a catch-all term encompassing all of the policy-based considerations courts have for limiting liability even when factual causation exists. *See* KEETON ET AL., *supra* note 56, § 42, at 273.

130. I discuss the connection between First Amendment audience analysis and the issue of "superseding" or "intervening" cause in greater detail below. *See infra* Part III.C.

131. *Cf.* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469 (2007) (observing that an actual-effects test "puts the speaker ... wholly at the mercy of the varied understanding of his hearers" (quoting Buckley v. Valeo, 424 U.S. 1, 43 (1976))).

132. *See, e.g.*, 18 U.S.C. § 871(a) (2006) (establishing criminal penalties for anyone who "knowingly and willfully deposits for conveyance in the mail ... any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict

courts must conduct audience analysis via some sort of ex ante judgment as to how much harm the speech would reasonably cause—that is, a judgment as to which audience reactions to speech are so natural or foreseeable that the associated harm should be imputed to the speaker, and which are so idiosyncratic as to break the chain of causation.[133]

B. Predictive Versus Normative Approaches to Audience Analysis

Thus, in cases like *Fulmer*, courts ought to apply some form of objective test rather than an actual-effects test in conducting audience analysis.[134] But in implementing such an objective test, how should courts determine what ought to count as a harm that can be imputed to the regulated speech? Generally speaking, courts could choose between two broadly different approaches to this question. They might assume a strongly normative vision of an idealized rational audience and project how such an audience *should* process speech.[135] Or they could seek to predict, in a more empirical and contextual manner, how the particular targeted audience in question would *likely* or *foreseeably* process the speech.

An illustration may be helpful to delineate between these two approaches.[136] Suppose that a neo-Nazi organization holds a rally in

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bodily harm upon the President of the United States"). Unlike in the tort context, criminal liability often attaches for inchoate wrongs—that is, wrongful acts where harm has not yet been realized. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636 (2002) ("Criminal law sometimes prohibits and punishes genuinely inchoate wrongs—uncompleted wrongful acts. Tort law does not.").

133. Of course, evidence of actual harm in a case could serve as a useful data point in making this sort of ex ante determination. *See, e.g.*, United States v. Schneider, 910 F.2d 1569, 1571 (7th Cir. 1990) ("The fact that the victim acts as if he believed the threat is evidence that he did believe it, and the fact that he believed it is evidence that it could reasonably be believed and therefore that it *is* a threat.").

134. As I discuss below, courts, in defining the contours of low-value speech categories, have generally adopted some form of objective measure of harm, although the exact formulations vary. *See infra* notes 197-205.

135. They could also presumably premise their analyses on the opposite normative vision of a highly unsophisticated, thin-skinned, and irrational audience. Given the significant weight accorded to free speech values in contemporary American culture and jurisprudence, however, one rarely encounters arguments for this sort of highly unprotective normative baseline. Furthermore, adopting such a standard would raise the same sorts of chilling and fairness concerns inherent to the "idiosyncratic audience" problem discussed above. *See supra* Part III.A.

136. The facts of this example are loosely based on *Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978).

a town full of Holocaust survivors. The rally includes much hateful invective, and in one particular speech, the speaker, after discussing his general admiration for the "ethnic purity" policies of the Third Reich, looks into the crowd and opines that the organization hopes to "finish the job the Nazis started." After the event, the speaker is charged under a criminal statute prohibiting true threats. A court might try to determine whether the particular audience in that town is, as a predictive matter, reasonably likely to feel actually threatened by the speech, and choose to allocate these harms to the speech itself based on this determination. On the other hand, it might decide that whatever the likely effects of the speech might be, the "sticks and stones" principle dictates that rational people ought to be thick-skinned against even such horrible invective, and thus any harm should be allocated to the audience's idiosyncratic reaction to the speech rather than to the speech itself.

In order to properly frame the following discussion, some initial clarifications are warranted. First, in discussing the ways in which courts might conduct audience analysis, I focus solely on the question of *harm calculation*—that is, how courts should calculate and measure speech-based harm. In other words, my sole concern is how courts determine what they should plug into the harm side of the equation in undertaking First Amendment analysis. It may be, of course, that even when certain speech is deemed to cause significant social harm, the *value* of that speech is so high that we are willing to pay that price; for example, in the scenario set forth above, regulation might not be justified even if the speech will cause substantial harm to the audience because it is high-value political advocacy. I am interested here only in the theoretical question of how courts should calculate, through audience analysis, the harms that should be imputed to the speech in question.[137]

Second, when I refer generally to a "normative" approach versus a "predictive" approach to audience analysis, I am not referring to two absolutely distinct modes of analysis. As a practical matter, what one might predict to be the audience's likely response to particular speech is often premised on how one thinks an idealized,

137. I thus also leave to the side any issues regarding the appropriate structure of government regulation. For example, a regulation targeting speech that causes significant social harm may nevertheless be struck down because it discriminates based on viewpoint. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

hypothetical audience will process the speech, and vice-versa. Furthermore, as I discuss in more detail below, any form of objective analysis necessarily includes some normative elements of how a reasonable audience should act; otherwise, it would simply collapse into the pure actual-effects test described above.[138] I use the terms "normative" and "predictive" simply to signify two general directions on a spectrum; courts can undertake audience analyses in a highly normative manner, in a highly predictive manner, or at any point in between.

Finally, I am not concerned here with questions regarding the *kinds* of social harms that ought to be legitimately subject to government regulation[139]—the sorts of normative questions that often dominate debates surrounding, for example, pornography or hate speech regulation.[140] Rather, my focus is solely on how courts should conduct audience analyses in calculating harms that are clearly subject to legitimate government regulation, such as the fear and intimidation caused by true threats.

With these clarifications out of the way, to what extent should courts premise audience analysis on a highly normative conception of an idealized audience, and to what extent should they seek to forecast the actual harms that will likely be suffered by the specifically targeted audience?

C. Foreseeability of Actual Harm as the Touchstone of Audience Analysis

In evaluating how courts ought to conduct First Amendment audience analysis, it is once again instructive to view the issue through the lens of tort law. Again, whenever speech is regulated on the basis of its content, the chain of causation between the speech and the resulting social harm typically runs through an audience.[141] In conducting audience analysis, courts must determine whether the audience's processing of the speech effectively breaks the chain of

138. *See supra* Part III.A.

139. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

140. *See supra* note 7.

141. *See supra* Part I.

causation—that is, should the harm resulting from the audience's processing of the speech be attributed to the speaker? Thus, First Amendment audience analysis is, in essence, a form of the superseding or intervening cause analysis that arises frequently in tort law: both confront the question of whether the subsequent intervention by another causal force should be sufficient to sever the chain of causation such that the harm inflicted should not be imputed to the actor.[142]

How, then, does tort law approach the issue of intervening cause? Traditional tort principles identify foreseeability as the touchstone of intervening cause analysis: whether a subsequent cause breaks the chain of causation between an allegedly tortious action and a resulting harm is premised on the ex ante foreseeability of that cause.[143] As one treatise puts it, "Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence."[144] This principle extends to situations in which the foreseeable intervening cause involves third party negligence, intentional wrongdoing, or even criminal action.[145] And since tort law generally takes actors' knowledge of specific relevant circumstances into account,[146] even harm caused by highly idiosyncratic intervening causes may be imputed to an actor, provided that he knew or should have known that the intervening cause could foreseeably result from his actions.[147]

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142. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 440, 441 (1965).

143. *See, e.g.*, Bouriez v. Carnegie Mellon Univ., 585 F.3d 765, 773 n.4 (3d Cir. 2009) (noting that under Pennsylvania law "[a] 'superseding cause' is an intervening force that is 'so extraordinary as not to have been reasonably foreseeable'" (quoting Chacko v. Commonwealth Dep't of Transp., 611 A.2d 1346, 1349 (Pa. 1992))); RESTATEMENT (SECOND) OF TORTS § 442A ("Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause."); KEETON ET AL., *supra* note 56, § 44, at 302 ("It is therefore said that the defendant is to be held liable if, but only if, the intervening cause is 'foreseeable.'").

144. KEETON ET AL., *supra* note 56, § 44, at 303.

145. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 447, 448; KEETON ET AL., *supra* note 56, § 44, at 304-05.

146. *See* KEETON ET AL., *supra* note 56, § 32, at 185 ("[I]f a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it.").

147. *See* David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 979 (2002) ("As far as legal cause is concerned, tort law does not distinguish sharply between risks that the defendant actually appreciated and risks that it should have appreciated but did not.

This longstanding tort principle makes both practical and normative sense. The fundamental goal of tort law is often conceptualized as maintaining the appropriate social balance between people's freedom to act and people's interest in personal security.[148] In premising liability on the foreseeability of intervening causes and their associated harms, tort law makes the sensible judgment—one that accords with basic notions of fairness—that actors ought to bear responsibility for the foreseeable consequences of their actions, even if those consequences may be highly idiosyncratic or the product of third party negligence or criminality.

The same rationale fits the First Amendment context, in which courts are similarly tasked with maintaining the appropriate social balance between the far-reaching value of unfettered speech and the potential harms that can result from such speech. Tort principles thus suggest a generally predictive approach to First Amendment audience analysis. If foreseeability is the touchstone of such analysis, then courts should be concerned with determining the reasonable likelihood that the targeted audience will actually process the speech in a harmful manner, rather than hypothesizing how an idealized rational audience *should* process the speech.

Professor Lyrissa Lidsky, however, has suggested that courts ought to adopt a broadly normative approach in undertaking audience analysis.[149] In her view, it is an "article[] of faith in modern First Amendment theory" that "audiences are capable of rationally evaluating the truth, quality, credibility, and usefulness of core speech."[150] That is, the audience is generally presumed to be "rational, skeptical, and capable of sorting through masses of information to find truth."[151] Lidsky argues that despite significant theoretical challenges to the "marketplace of ideas" theory and cognitive psychological studies highlighting people's propensity to cling to irrational beliefs, courts ought to adhere to the "rational audience" assumption.[152]

It requires only that the risk be *foreseeable*, not *foreseen*.").

148. *See, e.g.*, David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 719-20 (1992).

149. *See generally* Lidsky, *supra* note 117.

150. *Id.* at 810.

151. *Id.* at 815.

152. *Id.* at 835-49.

Lidsky's "rational audience" argument is pitched at a broad theoretical level and is, on its face, limited only to "core" speech.[153] Her argument suggests, however, that as a general matter, the proper approach to conducting audience analysis is to presume a "savvy and sophisticated" audience[154]—one that is non-impulsive, thick-skinned, and generally resistant to processing speech in harmful ways. Lidsky argues against adopting "[a] presumption of audience irrationality"[155]—a general assumption that audiences are apt to process speech in a harmful manner—and against approaches that would attempt to predict the actual effects of speech on a targeted audience, arguing, among other things, that such approaches risk "dumbing down"[156] public discourse and affording the government opportunities to interfere with the marketplace of ideas.[157]

I certainly agree with Lidsky's position in part. Much of the philosophical underpinnings of modern First Amendment jurisprudence are premised on the assumption that people generally process speech in a rational manner. Take, for instance, the "marketplace of ideas" metaphor famously set forth by Justice Holmes, who stated that "the ultimate good desired is better reached by free trade in ideas," and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[158] This "pursuit of truth" rationale for protecting speech—which has gone on to play a prominent role within the Supreme Court's First Amendment rhetoric[159]—necessarily assumes that public discourse occurs in a rational, honest, and fair manner such that the truth will ultimately emerge from an open clash of conflicting ideas.[160]

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153. *See id.* at 802-04. Lidsky has discussed, in a previous article, the benefits of taking actual audience reactions to speech into account in evaluating defamation claims. *See* Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 49 (1996) ("Requiring plaintiffs to bring evidence that their reputations were *actually* harmed in the eyes of *actual* communities will give the defamatoriness inquiry a more objective grounding.").

154. Lidsky, *supra* note 117, at 810.

155. *Id.* at 849.

156. *Id.* at 842.

157. *Id.* at 841-42.

158. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

159. *See, e.g.*, Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 534 (1980).

160. *See* SCHAUER, *supra* note 3, at 30; David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 90 (2012); Robert Post,

But the mere fact that the broad philosophical underpinnings of much of our First Amendment jurisprudence assume a rational audience does not necessarily mean that courts should calculate the harm resulting from speech based on an idealized rational audience construct. As I noted above, as a purely descriptive matter, First Amendment doctrine can be conceptualized at its core as a balancing analysis.[161] In crafting speech categories, assembling scrutiny tests, and the like, the Supreme Court has generally sought to determine when the far-reaching value of speech outweighs the often more immediate harms caused by the speech, and to calibrate the scope of First Amendment protection accordingly.[162] The overarching rational audience assumption adopted by Holmes and Brandeis at the inception of modern First Amendment jurisprudence recognizes the tremendous *value* that certain speech, such as political advocacy, has in uncovering and ascertaining truth. It also might serve to dictate, in general terms, what types of harms ought to be recognized as colorable speech harms.[163] But once certain social harms are identified as legitimate subjects of government regulation, the rational audience assumption does not necessarily lead to the premise that courts should measure those harms only insofar as an idealized hypothetical audience would suffer them.

I do agree that First Amendment audience analysis should not be geared towards the "least sophisticated audience."[164] As described above, the mere fact that someone might process the speech in a harmful manner should not, by itself, require that the harm in question be imputed to the speech.[165] But if First Amendment doctrine, at its most basic level, seeks to identify the optimal balance between the value and harms of uninhibited speech, then courts' ultimate goal should be to forecast, as accurately as possible,

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Participatory Democracy and Free Speech, 97 VA. L. REV. 477, 478 (2011); *see also* Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).

161. *See supra* note 4 and accompanying text.

162. Of course, as I noted above, this is an oversimplification; other concerns, such as chilling effects or the particular means by which the government chooses to regulate speech, come into play as well. *See supra* notes 15, 18 and accompanying text.

163. *See supra* notes 137-40 and accompanying text (distinguishing audience analysis from these sorts of purely normative questions).

164. Lidsky, *supra* note 117, at 838.

165. *See supra* Part III.A (discussing the shortcomings of actual-effects tests in light of the "idiosyncratic audience" problem).

the extent to which the speech in question would actually be processed by the targeted audience in a harmful manner.

Again, this sort of predictive and context-sensitive approach to audience analysis naturally follows from the parallel tort doctrine of intervening cause.[166] But it is also rooted in the fundamental premises of modern First Amendment jurisprudence. In seeking to properly tailor the scope of First Amendment protection, courts should weigh the value of speech against the harm that will foreseeably result from the actual audience's processing of such speech, not against some idealized notion of how a rational audience *should* process the speech.

If courts instead were to adopt a highly idealized rational audience standard in conducting audience analysis, then a number of very real social harms would simply be ignored. For example, in the *Skokie*-inspired example above,[167] if it is clear that the speech will foreseeably cause legitimately regulable harm to the audience—even if that harm may be idiosyncratic to that particular audience—then it is not clear why a court should not be entitled to take that social harm into account in determining the appropriate scope of First Amendment protection. Just as much as a strong irrational audience assumption, a strong rational audience assumption would skew courts' ability to maintain the appropriate balance between speech value and harm that rests at the center of First Amendment doctrine.

D. Potential Critiques of a Predictive Approach to Audience Analysis

In arguing that courts generally ought to adopt a rational audience assumption, Lidsky suggests that such an assumption produces independent benefits that would presumably justify courts' departure from pure accuracy and calibration concerns. She argues, among other things, that such an assumption would guard against the "dumbing down" of public discourse, that it would exhort citizens to conform to appropriate social standards, and that it would protect against government interference with the marketplace

166. *See supra* text accompanying notes 141-47.

167. *See supra* note 136 and accompanying text.

of ideas—benefits that would not accrue under either an "irrational audience" or "actual audience" assumption. I address each of these arguments in turn.

1. Preventing the "Dumbing Down" of Public Discourse

Lidsky suggests that failing to adopt a "rational audience" standard would "dumb down" the public discourse because speakers would have to be sensitive to "unsophisticated audience members who will not understand the nuances of their speech."[168] She argues that "[s]peakers would be responsible for transgressing the boundaries of public discourse unless they correctly predicted the interpretation that might be placed on their speech by unsophisticated audience members."[169] But in cases where the targeted audience will reasonably and foreseeably process the speech in question in a socially harmful manner—and that harm is something the government can legitimately seek to prevent—speakers *should* take this harm into account.

Take, for example, the basic facts of *Greenbelt Cooperative Publishing Association v. Bresler*.[170] Bresler, a real estate developer, won a libel verdict against a newspaper that had used the word "blackmail" to describe his negotiating position with the city council.[171] The Court found that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole."[172] Given the actual language of the article,[173] I would tend to agree with the Court's assessment, and the Court noted that the record was "completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime."[174]

But now let us imagine that the article was an editorial that said the following: "The town should not give in to Mr. Bresler's extortionate demands, which are tantamount to blackmail."[175] A

168. Lidsky, *supra* note 117, at 841-42.
169. *Id.* at 841.
170. 398 U.S. 6, 7-9, 15 (1970).
171. *Id.*
172. *Id.* at 14.
173. *See id.* at 15-18.
174. *See id.* at 14.
175. The Supreme Court has made clear that in the defamation context, there is no categorical constitutional immunity for statements of opinion. If any "statement on matters

"rational" reader would probably read this language as heated rhetoric. But what if it turns out that anyone familiar with the newspaper's readership—including the writer—could easily foresee that a substantial number of readers would take this to mean that Bresler had actually committed blackmail? In this case, the speech causes a real, substantial social harm that the government can clearly seek to regulate—damage to reputation based on a false perception. As long as the harm is foreseeable—even if it is not based on a "rational" interpretation—then it is unclear why we could not expect the speaker to account for this harm in deciding how to craft his speech ex ante.[176]

2. Encouraging Citizens to Conform to Higher Standards

Perhaps only harms that would be suffered by an idealized rational audience should count because such a standard will serve to educate listeners who do not meet that standard. Lidsky, for example, analogizes the function of the "rational audience" in First Amendment law to the function of the "reasonable person" in tort law.[177] This tort law analogy, however, does not clearly map onto the First Amendment framework.

The reasonable person standard in negligence law is used to define the terms of a person's duty to others; a person must act the way an idealized reasonable person would act, or suffer liability.[178] The educative function of tort law rests on the notion that a person with poor judgment will, as a result of being subject to liability under a negligence regime, learn to adhere to prevailing social standards of care. Put simply, the reasonable person standard incentivizes people to act in socially desirable ways.[179]

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of public concern" contains a "provably false factual connotation," then the speaker may be liable for libel. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990).

176. Of course, if Bresler were deemed to be a public figure—a subject on which the Court declined to rule in *Greenbelt*, 398 U.S. at 9—he would have to prove that the reporter made the defamatory statement with "actual malice." *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

177. Lidsky, *supra* note 117, at 842-44.

178. KEETON ET AL., *supra* note 56, § 32, at 173-75.

179. *See, e.g.*, *id.* at 176-77; Wendy J. Gordon, *Trespass-Copyright Parallels and the Harm-Benefit Distinction*, 122 HARV. L. REV. FORUM 62, 63 n.4 (2009) ("Negligence seeks to internalize harms and incentivize defendants away from undesirable behavior.").

As discussed above, however, speech causation is complex, and many harms resulting from speech are not actually incurred by the *listeners* of such speech. For example, in cases of reactive harm, listeners might process the speech in a way that causes them to commit harmful acts against third parties, as in incitement cases or "media harm" cases.[180] Or in circumstances that involve dissemination-based harm, like defamation, third parties might suffer harm based on the audience's interpretation of the speech in question. In these cases, adhering to a rational audience standard will not lead the audience to "come up to the standard of the reasonable person"[181] because it is third parties, not the audience, who will suffer uncompensated harm.

Furthermore, even in cases in which the audience suffers *direct* harm as a result of its "irrational" processing of speech, the logic of the reasonable person standard in tort law does not necessarily fit the First Amendment context. It makes intuitive sense to say that an absent-minded driver will, if he is able, learn to take greater precautions if he is forced to pay for property damage he has negligently caused. But it makes less intuitive sense to say that if the law did not provide the Holocaust survivors in the above example[182] with vindication for the foreseeable fear they felt, they would simply develop a thicker skin to extremist rhetoric in the future. Although a highly idealized rational audience assumption might force listeners to confront more potentially hurtful speech on a daily basis, it is unclear whether this would incentivize them to develop a thicker skin as a result—they may simply suffer increased harm.[183] And to the extent that the harm is reasonably foreseeable (and one that the government may legitimately seek to regulate), it is not immediately obvious why we should automatically insist that listeners bear such harm without legal recourse.

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180. *See supra* notes 26-28 and accompanying text.

181. Lidsky, *supra* note 117, at 842.

182. *See supra* note 136 and accompanying text.

183. Indeed, the audience in First Amendment direct-harm analysis may be more comparable to the *plaintiff* in the tort context, and tort law broadly recognizes harms caused by plaintiffs' special sensitivities. The most obvious example of this is the "thin-skull" rule, which generally holds that in calculating tort liability, "the defendant takes his victim as he finds him." RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 472 (10th ed. 2012).

3. Preventing Government Agenda-Setting

Perhaps a rational audience assumption is a necessary antidote to potential government interference with the marketplace of ideas. Lidsky argues that "[i]f courts were free to indulge the assumption that the public is generally stupid and uninformed," this assumption would open the door for the government to manipulate public discourse in the name of the "public good."[184] Again, I certainly agree that courts should not assume that the public is generally stupid and uninformed, and such an assumption might indeed risk excessive government interference with public discourse. But when speech foreseeably causes harms that outweigh the value of the speech, the government is justified in interfering with the marketplace of ideas. When speech will foreseeably lead to imminent violent acts, or cause listeners to feel actually threatened, or cause people's reputations to be actually damaged, it should not matter—at least as a question of calculating the harm attributable to the speaker—whether that harm might emerge in a manner that appears "irrational" in some abstract sense.

Lidsky suggests the early Espionage Act cases as examples of the dangers inherent in rejecting a strong rational audience assumption.[185] But as Lidsky observes, the Court in those cases undertook a highly deferential approach in scrutinizing the government's judgment of how audiences would process the regulated speech.[186] For example, in *Frohwerk*, the Court upheld Frohwerk's conviction under the Espionage Act with little to no scrutiny regarding the likelihood of actual harm.[187] I certainly agree that we ought to be inherently suspicious of the government when it seeks to regulate speech and that the Court should have done more to scrutinize the government regulation. But courts should address such suspicions by carefully double-checking the government's math on both the speech value and social harm sides of the equation. And if we care about accurately calculating the value and harms of speech in delineating First Amendment protection, the harm side of the equation should be premised on predictive concerns: how *likely*

184. Lidsky, *supra* note 117, at 844.
185. *See id.* at 845.
186. *See id.*
187. *See* Frohwerk v. United States, 249 U.S. 204, 209 (1919).

and *foreseeable* it is that the targeted audience will process the speech in a harmful manner.

E. Summary

Thus, courts should generally frame and undertake audience analysis as a matter of fact-based, predictive judgment—how the audience in question will *likely* process the speech—rather than as a normative judgment of how a hypothetical rational audience *should* process the speech. Of course, as I noted above, selecting this basic mode of analysis only points in a general direction that courts ought to travel along a spectrum of approaches. Within the set of highly contextual speech categorization cases like *Fulmer*, each case will present its own series of difficult, highly fact-intensive issues to resolve.

For example, what sorts of contextual factors should the court take into account in forecasting how the audience will likely process particular speech? If accurate prediction is the proper mode of analysis, then courts should delve deeply into context, taking into account the setting of the speech, the relationship between the speaker and the listener, and so forth. But there must be a stopping point in adopting contextual factors; if courts incorporated *every single* contextual factor related to the audience, the speaker, and the speech, the analysis would collapse into an actual-effects test. This scenario would be the equivalent of the *Fulmer* court conducting its audience analysis based on a "reasonable Egan" test, taking into account every single aspect of Egan's personality—and of course, if Egan actually felt threatened, then a reasonable person with all of his characteristics would obviously feel the same way.

Thus, within the *Fulmer* paradigm of audience analysis, courts must determine which contextual factors are relevant and which ought to be disregarded. In making these choices, some element of normative judgment must inevitably enter; for example, in certain circumstances, a court might choose to take the listener's social background into account, while it might choose to exclude this factor in other circumstances. Again, any sort of predictive analysis must incorporate some normative backstop lest it collapse into a simple actual-effects test. My sole contention here is that courts should generally frame their analyses towards the goal of accurately

forecasting how the audience will foreseeably respond, not towards an assessment of how an idealized audience should act. Given the fact-specific complexities of this type of audience analysis, it is difficult to generalize beyond this broad principle.[188]

F. Predictive Approaches in Generalized, Scrutiny-Stage Audience Analysis

In this discussion of the theoretical underpinnings of First Amendment audience analysis, I have focused exclusively on one particular paradigm of such analysis: the ex post categorization of particular speech as either low-value speech subject to broad government regulation or highly protected core speech.[189] This is because this paradigm of audience analysis—given the particular context within which it occurs—tends to involve a more complex set of issues and thus affords greater opportunities to explore in depth the sorts of theoretical concerns that courts might take into account in undertaking such analysis.

But the same principles apply equally to the other paradigm of First Amendment audience analysis: the more generalized, open-ended analysis that occurs at the scrutiny stage, such as the Court's analysis in *Edenfield*. Regardless of the context in which audience analysis occurs, courts' overall goal should be to ensure that the scope of First Amendment protection is correctly calibrated based on the value and harms of speech. Thus, courts' primary focus in undertaking any sort of audience analysis should be to predict, as accurately as possible, the extent to which the audience will foreseeably process the speech in a harmful manner.

Indeed, in the more generalized *Edenfield* paradigm of audience analysis, this basic principle is far more self-evident. Within the *Fulmer* paradigm, audience analysis is used to categorize particular speech that falls within the hazy borders between protected and

188. For an interesting discussion of exactly how complicated and fact-intensive such determinations can get, see Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1338-39 (2006) ("[T]he threats exception's irregular applications, and its adaptability to new forms, are unavoidable.... [because] it is hard to force a sharply defined doctrinal grid on a zone of human behavior that is, almost by definition, disorderly.").

189. *See supra* Part II.A.

low-value speech. As a result, courts must not only undertake a highly fact-intensive analysis, but they must also be sensitive to the idiosyncratic audience problem, which implicates general fairness concerns and can lead to chilling effects on speakers.[190] As I noted above, this explains why courts avoid pure actual-effects tests in conducting these sorts of audience analyses.[191]

But in cases like *Edenfield*, the government has already "frozen" a clearly delineated subset of speech.[192] Thus, courts need not worry about any idiosyncratic audience issues; there are no case-specific facts to work through, nor are there any direct chilling concerns in play. The court's job is simply to scrutinize the government's ex ante harm calculus in regulating speech, which calls for the court to forecast the actual likelihood that the targeted audience will process the regulated speech in a harmful manner.[193]

The more abstract and generalized posture of cases like *Edenfield* thus greatly simplifies the contours of courts' audience analyses. Rather than looking at a particular instance of speech, courts must evaluate a designated *subset* of speech, and rather than dealing with a particular contextualized audience, courts must look to the general target audience designated by the regulation in question. In this context, the analysis tends to take on a far more empirical bent, and courts naturally focus more directly on questions of pure prediction: to what extent will the audience process this particular subset of speech in a manner that actually produces the social harm that the government seeks to regulate?[194]

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190. *See supra* notes 127-31 and accompanying text.

191. *See supra* Part III.A. Along with adopting objective tests, courts might choose to address these sorts of chilling and fairness concerns by adding a subjective intent element to constitutional definitions of low-value speech. *See* Hess v. Indiana, 414 U.S. 105, 109 (1973) ("[S]ince there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had a tendency to lead to violence."); Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633 (2013).

192. Edenfield v. Fane, 507 U.S. 761, 768-70 (1993).

193. *See id.* at 770-71.

194. *See id.*

IV. THE RAMIFICATIONS OF ADOPTING A PREDICTIVE APPROACH TO AUDIENCE ANALYSIS

If, as I argue, the goal of audience analysis is to forecast, as accurately as possible, the harms that will likely result from the targeted audience's processing of speech, what ramifications should this have on the ways in which courts currently conduct audience analysis? In this Part, I propose that courts, in delineating tests for low-value speech, ought to frame audience analyses in clearly predictive terms rather than in terms that might invite a highly normative approach; I suggest the reasonable speaker framework adopted by some courts in the true threats context as a sensible model. Furthermore, in the context of more generalized scrutiny analyses, I observe that the Supreme Court's apparently increasing solicitude for considering empirical and social science data in conducting audience analysis represents a step in the right direction, and I argue that courts should generally err on the side of empirical rigor rather than intuitive judgment in undertaking such analyses.

A. Adopting a "Reasonable Speaker" Framework in Ex Post Speech Categorization Cases

How should courts conduct audience analysis in ex post speech categorization cases like *Fulmer*? As I discussed above, in order to accurately calibrate the scope of First Amendment protection, such analysis should be predictive in nature, premised on how the targeted audience will foreseeably process the speech rather than on how an idealized rational audience *should* process the speech.[195] But a pure actual effects-test, even in those circumstances in which it can feasibly be applied, is not a viable option due to both fairness and chilling concerns.[196]

Thus, courts must apply some form of objective test to measure the harm resulting from particular speech. But there are different ways in which courts can frame such tests, and this variety is

195. *See supra* Part III.C.

196. *See supra* notes 127-31 and accompanying text.

evident in the formulations that courts have adopted in crafting the various tests for low-value speech. For example, in the area of true threats—in which the Supreme Court has yet to establish a clear standard[197]—some courts have adopted a reasonable audience test, wherein speech is deemed a low-value threat if "an ordinary, reasonable recipient who is familiar with the context of the [speech] would interpret it as a threat of injury."[198] Other courts, like the First Circuit in *Fulmer*, have adopted a reasonable speaker test, which rests on whether the speaker "should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made."[199]

In the incitement context, the *Brandenburg* Court framed its audience analysis simply around whether the speech "is likely to incite or produce" imminent lawless action.[200] In *Cohen*, the Court defined "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[201] And defamation by implication cases have produced a variety of formulations;[202] for example, whether "the statements could fairly be read to libel the plaintiff,"[203] or whether the words convey defamatory meaning when "construed in the plain and popular sense in which the rest of the world would naturally understand them,"[204] or whether defamatory meaning can be gleaned " 'according to the fair

197. *See supra* note 96 and accompanying text.

198. United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973); *see also* United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) (quoting *Maisonet*, 484 F.2d at 1358); United States v. Schneider, 910 F.2d 1569, 1570 (7th Cir. 1990).

199. United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997); *see also* United States v. Hanna, 293 F.3d 1080, 1087 (9th Cir. 2002).

200. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

201. Cohen v. California, 403 U.S. 15, 20 (1971).

202. Although these formulations usually arise in the context of determining whether the law of a particular state recognizes a claim for defamation by implication, these standards also likely abut against constitutional standards, as there is presumably some constitutional limit as to how broadly states can define actionable defamation by implication. A similar dynamic can be seen in the true threats context, in which standards originally formulated in the context of statutory interpretation have gradually evolved into constitutional standards for defining unprotected true threats. *See* Crane, *supra* note 96, at 1245.

203. Loeb v. New Times Commc'ns Corp., 497 F. Supp. 85, 90 (S.D.N.Y. 1980).

204. Hatfill v. N.Y. Times Co., 416 F.3d 320, 331 (4th Cir. 2005) (quoting Schnupp v. Smith, 457 S.E.2d 42, 46 (Va. 1995)).

and natural meaning which will be given [the statement] by reasonable persons of ordinary intelligence.'"[205]

The extent to which there is any meaningful difference in the actual operation of these standards is unclear. The Supreme Court has done little to clarify the general incitement and fighting words standards it has established, and lower courts do not usually offer much of a gloss on these general standards. In many cases, the audience analysis inquiry is simply sent to the jury,[206] and whether a jury might apply, say, a reasonable audience test any differently from *Brandenburg*'s "likely to incite" standard is unclear. But if the goal of audience analysis is accurate forecasting of the harms that will foreseeably result from particular speech, then courts' doctrinal formulations of low-value speech categories should clearly reflect this goal. At the same time, however, such formulations should reflect general fairness concerns as to when speakers should be responsible for idiosyncratic audience responses, and they should limit any excessive chilling of valuable speech.

The reasonable speaker test adopted by multiple courts in the true threats context seems to provide the most sensible balance of all of these concerns. Under this standard, a court should measure the social harm resulting from the audience's processing of particular speech based on what the speaker should have reasonably foreseen under the circumstances; that is, whether he should have reasonably predicted that the audience to whom the statement was made would process the statement in a harm-producing manner.

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205. Romaine v. Kallinger, 537 A.2d 284, 288 (N.J. 1988) (quoting Herrmann v. Newark Morning Ledger Co., 138 A.2d 61, 67 (N.J. Super. Ct. App. Div. 1952)).

206. Defamation by implication cases are an exception; in those cases, courts must initially decide, as a matter of law, whether the language in question is reasonably susceptible to a defamatory meaning. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 614 (1977) ("The court determines (a) whether a communication is capable of bearing a particular meaning, and (b) whether that meaning is defamatory."). It also bears noting that in First Amendment cases, the Supreme Court has generally established that appellate courts must "make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression," Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964) (internal quotation marks omitted)), although in many contexts the specific boundaries of independent appellate review have not been clearly defined. *See, e.g.*, Bryan Adamson, *Critical Error: Courts' Refusal to Recognize Intentional Race Discrimination Findings as Constitutional Facts*, 28 YALE L. & POL'Y REV. 1, 41 (2009) (noting the "confusion as to which elements of libel ... would, as a constitutional imperative, demand 'independent assessment'" under *Bose*).

This test, in essence, mirrors the parallel tort law doctrine of intervening cause that I discussed above.[207]

The reasonable speaker approach explicitly pushes audience analysis toward prediction and foreseeability, designating the *actual* audience, rather than a hypothetical audience, as the relevant baseline. It encourages decisionmakers to undertake highly contextualized analyses, tailored to the particular facts of the case at hand, in an effort to ascertain how the targeted audience would foreseeably process the speech. By contrast, a more open-ended standard based on an "ordinary, reasonable audience" or an "ordinary citizen" would open the door for the decisionmaker to base its audience analysis on a strong normative judgment of how a hypothetical, idealized listener should process the speech. Again, if courts are to accurately calibrate the scope of First Amendment protection, then audience analyses should reflect the social harms that will foreseeably result from the actual audience's processing of the particular speech in question, rather than the harms that *should* result if an idealized rational audience were to process the speech.[208]

At the same time, the reasonable speaker framework, by calculating speech-based harms based on what the speaker should have reasonably foreseen, significantly mitigates the chilling and fairness concerns associated with premising speaker liability on idiosyncratic audience responses to speech. As noted above, most would deem it unfair to impute to the speaker all possible idiosyncratic audience responses to his speech—for example, the speaker whose lecture on healthy eating causes an unhinged listener to torch a nearby fast-food restaurant.[209] But what if the lecturer happened to *know* that this particular person was in the audience and could reasonably foresee that torching the restaurant was likely to occur as a result? At this point, any fairness concerns would be greatly diminished; allocating the resulting social harm to the speech would seem far more sensible when such harm could be reasonably predicted ex ante. In other words, it is not simply the idiosyncratic nature of an audience's response that triggers this

207. *See supra* text accompanying notes 141-48.
208. *See supra* Part III.C.
209. *See supra* Part III.A.

fairness concern—rather, it is the concern that the speaker could not reasonably *predict* such a response ex ante that makes it seem unfair.

Furthermore, the reasonable speaker framework mitigates any widespread chilling of valuable speech. The speaker need not worry about harm-inducing, idiosyncratic audience responses to his speech unless he reasonably should have predicted such a response ex ante. This could be either because he had specific knowledge of these idiosyncrasies or because they were so readily apparent that it is reasonable to impute such knowledge to him.

Of course, some degree of chilling will necessarily remain under a reasonable speaker framework. A speaker may be uncertain as to what will be deemed reasonable for him to foresee, and there is always a risk that courts will make mistakes. But to the extent courts remain concerned about these residual chilling effects, there are external means they can undertake to mitigate them. For example, they might choose to adopt a specific intent requirement—that is, a requirement that the speaker intend that the speech produce the harmful result in question[210]—or they might limit the application of the analysis to a particular subset of speech that is clearly defined in purely content-based terms.[211] The only point that I wish to make here is that when courts seek to measure the social harm associated with particular speech, the standard they use to measure the harms that count in this calculus should focus on what the speaker should reasonably be able to predict in light of the overall factual context, including the characteristics of the actual targeted audience. As long as the harms in question are reasonably foreseeable to the speaker, they should be relevant to the court's overall calculus, even if they might ultimately be outweighed by the value of the speech or other factors.

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210. *See* Kendrick, *supra* note 191, at 1658-59 (describing the Supreme Court's use of specific-intent requirements).

211. For example, the *Brandenburg* standard, which Gerald Gunther famously called the "most speech-protective standard yet evolved by the Supreme Court," Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975), has been construed to require both subjective intent and direct words of incitement on top of its "likely to incite" requirement. *See, e.g.*, Steven G. Gey, *The* Brandenburg *Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 977-78 (2010).

B. Embracing Empirical Rigor in Undertaking Scrutiny-Stage Audience Analyses

As noted above, within the more generalized and abstract *Edenfield* paradigm of audience analysis, courts have naturally tended to focus their analyses on purely predictive concerns.[212] Audience analysis in this context invariably takes on a far more empirical bent, geared specifically towards checking the government's ex ante calculus regarding the extent of harms actually produced by the subset of protected speech it seeks to regulate. Thus, the tenor of this more generalized paradigm of audience analysis tends to accord neatly with the overarching goal of all such analyses: accurately forecasting the harms likely to result from the targeted audience's processing of the speech.

But courts can take different approaches in undertaking this form of audience analysis. They might simply defer to legislative judgment in evaluating the causal link between the regulated speech and the government's asserted regulatory interest. They might rely on their own common sense intuitions of how audiences process speech in accepting or rejecting the government's assertions. Or they might require the government to produce empirical evidence to support its assertions and undertake a rigorous review of such material. In this Section, I discuss these different approaches, ultimately concluding that courts should err on the side of empirical rigor in conducting generalized, scrutiny-stage audience analyses.

1. Deference, Intuition, and Empirical Evidence

In conducting audience analysis within the more generalized *Edenfield* paradigm, the Supreme Court has at times afforded a significant degree of deference to legislative judgments. For example, in *Posadas de Puerto Rico v. Tourism Co. of Puerto Rico*, the Court evaluated a Puerto Rican law prohibiting casinos from advertising their facilities to the Puerto Rican public.[213] The government asserted that its regulatory interest "in the health,

212. *See supra* text accompanying notes 193-194.
213. 478 U.S. 328, 330 (1986).

safety, and welfare of its citizens" would be advanced by reducing the demand for casino gambling by Puerto Rican residents.[214] In applying the third prong of the *Central Hudson* test to the regulation—"whether the challenged restrictions ... 'directly advance' the government's asserted interest"[215]—the Court deemed the legislature's "reasonable belief" that the advertising would increase demand, along with the mere fact that the plaintiff casino operator chose to litigate the case, sufficient to establish the required causal connection between the regulated speech and the harm asserted by the government.[216]

The Court's analysis in *FCC v. Pacifica Foundation* followed a similar pattern.[217] In *Pacifica*, the Court upheld the FCC's censure of a radio broadcaster for broadcasting George Carlin's profanity-filled "Filthy Words" monologue.[218] The Court found that the FCC's restriction on profanity advanced the government's interest in protecting the well-being of children, stating that "Pacifica's broadcast could have enlarged a child's vocabulary in an instant,"[219] and that the government's interest in the "'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."[220] The Court found that "[t]he ease with which children may obtain access to broadcast material ... amply justif[ies] special treatment of indecent broadcasting."[221]

The Court adopted a highly deferential approach to audience analysis in both *Posadas* and *Pacifica*. In *Posadas*, it did not scrutinize the government's factual assertion that advertising casino gambling would increase demand; similarly, in *Pacifica*, it did not scrutinize the government's factual assertion that exposure to profanity negatively affected the well-being of children. The Court's lack of discussion of these issues suggests that this deference may

214. *Id.* at 341.

215. *Id.*

216. *See id.* at 341-42. Indeed, the Court went so far as to leave it "up to the legislature to decide whether or not ... a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Id.* at 344.

217. 438 U.S. 726, 749-50 (1978).

218. *Id.* at 760-61.

219. *Id.* at 749.

220. *Id.* at 749 (quoting Ginsberg v. New York, 390 U.S. 629, 639-40 (1968)).

221. *Id.* at 750.

have been rooted in the Court's general intuition as to how the speech in each case would affect the targeted audience; it likely found these causal connections sufficiently obvious on their face as to speak for themselves.

Although one might attribute the Court's highly deferential and intuition-based approach in both *Posadas* and *Pacifica* to its application of intermediate scrutiny,[222] the Supreme Court has, in recent years, increasingly held the government to a more rigorous evidentiary standard in establishing the causal link between the regulated speech and the state's asserted regulatory interest, particularly in the context of applying intermediate scrutiny to commercial speech regulations.[223] Thus, for example, the *Edenfield* Court, in evaluating the asserted link between in-person solicitations by accountants and an increased likelihood of fraud, noted that the state's burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[224] In *Rubin v. Coors Brewing Co.*, the Court rejected the government's "anecdotal evidence and educated guesses" that a ban on the display of alcohol content on beer labels suppressed the potential for harmful "strength wars" between beer manufacturers, stating that the government failed to "offer any convincing evidence that the labeling ban has inhibited strength wars."[225] And in *44 Liquormart v. Rhode Island*, a plurality of the Court declined to credit the government's assertion that a ban on advertising alcohol prices would "significantly advance the State's

222. As noted above, *Posadas* involved a commercial speech regulation, which the Court evaluated under the intermediate scrutiny framework set forth in *Central Hudson*. Posadas de P.R. v. Tourism Co. of P.R., 478 U.S. 328, 340-42 (1986). And in *Pacifica*, the Court appeared to apply a form of intermediate scrutiny premised on the "uniquely pervasive" nature of broadcast speech compared to printed media. 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.... [given its] uniquely pervasive presence in the lives of all Americans.").

223. *See* Clay Calvert & Matthew D. Bunker, *Free Speech, Fleeting Expletives, and the Causation Quagmire: Was Justice Scalia Wrong in* Fox Television Stations*?*, 47 SAN DIEGO L. REV. 737, 762 (2010) (observing that in commercial speech cases, "courts increasingly are demanding empirical evidence of some sort related to causation and remedy of harm, rather than impressionistic guesswork or mere speculation and conjecture").

224. Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).

225. 514 U.S. 476, 490 (1995).

interest in promoting temperance," noting that "the State has presented no evidence to suggest that its speech prohibition will significantly reduce marketwide consumption."[226]

Despite this general trend, however, the Court has remained somewhat inconsistent in dictating the extent to which it will demand and rely on empirical evidence in conducting audience analysis and the extent to which general intuition and common sense might be sufficient. Indeed, in *Burson v. Freeman*—a case invoking *strict scrutiny*—a plurality of the Court indicated that mere intuition and "common sense" could be a sufficient basis for crediting the government's asserted connection between the speech and harm.[227] In *Burson*, a four-Justice plurality upheld, under strict scrutiny, a Tennessee law banning campaign-related speech within 100 feet of polling places.[228] In evaluating the connection between the regulated speech and the state's asserted interest in preserving the integrity of the electoral process, the plurality observed simply that "[a] long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right."[229] Later, in *Florida Bar v. Went for It, Inc.*, the Court cited this language in *Burson* approvingly, concluding, over a four-Justice dissent, that empirical evidence submitted by the government need not adhere to rigorous statistical and methodological standards.[230]

If the focus of audience analysis within the *Edenfield* context is to double-check the government's estimation of the harm likely to result from the regulated speech, then some meaningful degree of judicial scrutiny should clearly apply. As a doctrinal matter, the government, within the context of both intermediate and strict scrutiny, shoulders the burden of both asserting its regulatory interest and proving a link between that interest and the speech that it seeks to regulate.[231] And although, as a technical matter,

226. 517 U.S. 484, 505-06 (1996) (plurality opinion) (emphasis omitted).

227. 504 U.S. 191, 207-08 (1992) (plurality opinion).

228. *Id.* at 211. Justice Scalia concurred in the judgment, arguing that the provision should have been upheld under a less exacting standard of scrutiny. *Id.* at 214 (Scalia, J., concurring).

229. *Id.* at 211.

230. 515 U.S. 618, 628-29 (1995).

231. In reality, how searching a scrutiny analysis the Court actually undertakes can vary. *Compare* Posadas de P.R. v. Tourism Co. of P.R., 478 U.S. 328, 341-42 (1986), *with* 44

courts generally defer to the government's judgment when the speech sought to be regulated falls within one of the low-value speech categories, even this form of regulation is still in fact subject to meaningful scrutiny, since as noted above, the initial judgment as to how that speech should be categorized is necessarily premised on some form of independent audience analysis conducted by a judge or jury.[232]

2. The "Averting Their Eyes" Trope and the Dangers of Intuition

The extent to which courts should rely on intuitive judgments and "common sense," as opposed to empirical evidence, in evaluating the connection between regulated speech and the government's asserted regulatory interest is a thornier issue. If courts' general goal in conducting audience analysis is to forecast, as accurately as possible, the extent to which the audience would actually process the regulated speech in a harmful manner, then any increased expectation that empirical evidence should be provided, and any increased solicitude for undertaking detailed analyses of such data, would certainly seem to be a positive development. Increased empirical rigor should, at least in theory, allow courts to predict speech-based harms more accurately, which would in turn allow them to better tailor the scope of First Amendment protection.

At the same time, however, empirical rigor comes at the cost of time and resources, and there are certainly situations in which the connection between speech and the audience's likely processing of the speech is so clear that demanding empirical support for such an assertion would be unnecessarily burdensome to the government and wasteful of judicial resources. For example, in *Rubin*, the Court observed that "[i]t is assuredly a matter of 'common sense' that a

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Liquormart v. Rhode Island, 517 U.S. 484, 505-06 (1996). Within the current landscape of First Amendment jurisprudence, though, it appears that the highly deferential approaches undertaken by the Court in *Posadas* and *Pacifica* are largely outliers; the Court typically applies a meaningful degree of judicial scrutiny to content-based regulations of fully or partially protected speech. *See, e.g.*, *44 Liquormart*, 517 U.S. at 509-10 (plurality opinion) (repudiating *Posadas*).

232. *See supra* text accompanying notes 97-101 (noting that all categories of low-value speech are defined, at least in part, by the extent to which they are processed by the audience in a socially harmful manner).

restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait."[233] As a matter of general logic, this appears true on its face, and it would seem odd and wasteful to require the government to prove this sort of causal connection by reference to empirical evidence. Perhaps the government's assertion in *Posadas*—that advertising for a casino will necessarily increase demand—is similarly intuitive enough on its face to justify no additional empirical support.

But of course, reliance on intuition and common sense also increases the likelihood that courts will inaccurately forecast the actual extent to which the regulated speech will produce the social harm asserted by the government. Although in many cases common sense determinations translate to a sensible judgment of what the actual effects of speech on an audience would likely be, they also, by nature, run the risk of skewing the appropriate calibration of First Amendment protection, either because courts' predictions are simply incorrect or perhaps because of courts' underlying desire to inject a largely normative conception of "appropriate" audience reaction into what should be a predictive analysis of actual harm.

Take, for example, the common trope, invoked frequently by the Supreme Court, that speakers confronted with offensive and potentially hurtful speech can limit the harm caused to them by simply "averting their eyes." This trope first emerged in *Cohen*, when the Court, in response to the argument that "Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers," responded that "[t]hose in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[234] Observing that the speech occurred in a public area rather than, say, in the listeners' home, the Court concluded, "[W]e do not think the fact that some unwilling 'listeners' in a public building may have been briefly exposed to [the speech] can serve to justify this breach of the peace conviction."[235]

233. Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995) (internal citation omitted).
234. Cohen v. California, 403 U.S. 15, 21 (1971).
235. *Id.* at 22.

The *Cohen* Court thus relied on an intuitive, common sense judgment regarding the audience's sensitivity to the speech. But it is not immediately apparent, on its face, whether this judgment is correct as an empirical matter. Certainly the audience, once confronted with Cohen's "Fuck the Draft" jacket, can choose to look away immediately. But it also seems plausible that most of the damage is done as soon as the speech is initially absorbed by the reader—that once the reader has observed the words, he will remain fixated on them, to his detriment, even if he immediately looks away. This question presumably has an actual empirical answer; as Schauer has noted, "the issue ... turns on how much, if at all, the mind and the memory will retain that which one wishes he had not seen in the first place."[236] It is not immediately obvious what that answer is, but the Court was willing to make this generalized empirical judgment based purely on its own intuition.

The reasons why the Court adopted this intuitive conclusion are not immediately clear. Perhaps the Court truly believed, as a predictive matter, that this is in fact empirically correct—that people could indeed avoid substantial harm from offensive written speech by looking away. Perhaps the Court was making an indirect normative judgment as to how people *ought* to act in a speech-tolerant society—that even if people will suffer emotional harm from a short glance at the jacket, they really ought to toughen up and develop a thicker skin. Or perhaps, as Schauer suggests, it is simply silly to believe that people experienced very much actual harm as a result of Cohen's jacket,[237] and the Court was content to adopt the "avert their eyes" trope simply to dispose of what was essentially a nonissue. Whatever the underlying rationale, *Cohen* introduced this empirical judgment, based on little more than general intuition, into the Court's jurisprudence, despite the fact that it might well be a completely inaccurate estimation of how audiences actually process speech. Needless to say, if the goal of audience analysis is to forecast, as accurately as possible, the actual harm that speech will

236. Schauer, *supra* note 6, at 106; *see also id.* at 107 (characterizing the issue as "an empirical psychological question, as to which we might think serious research would be of some assistance").

237. *Id.* at 94-95 ("[E]ven as far back as 1969 it seems far-fetched to imagine that very many people suffered very much anguish over their involuntary exposure to the words on Paul Cohen's jacket.").

likely cause, the Court's knee-jerk adoption of such a judgment could substantially hamper the Court's ability to properly calibrate the scope of First Amendment protection.

Since *Cohen*, the Court has trotted out the "avert your eyes" trope in numerous cases addressing "captive audience" issues, but it has done so in a largely inconsistent manner. As noted above, in *Lehman v. City of Shaker Heights*, a plurality of the Court upheld a city ban on posted political advertisements on public transportation,[238] based on its observation that "[u]sers would be subjected to the blare of political propaganda."[239] In a concurring opinion, Justice Douglas stated that "the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try not to listen."[240] By contrast, in *Erznoznik v. City of Jacksonville*—which was decided just a year after *Lehman*—the Court, in striking down a local ordinance prohibiting the showing of films containing nudity at drive-in theaters,[241] stated that "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'"[242] Similarly, in *Consolidated Edison, Inc. v. Public Service Commission of New York*, the Court struck down New York's order prohibiting "the inclusion in monthly electric bills of inserts discussing controversial issues of public policy,"[243] stating that "customers who encounter an objectionable billing insert may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"[244] The Court noted that "[t]he customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."[245]

It is difficult to square the different applications of the "avert your eyes" trope in these cases. Why the principle would apply any differently to the person who comes upon nudity shown on a drive-through movie screen or the person who comes across an insert in his electric bill, compared to the person who sees political

238. 418 U.S. 298, 299, 304 (1974) (plurality opinion).
239. *Id.* at 304.
240. *Id.* at 307 (Douglas, J., concurring) (emphasis omitted).
241. 422 U.S. 205, 217-18 (1975).
242. *Id.* at 210-11 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).
243. 447 U.S. 530, 532 (1980).
244. *Id.* at 542 (quoting *Cohen*, 403 U.S. at 21).
245. *Id.*

propaganda on a train, is unclear. In each case, people presumably have no notice that they will be confronted with harmful speech, but once they have processed the speech, they have the ability—if one accepts the *Cohen* Court's assumption—to drastically limit the harm they suffer by averting their eyes. As the *Lehman* dissent correctly pointed out, there is little to distinguish the political advertisements in that case from the offensive jacket in *Cohen*; in both cases, the speech was in written form, and "[s]hould passengers chance to glance at advertisements they find offensive, they can 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"[246]

A comparison of the Court's opinion in *Bolger v. Youngs Drug Products* with its opinion in *Florida Bar* vividly illustrates this disconnect. In *Bolger*, the Court analyzed the constitutionality of a federal law prohibiting the unsolicited mailing of advertisements for contraceptives.[247] A drug company sought to mail out, among other things, "informational pamphlets discussing the desirability and availability of prophylactics in general or [the company's] products in particular."[248] After deeming the informational pamphlets commercial speech, the Court evaluated the regulation under the *Central Hudson* standard.[249] Noting the government's asserted interest in protecting recipients from being exposed to offensive material within the confines of their home, the Court observed that "[r]ecipients of objectionable mailings … may 'effectively avoid further bombardment of their sensibilities simply by averting their eyes.'"[250] The Court thus concluded that the "short, though regular, journey from mail box to trash can ... is an acceptable burden, at least so far as the Constitution is concerned,"[251] and it struck down the regulation as a violation of the First Amendment.[252]

Contrast this with the Court's analysis in *Florida Bar*, which evaluated the Florida Bar's prohibition of direct-mail attorney

246. Lehman v. City of Shaker Heights, 418 U.S. 298, 320 (1974) (Brennan, J., dissenting) (quoting *Cohen*, 403 U.S. at 21)).

247. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 61 (1983).

248. *Id.* at 62.

249. *Id.* at 68-69.

250. *Id.* at 72.

251. *Id.* (quoting Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968)).

252. *Id.* at 75.

solicitations to accident victims within thirty days following an accident or disaster.[253] After accepting the government's asserted interest in "protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers,"[254] and after describing the results of a two-year study of lawyer solicitation undertaken by the Bar,[255] the Court upheld the regulation.[256] It explicitly distinguished *Bolger*—and the "avert your eyes" assumption relied upon in that case—by characterizing the government's asserted harm as "a function of simple receipt of targeted solicitations within days of accidents," which, according to the Court, could not be combatted simply by "[t]hrowing the letter away shortly after opening it."[257]

The rationales of *Bolger* and *Florida Bar* appear to be completely at odds with each other. In general terms, the issues were identical: commercial actors were sending unsolicited direct-mail advertisements to people at their homes, and these advertisements contained speech that many would find offensive based on its content. Yet in *Bolger*, the Court embraced the *Cohen* trope, assuming that offended parties can limit the offense caused by the speech by throwing the ads away in the trash.[258] In *Florida Bar*, by contrast, the Court insisted that merely throwing away the solicitation would be insufficient to prevent the audience from suffering substantial harm.[259] And the *Florida Bar* Court's attempt to distinguish *Bolger* is not particularly persuasive. Even accepting the Court's characterization of the harm in that case as the detrimental effects that readers' anger might have on the legal profession,[260] there is no obvious reason why the *Cohen* principle would not apply just as easily to that form of harm; readers could presumably limit any such anger or frustration by immediately

253. *See* Fla. Bar v. Went for It, Inc., 515 U.S. 618, 620-21 (1995).
254. *Id.* at 624.
255. *Id.* at 626-27.
256. *Id.* at 624-29.
257. *Id.* at 630-31.
258. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 72 (1983).
259. *Fla. Bar*, 515 U.S. at 631.
260. *See id.* ("The Bar is concerned not with citizens' 'offense' in the abstract, but with the demonstrable detrimental effects that such 'offense' has on the profession it regulates.") (citation omitted).

throwing the solicitation away, just as they could limit the offense caused by a contraceptive ad by throwing that away.

The Court's adoption and continued use of the "avert your eyes" trope therefore illustrates the risks of relying on intuitive judgments in conducting audience analysis. It might be correct that quickly looking away from an offensive jacket in a courthouse or nudity projected on a drive-in movie screen substantially limits the amount of direct harm the audience might suffer from being exposed to such speech. But it seems equally possible that this assumption is incorrect, and if that is the case, the Court's reliance on it would certainly skew its ability to properly tailor the scope of First Amendment protection.

Furthermore, the Court has appeared to pick and choose when it will invoke this harm-limitation assumption and when it will insist that merely looking away will not do the trick—and as we have seen, its reasoning is not particularly persuasive as to why the mechanism would function for some types of harms but not for others. Thus, this apparently empirical judgment of how people actually process speech may merely be makeweight "empirical" support for a conclusion that is ultimately normative in nature. That is, the Court's judgments may more accurately reflect an understanding that there are certain circumstances—based on, say, the value or context of the speech in question—wherein observers should or should not be expected to put up with offensive speech. But the Court could simply make this point directly, without skewing its audience analysis with a selectively applied, unsupported empirical claim that averting one's eyes substantially mitigates the direct harm suffered by listeners.

3. Erring on the Side of Empirical Rigor

Thus, although intuitive judgments as to how audiences process speech certainly have their place within audience analysis, courts should generally be cautious in relying on them. Such judgments, if incorrect, would skew courts' ability to accurately predict the social harm resulting from speech and thus hamper their ability to properly calibrate the scope of First Amendment protection. Furthermore, these judgments provide an easy opportunity for courts to integrate, either consciously or subconsciously, external

normative judgments into what should be a pure question of predicted harm.

Courts should therefore exercise restraint in adopting intuition-based judgments when conducting generalized, scrutiny-stage audience analysis. If the goal of audience analysis is to forecast, as accurately as possible, how an actual audience will process speech, then courts should be solicitous of more empirical, data-driven approaches to such analyses.[261] And indeed, in recent cases, the Supreme Court has increasingly embraced these sorts of approaches. For example, in *Brown v. Entertainment Merchants Ass'n*—in which the Court struck down California's prohibition on the sale or rental of violent video games to minors—both the majority and Justice Breyer in his dissent undertook a fairly detailed analysis of the social science data produced by the state in support of the regulation.[262] And in *United States v. Alvarez*—in which the Court struck down a federal law criminalizing lying about receiving military honors[263]—a plurality of the Court refused to accept, on its face, the government's assertion that "the public's general perception of military awards is diluted by false claims" without any evidence that this was indeed the case.[264]

Although adopting a more evidence-based approach to audience analysis does not render it immune from inconsistency and manipulation,[265] it certainly represents an approach under which courts are better able to tailor First Amendment protection in light of the actual harms the speech is likely to produce. The primary cost of such an approach—at least within the context of generalized audience analysis cases like *Edenfield*—would be the investment of government and judicial resources in compiling and analyzing such data. But if the alternative is resorting to potentially inaccurate and highly manipulable "common sense" assumptions, then this investment seems wise whenever there is any meaningful uncertainty as

261. Again, I refer here only to the generalized *Edenfield* paradigm of audience analysis. *See supra* Part II.B. As I discuss below, within the more contextual *Fulmer* paradigm of audience analysis, the benefits of empirical evidence are not as clear-cut. *See infra* note 273.

262. Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2739, 2742 (2011); *id.* at 2761, 2768-70 (Breyer, J., dissenting).

263. 132 S. Ct. 2537, 2549 (2012) (plurality opinion).

264. *Id.*

265. *See* discussion *supra* Part IV.B.1-2; *infra* note 280.

to the link between the government's regulation of speech and its asserted regulatory interest.

Again, wasting litigant and judicial resources in cases involving a completely obvious causal connection between speech and harm does not make sense; intuition and common sense judgments would suffice under such circumstances. My suggestion is merely that courts lean heavily towards skepticism regarding any intuitive or common sense audience assumptions, whether presented by the government or suggested by the court itself. Take, for instance, the Court's recent decision in *FCC v. Fox Television Stations, Inc.*[266] In deeming the FCC's explanation of its decision finding fleeting expletives "indecent" adequate under the APA, Justice Scalia, writing for the Court, stated that "[t]here are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them."[267] Citing the *Pacifica* Court's recognition, unsupported by any empirical data, of the state's interest in the "well-being of its youth," the Court noted that "it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate."[268]

Writing for a four-Justice dissent, Justice Breyer, while recognizing that an agency need not "always conduct full empirical studies of such matters,"[269] pointed to the complete absence of any empirical evidence in support of the FCC's assertion that its "fleeting expletives" policy "better protects children against what [the agency] described as 'the first blow' of broadcast indecency."[270] Justice Breyer noted that the FCC "could have referred to, and explained, relevant empirical studies that suggest the contrary," pointing to one particular study.[271] He observed that "its failure to discuss this or any other such evidence, while providing no empirical evidence at all that favors its position, must weaken the logical force of its conclusion."[272]

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266. 556 U.S. 502 (2009).
267. *Id.* at 519.
268. *Id.*
269. *Id.* at 564 (Breyer, J., dissenting).
270. *Id.* at 563.
271. *Id.* at 564.
272. *Id.*

Although technically not a First Amendment case, *Fox Television* illustrates the often unclear borderline between common sense judgments and empirical evidence-based judgments in undertaking audience analysis. One could plausibly say, as a matter of common sense, that allowing fleeting expletives would encourage children to mimic such behavior, and that such behavior would have a harmful effect on them. But I suggest that Justice Breyer has it right, and that courts should demonstrate an increased willingness to test these sorts of common sense judgments with empirical analysis and an increased expectation that the government will marshal such evidence in support of its content-based speech regulations.[273]

CONCLUSION

In this preliminary exploration of the significance and mechanics of First Amendment audience analysis, I have sought to emphasize that audience analysis ought to be framed and conducted toward the goal of forecasting, as accurately as possible, the extent to which the speech will cause actual social harm when processed by the targeted audience, rather than focusing on a normative inquiry of how an idealized, hypothetical audience *should* process such speech. I have therefore argued that in defining low-value speech

273. Within the *Fulmer* paradigm of audience analysis, a similar move towards empirical rigor might also, in some cases, help courts delineate more accurately how audiences would foreseeably process speech. For example, in a libel by implication case, litigants might introduce survey data indicating how readers actually interpret the speech in question as a basis for proving foreseeable harm. Indeed, litigants commonly use survey data to prove "likelihood of confusion" in trademark cases, and a detailed jurisprudence regarding the design and evidentiary significance of such data has emerged within trademark doctrine. *See* 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:184 (4th ed. 2013); *id.* § 32:195 ("[J]udges have come to expect that a survey will be introduced to aid the court in determining customers' state of mind."); *id.* §§ 32:158-66 (discussing the proper design of such surveys); *id.* §§ 32:184-89 (discussing how such surveys have factored into courts' decisionmaking processes). But given the highly fact-intensive and contextualized nature of audience analysis in cases like *Fulmer*, *see* United States v. Fulmer, 108 F.3d 1486, 1491-92 (1st Cir. 1997), it is difficult to generalize as to the usefulness of empirical approaches in these cases. And unless empirical evidence is especially useful, the incremental accuracy benefits provided may not justify the increase in the cost of litigation, because—unlike in the *Edenfield* paradigm of audience analysis, in which the government has already "frozen" the speech in question—high litigation costs might lead to a significant chilling effect on speakers. *See* Lidsky, *supra* note 117, at 838 ("In First Amendment law ... the chilling effect of expensive and protracted litigation on protected speech is likely to be substantial.").

categories, courts should craft audience analyses in a predictive rather than normative posture, citing the reasonable speaker standard as a possible model.[274] I have also argued that within the more generalized *Edenfield* paradigm of audience analysis, courts should err on the side of empirical rigor in order to assess more accurately the connection between the regulated speech and the government's asserted regulatory interest.[275] These approaches would sharpen courts' ability to properly calibrate the scope of the First Amendment in light of the actual value and harms of the speech.

There is likely no way to know how much of a difference these theoretical adjustments would make in the results that juries and courts reach. Perhaps in most cases there is no significant difference between, say, a court's judgment of how the actual targeted audience would foreseeably act versus how a hypothetical "rational audience" should act. Perhaps in most cases courts' common sense intuitions are largely correct, and an increased solicitude for empirical rigor will not change things dramatically. It may well be that in conducting the different forms of audience analysis, based on a wide array of doctrinal formulations and approaches,[276] courts and juries are, in fact, doing a decent job of calculating foreseeable harm.

But this does not change the fact that as a matter of both doctrinal purity and practical application, audience analysis should be framed as, and calibrated around, our best and most accurate estimation of foreseeable harms. Even in cases in which other factors, such as the value of the speech, might ultimately trump whatever harms it might foreseeably cause, simply knowing—or trying to know—exactly how much speech will "cost" has inherent value, both as a matter of judicial transparency and as a matter of developing a First Amendment jurisprudence that is increasingly sensitive and calibrated to the actual harms caused by speech.

Audience analysis is, by nature, highly open-ended, with courts making speculative inquiries as to how the targeted audience will process certain speech. In ex post speech categorization cases like *Fulmer*, the court must decide which contextual factors ought to

274. *See supra* Part IV.A.

275. *See supra* Part IV.B.

276. *See supra* text accompanying notes 196-205 (outlining the different formulations of audience analysis within low-value speech tests).

matter in determining, from an ex ante posture, the foreseeable harms caused by the speech.[277] In "frozen speech" cases like *Edenfield*, the court must decide exactly how much deference it will give to the government,[278] and it must determine when intuition is sufficient to sustain a connection (or nonconnection) between speech and harm and when empirical evidence is necessary.[279] And even when empirical evidence is marshaled, courts can make different judgments as to the degree of empirical rigor necessary for the court to make (or not make) a particular causal connection.[280]

As a result, a court undertaking audience analysis can easily import concerns other than the actual likelihood or foreseeability of harm—such as the value of the speech—into the calculus. Perhaps the radically different audience analyses the Court undertook in *Bolger* and *Florida Bar* can be best explained by a simple judgment that the sort of commercial speech regulated in *Florida Bar*—direct-mail attorney solicitations to accident victims within thirty days of the accident[281]—was inherently less valuable than the commercial speech in *Bolger*, which, as the *Bolger* Court noted, "contain[ed] discussions of important public issues such as venereal disease and family planning."[282] Perhaps Justice Holmes's apparent change of heart between *Frohwerk* and *Abrams* regarding the likelihood that subversive advocacy would lead to concrete harm was rooted not in a difference in empirical judgment regarding the foreseeability of such harm, but rather in a newfound recognition of the significant value of the speech in question.[283] And perhaps the *Cohen* Court's readiness to downplay the extent to which the profanity on Cohen's jacket might have caused psychological harm to readers was rooted in the fact that the speech in question carried political overtones,[284]

277. *See supra* text accompanying notes 187-88.

278. *See supra* Part IV.B.1.

279. *See supra* Part IV.B.1-2.

280. *Compare, e.g.*, Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995) ("[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information."), *with id.* at 641 (Kennedy, J., dissenting) ("Our cases require something more than a few pages of self-serving and unsupported statements by the State to demonstrate that a regulation directly and materially advances the elimination of a real harm when the State seeks to suppress truthful and nondeceptive speech.").

281. *Id.* at 620-21.

282. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67-68 (1983).

283. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

284. *See* Cohen v. California, 403 U.S. 15, 16 (1971).

and thus was deemed more valuable than if the jacket had said, for example, "Fuck the Yankees."

As many commentators have recognized, the blunt categorization approach adopted by the Court in classifying speech by value cannot, by nature, account for the multitude of reasons why we might value certain speech over other speech.[285] But legal doctrine is often hydraulic in nature; whenever the rigidness in one doctrinal area exerts pressure on courts' decisionmaking, that pressure often seeks release in other areas of the doctrine. As a result, the marriage of an open-ended speech harm analysis with the more rigid categorical speech value framework could well mean that judgments regarding speech value leak into the far more flexible speech harm analysis.

One can only speculate as to courts' underlying thought processes in conducting audience analysis, but to the extent this sort of analytical cross-pollination occurs, courts ought to guard against it as much as possible. The question of whether the audience will likely process speech in a manner that produces harm is theoretically separate from the question of how much we should value the speech itself. For example, public political advocacy might, under certain circumstances, foreseeably cause the same amount of fear and intimidation in the audience as a private direct threat, even if the *value* of the speech in the two situations may be so different as to justify different results. Adopting "pure" audience analyses—analyses focused singly on the goal of accurately forecasting harm—promotes judicial transparency in an area in which such transparency is especially important. In conducting audience analyses, courts ought to ascertain and make clear how much speech "costs" in each particular context, which would in turn shed greater light on its assessment of the value of the speech in question.[286]

Furthermore, a consistent dedication to ascertaining the predicted costs of speech will have salutary effects on the long-term

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285. *See, e.g.*, Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 298-99 (1995).

286. This is not to say that courts *always* ought to conduct some form of audience analysis. If, for example, a content-based speech regulation is obviously unconstitutional because of a clear flaw in its design, or the balance of value against harm is so one-sided as to dictate a result, then detailed audience analysis may well be unnecessary.

common law development of First Amendment doctrine. Although, as noted above, audience analysis is often complicated and highly fact-intensive, as courts collect more and more data points regarding the harms likely to be produced by different speech under different circumstances, they will be better able to calibrate the overall scope of First Amendment protection. If, as I have tried to establish here, capturing the appropriate First Amendment balance between the value and harms of speech necessarily means understanding the ways in which actual audiences will foreseeably process speech, then keeping a clean record of how much harm speech will likely cause under different circumstances is essential in pushing First Amendment jurisprudence towards greater doctrinal purity.