



# Capstone

JOURNAL OF LAW AND PUBLIC POLICY

VOLUME 01}

ISSUE 01} APRIL 2018

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JOURNAL OF LAW AND PUBLIC POLICY

VOLUME I | ISSUE I | SPRING 2018

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## *Letter from the Editor*

Dear Reader,

On behalf of the editorial staff, article contributors, and the Legal Research Club, we are proud to present this first edition of the Capstone Journal of Law and Public Policy. The aim of this journal is to give outstanding University of Alabama undergraduates opportunities to engage with the legal field before law school. With that in mind, we have collected here three articles and two essays that address a number of relevant issues with insightful legal analysis. Every piece was authored by a member of the University of Alabama community and edited by a dedicated team of undergraduates. These papers cover a wide range of topics, with a special focus on issues in Alabama, to give some insight into the issues of our time.

In her article “The Effect of *Elonis* on the True Threat Doctrine” Madeline Hughes analyzes *Elonis v. United States* and offers an interesting perspective on the effects of this case on the true threat doctrine of free speech. This article offers both informative discussion of the case itself and creative proposals on how we should proceed in its aftermath.

Frances Kyle explores the effects of housing discrimination on modern school systems in “Housing of the Past and Education Expenditures of the Present.” By combining an historical survey of Alabama housing policies with cunning legal and statistical analysis, Kyle demonstrates how discrimination of the past has led to disparate educational opportunities for students in Alabama.

In “Who’s On First,” Robert Pendley discusses the legal issues surrounding net neutrality. Given the recent actions taken around this topic, this is a timely and informative piece that brings First Amendment issues to bear on this controversy surrounding the FCC and Internet service providers.

Our essays feature two interesting topics. “Forgotten Children” by William Cope explores Alabama’s policy of exempting religiously affiliated daycares from certain state rules. Emily Risher in “Should Fido Be Allowed in a Courtroom” makes the case to allow therapy animals into courtrooms, especially in children’s cases.

We hope that you will find these pieces both interesting and informative, and that you will consider submitting to or working with Alabama’s first law review dedicated to the success of undergraduates.

Sincerely,

Spencer Pennington

Editor-in-Chief Spring 2018



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## MISSION STATEMENT

The goal of the Legal Research Club is to continue the tradition of excellence the University of Alabama by **equipping** undergraduates with the skills necessary to succeed in research, **expanding** perspectives of legal issues in both Alabama and the nation, and **excelling** in the publication of the *Capstone Journal of Law and Public Policy*.



## *The Effect of *Elonis* on The True Threat Doctrine: An Evaluation of the Scope of First Amendment Jurisprudence*

Madeline Hughes | The University of Alabama School of Law

Edited By: John Paul Williams Soriano, Sabrina Snowberger, Rylee Perentis, Chandler Piper

### INTRODUCTION

Throughout the fall of 2010, Tara *Elonis* logged on to Facebook and was appalled at what she saw on her Newsfeed.<sup>1</sup> Her ex-husband’s Facebook page was laden with harrowing posts that included threats against his place of work, the government, and of most concern to her, against her home and children.<sup>2</sup> In one post Anthony *Elonis* described a plan to kill her, “Did you know that it’s illegal for me to say I want to kill my wife...I also found out that it’s incredibly illegal...to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road...”<sup>3</sup>

His threats were portrayed as rap lyrics and other forms of artistic expression, but she felt “extremely afraid for her life” due to the violent and crude nature of the posts.<sup>4</sup> She took the

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<sup>1</sup> See *Elonis v. United States*, 135 S. Ct. 2001, 2005 (2015).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.* at 2008.

<sup>4</sup> *Id.* at 2006.



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steps necessary to get a protection- from- abuse order against Elonis.<sup>5</sup> Her actions did not stop him from continuing to post on Facebook; rather they encouraged more posts.<sup>6</sup> He expressed anger about the protection- from- abuse order when he posted, “Fold up your [order] and put it in your pocket [,] is it thick enough to stop a bullet? Try to enforce an order that was improperly granted in the first place.”<sup>7</sup> Elonis’ posts challenged the order, expressed his belief that the Constitution allowed him to issue the threats, and detailed further threats against elementary schools in the area.<sup>8</sup> The FBI became involved once Elonis posted, “Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined... the only question is...which one?”<sup>9</sup> Finally his post, “So next time you knock, you best be serving a warrant...cause little did y’all know, I was strapped wit’ a bomb,” caused the government to take further action.<sup>10</sup>

The government prosecuted Elonis for making threats against his co-workers, his ex-wife, police officers, an FBI agent, and local elementary schools.<sup>11</sup> The prosecution charged Elonis with five counts of violating 18 U.S.C. §875(c), a federal statute that prohibits the

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<sup>5</sup> *Id.*

<sup>6</sup> *See id.* at 2006-07.

<sup>7</sup> *Id.* at 2006.

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* at 2007.



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transmission of a threat in interstate or foreign commerce.<sup>12</sup> *Elonis* challenged the charges in the District Court, the Third Circuit Court of Appeals, and at the Supreme Court by arguing that the government failed to allege that he actually intended to threaten anyone.<sup>13</sup> The Supreme Court agreed with his argument, and they reversed and vacated his conviction under 18 U.S.C. §895(c).<sup>14</sup>

This Note evaluates whether the Supreme Court’s ruling in *Elonis* is an effort to narrow the true threat doctrine, a category of speech under the First Amendment that is not protected from government regulation. Part I provides a history of the true threat doctrine and explores the circuit split regarding whether a true threat requires a speaker to have a subjective intent to make a threat, or whether the test is an objective one that asks what a reasonable listener would infer from the speech. Part II will describe the *Elonis* case in greater detail and explore the Supreme Court’s reasoning in reversing *Elonis*’ conviction. Part III will evaluate what the Court accomplished with the ruling and will discuss the crucial questions that the Court left open to interpretation. Part III will also discuss how the Circuit Courts have handled true threat cases post-*Elonis*, and whether the true threat doctrine has been narrowed in application. Part IV will investigate the implications of narrowing the true threat doctrine and explore how the Supreme Court should respond to the questions left open in the *Elonis* decision so that lower courts can

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<sup>12</sup> *Id.*; 18 U.S.C. §895(c) (2012)(“Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”).

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*



accurately and consistently apply the true threat doctrine of First Amendment jurisprudence. In conclusion, I will summarize my thoughts on the *Elonis* decision and the state of the true threat doctrine.

## I. THE TRUE THREAT DOCTRINE

The First Amendment guarantee to freedom of speech is not an unqualified guarantee.<sup>15</sup> The Supreme Court has repeatedly ruled that there are certain types of narrowly-defined categories of speech that can be curbed without offending Constitutional principles.<sup>16</sup> The Constitution allows “restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>17</sup> While “the hallmark of the protection of free speech is to allow ‘free trade in ideas’ –even ideas that the overwhelming majority of people might find distasteful or discomforting,”<sup>18</sup> the Supreme Court has ruled that certain types of speech provide so little to the community, and produce so much harm, that the Constitution should not protect them.<sup>19</sup>

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<sup>15</sup> *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571 (1942).

<sup>16</sup> *Id.*; *See also* *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (“The First Amendment also affords protection to symbolic or expressive conduct as well as to actual speech.”)

<sup>17</sup> *R.A.V.*, 505 U.S. at 382–83 (quoting *Chaplinsky*, 315 U.S. at 572).

<sup>18</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>19</sup> *Roth v. United States*, 354 U.S. 476, 484, (1957).



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Historically, the Court has recognized libel, fighting-words, and obscenity, among others, as categories of speech that the government can proscribe.<sup>20</sup> “True threat” is another proscribable category that the Court has recognized; however, it is not one the Court has explored thoroughly.<sup>21</sup> The category was first recognized in *Watts v. United States*<sup>22</sup> when a Vietnam War protestor issued threats against the President of the United States. In its analysis, the Court ruled that the speech in question did not present a true threat, but provided no definition of what was considered a true threat outside of the facts of the case.<sup>23</sup> Later in *Virginia v. Black*,<sup>24</sup> the Court, in evaluating a prohibition on cross-burning, defined what constitutes a “true threat” and described what social harms the proscribable category is intended to eliminate. The Court emphasized that a defendant’s intent in speaking is crucial to evaluating a true threat, but left an important question unanswered.<sup>25</sup> The Court did not consider which mental state is necessary to the definition of a true threat: the listener’s interpretation of speech or the speaker’s intention in speaking.<sup>26</sup> This question remains unanswered, and lower courts have developed different tests,

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<sup>20</sup> See *Miller v. California*, 413 U.S. 15 (1973) (defining obscene material); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (refining the proscribable category of libel); *Chaplinsky v. State of New Hampshire* 315 U.S. 568 (1942) (discussing the proscribable category of “fighting words”).

<sup>21</sup> *Federal Threats Statute—Mens Rea and the First Amendment—Elonis v. United States*, 129 HARV. L. REV. 331 (2015).

<sup>22</sup> 394 U.S. 705 (1969).

<sup>23</sup> See *id.*

<sup>24</sup> 538 U.S. 343 (2003).

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*



some requiring an objective intent and some a subjective intent, to determine what type of speech is considered a proscribable threat under First Amendment jurisprudence.

## A. *WATTS v. UNITED STATES*

Threats against the President of the United States have historically been prosecuted; however, the freedom to express unpopular sentiments about the leader of the nation is a type of expression that underlies political speech.<sup>27</sup> In *Watts*, the Court analyzed when disdainful, unpopular speech crosses into an area of speech that is proscribable.<sup>28</sup> *Watts*, a Vietnam War protestor, was frustrated that he was drafted to serve while problems such as police brutality were plaguing his community.<sup>29</sup> He expressed his frustrations through his statement, “If they ever make me carry a rifle the first man I want to get in my sights is L. B. J.”<sup>30</sup> He was convicted of a felony for knowingly and willingly threatening the President.<sup>31</sup> The Supreme Court overturned his conviction.<sup>32</sup> In its analysis the Court focused on the dual nature of certain speech that blurs the line between political speech and true threats, and what meaningful difference separates political speech from true threats.<sup>33</sup>

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<sup>27</sup> *See Watts*, 394 U.S. at 709 (Douglas, J., concurring).

<sup>28</sup> *See id.* at 707.

<sup>29</sup> *Id.* at 706.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 705.

<sup>32</sup> *Id.* at 708.

<sup>33</sup> *Id.*



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The Court recognized that speech of frustrated or angry citizens could be laced with violent sentiment that leads to crude effect.<sup>34</sup> The key in determining which side of the line the speech falls on, either protected speech or proscribable speech, is to look at the speech in the context in which it was emitted.<sup>35</sup> The Court explained that in most instances, speech would likely be considered political activism.<sup>36</sup> Accordingly, the Court set a high bar for what constitutes a true threat.<sup>37</sup> Applying the facts of the case, the Court held that Watt’s speech was considered political activism because it was said during a political protest and in the heat of the moment.<sup>38</sup> Even though the speech was brazen, it was clearly an expression of frustration with the war, the draft, and the treatment of African American citizens. The Court began a discussion regarding the necessary intent for a true threat, but did not go far in the analysis.<sup>39</sup> The Court hinted that the lower court’s interpretation of the statute’s language,<sup>40</sup> namely that the defendant had to subjectively intend to carry out the threat, was incorrect.<sup>41</sup> Despite this language, the

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<sup>34</sup> *Id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* (“For we must interpret the language Congress chose ‘against a background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks...’”) (quoting *New York Times*, 376 U.S. at 270).

<sup>37</sup> Alison J. Best, *Elonis v. United States: The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 Md. L. Rev. 1127, 1144. (2016).

<sup>38</sup> *Watts*, 394 U.S. at 708.

<sup>39</sup> *Id.* at 707–08.

<sup>40</sup> *Watts* was convicted under a statute that required a speaker to “knowingly and willingly” issue a threat against the President.

<sup>41</sup> *Watts*, 394 U.S. at 708.



Court halted its discussion of requisite intent because it held that a ruling on the issue was not necessary, as the utterance did not fall into the proscribable category of true threat.<sup>42</sup>

The Court did not provide a definition of true threat or a necessary intent for true threat; rather, the Court established the general principle that the government must evaluate speech from the context in which it was said to determine whether speech is considered threatening. This was the hazy state of the true threat doctrine for three decades until the Court explained the doctrine more thoroughly in *Virginia v. Black*.<sup>43</sup>

## B. VIRGINIA V. BLACK

*Black* presented another opportunity for the Court to distinguish between speech that is considered a true threat and thus proscribable, and speech that is protected by the First Amendment.<sup>44</sup> The Court consolidated two challenges to a Virginia statute that prohibited cross-burning with an intent to intimidate, and made the act itself prima facie evidence of that intent.<sup>45</sup> Barry Black, one of the defendants, was convicted under the Virginia statute after he led a Ku Klux Klan rally where, in accordance with Klan ritual, he burned a thirty-foot cross.<sup>46</sup> Richard Elliot and Jonathon O'Mara were also arrested for violation of the statute when, as a part of a neighborhood dispute, the men burned a cross in their African American neighbor's yard.<sup>47</sup> It

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<sup>42</sup> *Id.*

<sup>43</sup> 538 U.S. 343 (2003).

<sup>44</sup> *See id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 348–49.

<sup>47</sup> *Id.* at 350.



was unclear if the men burned the cross out of racial animus or as a retaliatory measure for the neighbor's complaint about the sound of gunfire.<sup>48</sup>

Each defendant was charged with cross-burning with the intent of intimidating a person or group of persons. Each trial differed, however, in the instruction of law given to the jury. At Black's trial, the court used a set of instructions taken directly from the Virginia Model Instructions.<sup>49</sup> The jury was instructed that, "the burning of a cross *by itself is sufficient evidence* from which you may *infer the required intent*."<sup>50</sup> At Elliot's trial, the court gave a different jury instruction that required the prosecution to prove, "the defendant intended to commit cross burning [and] the defendant did a direct act toward the commission of the cross burning [and] the *defendant had the intent of intimidating* any person or group of persons."<sup>51</sup> In this trial, there was no instruction regarding the prima facie evidence provision of the Virginia statute.<sup>52</sup> O'Mara pled guilty to the charges, and thus no jury instruction was necessary, but he reserved the right to challenge the statute on First Amendment grounds.<sup>53</sup>

Each defendant appealed to the Supreme Court of Virginia arguing that the statute was facially unconstitutional. The court held that the statute was undistinguishable from a statute that

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 349.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 351.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 350.



the Supreme Court of the United States ruled was unconstitutional in *R.A.V. v. St. Paul*.<sup>54</sup> Both statutes were classified as content-based prohibitions, or prohibitions that discriminated on the basis of the message's content, that did not pass strict scrutiny analysis.<sup>55</sup> The Virginia Supreme Court also ruled that the prima facie evidence provision was overbroad because of the likelihood that it would allow the jury to infer the element of intent without proof, which would have a chilling effect on speech.<sup>56</sup>

## PLURALITY OPINION

A fragmented Supreme Court agreed with the Supreme Court of Virginia on narrow grounds.<sup>57</sup> In its analysis, the plurality opinion, written by Justice O'Connor, joined by Chief Justice Rehnquist, Justice Stevens, Justice Breyer, and Justice Scalia in part, explored what constitutes a true threat and provided a definition that is still used today. A true threat, "encompass[es] 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."<sup>58</sup> The majority explained that the "[s]peaker need not actually intend to carry out the threat."<sup>59</sup> Rather, the true threat doctrine was meant to "[p]rotect individuals from the fear of

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<sup>54</sup> See *Black v. Com.*, 262 Va. 764 (2001); see also 505 US 377 (1992)(holding that a statute that prohibited bias-motivated disorderly conduct was violative of the First Amendment because it was a content-based prohibition that did not pass strict scrutiny analysis).

<sup>55</sup> See *Black*, 262 Va. at 764.

<sup>56</sup> See *id.*

<sup>57</sup> See generally *Black*, 538 U.S. at 343.

<sup>58</sup> *Id.* at 359.

<sup>59</sup> *Id.* at 359–60.



violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.”<sup>60</sup>

The plurality explained that the holding in *R.A.V.* did not render the Virginia statute unconstitutional.<sup>61</sup> Unlike the statute in question in *R.A.V.*, the Virginia statute was not a content-based prohibition.<sup>62</sup> In *R.A.V.* the statute banned conduct that would, “arouse anger, alarm, or resentment in others on the basis of the race, color, creed, religion, or gender.”<sup>63</sup> Justice O’Connor explained that the relevant statute in *R.A.V.* was content-based discrimination because “it allowed the city to impose special prohibitions on those speakers who express views on disfavored subjects.”<sup>64</sup> The Virginia statute, however, “does not single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics.’”<sup>65</sup> The Virginia statute punished cross-burning with an intent to intimidate no matter if it was meant to intimidate on the basis of race, religion, political affiliation, or gender. The plurality used O’Mara and Elliot’s actions to illustrate the distinction: it did not matter if the defendants aimed to intimidate the neighbor because of his race or because of his objections to their proclivity for guns. Either

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<sup>60</sup> *Id.* at 360.

<sup>61</sup> *Id.* at 362.

<sup>62</sup> *Id.*

<sup>63</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code §292.02 (1990)).

<sup>64</sup> *Black*, 538 U.S. at 361.

<sup>65</sup> *Id.* at 362.



motivation was prohibited, and thus the Virginia statute did not create a content-based prohibition.<sup>66</sup>

The constitutional issue in the plurality opinion was based on the use of a prima facie evidence provision, not on Virginia's general ban of cross-burning.<sup>67</sup> The Court reasoned that given the nature and history of cross-burning in the United States, Virginia was rational in believing that cross-burning caused enough fear that in most instances, intimidation was the sole purpose in committing the act, and thus, it could be prohibited under the true threat doctrine.<sup>68</sup>

The Justices diverged on the constitutionality of the prima facie evidence provision of the statute. The O'Connor plurality took issue with the heavy burden the statute placed on a defendant to exonerate himself.<sup>69</sup> The statute required that any act of cross-burning be prima facie evidence of intent to intimidate and threaten, but the Court recognized that there are instances when cross-burning could be used for other purposes (i.e., in a movie, or Scottish ritual).<sup>70</sup> The problem was explained as:

As construed by the jury instruction, the prima facie evidence provision strips away the very reason why a State may ban cross-burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case.<sup>71</sup>

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<sup>66</sup> See *id.* at 361–63.

<sup>67</sup> See *id.* at 364.

<sup>68</sup> *Id.* at 362.

<sup>69</sup> *Id.* at 365.

<sup>70</sup> *Id.* at 365–66.

<sup>71</sup> *Id.* at 365.



In other words, a jury could convict a defendant without any evidence that he intended for the act to be an act of intimidation, or to make the recipient feel threatened. Therefore, the Court reasoned there was no line between conduct that expresses distrust, unhappiness, or unrest from conduct or speech that is considered a true threat.<sup>72</sup> The context of the speech, as explained in *Watts*, was crucial to determine this distinction.<sup>73</sup> By allowing the act to constitute prima facie evidence of a threat, the context in which the speech was emitted would no longer matter<sup>74</sup> and there would be an “unacceptable risk of the suppression of ideas.”<sup>75</sup> Through this explanation, the O’Connor plurality emphasized that the intent of speech, not just the speech itself, played a key role in determining what a true threat was. Unfortunately, the opinion did not explain that there are different levels of mens rea encompassed in the term “intent,” nor did the Court distinguish which level of mens rea was necessary for a true threat.<sup>76</sup>

## JUSTICE SCALIA’S CONCURRENCE

Justice Scalia’s concurrence paralleled the O’Connor plurality regarding the per se validity of the statute and the invalidity of the prima facie evidence provision of the statute as applied to Black’s trial.<sup>77</sup> However, Justice Scalia argued that the Court should remand the case before making the analysis to determine how the Supreme Court of Virginia would have

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<sup>72</sup> *Id.* at 366.

<sup>73</sup> *Id.* at 367–68.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 365.

<sup>76</sup> Brusco, Maria A., *Read This Note or Else!: Conviction under 18 U.S.C. §875(c) For Recklessly Making A Threat*, 84 FORDHAM L. REV. 2845, 2862 (2016).

<sup>77</sup> *Black*, 538 U.S. at 368–80.



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interpreted the provision.<sup>78</sup> He recognized that there were two possible interpretations of the statute: the one given from the Model Instruction in Black’s trial, and the one given by the Virginia Supreme Court in prior cases that explained how to apply prima facie evidence provisions.<sup>79</sup> Justice Scalia agreed that the jury instruction used in Black’s trial was constitutionally problematic because it could be understood to take the act of cross-burning alone as the necessary evidence of intent.<sup>80</sup> However, he believed that the Virginia Supreme Court’s interpretations of prima facie evidence provisions, that concluded the inference was rebuttable by the defendant, were likely constitutionally permissible.<sup>81</sup> He emphasized that the Court could not call on the overbreadth doctrine to facially invalidate the provision because there were only a limited set of circumstances where the provision would be considered unconstitutional.<sup>82</sup> To use the doctrine to render the provision facially invalid, precedent required a substantial number of instances where a statute’s application was unconstitutional.<sup>83</sup>

Regardless of these distinctions in reasoning, Justice Scalia ultimately concurred in the decision to vacate and remand the judgments against Black because of the impossibility of determining how the jury reached its verdict: based on an improper understanding of the prima

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<sup>78</sup> *Id.* at 378.

<sup>79</sup> *Id.* at 376–79.

<sup>80</sup> *Id.* at 373.

<sup>81</sup> *See id.* at 374.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (“In a facial challenge to overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct”) (quoting *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982)).



facie provision or a proper one. Like the O'Connor plurality, Justice Scalia paused when the element of intent was automatically assumed through the improper jury instruction. The intent of the crime is what makes a true threat distinguishable and thus out of reach of the First Amendment's protection. While the members of the Court clearly emphasized this point, Justice Scalia, like his brethren, failed to discuss the standard of intent that is necessary for evaluating what constitutes a true threat and when a person can be punished for language that either is conveyed as a threat or meant as a threat.

### JUSTICE SOUTER'S CONCURRENCE

Justice Souter concurred in the result the O'Connor plurality reached, but dissented based on the reasoning it used. Unlike the plurality, Justice Souter's opinion, joined by Justice Kennedy and Justice Ginsburg, reasoned that the Virginia statute should be invalidated as a content-based prohibition under the ruling in *R.A.V.*<sup>84</sup> The Justices argued that while on its face the statute did not discriminate based on viewpoint, the purpose and likely effect of the statute was to discriminate on viewpoint, namely the viewpoint of white supremacists.<sup>85</sup> The concurrence argued that no matter how disliked these viewpoints may be, they still deserve First Amendment protection.<sup>86</sup> The opinion reasoned that because the statute is classified as a content-

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<sup>84</sup> *See id.* at 380–82.

<sup>85</sup> *Id.* at 381.

<sup>86</sup> *See id.* at 380–82.



based prohibition that it is subject to strict scrutiny analysis.<sup>87</sup> The statute would not pass constitutional muster because it was not a narrowly tailored statute.<sup>88</sup>

The opinion agreed that the convictions should be vacated, but dissented in regard to the explanation of the law. The Justices used a different analysis than the plurality opinion and did not take issue with the prima facie evidence provision, nor the jury instruction. Therefore, this portion of the Court's opinion did not add weight to the analysis of what intent is required to constitute a true threat.

### JUSTICE THOMAS' DISSENT

Justice Thomas diverged from the plurality's opinion by arguing that there were no First Amendment issues presented by the facts of the case.<sup>89</sup> He argued that cross-burning should be classified as conduct, not a form of expression.<sup>90</sup> Further, he explained that conduct could be regulated regardless of the intent of a defendant. He supported this argument by providing examples of criminal statutes that do not require a level of mens rea, such as statutory rape.<sup>91</sup> Therefore, he concluded that the Virginia statute should be upheld as constitutional.<sup>92</sup>

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<sup>87</sup> *Id.* at 386–87.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 393–94.

<sup>90</sup> *Id.* at 394 (“This statute prohibits only conduct, not expression. And, just as one cannot burn down someone’s house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point.”).

<sup>91</sup> *Id.* at 397–98.

<sup>92</sup> *Id.*



In the alternative, Justice Thomas argued that if cross-burning is considered a form of expression, and thus falls under First Amendment jurisprudence, the statute should still be upheld as constitutional.<sup>93</sup> Like Justice Scalia, Justice Thomas reasoned that the Virginia Supreme Court should have first interpreted the statute; however he explained that any interpretation of the statute would be constitutional.<sup>94</sup> Any interpretation of the prima facie evidence provision would provide the jury with only an inference towards the defendant's intent.<sup>95</sup> He argued that the defendant would still have a chance to rebut the inference that the statute provided, and that ability alone would be enough to overcome constitutional concerns.<sup>96</sup> The plurality's explanation that the use of the provision, as exemplified in Black's trial, would chill speech because of easier prosecution was of little importance to Justice Thomas because the defendant theoretically could rebut the inference it provided.<sup>97</sup> At the end of his opinion, Justice Thomas reprimanded the other Justices for failing to emphasize the harm that this statute was trying to eliminate, while protecting those who, in his eyes, clearly intended to intimidate others.<sup>98</sup>

## SUMMARY AND CONSEQUENCE

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<sup>93</sup> *Id.* at 395.

<sup>94</sup> *Id.* at 396–97.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 400.



Taken together, the opinions expressed by the fragmented Court in *Virginia v. Black* reveal that something was inherently wrong with the jury instruction provided in Black's trial. Namely, the defendant's intent behind the act made a difference in determining what was and was not constitutionally protected expression. There was agreement throughout the opinion<sup>99</sup> that in some instances cross-burning might occur for a reason other than intimidation, and therefore a defendant should have the opportunity to provide context to determine if the expression was a true threat. The Court rejected the idea that a defendant must actually intend to carry out his threat by emphasizing the need to protect individuals from the fear that threats inspire. The Justices inherently relied on different standards of mens rea, which produced the split opinion. While the analysis of the true threat doctrine in *Black* provided more guidance than the analysis in *Watts*, the Court failed to articulate which factor was more important in determining the necessary intent for a true threat: the intent of the speaker or the perception of the listener.

### C. SUBJECTIVE INTENT COMPARED TO OBJECTIVE INTENT

The interpretation of the Court's decisions in *Watts v. United States* and *Virginia v. Black* has divided lower courts in one major way: some courts require a subjective intent in regard to anti-threat statutes, while others require a lesser, objective intent. The difference in these two tests illustrates the question left open in both *Watts* and *Black*. For example, if subjective intent were required, Black would have had to either intend for his message to be threatening to those that saw it, or know that his actions would come across to others as threatening and act anyways. If an objective test were used in the case, Black could be convicted

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<sup>99</sup> Although Justice Thomas disagrees.



if the prosecution could show that a reasonable person would feel threatened by Black's actions.

Subjective intent is distinguished from objective intent by the level of mens rea.

There are four levels of mens rea that are applied in criminal law that can be inserted into anti-threat statutes.<sup>100</sup> The four levels proscribed in the Model Penal Code (MPC) are purpose, knowledge, recklessness, and negligence.<sup>101</sup> Purpose is defined in the MPC as an act with a conscious objective to engage in the conduct to cause such a result that is prohibited, while having awareness of the existence of attendant circumstances or believing they exist.<sup>102</sup> A person acts knowingly "when she is aware that her conduct is of a specific nature, is practically certain that the result will obtain, and is aware that circumstances exist."<sup>103</sup> A person acts recklessly when she consciously disregards a substantial and unjustifiable risk that an element of a crime exists or will result from her conduct. The conduct involves a gross deviation from the standard a law-abiding person would adhere to.<sup>104</sup> Negligence, the least stringent standard of mens rea, only requires that a person act in a manner that a reasonable person in the same situation would not.<sup>105</sup> Purpose and knowledge fall into the subjective category of intent, negligence is in the

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<sup>100</sup> Model Penal Code §2.02(a) (AM. LAW INST., Proposed Official Draft 1962).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Brusco, *supra* note 77 at 2853–54; see also Model Penal Code §2.02(b).

<sup>104</sup> Model Penal Code §2.02(c).

<sup>105</sup> See Brusco, *supra* note 77 at 2854; Model Penal Code §2.02(d).



objective category, and recklessness arguably falls somewhere in-between.<sup>106</sup> In her article that details online threats, Alison Best explains how these standards are applied in true threat statutes:

In the context of true threats, a general, or objective intent requirement means a statement would qualify as a true threat if a reasonable person would have understood the communication as a threat. A specific or subjective intent standard would consider whether the speaker subjectively intended her posts to be interpreted as threats and would require more than an objective showing of intent.<sup>107</sup>

As a result of the lack of clarification regarding the necessary level of mens rea in anti-threat statutes, different standards of intent have been applied in different jurisdictions. Because the Supreme Court has not given a definite answer regarding the necessary intent, legislatures are free to prescribe the intent they see fit. There are true threat statutes that cover a variety of specific threats, like the cross-burning statute<sup>108</sup> in *Black*, and others that govern threats generally, like the federal statute 18 U.S.C. §875.<sup>109</sup> Many of these statutes, both at the federal level and the state level, proscribe the requisite mens rea, subjective or objective, for the crime. However, when a circuit court requires a heightened, or subjective, mens rea and the legislature has applied a lessor mens rea, a court must read a higher level of mens rea into the statute or declare it violative of First Amendment principles. In jurisdictions that only require an objective intent, any level of mens rea that the legislature applies is constitutional in a true threat statute.

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<sup>106</sup> Alison J. Best, *Elonis v. United States: The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 Md. L. Rev. 1127,1144 (2016).

<sup>107</sup> *Id.*

<sup>108</sup> See Va. Code Ann. §18.2-423 (1950).

<sup>109</sup> 18 U.S.C § 875(c) (2012) (“whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”).



Since *Black*, lower courts have formulated a variety of subjective or objective tests to apply in true threat jurisprudence. The circuit split and a description of both the subjective and objective tests are examined below.

#### *D. THE CIRCUIT COURT SPLIT PRIOR TO ELONIS*

After the *Watts* decision lower courts began to formulate their own definition for what constituted true threat. Some courts believed that speech was only a true threat when a reasonable speaker could determine that the speech would be threatening to the listener.<sup>110</sup> In the Ninth Circuit Court of Appeals, the test focused on a “reasonable speaker.”<sup>111</sup> It reasoned that the purpose of true threat was to protect the listener from the harm that a threat can cause, namely fear and mental anguish.<sup>112</sup> Unlike other circuits, the Ninth Circuit also focused on the intent of the speaker, while recognizing the importance of the impact on the listener. The Ninth Circuit’s test changed from a hybrid-objective test to a subjective test after *Black*.<sup>113</sup> Other courts believed that the harm in true threats, namely the fear and panic that threats caused a listener, should be the basis of a anti-threat statutes and that an objective, reasonable listener test should be applied.<sup>114</sup> The Eleventh Circuit has always applied a “reasonable listener” test. In *United States*.

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<sup>110</sup> See *Planned Parenthood of the Columbia/Williarnette, Inc. v. Am. Coal. Of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (applying the reasonable speaker test); *United States v. Saunders*, 166 F.3d 907, 912 (7th Cir. 1999)(same); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997)(same).

<sup>111</sup> *Planned Parenthood of the Columbia/Williarnette, Inc.*, 290 F.3d at 1058.

<sup>112</sup> *Id.*

<sup>113</sup> *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011).

<sup>114</sup> See *United States v. Adams*, 73 F. Supp. 2d 2, 3 (D.D.C. 1999)(applying the reasonable listener test); *United States v. Viefhaus* 168 F. 3d 392, (10<sup>th</sup> Cir. 1999) (same); *United States v. Miller*, 115 F.3d 361,363 (6th Cir. 1997) (same); *United States v. Dinwiddie*, 76 F.3d 913,925 (8th Cir. 1996)(same); *United States v. Daugenbaugh*, 49 F.3d 171, 173-74 (5th Cir. 1995)(same); *United States v. Darby*, 37 F. 3d 1059 (4th Cir. 1994)(same); *United States v. Kosma* 951 F.2d 549 (3d Cir. 1991)(same); *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983)(same);



*v. Callahan*<sup>115</sup>, the reasonable listener test was described as when “[a] defendant intentionally made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm upon or to take the life of the persons named in the statute.”<sup>116</sup>

After *Black*, some circuits, like the Ninth Circuit, switched the evaluation from an objective, reasonable speaker test to a subjective intent test.<sup>117</sup> The Ninth Circuit began to apply subjective intent. This decision was based on a reading of *Black* that commanded the use a subjective intent test.<sup>118</sup> The Ninth Circuit explained that requiring purpose or knowledge in issuing a threat is the only factor that distinguishes between protected expression and unprotected criminal behavior.<sup>119</sup> The Court also explained that with certain statutes, there would be room for an objective element, but only in conjunction with a subjective evaluation.<sup>120</sup> Other courts did not read *Black* in a manner that affected the application of a reasonable listener test.<sup>121</sup>

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United States v. Kelner 534 F.2d 1020 (2d Cir. 1976)(same).

<sup>115</sup> 702 F.2d 964 (11th Cir. 1983).

<sup>116</sup> *Id.* at 965.

<sup>117</sup> United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011); *see also* United States v. Heineman, 767 F.3d 970 (10th Cir. 2014).

<sup>118</sup> *Bagdasarian*, 652 F.3d at 1117 (“Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.”).

<sup>119</sup> *Id.* at 1118.

<sup>120</sup> *Id.*

<sup>121</sup> *See* United States v. Turner, 720 F. 3d 411 (2nd Cir. 2013)(applying a reasonable listener test); United States v. Elonis, 730 F.3d 321 (3rd Cir. 2013)(same); United States v. Nicklas, 713 F. 3d 435 (8th Cir. 2013)(same); United States v. White 670 F. 3d 498 (4th Cir. 2012)(same); United States v. Jeffries, 692 F. 3d 473 (6th Cir. 2012)(same); United States v. Alaboud, 347 F. 3d 1293 (11th Cir. 2003)(same); *but see* United States v. Cassel, 408 F. 3d 622 (9th Cir. 2005).



The Sixth Circuit reaffirmed its use of the reasonable listener test, an objective intent test, in *United States v. Jefferies*.<sup>122</sup> The opinion explained that the Ninth Circuit read too much into the *Black* decision.<sup>123</sup> Rather than reading the decision to require a subjective intent, the Sixth Circuit Court explained that the *Black* decision was based on principles of overbreadth.<sup>124</sup> The court reasoned that as long as the standard applied provides a distinction between constitutionally protected speech and true threat, it was an acceptable standard.<sup>125</sup> The reasonable listener test allowed this distinction as it allowed the juror to focus on contextual clues that would separate constitutionally protected speech, such as political speech, from proscribable speech, namely true threats.<sup>126</sup>

Because of the disagreement and confusion amongst lower courts regarding the necessary level of intent, a person could be prosecuted under the same statute, but with different element requirements depending on which jurisdiction he was prosecuted in. It seems inherently wrong, especially when applying federal statutes, that a criminal defendant would be convicted in one jurisdiction, and set free in another based on the same speech.<sup>127</sup> Scholars and lower courts were

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<sup>122</sup> 692 F.3d 473, 480 (6th 2012).

<sup>123</sup> *Id.* at 479.

<sup>124</sup> *Id.* at 479–80.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See Jing Xun Quek, *Privacy Law: Elonis v. United States: The Next Twelve Years*, 31 Berkeley Tech. L.J. 1109, 1111 (2016) (“This inconsistency in the statutory language results not only in confusion among lower courts, but also means that similar cases will be treated differently based simply on the jurisdiction in which a defendant is charged.”).



hoping that *Elonis* would provide guidance by answering what intent was necessary to constitute proscribable speech under the true threat doctrine.

## II. THE ELONIS DECISION

Anthony Elonis was convicted for five counts of violating 18 U.S.C. 875(c), a federal threat statute.<sup>128</sup> In the District Court, Elonis moved to dismiss his indictment on the grounds that the government failed to allege that he purposefully threatened anyone.<sup>129</sup> His motion was denied and the jury convicted Elonis on four of the five counts.<sup>130</sup> The Third Circuit affirmed.<sup>131</sup> The Supreme Court granted certiorari.<sup>132</sup>

### A. FACTS AND PROCEDURAL HISTORY

After Elonis' wife left him in May of 2010, Elonis changed his Facebook profile to that of his online persona, "Tone Dougie." Elonis changed his profile in order to showcase his newfound appreciation of rap music and creative rap lyrics. The profile included some of his own lyrics, which included violent language and imagery, as well as a disclaimer that all of his lyrics were therapeutic to him and were meant to be fictional. Despite his disclaimers, the content and persons represented in his lyrics were reflective of many of the people and situations in his life. His co-workers became the subject of his rap lyrics after one of the workers

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<sup>128</sup> *United States v. Elonis*, No. 11–13, 2011 WL 5024284, at \*3 (E.D.Pa. Oct. 20, 2011).

<sup>129</sup> *Id.*

<sup>130</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2007 (2015). Elonis was only acquitted of the charge of threatening his co-workers and place of employment under 18 U.S.C. §875(c).

<sup>131</sup> *United States v. Elonis*, 730 F.3d 321, 327 (3d Cir. 2013).

<sup>132</sup> *Elonis v. United States*, 134 S.Ct. 2819 (2014).



complained to their boss about the content of Elonis' page. Because of this incident Elonis was fired from his position at a theme park; subsequently, he posted a "rap" that threatened both workers and customers at the park.<sup>133</sup> This post became the basis for the first count of Elonis' indictment under 18 U.S.C. 875(c).

Additionally, he repeatedly posted lyrics and video scripts that targeted his ex-wife. Due to the extremely detailed information in the material, his ex-wife was in fear for her life.<sup>134</sup> She believed that Elonis would carry out the threats, so she took the necessary steps to get a protection-from-abuse order from local law enforcement. Once she did this, Elonis posted a rap that expressed his anger over the order. In this post Elonis once again threatened his ex-wife and local law enforcement.<sup>135</sup> The threats against his wife were the basis of Count Two, and the threat against the local police was the basis for Count Three of the indictment. Count Four was based on his threat to ravage a local elementary school in "the most heinous school shooting ever

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<sup>133</sup> *Elonis*, 135 S. Ct. at 2005 ("Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f\*\*\*in' gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be f\*\*\*in' scary?")

<sup>134</sup> *Id.* at 2005–06 ("Hi, I'm Tone Elonis. Did you know that it's illegal for me to say I want to kill my wife? It's one of the only sentences that I'm not allowed to say... Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife...Um, but what's interest is that it's very illegal to say I really, really think someone out there should kill my wife...But not illegal to say with a mortar launcher. Because that's its own sentence... I also found out that it's incredibly illegal, extremely to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room... Yet even more illegal to show an illustrated diagram.").

<sup>135</sup> *Id.* at 2006 ("Fold up your [protection-from-abuse order] and put it in your pocket...Is it thick enough to stop a bullet? Try to enforce an Order that was improperly granted in the first place...Me thinks the Judge needs an education on true threat jurisprudence...And prison time'll add zeros to my settlement...And if worse comes to worse I've got enough explosives to take care of the State Police and the Sheriff's Department.").



imagined.”<sup>136</sup> The final count of Elonis’ indictment was based on a threat he issued on his Facebook to the FBI officer that came to his home to investigate the threat against the elementary school.<sup>137</sup>

Before trial in the District Court, Elonis requested a jury instruction that required the government to prove he subjectively intended to communicate a true threat. The prosecution protested the instruction and the following instruction was used instead:

A statement is a true threat when a defendant intentionally makes a statement in a context or under circumstances wherein a *reasonable person would foresee* that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.<sup>138</sup>

Elonis appealed the judgment, arguing that a subjective intent should have been required for the jury instruction rather than an objective one. The Third Circuit Court of Appeals disagreed with his argument and affirmed the use of objective intent for true threat.<sup>139</sup> The Supreme Court granted certiorari to determine if a subjective standard was required under 18 U.S.C. §875(c).

The Court began the evaluation by looking at the definition of “threat.” On its face, the definition of threat only speaks to what a message conveys, not what the speaker is thinking

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<sup>136</sup> *Id.* at 2006.

<sup>137</sup> *Id.* at 2006–07 (“You know your s\*\*\*\*’s ridiculous when you have the FBI knockin’ at yo’ door...Little Agent Lady stood so close...Took all the strength I had not to turn the b\*\*\*\*ghost...Pull my knife, flick my wrist, and slit her throat...Leave her bleedin’ from her jugular in the arms of her partner...So next time you knock, you best be serving a warrant...And bring yo’ SWAT and an explosives expert while you’re at it...Cause little did y’all know, I was strapped wit’ a bomb...Why do you think it took me so long to get dressed with no shoes on? I was jus’ waitin’ for y’all to handcuff me and pat me down...Touch the detonator in my pocket and we’re all goin’... BOOM...”).

<sup>138</sup> *Id.* at 2007 (quoting jury instruction).

<sup>139</sup> *United States v. Elonis*, 730 F.3d 321, 327 (3d Cir. 2013).



when conveying the message.<sup>140</sup> Further, the text of the statute did not provide the reader with a required mental state.<sup>141</sup> The Court concluded that because neither the definition of threat, nor the statute itself provided any indication of the required mental state, it had to turn to general principles of criminal statutory interpretation.<sup>142</sup> In fact, the Court explicitly stated that the holding was not based on First Amendment considerations.<sup>143</sup>

## B. A STATUTORY ISSUE

In *Elonis*, the federal statute was silent regarding mens rea, so the Court had to evaluate what level of mens rea was necessary.<sup>144</sup> Rather than providing a conclusive answer, the Court clarified that a mens rea of negligence was not sufficient. The Court began its evaluation by stating that just because a statute does not include a mental state within the text does not mean that there is not a required mental state; rather one must be read into the statute.<sup>145</sup> This rule reflects the idea that a criminal must be conscious of the wrongdoing in order to be punished for it.<sup>146</sup> Therefore, the Court “will interpret criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.”<sup>147</sup> The Court will

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<sup>140</sup> *Elonis*, 135 S.Ct. at 2008 (quoting Black’s Law Dictionary 1519 (8th ed. 2004)) (“A communicated intent to inflict harm or loss on another.”)

<sup>141</sup> *Id.* at 2008–09.

<sup>142</sup> *Id.* at 2009.

<sup>143</sup> *Id.* at 2012.

<sup>144</sup> After the *Elonis* decision, Congress has proposed an amendment to 18 U.S.C. §875(c) that will insert a mens rea of either knowledge or recklessness. 2015 CONG US S 2552.

<sup>145</sup> *Elonis*, 135 S.Ct. at 2009 (quoting *Morissette v. United States* 342 U.S. 246, 250 (1952)).

<sup>146</sup> *Id.* (not saying that ignorance of law is an excuse).

<sup>147</sup> *Id.* (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994)).



generally only apply the lowest level of mens rea necessary to separate criminal conduct from non-criminal conduct.<sup>148</sup>

Based on this principle, in some cases, the Court has considered that the necessary mens rea is met if the defendant knowingly acts. Here, the Court commanded that each element of the statute demanded a scienter requirement and that knowingly acting was not enough for a conviction. The Court broke the statute into two elements: 1) knowingly transmitting a communication, and 2) the threatening nature of the communication. So while it might be easy to show that a defendant knowingly transmitted a communication, the second element separates the criminal action from the non-criminal action. Therefore, the Court explained, the “reasonable person” standard was not sufficient. This is not new. In cases where the Court has had to read a mens rea standard into a statute, it will not apply a negligence standard. The “conventional requirement for criminal conduct is awareness of some wrongdoing.”<sup>149</sup> However, this is not to say that a negligence standard is never acceptable in a criminal statute, or if Congress rewrote the statute to supersede the holding that it would be unconstitutional.<sup>150</sup> If a legislature includes a mens rea of negligence in the statute the Court will uphold it and apply the law as written. For example, in some jurisdictions involuntary manslaughter and vehicular manslaughter require a criminal negligence standard, and it is rare that these crimes are found to be improper.

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<sup>148</sup> *Id.* at 2010.

<sup>149</sup> *United States v. Dotterweich*, 320 U.S. 277, 281 (1943).

<sup>150</sup> *Brusco*, *supra* note 77, at 2870.



It is only when a court is asked to read a mens rea into a statute that a court will avoid applying the lowest recognized level of mens rea.<sup>151</sup> Because the jury instruction at *Elonis*' trial included a mens rea that equated to negligence, the Court overturned *Elonis*' conviction. They then stated that if the jury instruction had commanded the jury to evaluate whether *Elonis* transmitted the communication for the purpose of issuing a threat, or with knowledge that the communication could be seen as a threat, the instruction would be upheld.<sup>152</sup> So, in practice, the Court held that subjective intent would meet the statutory requirements. Unlike other cases however, where the Court typically applies the lowest possible level, recklessness, the Court refused to evaluate whether a mens rea of recklessness would be satisfactory. This could hint that the Court would lean towards a subjective intent under First Amendment principles, but the Court never explicitly says this. Instead, the Court ruled that because the question of recklessness was not briefed by the petitioner or respondent, nor argued at oral argument, the Court was not in a position to determine whether recklessness would be satisfactory.

### C. CONCURRENCE AND DISSENT

Justice Alito, writing in concurrence, agreed with the majority that the negligence standard presented by the government was not a strong enough standard by which to prosecute *Elonis* under 18 U.S.C §875(c).<sup>153</sup> He did take issue with the Court's reluctance to answer the

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<sup>151</sup> *Rogers v. United States*, 422 U.S. 35 (1975).

<sup>152</sup> *Elonis*, 135 S. Ct. at 2012.

<sup>153</sup> *Elonis v. United States*, 135 S. Ct. 2011, 2015 (Alito, J., concurring) (“Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.”).



question of whether a recklessness standard would suffice.<sup>154</sup> Justice Alito criticized his peers for avoiding their duty to clarify the law and for failing to set standards for lower courts to apply.<sup>155</sup> He expressed that the First Amendment principles govern the outcome, and additionally that recklessness would be a sufficient standard under a true threat statute.<sup>156</sup> He would support the conclusion that negligence is not a workable standard in 18 U.S.C. §875(c) and would apply that decision to most true threat statutes.<sup>157</sup> In theory, if his reasoning and outcome were applied, the scope of the true threat doctrine would be slightly narrowed.<sup>158</sup>

Justice Thomas, in dissent, disagrees with Justice Alito that a negligence standard of intent is not enough for the true threat doctrine.<sup>159</sup> Instead, he believes that an objective test is sufficient.<sup>160</sup> Like Justice Alito, Justice Thomas frowned upon the Court’s refusal to discuss First Amendment principles to resolve a circuit split.<sup>161</sup> He also delves into the First Amendment jurisprudence of true threat and explained that an objective negligence standard satisfies the demands of the First Amendment.<sup>162</sup> Justice Thomas would apply an objective test in true threat

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<sup>154</sup> *Id.* at 2016.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *See id.* at 2015.

<sup>158</sup> *Id.* (Alito, J., concurring)(“someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyways.”).

<sup>159</sup> *Id.* at 2018 (Thomas, J., dissenting).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 2024–28.



jurisprudence, thus resolving the circuit split in favor of the majority. His version of true threat would be broader than the scope articulated by Justice Alito. However, because the Court did not use First Amendment reasoning, neither of these positions are binding.

### III. THE IMPLICATIONS OF ELONIS

The explicit statement that the decision was not grounded in First Amendment principles suggests that the true threat doctrine has not been narrowed at all. By basing the decision on a single statute, the implications of *Elonis* are narrow. Jing Xun Quek supports this contention in his article that evaluates the effect of the *Elonis* decision: “The Court’s narrow holding in *Elonis* raises more questions than it answers, and does little to alleviate the confusion among the lower courts in the wake of *Virginia v. Black*.”<sup>163</sup> The Court’s discussion of intent that was central to its decision in *Black* was not explored in *Elonis*. The Court used the ambiguity of the statutory language to conclude that the statute did not provide a relevant standard of mens rea. Instead of delving into the question of what level of mens rea is necessary for a true threat proscription under the First Amendment, the Court decided the case on grounds of statutory interpretation.

#### A. TRUE THREAT UNSCATHED

The Supreme Court could have chosen to resolve the First Amendment issue in the circuit split; however, the Court proved that it would only resolve the problem to the extent necessary.<sup>164</sup> While the method of decision-making is supported historically, Justice Thomas and

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<sup>163</sup>Quek, *supra* note 128, at 1125.

<sup>164</sup> See Russomanno, *supra* note \_\_ at 14 (Judicial minimalism/constitutional avoidance finds its roots in the principle articulated by Justice Louis Brandeis in 1936: ‘[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.’ In adopting or suggesting a minimalist approach, more than fifty U.S. Supreme Court rulings



Justice Alito are correct: by basing the decision on statutory interpretation, the Court made understanding this issue more difficult.<sup>165</sup> It is not clear from the current vantage point what will happen if the question of required intent is brought to the Court under a different true threat statute: because the Court struck down negligence as a sufficient level of mens rea in this case, does not mean that the Court would do so when a statute includes a prescribed element of negligence. At the heart of judicial minimalism is the democratic process; it is possible that the Court would let a legislature apply whichever level of intent it sees fit. The problem is that this does not paint a clear picture for what is legal and what is illegal, especially when the line can be so easily blurred between threatening language, art, music, or political expression. By using judicial restraint to base the decision on statutory issues rather than First Amendment principles, and by refusing to decide the sufficiency of recklessness as the mental standard, under §875(c), the Court encourages legislatures to use a heightened level of intent in true threat statutes in order to ensure that the statute would not be considered unconstitutional if questioned.

## *B. MISSED OPPORTUNITIES*

After the *Elonis* decision, the circuit split regarding the necessary standard of intent remains. Circuits that have evaluated anti-threat statutes after *Elonis* have gone down two distinct paths. The first path attracts the circuit courts that applied a subjective standard of intent pre-*Elonis*. These circuits have continued to require a subjective intent for anti-threat statutes, and have used

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have cited this Brandeis passage. The *Elonis* ruling was an additional example that the court is not reluctant to utilize minimalism.”

<sup>165</sup> *Elonis*, 135 S.Ct. at 2013 (“The Court’s disposition of this case is certain to cause confusion and serious problems.”) (Alito, J., concurring); *Elonis*, 135 S.Ct. at 2018 (“This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.”)(Thomas, J., dissenting).



*Elonis*' rejection of a negligence standard in 18 U.S.C. §875(c) as support for the subjective test.<sup>166</sup> The second path attracts circuit courts that have traditionally applied an objective test.<sup>167</sup> These circuits contend that because the Court chose to evaluate the case on statutory, rather than constitutional grounds, the result of the case only applies to 18 U.S.C. §875(c), and thus the courts are free to continue to use an objective test for other statutes.<sup>168</sup> The true threat doctrine has retained its scope in application in the lower courts despite the Court's ruling in *Elonis*. Courts have either refused to apply the holding of *Elonis*, or have applied the standard of intent given in *Elonis* and reached the same result in applying subjective intent as in applying an objective intent.

Five Courts of Appeals have ruled that the decision in *Elonis* does not apply to other true threat statutes. The circuits that have applied *Elonis* to other statutes used the subjective intent requirement to all true threat statutes prior to the decision.<sup>169</sup> The two main reasons that courts have used for not applying the *Elonis* decision are: 1) if another statute provides a requisite mens rea, the evaluation in *Elonis* is moot, and 2) because the decision was based on statutory interpretation of silent mens rea, no constitutional principle was formed that lower courts are required to adhere to.<sup>170</sup> In *United States v. White*,<sup>171</sup> the Fourth Circuit applied the decision to a

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<sup>166</sup> See *United States v. Haddad*, --- Fed.Appx. ----, 2016 WL 3316744 (7th Cir. 2016); *United States v. Zagorovskaya*, 628 F. App'x 503, 504 (9th Cir. 2015).

<sup>167</sup> See *In re D'Amario*, 2015 U.S. App. LEXIS 23142; *United States v. White*, 810 F. 3d 212 (2016).

<sup>168</sup> *Id.*

<sup>169</sup> See *United States v. Haddad*, --- Fed.Appx. ----, 2016 WL 3316744 (7th Cir. 2016); *United States v. Zagorovskaya*, 628 F. App'x 503, 504 (9th Cir. 2015).

<sup>170</sup> See *In re D'Amario*, 2015 U.S. App. LEXIS 23142; *United States v. White*, 810 F. 3d 212 (2016).

<sup>171</sup> 810 F. 3d 212 (2016).



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charge under 18 U.S.C §875(c); however, the Court refused to apply the decision to a charge under 18 U.S.C. §875(b). According to the Fourth Circuit, the only reason that the Supreme Court reached its decision was because the statute in *Elonis* did not have a specified mental state.<sup>172</sup> It refused to apply the holding because it was “purely statutory: and, having resolved the question on statutory grounds, the Court declined to address whether a similar subjective intent to threaten is a necessary component of a ‘true threat’ for purpose of the First Amendment.”<sup>173</sup> The Eighth Circuit has applied the same reasoning.<sup>174</sup> In a case similar to *White*, the Court applied the *Elonis* decision to the conviction under §875(c), but refused to apply it to a conviction under 18 U.S.C. §115(a)(1)(b).<sup>175</sup> Further, the Court of Appeals did not discuss the implications of a heightened intent requirement for the first charge, because the prosecution agreed to settle the case, as long as the other conviction was upheld.<sup>176</sup> The Second Circuit and Third Circuit have explicitly denied any constitutional implications of the *Elonis* decision, and have refused to apply a subjective intent requirement on all true threat statutes.<sup>177</sup> Rather, the courts continue to apply either a reasonable listener standard, or evaluate convictions based on the intent element provided in the particular statute.

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<sup>172</sup> *Id.*; see also *United States v. Ziba*, --- Fed.Appx. ----, 2016 WL 3194679 (Mem)(2016)(“The mental state required there is not in the crime here.”).

<sup>173</sup> *Id.* at 220.

<sup>174</sup> See *United States v. Wynn*, 827 F. 3d 778 (2016).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See *In re D’Amario*, (“Petitioner’s reliance on [*Elonis*] is misplaced because that case does not develop any rule of constitutional law, let alone one made retroactively applicable to cases on collateral review.”).



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The Second Circuit has applied the holding of *Elonis* to two cases involving 18 U.S.C § 875(c).<sup>178</sup> In *United States v. Jordan*<sup>179</sup>, the Court explained that the jury would have convicted the defendant of violating §875(c) even with the heightened intent requirement. In determining that a jury could convict a defendant beyond a reasonable doubt, the opinion referenced other threat statutes with heightened elements of mens rea that the defendant was convicted under. Each of those statutes required a heightened standard of intent, and the jury found that the defendant had the requisite intent for each of those. The Court reasoned that because the evidence used is the same for all of the counts, “there is no doubt that the jury would have found that Jordan knew that his threatening communications would be viewed as threats.”<sup>180</sup> The Court elaborated in *United States v. Choudhry*<sup>181</sup> that “if the evidence bearing on the omitted element is overwhelming and essentially uncontroverted, there is no basis for concluding that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.”<sup>182</sup>

This is likely to happen in the majority of cases, because whenever the government decides to prosecute speech, the speech likely has sympathetic facts and context to support any mens rea requirement. The government will try to avoid bringing fruitless claims, and thus will not

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<sup>178</sup> See *United States v. Choudhry*, 649 F. App'x 60, 63 (2d Cir. 2016); *United States v. Jordan*, 639 Fed.Appx. 768 (2d Cir. 2016); *but see United States v. Houston*, 792 F. 3d 663 (6th Cir. 2015); *United States v. Martinez*, 800 F. 3d 1293 (11th Cir. 2015).

<sup>179</sup> 639 Fed.Appx. 768.

<sup>180</sup> *Id.* at 770.

<sup>181</sup> 649 F. App'x 60.

<sup>182</sup> *Id.* at 63 (quoting *Neder v. United States*, 527 U.S. 1, 18-20 (1999)).



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prosecute a speaker when the jury will not be sympathetic to the victim. For example, as Justice Alito explained in his concurrence, *Elonis* likely should still have been convicted of violating §875(c). However, due to a procedural defect, the Supreme Court vacated the conviction rather than remanding it to the Third Circuit to evaluate the case under the articulated standard.

Usually, the context of the speech will be so egregious that a jury will have no problem finding the defendant guilty even if a higher standard is applied.

Parallel outcomes have been produced in lower federal courts and in state courts. Most judges have refused to apply *Elonis* outside of the statutory scope of 18 U.S.C. §875(c), and even where the heightened intent is applied, the result is rarely overturned.<sup>183</sup> Therefore, in application, the doctrine has not been narrowed any more than before. Some courts still apply the subjective/objective or subjective tests, while most still apply the objective tests and consider *Elonis* a statutory decision that only applies to 875(c) and not to other anti-threat statutes. The state of First Amendment law remains the same after *Elonis*. Scholars can only speculate if the language used in the opinion hints that the Court will narrow the doctrine if given a chance in the future.

The Court that decided *Elonis* could have answered the question that the Court left unanswered in *Black*. Instead, lower courts are still left wondering if true threats cover only “statements said with the purpose of putting someone in fear, applies also to statements said

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<sup>183</sup> See *People v. Murillo*, 238 Cal.App.4th 1122 (2015)(refusing to apply *Elonis* to a state statute); *United States v. Kirsch*, 151 F. Supp. 3d 311 (Western District of New York, 2015); *Council on American-Islamic Rels. Action Network, Inc. v. Gaubatz*, 123 F. Supp. 3d 83 (Dist. of District of Columbia, 2015)(holding that *Elonis* “simply does not control these circumstances.”). See also *United States v. Schueller*, 136 F. Supp. 3d 1074 (District of Minn., 2015); *Mabie v. United States*, 2015 U.S. Dist. LEXIS 147370 (East. District of Missouri, 2015); *United States v. Toltzis*, No. 14-CR-00567-RMW, 2016 WL 3479084, at \*1 (N.D. Cal. June 27, 2016).



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knowing that the target will be put in fear, applies also to statements said knowing that there's a serious risk that the target will be put in fear, or covers all statements that a reasonable person would view as aimed at putting the target in fear."<sup>184</sup> Unlike the *Black* Court, the *Elonis* Court moved further into the analysis of which mens rea should apply. Unfortunately, the *Elonis* Court did not use a First Amendment evaluation to do so. The *Black* Court certainly expressed that intent was vital in First Amendment evaluations and hinted that a standard that evaluates the defendant's beliefs was crucial. The Court also expressed the harms that the doctrines try to avoid, which requires an inquiry into facts outside of the defendant's mind: the context in which the defendant speaks. In *Elonis*, the Court evaluated the issue from a purely statutory perspective, thus it emphasized the importance of the defendant's ability to distinguish between what is right and what is wrong. Taken together, it is clear that that the context of the threat matters: both what the defendant is aware of and believes, and what the listener is aware of. What is indiscernible from either case is if the Supreme Court values one concern over the other. Because of this discrepancy, it would be best to apply a recklessness standard to anti-threat statutes, as recklessness takes both what the speaker believes and what the listener hears into consideration.

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<sup>184</sup> Eugene Volokh, *The Supreme Court Doesn't Decide When Speech Becomes a Constitutionally Protected "True Threat,"* WASH. POST: VOLOKH CONSPIRACY (June 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/the-supreme-court-doesnt-decide-when-speech-becomes-a-constitutionally-unprotected-true-threat/>.



## IV. WHERE WE GO FROM HERE

### A. *IMPLICATIONS OF A NARROWED DOCTRINE*

The conflicting principles of First Amendment jurisprudence guide an evaluation of the advantages and disadvantages of a narrowed true threat doctrine. Some argue that proscribing threatening speech is valuable to society because threatening speech lacks any value that traditionally justifies the right to freedom of speech.<sup>185</sup> One of the purposes of the First Amendment, however, is to protect speech that the majority of the population would find unbecoming.<sup>186</sup> Does the mens rea of a true threat statute raise this concern? Likely not. If enough context and evidence surrounding the threat is shown to a jury, most mental standard requirements, especially recklessness, could be satisfied. Further, the First Amendment only protects speech that is valuable to society, and the Supreme Court has consistently held that threatening speech has no value, thus it deserves no constitutional protection. This reasoning is supported by the comparison of a threat to behavior: it is “far removed from seminal speech values and is closely related to conduct.”<sup>187</sup> The harm produced is the concern that drives the true threat doctrine, not the value of the prohibited speech, because there is no value in such speech. So, if the true threat doctrine were narrowed, the Court would allow more room for harm in society while adding little value.<sup>188</sup> The Third Circuit recognized this in insisting that a

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<sup>185</sup> Russomanno, *supra* note 1, at 2.

<sup>186</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

<sup>187</sup> See Eberle, Edward J., *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1223 (2014).

<sup>188</sup> Russomanno, *supra* note 1, at 18.



reasonable standard apply in *Elonis*: “Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from ‘the fear of violence’ and the ‘disruption that fear engenders,’ because it would protect speech that a reasonable speaker would understand to be threatening.”<sup>189</sup> Further, in today’s society, it is important to limit threatening speech because of how easily it is distributed: “The Internet, including the social media that it accommodates, has helped create an environment that practically invites the kinds of threats at issue in *Elonis*.”<sup>190</sup>

On the other end of First Amendment jurisprudence is the desire to encourage the distribution of different values, thoughts, and beliefs. In construing the true threat doctrine broadly, there is a chance that people could be punished for violent expression in art, therapy, or other outlets. Because the reasonable person standard inquires what a reasonable person would believe, the standard invites others to judge the artistic proclivities of the speaker. By applying a subjective standard to true threat doctrine, the speaker is protected from this judgment. However, the purpose of the doctrine is to protect people from the harm of fear. By narrowing the scope of the doctrine, its purpose is not fulfilled. A satisfactory middle ground might be to apply a hybrid test like that of the “reasonable speaker” to ensure that the harm is avoided, while protecting speech that does not fall squarely within the realm of true threat. This way, those that are exercising their First Amendment rights are protected, and those who are truly culpable will be punished, as a true threat will be evident from the context of their words and actions.

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<sup>189</sup> United States v. *Elonis*, 730 F.3d 321, 330 (3d Cir. 2013).

<sup>190</sup> See Russomanno, *supra* note 1, at 29.



## B. THE NEXT OPPORTUNITY

As a general rule, to enforce the true threat doctrine, the Court will adopt a standard that has the least impact on speech.<sup>191</sup> This means that the speaker must know the import of what he is saying. However, the purpose of the true threat doctrine is to protect the listener from the harm that threats inspire, such as fear. Quek illustrates this point in his article when explains, “the problem with the initial conviction in *Virginia v. Black* was due to the fact that a prima facie standard explicitly declines to consider context in assigning guilt. In order to engage in contextual analysis of any given case, however, one must necessarily refer to how the average person views the context of a communication.”<sup>192</sup> It would not be effective to let a defendant say, “I had no idea the listener would take it that way, I didn’t mean it that way.” More protection must be given to the person that is the recipient of the speech. For example, *Elonis* has been criticized for producing an inapposite result.<sup>193</sup> Through his detailed and brutal posts, Elonis inspired the type of fear in his ex-wife that the true threat doctrine is supposed to protect people from. He was able to get away with it by claiming that he never intended his posts to be a threat. The sensitivities of his wife and community were irrelevant. This result makes little sense when compared to the claimed purpose of the true threat doctrine. Therefore, the standard of mens rea that is used in true threat statutes must balance the main concerns of the First Amendment true threat doctrine more effectively than the result in *Elonis*.

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<sup>191</sup> See *R.A.V.*, 505 U.S. at 382.

<sup>192</sup> Quek, *supra* note 128, at 1126.

<sup>193</sup> See generally Best, *supra* note 38; Brusco, *supra* note 77; Russomanno, *supra* note 1; Quek, *supra* note 128.



The standard of intent that incorporates these concerns is the standard of recklessness. By definition, recklessness evaluates what the speaker believes and what the listener might hear.<sup>194</sup> In an article that argues the use of the standard of recklessness to protect domestic violence victims, Maria Brusco explains that the standard of recklessness reflects this balance because by definition it is a contextual inquiry into the situation regarding the threat.<sup>195</sup> If a strictly subjective standard is applied, a victim of domestic violence is not afforded much protection from true threats because it would be difficult to show that an abuser spoke with the purpose to threaten, or that the abuser spoke knowing his speech would threaten.<sup>196</sup> If a lower standard such as recklessness is applied, a victim of domestic violence can incorporate her side of the story in order to provide context as to why she would take the speech as a threat, or why the speaker should have realized the effect of the speech on the victim.<sup>197</sup> A recklessness standard is not too low because it still requires the prosecution to show that speech would be a gross deviation from the conduct of a reasonable person, thus the defendant would not be convicted based on the sensitivities of a particular victim.<sup>198</sup> The recklessness standard, in Brusco's opinion, is the middle ground.<sup>199</sup>

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<sup>194</sup> Model Penal Code §2.02(c).

<sup>195</sup> Brusco, *supra* note 77, at 2873.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 2874–77.

<sup>199</sup> *Id.* at 2874–76.



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This is also illustrated when true threats are considered in the context of the Internet. Because the standard of recklessness balances the intent of the defendant and the perception of the listener, it allows the context of the speech to be of utmost importance. In his article arguing for the standard of recklessness, Joseph Russomanno explains that the Internet creates the perfect environment for true threats to arise.<sup>200</sup> The Internet provides a medium for people to blow off steam with little repercussion.<sup>201</sup> Social standards seem to be less important and communication becomes less personal.<sup>202</sup> People have come to believe that what they say online stays online.<sup>203</sup> Therefore, proving that a defendant purposefully or knowingly issued a threat on the Internet becomes very difficult for prosecutions.<sup>204</sup> If a standard of recklessness is applied, the prosecution needs to show that while a defendant might have not intended the speech to be threatening, he consciously disregarded a substantial risk that someone else might find his language threatening. As applied to the *Elonis* case, it would be relatively simple for a jury to determine that in posting his rap lyrics, namely those specifically targeted at his ex-wife, *Elonis* consciously disregarded a substantial risk that his ex-wife would fear for her life.

The *Elonis* Court did not evaluate the standard of recklessness, but in concurrence, Justice Alito explains its validity under First Amendment considerations and encourages its use. He states in his concurrence:

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<sup>200</sup> Russomanno, *supra* note 1, at 29.

<sup>201</sup> *Id.* at 30.

<sup>202</sup> *Id.* 29–31.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 31.



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There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct...Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway.<sup>205</sup>

Justice Alito recognized that the context of the speech matters and that while First Amendment protection of speech is important, the true threat doctrine is meant to prevent harm to society. He perfectly illustrates the balance that must be struck in true threat analysis when he states:

It can be argued that §875(c), if not limited to threats made with the intent to harm, will chill statements that do not qualify as true threats, *e.g.*, statements that may be literally threatening but are plainly not meant to be taken seriously...But we have also held that the law provides adequate breathing space when it requires proof that false statements were made with reckless disregard of their falsity.<sup>206</sup>

Recklessness is therefore the ideal standard of mens rea for true threat analysis because it allows the prosecution to detail the context in which the threat is given, thereby balancing both how the speech is perceived and what the defendant believes in articulating it.

## CONCLUSION

The Supreme Court did not narrow the true threat doctrine; rather the court used judicial minimalism to decide the case on historic principles of criminal law and statutory interpretation. The state of the law is unstable; instead of narrowing the doctrine by eliminating the circuit split, the Court has made the state of First Amendment jurisprudence a guessing game. The language of the majority opinion, the concurrence, and the dissent seem to suggest that the negligence standard has been eliminated, but in practice it is still used. Therefore, *Elonis* did not have the

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<sup>205</sup> *Elonis v. United States*, 135 S.C. 2001, 2015 (2015).

<sup>206</sup> *Id.* at 2017.



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effect of narrowing the true threat doctrine. This is not to say that the Court will not narrow the doctrine, but it did not do so through *Elonis*. In order to stabilize the state of law, the Court should grant certiorari and provide an answer to the question of recklessness under § 875(c). This would answer the narrow question left open in *Elonis*, but the Court should go even further and make a decision based on First Amendment principles to unify the state of the law across the nation. As Justice Thomas said in his dissent, “this failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty.” It is the Court’s job to provide insight and answer questions about what a true treat is and provide a standard of intent that governs threatening speech. Until the Court does this, the state of the law regarding true threat jurisprudence remains as the Court left it under *Virginia v. Black*.



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## *Housing of the Past and Education Expenditure of the Present: Persisting Disparities*

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Edited By: Henry Pitts and Allison Beaty

### INTRODUCTION

Much of the progress made under desegregation orders following the *Brown v. Board of Education 1954* decision has since been undone as race-conscious policies have been deemed unlawful, and those committed to racial separation have developed ways to re-color American schools.<sup>207</sup> The Office for Civil Rights warned against the implications such “re-segregation” could have on school funding:

“Allocation of funding should be designed to ensure the **availability of equal educational opportunities** for students which may require more or less funding depending upon the needs at a particular school. Intradistrict and interdistrict funding **disparities often mirror differences in the racial and socioeconomic demographic of schools**, particularly when adjusted to take into consideration regional wage variations and extra costs associated with educating low-income children. **These disparities are often a result of a funding system that allocate less State and local funds to high poverty schools that frequently have more students of color, which can be traced to a reliance on**

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<sup>207</sup>Orfield, Gary, and Chungmei Lee. "Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies." *Civil Rights Project/Proyecto Derechos Civiles* (2007).



**property tax revenue for school funding. Such disparities may be indicative of broader discriminatory policies or practices that, even if facially neutral, disadvantage students of color.”<sup>208</sup>**

This address applies very pointedly to the State of Alabama’s public education system. While the method by which the State of Alabama allocates funds to schools fails in measures of both equity and adequacy for all schoolchildren, it is particularly problematic for Alabama’s students attending racially identifiable minority city districts.<sup>209</sup> Racially discriminatory housing policies at the local, state and federal levels have shaped Alabama’s city school districts into the racially identifiable entities they are today. Such segregation has had lasting impacts on per-pupil expenditure, the negative effects of which are more heavily felt in minority schools. Enduring traces of legal residential segregation in Alabama’s cities have confined high minority districts to communities of lower property value and higher levels of poverty, limiting the funding available in these schools. Without addressing the remnants and impacts of such policies with respect to school funding, the state legislature has allowed them to impact yet another generation of Alabama students.

Today, students enrolled in racially isolated schools across the nation are far less likely than their white peers to attend high-quality schools.<sup>210</sup> Rather, minority students are more often confined to districts with high poverty rates, reduced academic rigor, fewer Advanced Placement

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<sup>208</sup>Lhamon, Catherine E. "Dear colleague letter: Resource comparability." *Washington, DC: US Department of Education, Office for Civil Rights.* (2014).

<sup>209</sup> “Students of Color” will refer to only African American students who are enrolled in Alabama’s Public Schools at much more significant rates than other students typically classified in this way. A “racially identifiable” district has 51% or more single-race enrollment. Additionally, this report considers only city school districts due to the differences in racial composition, historical creation and rules governing city and county districts. Alabama Code Title 16. Education § 16-8-8.

<sup>210</sup> “Racial Isolation” will refer to a social science definition used interchangeably with segregation as a measure of racial separation.



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(AP) courses and less-qualified teaching staffs.<sup>211</sup> Not only academic resources and achievement, but school funding itself varies along racial lines. A study by The Education Trust in 2015 found a \$1,200 gap in funding between districts serving the fewest number of minority students and those serving the highest number across the nation.<sup>212</sup>

Alabama reflects this national truth, and disparities across the state can be dramatic. Such is the case in Birmingham, Alabama, where five school districts share boundaries but can be approximated into two starkly different groups. These districts include Birmingham City, Vestavia Hills City, Homewood City, Hoover City and Mountain Brook City systems. In 2013 Birmingham City School District served 22,301 students, 93% black and only 1.10% of whom were white. Enrollment for the remaining four was as follows, respectively: 6,773 students, 6.9% black, 83.2% white; 3,935 students, 22% black, 61.8% white; 13,875 students, 25% black, 59% white; and 4,445 students, 97.3% white and not a single black student. The four latter districts, referred to as “Over the Mountain” schools (OTM), offered their high schoolers upwards of 18 AP courses, no fewer than four college and career counselors, over 59% of teachers have master’s degrees, fewer than 2.5% of core academic classes lack highly qualified teachers, and physics and calculus courses are offered in all high schools. Birmingham City failed to offer comparable provisions to its students. Among the seven high schools included in the Birmingham system, one school offered 10 AP courses while the district average fell to 6.14. On average the district had two college and career counselors for each school, 40% of teachers held

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<sup>211</sup> Orfield, G., & Lee, C. *Historic Reversals* (2007).

<sup>212</sup> Ushomirsky, Natasha, and David Williams. "Funding Gaps 2015." *Washington, DC: The Education Trust, March* (2015).



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master's degrees, 9.8% of core academic classes lacked highly qualified teachers and only three schools offered physics classes.<sup>213</sup>

Differences in educational resources are reflected in student performance. Each OTM school excelled in AP testing with pass rates above 64%, while barely 2.6% of Birmingham's students passed the same exams that year. According to the Alabama Accountability System A-F Report Card, the OTM districts had Learning Gains in both Reading and Math far above the state level. Student Achievement Scores in Reading and Math proved likewise, and graduation rates exceeded 94% for the 2015-2016 school year.<sup>214</sup> On the other hand, Birmingham's students performed below the average state level in all measures with a remarkably low score in Student Achievement in Reading of 33, compared to the state average of 56, and in Math of 40, compared to the state average of 63. In this year, Birmingham only graduated 80% of its students.<sup>215</sup> Achievement across the state also highlights racial differences. Fifteen of the twenty top performing high schools had majority white student bodies and only three had majority black enrollment, all three of which are designated as magnet schools, operating in a different manner from the traditional neighborhood schools.<sup>216</sup>

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<sup>213</sup> Data for all schools from Educational Equity Reports provided by the Civil Rights Data Collection: *Pathways to College and Career Readiness Data and Student and Staff Data*. (2013) Retrieved from <https://ocrdata.ed.gov/DataAnalysisTools/DataSetBuilder?Report=7>.

<sup>214</sup> Learning Gains are determined based on demonstrated improvement in Math and Reading from one year to the next. Student Achievement Scores measure the percentage of students scoring proficient in Math and Reading assessments.

Alabama State Department of Education. *A-F Report Card 2015-2016*. (2017). *Alabama Accountability System Dashboard*. Retrieved from <https://ap.alsde.edu/accountability/atof>.

<sup>215</sup> Alabama State Department of Education. *A-F Report Card 2015-2016*. (2017)

<sup>216</sup> U.S. News & World Report L.P (2016). *Best High Schools in Alabama*. Retrieved from <https://www.usnews.com/education/best-high-schools/alabama>



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Discrepancies in resources and achievement between OTM and Birmingham City Schools could be attributed to several factors, but one major difference is in funding allocation. The Office for Civil Rights maintains that although comparison of funds is not in and of itself an indicator of issues pertaining to resource comparability, as some school systems may be able to provide greater resources for fewer dollars than others, adequate funds are required to provide the elements that contribute to a quality system of education (Lhamon 2014). Although an example of extremity, Mountain Brook City Schools spent \$11,986 per-pupil in local and state funds in 2016 while Birmingham spent only \$8,221 per-pupil. Collectively, the OTM schools spent around \$10,502 per-pupil.<sup>217</sup> Birmingham's students, 93% black, were receiving around \$2,281 less than their neighbors, collectively 75.33% white.<sup>218</sup> Birmingham illuminates differences across neighboring districts, in addition to the role location plays in determining a child's school district and thus the amount of money funding their education. This incidence is not isolated and appears to be relevant at the state level. Alabama spent \$641, or 7%, less per-pupil in districts with the highest number of black students than in districts with the lowest number in 2015.<sup>219</sup> Alabama must consider the historically relevant context that has defined its school districts in order to overcome a \$12,820 gap in classroom spending for minority students in isolated districts, a history that lies in the narrative of city settlement.

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<sup>217</sup> For the purpose of comparing Per-Pupil Expenditures across districts, Federal contributions were not included. Federal grants for education serve the purpose of providing additional support on top of fundamental levels provided by state and local funds.

<sup>218</sup> Alabama State Department of Education. *Alabama Education Report Card 2014-2015*. (Feb 2015). Statistical and Financial Report of Operation for the Alabama State Department of Education. Retrieved from <http://www.alsde.edu/sec/comm/Education%20Report%20Card/REPORT-CARD-2016.pdf>.

<sup>219</sup> Ushomirsky, Natasha, and David Williams. "Funding Gaps 2015."



## WHO IS LIVING WHERE?

Initial “black urbanization” beginning in the early 1900s was met with hostility by city-dwelling white people.<sup>220</sup> The government at all levels played a hand in creating and maintaining neighborhood “color lines” as a result. While individual choices concerning where to live cannot be negated by these practices, their significance is clearly undermined by the incentives and apparent racial discrimination that have influenced and continue to shape those individual choices. Between 1880 and 1981 the black population working in agriculture decreased from 87% to 1% as former slaves left rural farms for industrial jobs in the city.<sup>221</sup> In reaction to this “negro infiltration,” unwelcoming white residents sought legal measures to keep their neighborhoods white and protect the property value of their homes.<sup>222</sup>

Northern states typically employed racially restrictive covenants to achieve these means. Neighbors agreed not to sell or lease their property to members of another race for an extended period of time, often beyond the death of the original property owner. Creation and existence of such covenants was permissible until 1968 even after court enforcement of these covenants ended in 1948. More popular among southern states was the use of racial zoning laws to accomplish the same goals. Following the 1917 court decision making racial zoning illegal, the use of Jim Crow intimidation and city planning strategies were employed almost immediately. Such tactics allowed racial zoning to continue under another name. Birmingham’s city officials out-maneuvered the 1917 strike down with racially coded zoning methods to dictate who could

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<sup>220</sup> Wells, A. S., & Crain, R. L. “Creating the Color Line: White Flight and Urban Ghettos.” *Stepping Over the Color Line: African-American Students in White Suburban Schools*. Yale University Press. (1999). 23-69.

<sup>221</sup> Wells, A. S., & Crain, R. L. “Creating the Color Line,” 29.

<sup>222</sup> Wells, A. S., & Crain, R. L. “Creating the Color Line,” 35.



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live where in the 1919 “City Plan of Birmingham.”<sup>223</sup> Under government authority, housing construction for African Americans was impermissible in locations considered too close to established white neighborhoods.

By the 1940s, black farmers were moving into cities at the highest rate yet. Within twenty years, significantly more black people occupied city spaces than did white people as “white flight” mirrored “black invasion.” Keen to relocate, white homebuyers quickly moved to suburbs, taking their wealth with them and leaving cities and their residents with fewer economic opportunities and resources. Mass exodus of white people was primarily incentivized by mortgages provided at low rates by the Home Owners Loan Corporation (HOLC) to be paid over a period of many years. Loans were made available almost exclusively to white homebuyers interested in suburban properties and were justified by racially determined risk analysis of loan success. The HOLC and private lending agencies strategically “red-lined” areas they considered most likely to default, and eliminated these properties from loan eligibility. Guidelines for determining such status considered race as a predominating factor indicating risk.<sup>224</sup>

In Birmingham, redlining was used systematically to eliminate 64% of the city’s geographical space from loan qualifications. The northern extension of the city was almost completely redlined, with the highest concentration of red-lined areas nearest the inner-city. Areas considered “Hazardous,” or redlined, were neighborhoods of “predominating Negro” occupancy. Mortgage availability for home building or purchasing within these areas was

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<sup>223</sup>Silver, Christopher. “The Racial Origins of Zoning in American Cities.” *Urban planning and the African American community: In the shadows* 38 (1997).

<sup>224</sup> Wells, A. S., & Crain, R. L. “Creating the Color Line,” 49-51.



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considered either “None” or “Very Limited.” Evaluation records indicate that one of these neighborhoods included “negro low-cost slum clearance projects containing 544 units” with poor living conditions. These neighborhoods were considered “real Negro property in Birmingham.” Mobile experienced similar zoning practices, with 52% of the city eliminated from mortgage eligibility. Any neighborhood with some level of minority concentration was labeled a neighborhood of low desirability and off-limits from mortgage lending. Areas in Montgomery with as little as 2% presence black residents received “Hazardous” designations. Neighborhoods with the best ratings experienced no “infiltration” of black neighbors, boasted of separation from odor and noise of the city, offered high schools requiring attendants to pay tuition and had ample mortgage eligibility.<sup>225</sup>

White homebuyers were further incentivized to quit the city with government sponsored insurance availability. The Federal Housing Authority (FHA) and the Veterans Administration (VA) worked in conjunction with the HOLC to insure low-risk loans and forbade the insuring of loans that would lead to integration until the early 1960s. Seeking to spur construction in suburban areas, FHA policies favored single-family homes, simple renovations, highly valued property as determined by “unbiased professional estimates,” and similarly situated neighborhoods.<sup>226</sup> The combination of these regulations and the subjective consideration of the “character of the borrower” deemed both crowded areas within the city and black borrowers desiring to move outside of the city ineligible. From the 1930s to 1950s the FHA subsidized

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<sup>225</sup>Quotes taken from property evaluations available via Interactive map outlining red-lined neighborhoods.

Nelson, Robert K., Winling, LaDale, Marciano, Richard, Connolly, Nathan, et al. “Mapping Inequality,” American Panorama, ed. Robert K. Nelson and Edward L. Ayers. Retrieved from <https://dsl.richmond.edu/panorama/redlining>

<sup>226</sup> Wells, A. S., & Crain, R. L. “Creating the Color Line,” 51.



loans on nearly 60% of all homes purchased, yet only 2% of these loans were offered to minority homebuyers.<sup>227</sup>

Methods of racial segregation beyond home purchasing power was in some cases the result of individual exploitation of power. The results, however, were the same. The construction of the federal highway systems in the 1940s and 50s provided one avenue for this behavior. The man appointed to Alabama State Highway Director, an individual who also served as a high-level official of the Ku Klux Klan, used his authority to route I-65 and I-85 through flourishing African American communities in both Birmingham and Montgomery, pushing his anti-civil rights agenda.<sup>228</sup> The displacement of so many families created a need for new housing, which the city of Montgomery met with segregated housing projects. At the same time that white people obtained insured and affordable loans to purchase suburban homes, grow their wealth and establish an identity stake in the title of property owner, people people were isolated into low-income public housing projects in undesirable locations.<sup>229</sup> Attributes of independence and individualism associated with home ownership were reserved for white people, while stereotypes of inner-city life thickened racial stigma and strengthened the enduring color line. The Fair Housing Act of 1968 attempted to remedy this explicit housing discrimination by making racial consideration in property value and loan eligibility illegal, but the decades of policies and practices preceding the law made racial segregation appear a natural part of suburban/urban life.

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<sup>227</sup> History of Fair Housing in Alabama. (n.d.). Retrieved from <https://centralalabamafairhousing.org/about/history-of-fair-housing-in-alabama/>

<sup>228</sup> History of Fair Housing.

<sup>229</sup> Wells, A. S., & Crain, R. L. "Creating the Color Line," 47.



The relevance of these practices and policies is notable not only spatially, but economically. For these reasons, as well as others, African Americans have experienced enduring discrimination in housing that is rivaled by no other minority group, establishing substantial barriers to the accumulation of wealth in communities of color.<sup>230</sup> Black home-ownership has not been as financially rewarding as white home-ownership due to both overt racism of the past and colorblind policies of today governing property appraisal. A widely-used appraiser's manual considered a racial scale as part of the value assessment until 1977, marking "Negro" and "Mexican" properties with the lowest values. Such guidelines were created with an understanding of race as a leading factor of community decline.<sup>231</sup> While methods for determining a home's value today are facially neutral, beliefs concerning connection between race and monetary worth remain intact. Prejudiced assumptions continue to guide appraisers to undervalue black-owned homes, even in instances where this irrationality contradicts the self-interest of the professional. Behaviors of real estate agents and home buyers alike reinforce the fallacy that the presence of black neighbors inherently causes depreciation, asserting that valuations designated at the time of legal discrimination continue to influence where people purchase homes to this day.

Although there is a relationship between black home ownership and property depreciation over time, it exists because white home-buyers typically have little interest in being neighbors with black people. For white homebuyers, the race of their neighbors is more

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<sup>230</sup> Wells, A. S., & Crain, R. L. "Creating the Color Line," 43.

<sup>231</sup> Margalynne Armstrong. *Race and Property Values in Entrenched Segregation*, 52 U. Miami L. Rev. 1051, 1066 (1998)



important in guiding their decision to purchase when all other factors remain constant.<sup>232</sup> White homebuyers have eliminated themselves from the housing market in many integrated neighborhoods. Due to lower housing demand in neighborhoods where black families reside, property values fall in comparison to white-dominated neighborhoods considered desirable for homebuyers of either race. For these reasons, white-owned properties appreciate at substantially higher rates than similarly situated properties owned by black people. This pattern is reinforced as the presence of fewer white people is often met with reduced public services and community conditions, further depreciating property values.<sup>233</sup> Whether race is intentionally considered or not, property value is still connected to race because of preferences of white buyers. Homebuyers who can afford to settle down in whiter, wealthier neighborhoods benefit from the remaining racial segregation that almost promises the steady rise in the value of their investment.

The enduring effects of housing segregation have massive implications on education, school segregation, and school funding. School funding and housing are perpetually reinforcing. A history of barring African Americans from whiter neighborhoods parallels consolidation of minorities into highly segregated schools. By looking at Alabama's city schools today, one can see the ways in which problems of the past are fixed to the present. Today there are 69 independent city school districts in Alabama serving a total of 265,805 students in kindergarten through twelfth grade.<sup>234</sup> Collective enrollment of black and white students amounts to 38.4% and 49.24% respectively. Despite apparent diversity, only six individual districts have similar

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<sup>232</sup> Wells, A. S., & Crain, R. L. "Creating the Color Line," 42.

<sup>233</sup> Armstrong. *Race and Property Values in Entrenched Segregation*.

<sup>234</sup> Crain, T. Powell. *Student Demographic Enrollment Data*. Alabama School Connection. (Nov 2015) Retrieved from <http://alabamaschoolconnection.org>



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racial composition. The remaining districts can be defined racially. Seventeen of the 69 districts are Racially Identifiable Black Districts (RIBD) and forty-six are Racially Identifiable White Districts (RIWD), representing 25% and 67% respectively of all city districts. While most schools can be racially defined, there are differences between the extent of isolation experienced in these districts. Over 41% of RIBD enroll over 90% black students while only 8.7% of RIWD enroll over 90% white students. At every measure above the majority mark, students in RIBD have less diverse groups of peers than their white counterparts in RIWD, and experience higher concentrations of single-race enrollment. Population patterns of black children in schools mirror the highly-dense populations of housing projects to which minorities have been historically confined, suggesting geographic limitations based on race still exist.

## FUNDING IN ALABAMA

When housing segregation translates to school segregation, it becomes the responsibility of the state to ensure that such segregation, accomplished by “individual choice,” does not impact the funding allocated to a given district. Following judicial pressure mounting from decade-long litigation, the Alabama State Legislature adopted a new method for funding schools. The resulting Foundation Program, based on a century old formula, was implemented in the 1995-1996 school year.<sup>235</sup> The idea of the Foundation Program is to calculate a base-level of funding for each district in order to service necessary resources for educating its pupils. With this program, each district, regardless of wealth, would ideally have enough money to adequately provide these services, because the state agrees to make up what is lacking in local spending.

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<sup>235</sup> Augenblick, Palaich, and Associates. *Equity and Adequacy in Alabama Schools and Districts: Prepared for Alabama State Department of Education*. (2015).



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The Foundation Program explicitly outlines the minimum financial support each district will need based on the sum of four categories, which are teaching units, instructional support, other current expenses and classroom materials. The target revenue for each district's foundation is calculated on a per-unit basis, where the units are teachers. Using the Average Daily Membership (ADM) of a district, the legislature calculates the number of teaching units a district will require at different grade levels.<sup>236</sup> Special Education teachers are calculated as a weight of 2.5, attributed to 5% of the ADM, and additional adjustment accounts for career technical education in grades 7-12.<sup>237</sup> Instructional Support units are designated based on the classification of ADM.<sup>238</sup> The Total Units for a system are determined by the sum of Teaching, Instructional Support, Special Education and Vocational Units. Once the number of units is determined for a district, the Total Foundation Program is derived by measurements of Salary, Fringe Benefits, Classroom Instructional Support and Other Current Expenses whose costs are determined annually by the legislature.<sup>239</sup>

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<sup>236</sup> ADM is the average daily enrollment of a district during the first 20 days after Labor Day of the current school year. The ADM in each grade is divided by a particular weight assigned by the State Legislature. Lower grade levels have smaller "grade divisors," ensuring lower student-teacher ratios.

<sup>237</sup> Alabama State Department of Education. *A Guide to State Allocation Calculations, 2015-2016*. Montgomery, AL: Alabama State Department of Education, 2015.

<sup>238</sup> This accounts for principals, counselors, librarians, etc. who provide support to teachers. The classifications typically allow more Instructional Units for larger schools at calculated intervals.

<sup>239</sup> Teacher salaries are determined by a matrix schedule in which those with more experience and higher degree level are rewarded accordingly. Fringe benefits include insurance, matching retirement, unemployment compensation and personal or sick leave. The Other Current Expenses category is used to provide more flexibility for resources depending on the district's needs. Rates for these category are distributed on a per-unit basis. Classroom Instructional Support includes student materials, technology, library enhancement, professional development and textbooks. Again, rates are determined annually by the legislature and allocated per-unit, with the exception of textbook funds which are granted based on ADM.



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Local governments must match their expected contribution to receive state money, and the contribution required is determined by revenue collected from a uniform rate property tax. This amount is then subtracted from the Foundation Program to determine the state contribution to each district. Because the tax rate is applied consistently to all districts, more affluent neighborhoods with higher property values are expected to contribute more to meet their calculated Foundation. Beyond the Foundation, the state assumes responsibility for providing funds for school nurses, technology coordinators, transportation, capital purchases, and at-risk students.<sup>240</sup> The calculated Foundation guarantees a funding floor, but district boards of education retain flexibility to raise additional funds. Voters may choose to raise Special School taxes for the purpose of having more teachers, support positions or resources as long as the base is met.

## METHODS

A quantitative analysis was performed to explore simple numerical relationships between racial composition of a school district and the level of funding the district spends. Enrollment data collected from the Alabama State Department of Education (ALSDE) database containing enrollment by race from the 2014-2015 school year was analyzed with respect to information from the Alabama Report Card for the 2014-2015 school year regarding dollar amounts for local and state per-pupil expenditure (PPE).<sup>241</sup> The sum of the two measurements is used to determine

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<sup>240</sup>Students who fall into the “At-Risk” category are low-performing students likely to drop out. Funds allotted are to be used for additional services that will help to guide the students out of the “At-Risk” category. The number of students identified within each district are those that are both eligible for Free and Reduced Lunch and receive “not proficient” scores on the ACT Aspire Test. The amount each district receives for these students is determined by the legislature.

<sup>241</sup>Powell. *Student Demographic Enrollment Data*.



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a district's Total PPE. While there are federal monetary provisions provided to school districts, these provisions are referred to as categorical-aid. Such aid will not be considered in this analysis as they are supplemental and do not contribute to the Foundation level. Data concerning percentage of enrolled students eligible for Free and Reduced Lunch (FRL), which will serve as a proxy measurement of poverty level of a district, was also considered.<sup>242</sup> The purpose of this data analysis is to observe the role of local and state spending in determining total spending of a district, relationships between PPE and racial identity of a district, and levels of poverty associated with racially identified districts.

## RESULTS

School funding in Alabama's city school districts appears to be problematic when considering the per-pupil expenditure in each district as it pertains to racial enrollment. Prominent issues include vast differences in local levels of spending, based on revenue obtained through property tax, as well as omission of additional funds for high-need students at the state level.

The first analysis addresses the roles of both local and state spending in shaping overall per-pupil expenditure in a district. Graph 1 depicts results of the first analysis, revealing which school districts fall above and below average funding at the local, state and total levels as well as trends between the three measurements. While a majority of districts fall below the average mark, district assortment is further marked by racial identifiability. RIWD are almost equally

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<sup>242</sup> The level of FRL was collected for all but one of the 69 districts, as Pelham City Schools was only established in the 2014-2015 school year.  
Alabama State Department of Education. *Alabama Education Report Card 2014-2015*.



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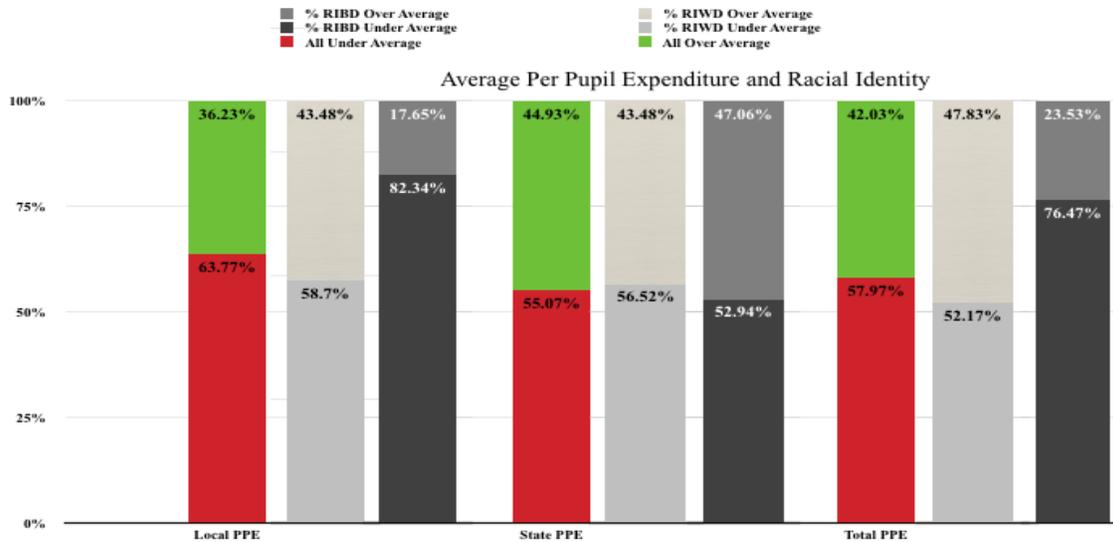
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represented above and below the average for each measurement, within 8.7%, or 4 school districts in the most extreme case. For RIBD, however, 82.34% (14 districts) fall below the Local PPE average and 76.47% (13 districts) fall below the total average. While RIWD account for 65% of all city districts, they account for 80% of the districts marked above and only 61% below average local spending. Following state spending, RIWD account for 75.86% of all districts above average Total PPE and 60% below. Conversely, RIBD account for only 12% of all districts above average Local PPE and almost 32% below. Eleven more RIBD districts are below average than are above. In the Total PPE measurement, RIBD account for 13.79% of districts above average and 32.5% of those below, marking a 10 district difference in RIBD representation. Local spending can be categorized as the most inequitable of the three measurements, while state spending is distributed consistently to all districts. However, state money does not remedy the local spending gap. Instead, Total PPE is a more accurate reflection of the district's ability to spend local dollars competitively. While attending an RIWD does not guarantee exceptional funds, attending an RIBD puts a child at high-risk of poor funding, relative to all city schools. These districts remain grossly overrepresented on the lower end of spending and underrepresented on the higher end even after state spending is included.



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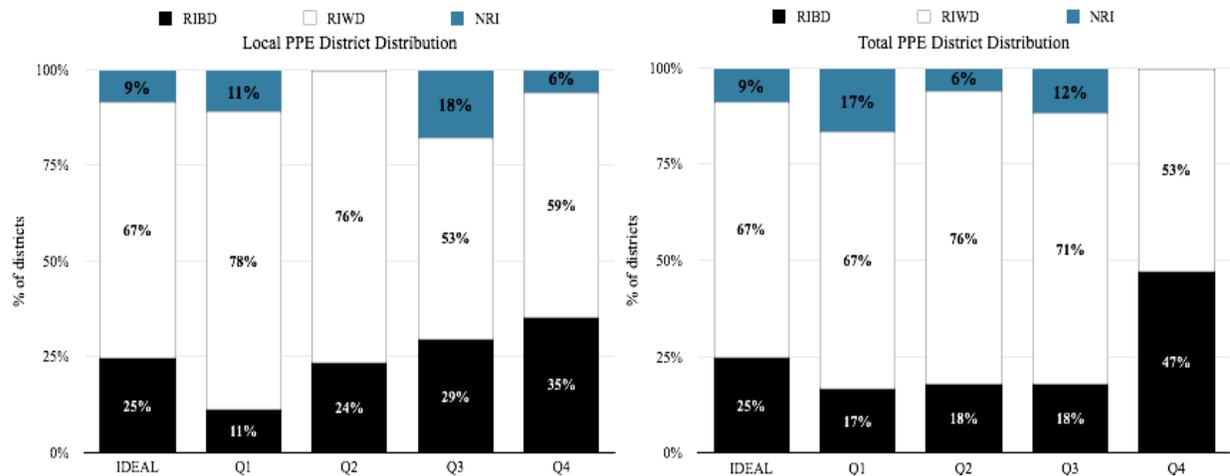


After determining the importance of local spending, the second data analysis examined how racially identifiable districts compare in measures of Local PPE, first addressing differences between RIWD and RIBD spending averages. Average PPE for RIWD is \$2,270 at the local level and \$8,049.22 when state spending is included. This amounts to \$463 more spending at the local level and \$372.10 more in total by RIWD than by RIBD. This amount could be considered insubstantial for an individual, but the accumulation of such deficiencies amounts to \$7,442 more to spend for a class of 20 students in RIWD schools. To see if minority concentration has any implications on funding, differences in average Total PPE were calculated between RIWD and RIBD enrolling 90%, 80%, 70%, 60% and 50% students of one race, measuring only schools falling within one of these categories of 10% increments. Total PPE favors RIWD in each case, the largest difference being \$1,224.93 in the over 90% enrollment category and the smallest being \$467.8 in the 60-69% category, with the exception of the 70-79% one-race enrollment category which favors RIBD by \$693.8 per pupil. The difference between average Total PPE for



districts with enrollment over 50% White minus under 50% White was \$204.82, and the same formula for over and under majority-black was -\$391.78. In one way or another, it either pays to be in an RIWD or it costs to be in an RIBD.

Further comparison of Local PPE difference examined funding distribution to districts and their racial enrollment. Graph 2 illustrates the results, and compares them to overall proportions of racially identifiable districts in the city system.<sup>243</sup> There is more spending at the local level for RIWD, which are over-represented in the two quartiles providing the highest Local PPE. At the other end, RIBD are over-represented in the two quartiles providing the lowest. As local spending decreases by quartile, the representation of RIBD increases, suggesting a negative correlation between local expenditure and RIBD representation by quartile.



The same method was applied for analysis of Total PPE, shown in Graph 3. The variation between the two reflects only the dollar value of state spending as no other factors were considered. This was intended to analyze the effects of state spending and the extent to which it

<sup>243</sup> School districts were divided into quartiles, where Q1 depicts the 18 districts with the highest Local PPE, and Q2-Q4 show groups of 17 with decreasing local spending.



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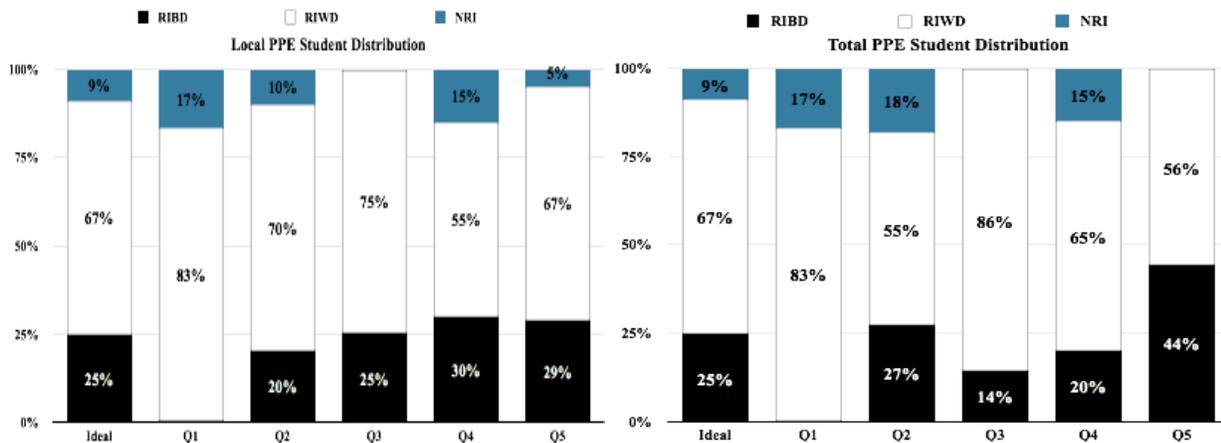
helps or hurts funding equity, and in fact it seems to do both. State contribution appears to enhance RIBD representation in the highest levels of funding, decrease representation in moderate levels of funding and exacerbate over-representation in the lowest levels of funding.

The dollar disparities between the four quartiles further demonstrates inequality. Average Local PPE for Q1 is \$3,373.83, a total of \$2,050.89 higher than that of Q4. The Total PPE associated with quartiles determined by Local PPE mirrored a decrease in dollar value when moving from Q1 to Q4, despite State PPE averages for these categories rising and falling. Average Total PPE for Local PPE Q1 is \$9,057.33, or \$1,894.74 more than that of Q4. By looking at individual district movement, we find that the majority of districts remained in the quartile prescribed based on Local PPE. The six highest ranked districts retained their ranks, and only two districts were moved up to Q1 status.

Although this method helps us to understand variability among districts, the picture is incomplete until we understand how PPE is distributed to groups of students. To assess funding based on the number of students receiving such funds, as opposed to district level of funding, the data was used to assign districts into quintiles representing roughly 20% of enrollment in all city districts.<sup>244</sup> The first quintile represents one-fifth of students who receive the most local money, the fifth quintile represents those who receive the least local money, and the third quintile represents those receiving median-level funding values. Graphs 4 and 5 display the results for local and total spending respectively.

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<sup>244</sup> Q1- 20.68%, Q2- 20.34%, Q3- 20.22%, Q4- 19.84%, Q5- 20.26%



Of the 20% of students receiving the highest levels of either local or total PPE, none attend school in an RIBD. While the group of students receiving median levels of local funding attend a combination of schools that more accurately reflects the racial compositions of the city school districts, the trend shows higher proportions of students attending RIBD as local spending decreases. Total PPE Student Distribution demonstrates altered distribution due to state spending and includes exacerbated inequality in Q3-Q5.

It is evident in each account that while state spending is relatively moderate across all districts, local variation runs the gamut. Ideally, state spending would remedy these differences, but it does not fully do so, and in every measurement, Total Expenditure reflects more closely the levels of Local PPE than that of State PPE. This signifies low fiscal neutrality among city school districts, meaning the location of a school and the community in which it is embedded is a significant indication of the spending within the district.<sup>245</sup> Because the ability to spend local money depends on revenue from a uniform property tax, those living in predominantly black neighborhoods are at a disadvantage because of low property values established during explicit

<sup>245</sup> Augenblick, Palaich, and Associates. *Equity and Adequacy in Alabama Schools and Districts*.



racial segregation, as well as discriminatory appraisal methods of realtors and market demand controlled by prejudiced white homebuyers.

On the other hand, in wealthier, whiter districts, homes have appreciated over time, properties have accumulated wealth over generations, and today the residents retain more power and capital to levy additional taxes for their schools.<sup>246</sup> Ultimately, the importance of local spending and the disparity it creates incentivize the maintenance of segregated schools when people are “house shopping.” Since 2000 there were 8 districts that have splintered off from their county system in order to have more control over these precious local dollars.<sup>247</sup> The results have further segregated students along racial and socioeconomic lines.<sup>248</sup>

A significant dimension of segregation is its interaction with poverty, and the rarity of a segregated minority school holding middle-class status. A 2007 report by The Civil Rights Project concluded that students in segregated minority schools are enrolled in predominantly poor schools at a rate nearly four times as high as students enrolled in schools with below 10% minority enrollment.<sup>249</sup> By comparing the data provided by the Alabama Department of Education concerning Free and Reduced Lunch Eligibility with enrollment by race at the district level, we find that Alabama’s minority schools are experiencing much higher concentrations of poverty than their white counterparts. There is a close relationship between racial identifiability

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<sup>246</sup> Armstrong, *Race and Property Values in Entrenched Segregation*.

<sup>247</sup> Pelham City (2014), Alabaster City (2012), Satsuma City (2012), Chickasaw City (2011), Saraland City (2007), Trussville City (2005), Boaz City (2004), Leeds City (2003).

Information regarding school secessions retrieved from <https://edbuild.org/content/fractured#AL>

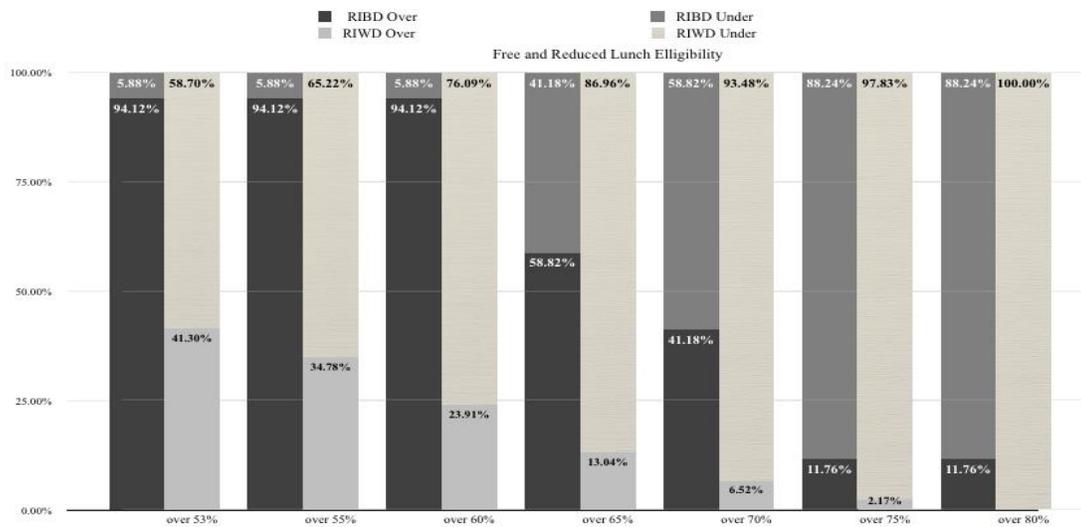
<sup>248</sup> EdBuild (2016). *Fractured: The Breakdown of America’s Schools*. Pg. 19-20.

<https://edbuild.org/content/fractured/fractured-full-report.pdf>

<sup>249</sup> Orfield, G., & Lee, C. (2007). *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*. *Civil Rights Project/Proyecto Derechos Civiles*.



of a district and the poverty level of that district. RIWD make up 67% of all Alabama schools, but 90% of all districts with below-average poverty. For schools at or above the 53% mark, the distribution is more equitable, although RIBD are still overrepresented by 168%.<sup>250</sup> However, as the poverty level increases, the number of RIWD quickly decreases, leaving RIBD with the highest concentration of poverty within the classrooms.



Segregation and discrimination in housing have proven to be the most profound and durable evidence of racial inequality in the U.S. Urban centers have been synonymous with minority poverty across the South for decades. Isolation has increased in recent years as income inequality has altered class structure across the country, and poverty has compounded for black people living in cities. Massey (2003) finds that the persistence of the minority underclass can only be explained by way of racial segregation in housing.<sup>251</sup> While poor white people

<sup>250</sup> 53% is used for comparison because it is the average FRL enrollment in all city districts

<sup>251</sup> Massey, Douglas S., and Mitchell L. Eggers. "The Ecology of Inequality: Minorities and the Concentration of Poverty, 1970-1980." *American journal of Sociology* 95, no. 5 (1990): 1153-1188.



experience statistically small levels of spatial isolation, black people of varying income levels experience such geographic isolation more consistently than any other minority group. Neighborhoods composed of predominantly minority households are subject to higher concentrations of poverty than those in which both minority and non-minority families reside. Location and poverty level in Alabama's districts support this idea. In the city schools with the lowest Local PPE, all RIBD have above average poverty rates while those in RIWD vary. Low community wealth and high poverty rates are not as tightly interwoven in RIWD, suggesting more opportunity for economically disadvantaged children in RIWD than in RIBD.

Increased economic segregation has lasting implications on the educational attainment of children in both high- and low-income families. Episodes of economic segregation have been proven to aid educational advancement for children of high-income families at the same rate of decline in attainment for children of low-income families. While the overall measures of educational attainment remained stable, the economic achievement gap expanded to .579 years in one particular study.<sup>252</sup> The study provided statistical evidence that disparity in mean income across neighborhoods plays a large role in educational quality and attainment of students, which can be traced to reliance on local property taxes to fund schools. Higher concentrations of poverty means lower revenue collected from property taxes, less money allocated to schools, fewer resources and reduced educational attainment.<sup>253</sup> This is particularly threatening to the

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<sup>252</sup> Mayer, Susan E. "How Economic Segregation Affects Children's Educational Attainment." *Social forces* 81, no. 1 (2002): 153-176.

<sup>253</sup> Mayer. "How Economic Segregation Affects Children's Educational Attainment."



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educational attainment of students attending RIBD where both high poverty rates and low local spending are compounding barriers to school funding.

While the Foundation Program was a popular method for funding in the 90s, it is less popular today as most states have shifted to a per-student base rate of calculating district financial need. By counting all of the required resources and the cost of instruction, the state decides how much money it takes to educate a student with no special needs. This amount is then weighted differently depending on the additional funds necessary to provide equitable education to particularly situated students. Weights are given for students living in poverty, students with physical and educational disabilities, students who speak English as a second language, and students in high-poverty districts.

The Foundation Program does not consider these factors. There is no adjustment for poverty. Through “At-Risk” allocation there is some additional funding for students who are poor and failing, but in FY 2009 this amounted to only \$100 additional funds per at-risk child.<sup>254</sup> When reporting on the state’s funding as it compared to district need, a report commissioned by the Alabama Legislature concluded: “This state’s distribution of needs actually gets worse when you look at need, rather than better.”<sup>255</sup> Formulaic funding based on student numbers rather than student needs is a problem, especially since the discovery that districts with high-poverty rates require more funding than their middle-class peers to meet the same fundamental educational

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<sup>254</sup> Yes, there is an adjustment for children with special needs but it is only applied to 5% of the district ADM when in reality around 11% of district ADM in Alabama requires special needs services.

Augenblick, Palaich, and Associates. *Equity and Adequacy in Alabama Schools and Districts*.

<sup>255</sup> Augenblick, Palaich, and Associates. *Equity and Adequacy in Alabama Schools and Districts*.



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requirements.<sup>256</sup> While all poor students in Alabama's city districts deserve better, it is those in the RIBD that are most jeopardized by the lack of specialized adjustment, because they are most concentrated and confined to high-poverty districts and expected to be academically competitive with low-poverty districts on the same dollar value.

## CONCLUSION

It is clear that there are relationships between the racial composition of a school and its ability to spend on a per-pupil basis. While there are several factors contributing to why this is the case, local spending and high poverty rates in minority neighborhoods, influenced by racially discriminatory housing policies and patterns, contribute to this relationship. Put plainly, a city district in the state of Alabama with high levels of minority enrollment is more likely than a school with majority white enrollment to experience low-level funding and higher concentrations of poverty. Districts with over 90% single-race enrollment present an even more stark contrast. While there is more fluidity in median level-funding and more diverse districts, the extremes eerily illustrate the strong legacy of racial inequality in Alabama. Districts with the highest spending capacity are almost all majority white schools. Districts with the highest minority enrollment fall well below average spending capacity. Not a single RIBD is among the 17 districts with the lowest levels of poverty, while all districts with the highest levels of poverty have high minority enrollment. The maintenance of this inequality is to the benefit of neighborhoods who have been capable of maintaining neighborhood "color lines" at the expense of the children who suffer from the state's complacency with past discrimination.

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<sup>256</sup>Ushomirsky, Natasha, and David Williams. "Funding Gaps 2015."



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A report commissioned by ALSDE found that funding for a majority of Alabama's school districts is considered both inequitable and inadequate, falling between 22% and 37% less than suggested by professionals and "model districts."<sup>257</sup> To move toward more adequate and equitable school funding, the report suggests the state progress to a student-based formula for spending that most other states have adopted. In this way, funding takes into consideration the cost of providing districts with particularly situated students more money. The second suggestion was that local tax revenue be equalized through increased tax incentives with guaranteed rates of return by the state. Districts with fewer local dollars, they could vote to raise taxes while being promised a tax break by the state if they invest this tax return into education. Lastly, the report admits that Alabama simply needs to commit more money to its system of education if it wishes to be equitable and adequate throughout the state.<sup>258</sup>

Although higher expenditures cannot be held solely responsible for student performance, several longitudinal studies have concluded that there are significant correlations between PPE and student outcomes. This is intuitive, as more spending typically means better resources are available. Coleman (1993) suggests additional funds for students could be used to undermine the educational disadvantages placed upon individuals by poverty and family status in a way that helps to make up for lacking "social capital."<sup>259</sup> One study in particular found that "For poor children, a twenty percent increase in per-pupil spending each year for all twelve years of public

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<sup>257</sup> Thirteen city districts meeting particular criteria of academic achievement were examined to determine a level of funding considered adequate for fueling a successful district.

Augenblick, Palaich, and Associates. *Equity and Adequacy in Alabama Schools and Districts*.

<sup>258</sup> Augenblick, Palaich, and Associates. *Equity and Adequacy in Alabama Schools and Districts*.

<sup>259</sup> Coleman, James S. "Equality and achievement in education." (1993).



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school is associated with nearly a full additional year of completed education, 25 percent higher earnings, and a 20 percentage-point reduction in the annual incidence of poverty in adulthood.”<sup>260</sup> To summarize, how money is spent is likely more significant than the amount of money spent, but the level of funding does contribute to life outcomes for students within the institution of schooling, and therefore it must be as equitably distributed as possible.

Considering 90% Alabama’s city school districts are racially identifiable while the city systems as a whole do not show a clear racial majority, we must pause to consider why this truth has come to be, and what structural factors beyond an explanation of “individual choice” have influenced such stark racial isolation in Alabama’s schools. Although we are no longer dealing with explicit racism in housing, residential segregation is not a thing of the past. Remnants and perpetuation of such segregation continue to pose barriers to local funding in RIBD when local contribution is tied to property value. The remains of de facto segregation from the post-Brown education system are based on the reliance of school funding at the local level. The reality is that families who can afford to live in better neighborhoods can buy better schooling. Intersections of wealth and race that have been long entrenched in our country’s identity limit opportunities of black communities for sufficient school funding.

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<sup>260</sup>Jackson, C. Kirabo, Rucker Johnson, and Claudia Persico. *The effect of school finance reforms on the distribution of spending, academic achievement, and adult outcomes*. No. w20118. National Bureau of Economic Research, 2014.



## *Who's on First: First Amendment Issues and Net Neutrality*

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### INTRODUCTION

The iconic rock band Pearl Jam is known for its controversial yet poetic protest songs. Many of Pearl Jam's songs comment on the role of the media and how communication shapes the world. For instance, in its seventh album RIOT ACT, the song *Ghost* includes the lyric "[t]he TV, she talks to me; [b]reaking news and building walls; [s]elling us, what I don't need; [d]idn't know soap made you taller."<sup>261</sup> This lyric speaks to how susceptible the individual media consumer is to the message being sent their way. The media consumer relies on the provider of the media to send messages as they are intended to be sent by the message creator. Americans believe in the free flow of ideas.

In August 2007, Pearl Jam performed a concert in Chicago, Illinois.<sup>262</sup> Living up to its reputation, they covered *Another Brick in the Wall* by Pink Floyd but replaced some of the lyrics with ones criticizing President George W. Bush.<sup>263</sup> The telecommunications giant AT&T offered

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<sup>261</sup> Pearl Jam, *Ghost*, on RIOT ACT (Studio X 2002).

<sup>262</sup> The Associated Press, *Censoring of Song Was an Error, AT&T Says*, N.Y. TIMES, Aug. 10, 2007, <http://www.nytimes.com/2007/08/10/business/media/10censor.html>.

<sup>263</sup> *Id.* (The lyrics included "George Bush leave this world alone" and "George Bush find yourself another home.")



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a webcast of the concert on its Blue Room entertainment website.<sup>264</sup> Instead of streaming the concert live, AT&T opted to show the concert on a brief delay.<sup>265</sup> This allowed AT&T to cut the criticizing lyrics from the webcast and censor other lyrics.<sup>266</sup> The webcast aired a sanitized version of the live performance.

There is a debate on whether companies like AT&T should be allowed to interfere with the data and content on the Internet, and one side of this debate supports a position commonly known as net neutrality. Advocates for net neutrality believe that Internet service providers “should provide [people] with open networks – and shouldn’t block or discriminate against any applications or content that ride over those networks.”<sup>267</sup> Thus, these advocates believe that net neutrality allows an “open Internet that fosters investment, innovation, consumer choice and free speech.”<sup>268</sup> In other words, net neutrality means that the provision of access to the Internet should be a neutral decision by the Internet service providers and there should be no discrimination or interference by these providers.

Portugal is one example of a country without net neutrality.<sup>269</sup> Instead of widespread blocking of content, the tiered nature of content access by consumers is what is most frequently

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Net Neutrality: What You Need to Know Now*, FREE PRESS, <https://www.savetheInternet.com/net-neutrality-what-you-need-know-now> (last visited October 23, 2017).

<sup>268</sup> *President Obama’s Strong Commitment to Net Neutrality and an Open Internet*, 2010 WL 4876503, at \*1.

<sup>269</sup> Michael Hiltzik, *Portugal’s internet shows us a world without net neutrality, and it’s ugly*, L.A. TIMES, Nov. 27, 2017, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-portugal-internet-20171127-story.html>.



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cited as the Portuguese Internet's most distinct feature.<sup>270</sup> There is a fee for basic service, and then Internet subscribers can add additional packages for about \$6 per month: a messaging package that includes access to FaceTime, instant messaging, and Skype; a social package for access to Facebook, Instagram, Twitter, and Snapchat; a video package for YouTube and Netflix; and email and music packages allow the subscriber to access online email websites and streaming music websites respectively.<sup>271</sup> In addition, Portuguese regulators allow Internet service providers to essentially exempt certain content from these packages and allow Internet subscribers to access that content without having purchased one of the add-on packages.<sup>272</sup> This is known as “zero-rating.”<sup>273</sup> With zero-rating, Internet service providers in Portugal have the ability to favor certain content and effectively block other content through economic pressuring.

Zero-rating exists currently in the U.S. but on a much more limited basis, which usually takes the form of a “data free” feature in a consumer’s Internet service package.<sup>274</sup> For example, in 2016, AT&T offered “Data Free TV” where consumers could watch TV on smart phones and other devices without incurring charges against their data limits only if they did so on the DirecTV app.<sup>275</sup> DirecTV is wholly owned by AT&T.<sup>276</sup> In 2017, the Wireless Telecommunications Bureau of the Federal Communications Commission released a report on zero-rating and sponsored data offerings by American Internet service providers.<sup>277</sup> In this report, the Bureau decided that zero-

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*



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rating was not per se “concerning” but how it was then employed by Internet service providers showed “that—absent effective oversight—these practices will become more widespread in the future” and this posed potential discriminatory practices.<sup>278</sup> Given the Portuguese experience with a biased Internet and the practice of zero-rating in a currently net-neutral U.S., if the U.S. were to move away from net neutrality, tiered pricing and zero-rating would produce a cyber-climate where Internet service providers can easily engage in censoring not all too unlike the blocking that they have already engaged in.

In the past two decades alone, the Internet has become a staple of the everyday American life. Beyond streaming concerts, Americans use the Internet to read the news, watch movies conduct business, shop, and much more. The Internet is the embodiment of the free flow of ideas. This is why incidents like the August 2007 Pearl Jam concert and the idea of discriminatory pricing infuriate many Americans and why most Americans support an open Internet and net neutrality.<sup>279</sup>

Frequently evoked dangers of not maintaining net neutrality are that it would stymie free speech and allow discriminatory practices by Internet service providers based on the viewpoints of content creators.<sup>280</sup> U.S. Senator Richard Blumenthal from Connecticut stated recently that “allowing a broadband provider to block or discriminate against certain content providers ... is also

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<sup>278</sup> *Id.*

<sup>279</sup> See Harper Neidig, *Cable Industry poll: Majority support net neutrality rules*, THE HILL, May 11, 2017, <http://thehill.com/policy/technology/332948-cable-industry-poll-majority-support-net-neutrality-rules> (showing that a majority of registered voters support rules preventing Internet providers from interfering with content placed on the Internet).

<sup>280</sup> Press Release, Sen. Ed Markey (D-Mass.), Senate Democrats Join Entrepreneurs, Advocates, Consumers in Defense of Net Neutrality (February 7, 2017) (available at <https://www.markey.senate.gov/news/press-releases/senate-democrats-join-entrepreneurs-advocates-consumers-in-defense-of-net-neutrality>).



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a danger to free speech – one of the core principles of our democracy – at a time when so many of our First Amendment rights are threatened.”<sup>281</sup> But, is this true? Do content creators and consumers of that content have First Amendment protections from the alleged discriminatory practices of Internet service providers? Do the Internet service providers themselves have First Amendment rights to make decisions on which content they choose to carry on the Internet? This paper explores the question of which actors have First Amendment protections or claims in the context of net neutrality. In Part I, the paper describes the past regulatory and judicial framework concerning control of the Internet and introduces the changes to that framework that are to take place under the Trump Administration. Part II establishes the applicable U.S. Supreme Court free speech jurisprudence. Part III then presents a discussion of the First Amendment claims, given the changes under the Trump Administration, under two different concepts of the Internet: publicly-provided Internet and privately-provided Internet. In conclusion, this paper posits that Internet service providers will likely have First Amendment claims against remaining policies that maintain net neutrality if the proposed changes by the Trump Administration take place.

## **I. NET NEUTRALITY AND TELECOMMUNICATIONS REGULATORY**

### **HISTORY**

When an American places a telephone call in the United States, he or she expects to be able to successfully place the call to the recipient without intentional interference from the telephone company. In other words, telephone companies are expected and required to treat all phone calls the same with regards to facilitating the connection. Currently, these same expectations and

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<sup>281</sup> *Id.*



requirements apply to Internet service providers as well, which would be affected by the rule changes proposed by the current FCC chairman Ajit Pai. The current and future regulatory framework for the Internet is a result of (1) the nature of the Internet market; (2) the jurisdiction of the FCC and a definitional dichotomy for provision of telecommunications services; (3) court challenges to those regulations; and (4) the changes to the regulatory framework under the Trump Administration.

### *The Internet Market*

The Internet market can be thought of as consisting of four major actors: backbone networks, broadband providers, edge providers, and end users.<sup>282</sup> Backbone networks are essentially the connections between different routers that facilitate the flow of data through the Internet.<sup>283</sup> They are the highways on which data travels through the cyber universe. The broadband providers are the entities that allow consumers to access these highways by connecting the end user to the backbone networks.<sup>284</sup> Examples of broadband providers are Internet service providers like AT&T, Verizon, Comcast, etc. The edge providers are the curators and creators of content and services for the Internet.<sup>285</sup> Netflix, Amazon.com, and Google are examples of edge providers. Lastly, the consumers of the content and services provided by edge providers are the end users.<sup>286</sup> Any person who logs on to the Internet is an end user.

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<sup>282</sup> Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

<sup>283</sup> *Id.* at 629.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*



The interaction between the four major Internet actors creates the Internet market. First, an edge provider creates content and transmits the content via packages of data to the backbone networks through a broadband provider.<sup>287</sup> The broadband provider then allows end user access to that content on the backbone networks.<sup>288</sup> Of recent, broadband providers have started producing their own content.<sup>289</sup> Therefore, the lines between the four actors has started to blur.

There are two key relationships in the Internet market: the broadband provider-edge provider relationship, and the broadband provider-end user relationship. In both, broadband providers charge fees for access to the backbone networks. However, because of the traditional regulatory framework provided by the FCC, the broadband providers have not been allowed to discriminate in provision of access to edge providers or to end users.<sup>290</sup>

### *FCC Jurisdiction and Telecommunications Services Dichotomy*

Congress passed the Communications Act of 1934 to spur competition and prevent “monopolistic domination in the broadcasting field.”<sup>291</sup> There has also been an underlying goal to regulate the “dynamic aspects of radio transmission.”<sup>292</sup> The Act created the FCC and established

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<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> Rob Frieden, *Invoking and Avoiding the First Amendment: How Internet Service Providers Leverage Their Status as Both Content Creators and Neutral Conduits*, 12 U. PA. J. CONST. L. 1279, 1289-90 (2010). Also, for example, AT&T, Comcast, and Verizon all have “my” platforms where users can access news, weather, limited video, and other content directly on their websites instead of on the edge provider websites.

<sup>290</sup> See 47 U.S.C. § 202(a) (2012) (providing that common carriers can not engage in “unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services”).

<sup>291</sup> *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940).

<sup>292</sup> *Id.*



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a dual federal-state regulatory framework for the telecommunications industry.<sup>293</sup> The FCC has jurisdiction over all interstate telecommunication activities, but state governments have sole jurisdiction over purely intrastate activities.<sup>294</sup> The transmission of data over the Internet is an interstate activity, hence the FCC can regulate the Internet, and has done so since the inception of the Internet.

In 1996, Congress passed the Telecommunications Act.<sup>295</sup> This act essentially served three legislative goals: (1) remove market entry barriers for emerging telecommunications companies; (2) punish predators in the telecommunications market to lower costs for consumers; and (3) maintain historical subsidies to the telecommunications industry.<sup>296</sup> The Act distinguishes between two types of service providers: telecommunication and information.<sup>297</sup> Telecommunications services included “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”<sup>298</sup> Information services, on the other hand, included “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”<sup>299</sup>

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<sup>293</sup> See *Louisiana Public Service Com'n v. FCC*, 476 U.S. 355, 360 (1986).

<sup>294</sup> 47 U.S.C. § 152 (2012).

<sup>295</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104 110 Stat. 56 (1996).

<sup>296</sup> See Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L. REV. 123, 130–31 (1996).

<sup>297</sup> 47 U.S.C. § 153 (2012).

<sup>298</sup> *Id.* at (51).

<sup>299</sup> *Id.* at (24).



## *Rule Changes and Court Challenges*

The first real step to regulate the Internet came in 2007 when Comcast's Internet subscribers filed a complaint with the FCC. The complainants alleged that Comcast was intentionally blocking their use of specific file sharing applications on the Internet.<sup>300</sup> They argued that Comcast's actions violated a current FCC policy on the Internet, which stated that "consumers are entitled to access the lawful Internet content of their choice ... [and] to run applications and use services of their choice."<sup>301</sup> Comcast argued that its policy of blocking file sharing applications was a direct result of the technological limitations in servicing such large amounts of data for the file sharing applications.<sup>302</sup> The FCC found that Comcast had violated the FCC's policies, and they issued an order requiring Comcast to follow specific disclosure procedures.<sup>303</sup> Then, Comcast appealed to the D.C. Circuit Court on grounds that the FCC failed to show proper jurisdiction over Internet regulation and that the FCC order violated the Due Process Clause.<sup>304</sup> In *Comcast Corp. v. FCC*, the D.C. Circuit Court ruled that the FCC can regulate the Internet, but that its jurisdiction to do so must be limited to a "statutorily mandated responsibility."<sup>305</sup> Specifically, the court held that the FCC had overstepped its statutory responsibilities, and the FCC rules were held to be invalid.<sup>306</sup>

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<sup>300</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

<sup>301</sup> *Id.* at 645.

<sup>302</sup> *Id.* at 644-45.

<sup>303</sup> *Id.* at 645.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* at 661.

<sup>306</sup> *Id.*



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In response to its legal loss in *Comcast Corp.*, the FCC in 2010 promulgated an order adopting the first network neutrality rules.<sup>307</sup> This order had three basic rules: (1) broadband providers must disclose their policies and practices regarding network management; (2) broadband providers cannot block lawful activity by edge providers; and (3) broadband providers cannot discriminate in transmitting lawful activity on backbone networks.<sup>308</sup> The rationale given for the rules was to foster “innovation, investment, job creation, economic growth, competition, and free expression.”<sup>309</sup> So from this first attempt at regulating net neutrality, “free expression” was an underlying rationale given by the actors.

In *Verizon v. FCC*, the D.C. Circuit Court again ruled against the FCC by holding that the new order was invalid.<sup>310</sup> The court explained that the anti-discrimination rule of the FCC’s order “relegated [those providers], *pro tanto*, to common carrier status.”<sup>311</sup> This, the court held, was not allowed because broadband providers were statutorily exempt from common carrier treatment.<sup>312</sup> Therefore, after *Verizon*, broadband providers could treat edge providers and end users differently (e.g. higher paying edge providers or end users could receive faster speeds from the broadband providers).

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<sup>307</sup> See *In the Matter of Preserving the Open Internet Broadband Indus. Practices*, 25 FCC Rcd. 17905 (2010).

<sup>308</sup> *Id.* at 17906.

<sup>309</sup> *Id.*

<sup>310</sup> *Verizon*, 740 F.3d 623.

<sup>311</sup> *Id.* at 655.

<sup>312</sup> *Id.* at 650 (showing that 47 U.S.C. § 332(c)(2) (2012) expressly exempts mobile broadband providers from treatment as a common carrier).



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Post-*Verizon*, in 2015, the FCC again attempted to craft new rules for maintaining net neutrality in what is known as the *Title II Order*.<sup>313</sup> These rules mandated that a broadband provider not (1) “block lawful content, applications, services, or non-harmful devices, subject to reasonable network management;” (2) “impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management;” and (3) “engage in paid prioritization.”<sup>314</sup> The addition of the words “reasonable network management” to the first and second rules gave broadband providers some discretion in managing the technological components of networks, as was argued by Comcast in *Comcast Corp.* as its rationale for blocking the file sharing applications.<sup>315</sup> The new rules also provided the FCC with enforcement actions to determine if broadband providers were acting in just and reasonable ways in accordance with the rules.<sup>316</sup>

The FCC based its legal authority to issue such broad rules for an open Internet on Title II of the Communications Act and Section 706 of the Telecommunications Act.<sup>317</sup> First, the FCC reclassified broadband providers as telecommunications service providers.<sup>318</sup> This reclassification avoided the legal challenges posed in *Comcast Corp.* and *Verizon*, where the Court stated that the FCC had moved beyond its jurisdiction to regulate broadband providers considering that these

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<sup>313</sup> See *In the Matter of Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (*Title II Order*).

<sup>314</sup> *Id.* at 5607.

<sup>315</sup> See Federal Communications Commission, “FCC Adopts Strong, Sustainable Rules to Protect the Open Internet,” (press release and summary) at 3, available at [www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-Internet](http://www.fcc.gov/document/fcc-adopts-strong-sustainable-rules-protect-open-Internet) (last visited Oct. 9, 2017). See also *Comcast Corp.*, 600 F.3d at 645.

<sup>316</sup> Federal Communications Commission, *supra* note 60, at 5.

<sup>317</sup> *Id.*

<sup>318</sup> *Title II Order* at 5615.



providers were not telecommunications service providers.<sup>319</sup> The FCC also announced that, in accordance with its duty to forbear from provisions of the Communications Act that are not in the public's interest, it would refrain from enforcing rate regulations, universal service contributions, and taxation requirements (given that broadband service is exempt from state and local taxation under the Internet Tax Freedom Act) for broadband providers.<sup>320</sup>

In *United States Telecom Ass'n v. FCC*, the D.C. Circuit Court analyzed the validity of the *Title II Order*.<sup>321</sup> The circuit court ruled that the FCC had the authority to classify broadband providers as telecommunications service providers, thus making them common carriers.<sup>322</sup> It explained that the FCC's reliance on statutory construction of Title II of the Telecommunications Act was reasonable.<sup>323</sup> The fact that the Internet is used by virtually all the public furthers the argument made by the FCC that provision of the service could be classified as common carriage.<sup>324</sup> For these reasons, the D.C. Circuit upheld the *Title II Order*.<sup>325</sup>

### *The Internet in the Trump Era*

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<sup>319</sup> See *Comcast Corp.*, 600 F.3d at 652 (where Comcast argued that the FCC's regulation of its network management was not proper given that this regulation fell outside of the "statutorily mandated responsibilities" of the FCC); *Verizon*, 740 F.3d at 655 (holding that the no-blocking rule and the anti-discrimination obligation attempted, pro tanto, to relegate broadband providers as common carriers when the FCC had already classified broadband providers as exempt from common carrier status).

<sup>320</sup> Federal Communications Commission, *supra* note 60, at 4.

<sup>321</sup> 825 F.3d 674 (D.C. Cir. 2016).

<sup>322</sup> *Id.* at 716.

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 745.



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On November 8, 2016, Donald J. Trump was elected President of The United States after a campaign that consistently questioned and criticized American institutions and long-held ideals.<sup>326</sup> One of these critiqued institutions was the open Internet. President Trump's chairman of the FCC, Ajit Pai, announced on April 26, 2017, that the FCC would consider adopting new rules for deregulating broadband providers.<sup>327</sup> On the same day, the FCC distributed a Notice of Proposed Rulemaking, In the Matter of Restoring Internet Freedom (*NPRM*).<sup>328</sup> The detailed *NPRM* stated that the FCC was seeking to reclassify broadband providers as information services.<sup>329</sup> The result of this rule would be to exempt broadband providers from common carrier status. Then, on November 21, 2017, Chairman Pai announced that the *NPRM* would be voted on during the December 4, 2017 meeting of the FCC for implementation.<sup>330</sup> The vote was then rescheduled for December 14, 2017, at which time the *Title II Order* was repealed.<sup>331</sup> This simple reclassification away from common carrier status will have major economic implications for Internet service providers, but could potentially also have major First Amendment implications.

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<sup>326</sup> See Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016,

<https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html>.

<sup>327</sup> Cecilia Kang, *FCC Chairman Pushes Sweeping Changes to Net Neutrality Rules*, N.Y. TIMES, Apr. 26, 2017, [https://www.nytimes.com/2017/04/26/technology/net-neutrality.html?\\_r=1](https://www.nytimes.com/2017/04/26/technology/net-neutrality.html?_r=1).

<sup>328</sup> Notice of Proposed Rulemaking, In the Matter of Restoring Internet Freedom, WC Docket No, 17-108 (April 27, 2017).

<sup>329</sup> *Id.* at \*20.

<sup>330</sup> See Cecilia Kang, *F.C.C. Plans Net Neutrality Repeal in a Victory for Telecoms*, N.Y. TIMES, Nov. 21, 2017, <https://www.nytimes.com/2017/11/21/technology/fcc-net-neutrality.html>.

<sup>331</sup> Cecilia, Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES, Dec. 14, 2017, [https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0).



## II. CONTENT, FORUMS, AND SPEAKERS

The U.S. Supreme Court has shown a general reluctance to uphold restrictions on content placed on the Internet.<sup>332</sup> Still, the direct issue of free speech, broadband providers, and the open Internet has not yet reached the Court. This section introduces the “content based vs. content neutral” categorical approach the Court has taken with First Amendment issues; connects the state action doctrine to the cases on government speech; looks at the framework for time, place, and manner restrictions of speech; and then shows how the Court has generally viewed the Internet in the First Amendment context.

### *Content-Based vs. Content-Neutral*

The general framework for Supreme Court jurisprudence on free speech is one of the categorical designations with corresponding scrutiny rules.<sup>333</sup> Most government regulations involving speech must be subject to either strict or intermediate scrutiny.<sup>334</sup> The Supreme Court has consistently held that content-based regulation of private speech is presumptively invalid and must meet the most exacting scrutiny – strict scrutiny.<sup>335</sup> Therefore, content-based regulations must be narrowly tailored to address a compelling state interest.<sup>336</sup> Content-neutral regulation of private speech only has to meet intermediate scrutiny.<sup>337</sup> The rationale behind this distinction is

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<sup>332</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW § 11.3.4.6 at 1093 (5th ed. 2015).

<sup>333</sup> See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (“[T]he First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations.”).

<sup>334</sup> See *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622, 641-42 (1994) (*Turner I*).

<sup>335</sup> *Id.* at 642

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*



that content-based regulation poses the greatest risk in “excising certain ideas or viewpoints from the public dialogue.”<sup>338</sup> In deciding on whether a regulation is content-based or content-neutral, the “principal inquiry . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”<sup>339</sup> Consequently, regulations that distinguish between favored and disfavored speech because of the positions expressed are content-based.<sup>340</sup> In the context of net neutrality, if a given restriction discriminates treatment of different content because of views expressed, the entity issuing such a restriction would have a difficult time showing that the restrictions are narrowly tailored for a compelling interest.

### *State Action and Government Speech*

When deciding which level of scrutiny to apply, the Court must first analyze the identity of the speaker and the regulator. The language of the First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>341</sup> Therefore, the protections against limits to free speech are directed at the government, not at private actors.<sup>342</sup> This is known as the state action doctrine and is a threshold question for constitutional issues.<sup>343</sup> This doctrine is especially important for the net neutrality debate due to the question of whether Internet service providers are truly private actors.

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<sup>338</sup> *Id.*

<sup>339</sup> *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

<sup>340</sup> *Id.* at 643.

<sup>341</sup> U.S. CONST. amend. I. Likewise the Fourteenth Amendment states “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” U.S. CONST. amend. XIV.

<sup>342</sup> Chemerinsky, *supra* note 77, at § 6.4.2.

<sup>343</sup> *Id.* at § 6.4.3.



The Supreme Court may deem seemingly private entities to be bound by the Constitution. In *Lebron v. National Railroad Passenger Corp.*, Amtrak, a passenger train company, refused to allow private advertisement on its trains that critiqued other companies' political beliefs.<sup>344</sup> The advertiser claimed that Amtrak was a federally-created corporation, and thus was a government actor bound by the limits of the First Amendment.<sup>345</sup> Amtrak claimed that it was not a government entity because it was privately chartered and incorporated under the District of Columbia Business Corporation Act, and thus not bound by the First Amendment.<sup>346</sup> Justice Scalia, writing for the majority, held that "where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."<sup>347</sup> This suggests that a private entity will be considered a government actor if it is created by the government and the government retains some control over the entity. As a result of this analysis, the Supreme Court ruled in *Lebron* that Amtrak was a government actor and could not prevent the advertiser from expressing his criticism of certain political beliefs.<sup>348</sup>

A major exception to the state action doctrine is the public function exception. The Supreme Court will deem a private entity to be a state actor when the private entity exercises "powers traditionally exclusively reserved to the State."<sup>349</sup> The exception was first applied in

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<sup>344</sup> 513 U.S. 374 (1995).

<sup>345</sup> *Id.* at 384.

<sup>346</sup> *Id.* at 385.

<sup>347</sup> *Id.* at 397.

<sup>348</sup> *Id.*

<sup>349</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).



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*Marsh v. Alabama*, in which the Supreme Court held that a company town run by a shipbuilding corporation could not criminally punish an individual for soliciting religious literature throughout the town.<sup>350</sup> The Court explained that “the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the constitutional and statutory rights of those who use it.”<sup>351</sup> Further, the Court established a balancing test where the property interests of private owners is balanced against the constitutional freedoms enjoyed by people restricted in activities by the private entities.<sup>352</sup>

The public function exception was analyzed in the private utility provider context in *Jackson v. Metropolitan Edison Co.*<sup>353</sup> In that case, a private utility company argued that it did not have to comply with due process constitutional requirements when terminating a customer’s service because it was not a state actor.<sup>354</sup> The Court agreed and reasoned that the running of a utility was “not traditionally the exclusive prerogative of the State.”<sup>355</sup> This holding is especially salient for the net neutrality debate because Internet service providers are frequently described like utility companies.<sup>356</sup>

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<sup>350</sup> 326 U.S. 501, 516-17 (1946).

<sup>351</sup> *Id.* at 506.

<sup>352</sup> *Id.* at 509.

<sup>353</sup> *Jackson*, 419 U.S. 345.

<sup>354</sup> *Id.* at 346.

<sup>355</sup> *Id.* at 353.

<sup>356</sup> In fact, as described earlier, the FCC has treated Internet service providers like utility companies in the past. *See Part 1, Rule Changes and Court Challenges. See also* Cecilia Kang, *Court Backs Rules Treating Internet as Utility, Not Luxury*, N.Y. Times, June. 14, 2016, [https://www.nytimes.com/2016/06/15/technology/net-neutrality-fcc-appeals-court-ruling.html?\\_r=0](https://www.nytimes.com/2016/06/15/technology/net-neutrality-fcc-appeals-court-ruling.html?_r=0).



Once an actor has been identified as a government actor, the question turns on whether the actor is limiting another entity's speech or speaking itself. Government speech is an issue in the net neutrality debate if the government chooses to federalize the Internet by providing Internet services to all Americans. In *Pleasant Grove, Utah v. Summum*, the U.S. Supreme Court noted that “[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”<sup>357</sup> Therefore, there is no “free speech” limit to the type of regulation that the government can establish for government speech.<sup>358</sup> In this case, a religious organization, Summum, sought to donate a religious monument to a government park in Pleasant Grove, Utah.<sup>359</sup> Summum saw that there was already an existing Ten Commandments monument and wished to have its own religious symbol present in the park.<sup>360</sup> The mayor of Pleasant Grove denied the donation and request because it did not meet the requirements for monuments chosen for the park: (1) monuments directly related to Pleasant Grove history or (2) monuments donated by an organization with deep ties to the Pleasant Grove community.<sup>361</sup> The Court reasoned that a government entity can adopt private speech as its own and not have to comport with traditional First Amendment scrutiny.<sup>362</sup> Here, when Pleasant Grove chose to erect permanent monuments in its park, it was government adoption of private speech.<sup>363</sup> Any regulation that Pleasant Grove chose

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<sup>357</sup> 555 U.S. 460, 467 (2009).

<sup>358</sup> *Id.* at 468 (The Court was careful in stating that there are Establishment Clause limits to government speech and that ultimately public officials are “accountable to the electorate and the political process for [their] advocacy” of certain speech and ideas.).

<sup>359</sup> *Id.* at 465.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 468.

<sup>363</sup> *Id.* at 470.



in deciding which monuments to erect in the park did not have to meet any type of First Amendment scrutiny.<sup>364</sup> Therefore, Summum could be blocked from erecting a monument in the park.<sup>365</sup>

### *Time, Place, and Manner Restrictions*

The *Summum* Court did explain that there is a difference, however, when the government establishes a forum for private speech.<sup>366</sup> Standards for limitations on speech based on where the speech occurs “differ depending on the character of the property at issue.”<sup>367</sup> The restrictions subject to these standards are commonly called “time, place, and manner restrictions,” and given that the Internet can be contemplated as an actual space where speech occurs, these types of restrictions could be present in the net neutrality debate.<sup>368</sup> In *Frisby v. Schultz*, the Supreme Court decided whether the city of Brookfield, Wisconsin could completely ban picketing “before or about” any residence.<sup>369</sup> Schultz engaged in orderly and peaceful picketing outside of the residence of a doctor who performed abortions.<sup>370</sup> In response, the Brookfield Town Board adopted an ordinance prohibiting all picketing in front of a residence.<sup>371</sup> The Court explained that there are three types of fora where speech can occur: “(1) the traditional public forum, (2) the public forum created by government designation, and (3) the nonpublic forum.”<sup>372</sup> Traditional public fora

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<sup>364</sup> *Id.* at 473.

<sup>365</sup> *Id.* at 481.

<sup>366</sup> *Id.* at 469.

<sup>367</sup> *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)).

<sup>368</sup> *See Perry Educ. Ass'n*, 460 U.S. at 45.

<sup>369</sup> *Frisby*, 487 U.S. at 476.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 479-80.



include public streets, sidewalks, and public parks.<sup>373</sup> Content-based restrictions of speech in traditional public fora must be “necessary to serve a compelling state interest” and must also be “narrowly drawn to achieve that” interest.<sup>374</sup> Content-neutral restrictions of speech in traditional public fora must still be “narrowly tailored to serve a significant government interest” but also only have to “leave open ample alternative channels of communication.”<sup>375</sup> A public forum created by government designation must meet the same requirements that the traditional public forum must meet.<sup>376</sup> In other words, content-based restrictions on speech in traditional and limited public fora must meet strict scrutiny, whereas content-neutral restrictions must meet a lesser but intermediate level of scrutiny.<sup>377</sup> Lastly, public property that is not a forum for public communication (i.e. government buildings, schools, etc.) is governed by different standards.<sup>378</sup> Any regulation of speech in a non-public forum must be reasonable and content-neutral.<sup>379</sup>

In *Frisby*, the restriction on picketing was a traditional public fora regulation since the picketing was conducted on the city streets.<sup>380</sup> Here, the ordinance at issue was content-neutral because it applied to all picketing regardless of its message.<sup>381</sup> The Court reasoned that because the restrictions on picketing were limited to just around the household and since Brookfield had

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<sup>373</sup> *Id.* at 480.

<sup>374</sup> *Id.* at 481 (quoting *Perry Educ. Ass'n*, 460 U.S. at 45).

<sup>375</sup> *Id.*

<sup>376</sup> *Summun*, 555 U.S. at 468.

<sup>377</sup> *See id.* at 481.

<sup>378</sup> *See Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 667 (1998) (holding that a government-owned television station was a non-public forum and a broadcaster’s choice of content and selection of speakers was itself speech protected by the First Amendment).

<sup>379</sup> *Perry Educ. Ass'n*, 460 U.S. at 46.

<sup>380</sup> *Frisby*, 487 U.S. at 480.

<sup>381</sup> *Id.* at 482.



an interest in ensuring privacy in the home, the anti-picketing ordinance met the analysis for content-neutral restrictions in traditional public fora.<sup>382</sup> As shown later, recent Supreme Court dicta has nearly equated the Internet to city streets for speech purposes.<sup>383</sup> If this is the case, then the time, place, and manner doctrine could be implicated in the net neutrality context.

### *Common Carriers and Conduits of Speech*

The identity of the speaker and the location of the speech overlap in the context of common carriers. What exactly qualifies as a common carrier, however, is somewhat complex. As Dawn C. Nunziato, a prominent expert on free speech issues in cyberspace, explains, American common carriage doctrine “has its roots in the early English law of common carriage, under which private entities that served the public in the performance of important public functions were charged with certain obligations.”<sup>384</sup> Therefore, it is safe to say that a common carrier is a pseudo-governmental, private entity that serves the public.<sup>385</sup> The Communications Act of 1934 defines a “common carrier” as:

any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.<sup>386</sup>

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<sup>382</sup> *Id.* at 484.

<sup>383</sup> *See* *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

<sup>384</sup> Dawn C. Nunziato, *First Amendment Values for the Internet*, 13 *FIRST AMEND. L. REV.* 282, 301 (2014).

<sup>385</sup> *See, e.g.,* *Primrose v. W. Union Tel. Co.*, 154 U.S. 1 (1893) (holding that telegraph companies were common carriers just like transportation providers are, as established under the Interstate Commerce Act of 1887). *See also* Nunziato, *supra* note 130, at 296 (showing that the United States Postal Service has been regulated like a common carrier).

<sup>386</sup> 47 U.S.C. § 153 (2012).



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The First Amendment issue with common carriers is that although common carriers are private entities – who ostensibly have First Amendment protections – they lose those First Amendment protections because they serve a public function. This doctrine “rests on the . . . assumption that, in the absence of regulation, the carrier will have enough monopoly power to deny citizens the right to communicate.”<sup>387</sup> The common carrier is not really a speaker in the traditional sense, but is merely a conduit for other speakers.

The cases involving common carriers and their free speech protections implicate, either directly or indirectly, the issue of the government forcing the use of private property for speech purposes. First, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court held that the government could not force a newspaper to provide space in its pages for political candidates.<sup>388</sup> Specifically, the regulation stated that the newspaper had to provide the space to political candidates only if the editorial board of the newspaper had published disparaging or critical pieces regarding the candidates.<sup>389</sup> The newspaper company argued that forcing it to provide a space for political candidates infringed on its First Amendment rights to publish what it wanted and that the government should instead seek to encourage “multiplicity of outlets, rather than compelling a few outlets to represent everybody.”<sup>390</sup> The Court reasoned that it is inconsistent with the First Amendment for the government to regulate the decisions a newspaper must make towards the size

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<sup>387</sup> Nunziato, *supra* note 130, at 301 (quoting ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 106 (Belknap Press, 1984)).

<sup>388</sup> 418 U.S. 241, 258 (1974).

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at 253-54 (quoting T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 671 (1970)).



and content of the paper.<sup>391</sup> These decisions constituted the “exercise of editorial control and judgment” and would be protected by the First Amendment.<sup>392</sup>

The Supreme Court once again considered the First Amendment rights of common carriers in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*.<sup>393</sup> In this case, the issue was whether the government could require a utility company to include in its billing envelopes an insert from a local public interest group concerning utility rates. Again, the Court emphasized that the First Amendment does not stand for compelling a private entity to devote access to certain viewpoints.<sup>394</sup> When a private company is required to carry one particular speaker’s viewpoint, “this impermissibly burdens [the company’s] own expression.”<sup>395</sup> The Court confirmed that “the choice to speak includes within it the choice of what not to say,” and this choice can be made by corporations and individuals alike.<sup>396</sup> Because the “[s]tate’s asserted interest in exposing appellant’s customers to a variety of viewpoints is not—and does not purport to be—content neutral,” the regulation had to pass strict scrutiny.<sup>397</sup> The Court held that the regulation was not narrowly tailored to addressing “fair and effective utility regulation.”<sup>398</sup> Therefore, the regulation was unconstitutional.<sup>399</sup>

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<sup>391</sup> *Id.* at 258.

<sup>392</sup> *Id.*

<sup>393</sup> 475 U.S. 1 (1986).

<sup>394</sup> *Id.* at 910.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 912.

<sup>397</sup> *Id.* at 914.

<sup>398</sup> *Id.* at 913.

<sup>399</sup> *Id.* at 914.



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In contrast, shopping centers have been treated differently by the Court. In *PruneYard Shopping Center v. Robins*, a California constitutional provision requiring shopping centers to allow protesters to use the center for speech was challenged.<sup>400</sup> The shopping center argued that, like in *Tornillo*, this provision was inconsistent with the First Amendment because it specifically required the shopping center to carry speech which it itself might find hostile or disagreeable.<sup>401</sup> The Court distinguished *Tornillo* by explaining that the government forcing the newspaper to publish content was different from allowing protestors to use property for speech.<sup>402</sup> There was no risk that the speech of the protestors would be “identified with those of the owner” since the shopping center was a place of business open to the public.<sup>403</sup> Thus, the Court appeared to make a distinction based on who the audience believed was the speaker. If the speaker was perceived to be the actual person giving the materials or making the speech, then compelling the property owner to provide access would be permissible. If the speaker was perceived to be the owner of the space, compelled use of the property would be unconstitutional. This distinction could likely be present in the net neutrality context. When a broadband provider carries content by edge providers, does an end user perceive the content as that of the broadband provider or of the edge provider?

In the specific context of telecommunications, the Supreme Court established a baseline framework for telecommunication common carriers in *Turner Broadcasting System, Inc. v. FCC* (commonly known as *Turner I*).<sup>404</sup> In *Turner I*, Turner Broadcasting Systems and other cable

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<sup>400</sup> 447 U.S. 74 (1980).

<sup>401</sup> *Id.* at 80.

<sup>402</sup> *Id.* at 88.

<sup>403</sup> *Id.* at 87.

<sup>404</sup> *See Turner I.*



operators objected to a rule set by the FCC, which required all cable network operators to carry all broadcast programming.<sup>405</sup> The argument was that this “must-carry” rule infringed upon the cable operator companies’ abilities to use editorial control in what programming to show.<sup>406</sup> Thus, the cable operators asserted that their First Amendment rights were violated because of the must-carry rule.<sup>407</sup> Justice Kennedy, writing for the plurality, explained that precedent showed “that Government regulation over the content of broadcast programming must be narrow, and the broadcast licensees must retain abundant discretion over programming choices.”<sup>408</sup> Kennedy declared that “it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>409</sup> Therefore, the Court held that cable providers would be treated just like the newspapers in *Tornillo* and could possess First Amendment protections from content-based regulations.<sup>410</sup>

### *Free Speech and the Internet*

The Supreme Court first considered the Internet in *Reno v. American Civil Liberties Union*, which at its core was a case concerning a specific category of speech: profanity and indecent

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<sup>405</sup> *Id.* at 634.

<sup>406</sup> *See id.* at 636.

<sup>407</sup> *Id.* at 643-44.

<sup>408</sup> *Id.* at 651 (citing *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378-80 (1984); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 126 (1973)).

<sup>409</sup> *Id.* at 663 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 (1972); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978)).

<sup>410</sup> *Id.* at 635. *See Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 224 (1997) (*Turner II*) (ultimately holding that the must-carry provision passes intermediate scrutiny because it is content-neutral)).



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speech.<sup>411</sup> Justice Stevens stated that “the content on the Internet is as diverse as human thought.”<sup>412</sup> Stevens also distinguished prior case law regarding regulation of broadcast media from regulation of the Internet because the broadcast medium “as a matter of history had ‘received the most limited First Amendment protection’” whereas the Internet has not.<sup>413</sup> The Internet does not invade people’s homes like radio or television do.<sup>414</sup> The Court explained that there was no precedent that justified establishing one type of First Amendment scrutiny that should be applied to all the Internet because of the diversity of speech that can exist there.<sup>415</sup> Since *Reno*, the Court has maintained that the Internet is a unique medium and facilitates speech in unique ways.<sup>416</sup>

Most recently, in *Packingham v. North Carolina*, the Court described the spatial context of Free Speech issues.<sup>417</sup> Justice Kennedy explained that deciding what rules to apply for a given space where speech occurs is important.<sup>418</sup> He posited that “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in

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<sup>411</sup> See 521 U.S. 844 (1997).

<sup>412</sup> *Id.* at 852 (quoting *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997)).

<sup>413</sup> *Id.* at 867.

<sup>414</sup> *Id.* at 869 (“Users seldom encounter content by ‘accident.’”) (quoting *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996), *aff’d*, 521 U.S. 844 (1997)).

<sup>415</sup> *Id.* at 870.

<sup>416</sup> See, e.g., *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 566 (2002) (“The Internet ... offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”) (quoting 47 U.S.C. § 230(a)(3) (2012)); *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 206 (2003) (finding that Internet provision “facilitate[s] research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality”).

<sup>417</sup> 137 S. Ct. at 1735.

<sup>418</sup> *Id.*



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general.”<sup>419</sup> This seemingly equates the Internet to public streets and parks, which was the fear of Justice Alito’s dissent.<sup>420</sup> If this is truly the result of designating the Internet as a “vast democratic forum” and one of the “most important places” for protected speech, then there is an easy argument for net neutrality proponents in claiming that the Internet is much more like traditional public fora than the other fora in time, place, and manner analysis.

The U.S. Supreme Court has not directly ruled on whether Internet service providers can restrict access to content on the Internet consistent with the First Amendment. However, the D.C. Circuit Court recently analyzed this issue in *United States Telecom Ass'n v. FCC*.<sup>421</sup> In this case, several broadband providers petitioned the court to strike down a nondiscrimination and open access order from the FCC claiming, among other things, that the order violated the broadband providers’ First Amendment rights.<sup>422</sup> First, the circuit court found that broadband providers had properly been designated as common carriers.<sup>423</sup> The court noted that common carriers have traditionally been required to provide equal access to their services without violating the First Amendment.<sup>424</sup> The circuit court reasoned that the First Amendment “comes ‘into play’ only

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<sup>419</sup> *Id.*

<sup>420</sup> *Id.* at 1738 (Alito, J., dissenting) (“I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.”).

<sup>421</sup> 825 F.3d 674.

<sup>422</sup> *Id.* at 689.

<sup>423</sup> *Id.* at 713.

<sup>424</sup> *Id.* at 740-41 (citing *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 739 (1996); *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 106 (1973)).



where ‘particular conduct possesses sufficient communicative elements.’”<sup>425</sup> Since broadband providers were common carriers and merely “facilitate[d] the transmission of the speech of others rather than engage in speech in their own right,” broadband providers could be required to meet equal access obligations.<sup>426</sup> The broadband providers made an argument that some conduits of speech (e.g. newspapers and cable television companies) have received First Amendment protections.<sup>427</sup> The court found that, unlike the newspaper in *Tornillo* and the cable television company in *Turner I*, a broadband provider does not make “editorial decisions about which speech to transmit.”<sup>428</sup> The court did specify that if a broadband provider started to make editorial decisions on which content to carry, then the provider might have First Amendment protections.<sup>429</sup> The court held that because a broadband provider is not considered a speaker when it provides neutral access to the networks, the First Amendment could not possibly protect it from regulations requiring nondiscrimination and equal access.<sup>430</sup> This is particularly important reasoning given that the line between broadband providers and edge providers is slowly disappearing as broadband providers are starting to make their own content. If a broadband provider uses zero-rating policies to favor its own content over that of individual edge providers, then courts will have to analyze whether broadband providers are truly like the *Tornillo* newspaper or the *Turner I* cable television company.

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<sup>425</sup> *Id.* at 741 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)).

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 742 (citing *Tornillo*, 419 U.S. at 257; *Turner I*, 512 U.S. at 636).

<sup>428</sup> *Id.* at 743.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 743-44.



These First Amendment principles could potentially apply to the future of Internet provision in the Trump era. However, the application might be more nuanced than the American citizenry realizes. The paradigms that could exist for the Internet each provide different potential claimants of First Amendment protections.

### III. FREE SPEECH AND THE BROADBAND PROVIDER

In the Trump-era and beyond, there are three possible paradigms for the Internet: (1) the government could take over the provision of the Internet and transform it into a truly public good; (2) the current system could remain the same with private broadband providers being treated as easily-regulated common carriers; or (3) private broadband providers could be reclassified as non-common carriers by the FCC or by the courts. This Part posits the likely First Amendment implications in each paradigm.

#### *Public Broadband Providers*

The government could certainly federalize the broadband Internet industry, albeit at a huge budgetary cost. Despite a false report by *The Washington Post* in 2013 that the FCC was looking to implement a national Wi-Fi network<sup>431</sup>, the government could still make Internet provision a public good. However, as scholar Enrique Armijo posits, cities and municipalities are already starting to provide government-owned broadband networks.<sup>432</sup> Also, some cities are not electing

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<sup>431</sup> See Cecilia Kang, *Tech, telecom giants take sides as FCC proposes large public WiFi networks*, WASH. POST, Feb. 3, 2013, [https://www.washingtonpost.com/business/technology/tech-telecom-giants-take-sides-as-fcc-proposes-large-public-wifi-networks/2013/02/03/eb27d3e0-698b-11e2-ada3-d86a4806d5ee\\_story.html?tid=a\\_inl&utm\\_term=.62fd4207b3d9](https://www.washingtonpost.com/business/technology/tech-telecom-giants-take-sides-as-fcc-proposes-large-public-wifi-networks/2013/02/03/eb27d3e0-698b-11e2-ada3-d86a4806d5ee_story.html?tid=a_inl&utm_term=.62fd4207b3d9).

<sup>432</sup> Enrique Armijo, *Government-Provided Internet Access: Terms of Service As Speech Rules*, 41 FORDHAM URB. L.J. 1499, 1500–01 (2014) (giving Chattanooga, TN and Lafayette, LA as examples of major cities starting this trend).



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to strive for complete ownership and are instead partnering with private broadband providers to create hotspots that cover entire neighborhoods, city blocks, and streets.<sup>433</sup> Armijo suggests that government-provided Internet access would solve the net neutrality issue and automatically result in full First Amendment protections for edge providers.<sup>434</sup> This conclusion, however, does not necessarily follow from current Supreme Court precedent.

Armijo argues that a government-owned Internet would not be considered a public forum for purposes of time, place, and manner jurisprudence.<sup>435</sup> Armijo cites other scholars in explaining that “forum doctrine comes from the [property law] theory of easement.”<sup>436</sup> While this might be true, the Supreme Court has determined that a public forum is “defined by the objective characteristics of the property, such as whether, by long tradition or by government fiat, the property has been devoted to assembly and debate.”<sup>437</sup> On the other hand, a government-designated public forum is one created “by intentionally opening a nontraditional public forum.”<sup>438</sup> Simply put, there are only two questions that need to be asked of a forum in order to determine whether the forum is traditional or government-designated: (1) has the forum, by long tradition, been devoted to open assembly and debate or (2) has the government expressly designated the forum as open to assembly and debate.

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<sup>433</sup> *Id.* (Harlem WiFi is an example of this type of public-private partnership.).

<sup>434</sup> *See id.* at 1512.

<sup>435</sup> *Id.* at 1509.

<sup>436</sup> *Id.*

<sup>437</sup> *See Arkansas Educ. Television Com’n*, 523 U.S. at 677 (quoting *Perry Educ. Ass’n*, 460 U.S. at 45).

<sup>438</sup> *Id.* (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985)).



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Since the Internet has been home to content “as diverse as human thought”<sup>439</sup>, it seems to follow that, traditionally, the Internet has been a place devoted to debate and dialogue. Does this make the Internet like the other traditional public fora: streets, sidewalks, and parks? Armijo argues that the “modernity of a space nearly always eliminates it from traditional public forum eligibility.”<sup>440</sup> Armijo compares government-owned Internet to public library networks, post offices, and public access television channels, which have all been held to be non-public fora.<sup>441</sup> However, as the nature of the Internet continues to evolve, this comparison loses its saliency. Today, social movements start on the cyber highways of the Internet. People assemble in chat rooms in live-time to discuss and plan important events and activities. In this way, the government-owned Internet starts to resemble the streets. If the government were to federalize the Internet and provide free access to all Americans, there is surely a strong argument that this infrastructure is much more like streets and parks than government-owned businesses with specific purposes (e.g. libraries, post offices, and public television). This is in-line with the dicta in *Packingham*, which all but called the Internet a cyber sidewalk.<sup>442</sup> Despite Armijo’s disagreement, the government-owned Internet can and should be a public forum.

The implications of the government-owned Internet being a public forum are that any government restrictions on Internet speech must pass the *Frisby* time, place, and manner analysis. For instance, if the government in this context chose to block all Neo-Nazi websites from being

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<sup>439</sup> *Reno*, 521 U.S. at 852.

<sup>440</sup> Armijo, *supra* note 178, at 1509.

<sup>441</sup> *Id.* (citing *United States v. American Library Association*, 539 U.S. 194, 206 (2003); *United States Postal Service v. Greenburg Civic Associations*, 452 U.S. 114, 129 (1981); and *Denver Area Educational Television Consortium v. FCC*, 518 U.S. 727, 740 (1996)).

<sup>442</sup> *Packingham*, 137 S. Ct. at 1735.



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hosted on the Internet, this regulation would likely be considered content-based because the government would have issued such regulation based on its “disagreement with the message [the speech] conveys.”<sup>443</sup> Therefore, this content-based blocking would have to pass strict scrutiny, in which case the government would have a high burden to show that the regulation was narrowly drawn for a compelling state interest, a burden it likely cannot meet.<sup>444</sup>

As the above example shows, the type of blocking that has traditionally occurred in the current net neutrality debate (e.g. blocking because of disagreement with a message conveyed) would likely be held unconstitutional in the government-owned Internet context because the entity doing the blocking is the government. This would be considered state action. This result is much more easily reached than in the current net neutrality reality because presently, the actor deciding who speaks and who does not is a private company. When broadband providers are publicly-owned, edge providers and end users alike could have First Amendment claims, which they likely do not have if broadband providers remain private.

### *Private Broadband Providers*

Absent major political shifts, the Internet is likely to remain facilitated by private broadband providers. Under the past designation as common carriers, private broadband providers were required to follow the regulations imposed by the government and could not argue on First Amendment grounds that the regulations are unconstitutional.<sup>445</sup> The D.C. Circuit in *U.S. Telecom Association* emphatically distinguished the First Amendment rights of private broadband providers

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<sup>443</sup> See *Turner I*, 512 U.S. at 642.

<sup>444</sup> See *Frisby*, 487 U.S. at 481.

<sup>445</sup> See *U.S. Telecom Ass'n*, 825 F.3d at 742.



when they are classified as common carriers versus when they are not.<sup>446</sup> If broadband providers are classified as common carriers, the FCC can impose nondiscrimination and equal access regulations on them. If broadband providers are not classified as common carriers, then the FCC cannot impose those regulations. According to the reasoning of the D.C. Circuit, the recent *NPRM* reclassification rules render nondiscrimination and equal access regulations unconstitutional. Broadband providers would have First Amendment claims to challenge any remaining nondiscrimination and equal access regulations. However, some scholars, such as Dawn Nunziato, have claimed that removing common carrier status for broadband providers is inconsistent with the First Amendment.<sup>447</sup>

Nunziato correctly states that the U.S. Supreme Court has consistently held that “speech cannot be . . . burdened, any more than it can be punished or banned.”<sup>448</sup> Nunziato worries that allowing broadband providers to charge higher prices for tiered packages on the Internet or blocking whole content altogether would be the content-based and viewpoint discrimination expressly prohibited by free speech jurisprudence.<sup>449</sup> This is a faulty understanding of the First Amendment jurisprudence and Nunziato glosses over an important inquiry in free speech analysis: state action and government speech.

The First Amendment generally does not protect against private regulation of private speech – it requires state action, and does not usually protect government speech.<sup>450</sup> It usually only

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<sup>446</sup> *Id.*

<sup>447</sup> Nunziato, *supra* note 130, at 295.

<sup>448</sup> *Id.* (quoting *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992)) (internal quotation marks omitted).

<sup>449</sup> *Id.* at 297-98.

<sup>450</sup> *See Sumnum*, 555 U.S. at 468.



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protects government regulation of private speech. Nunziato fails to acknowledge that a broadband provider not classified as a common carrier is a private entity. The broadband provider's choice of which content to provide access to is private regulation of private speech. The edge provider and the end user in this context are not protected by the First Amendment because the government is not restricting the speech, a private company is.

Nunziato could just be making a normative analysis that private regulation should be treated just like government regulation for free speech purposes. The argument that the state action could still apply to broadband providers through the public functions exception has been unsuccessful in lower court opinions because Internet provision has not been found to be a traditional public function.<sup>451</sup> The Supreme Court could certainly amend this analysis and decide that Internet provision is a public function. Likewise, the Court could also amend its state action doctrine to be more lenient. This is what Nunziato seems to be advocating for when she pleads for a more functional approach to the public functions exception to state action.<sup>452</sup> However, this would be a major shift in constitutional jurisprudence which traditionally only protects against government action or inaction and looks skeptically on forcing private actors into public functions. It is also concerning that a more lenient state action doctrine could have undesired effects in other areas of constitutional concern. It would be a slippery slope to amend the state action doctrine. Still, there is an easier way to the result that Nunziato advocates. This is the common carrier

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<sup>451</sup> *See, e.g.,* *Island Online, Inc. v. Network Sols., Inc.*, 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000) (finding that although the Internet was created by efforts of the U.S. Department of Defense, “the Internet is, by no stretch of the imagination, a traditional and exclusive public function.”).

<sup>452</sup> *See* DAWN NUNZIATO, *VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET* Age 98 (2009).



classification. If the common carrier classification could be imposed by the Court on to broadband providers outside of how the FCC classifies broadband providers then there might be a First Amendment argument for maintaining the nondiscrimination and equal access obligations.

The *U.S. Telecom Ass'n* court described a common carrier as “mak[ing] a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.”<sup>453</sup> Common carriers do not have grounds to raise First Amendment concerns.<sup>454</sup> The court failed to fully specify whether, absent the FCC classification as such, broadband providers would still be considered common carriers. Much of the reasoning of the case rested on statutory interpretation of the Telecommunications Act and whether the *Title II Order* was a statutorily permissible reclassification of broadband providers as common carriers. Similarly, the First Amendment discussion in the case invokes the direct reasoning of the FCC in classifying broadband providers as common carriers and merely states that the broadband providers themselves did not provide any evidence to refute the findings.<sup>455</sup> This begs the question of whether a broadband provider could ever provide evidence proving that it is not a common carrier.

Are broadband providers more like the *Tornillo* newspaper or the *Pruneyard* shopping center? Logically, the current Internet does not show signs of ownership from the broadband providers. An end user is likely not to think that the broadband provider is the speaker when it

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<sup>453</sup> *U.S. Telecom Ass'n*, 825 F.3d at 740.

<sup>454</sup> *Id.* at 741 (“The absence of any First Amendment concern in the context of common carriers rests on the understanding that such entities, insofar as they are subject to equal access mandates, merely facilitate the transmission of the speech of others rather than engage in speech in their own right.”).

<sup>455</sup> *Id.*



goes to a website. In this way, the Internet is more like the *Pruneyard* shopping center—a common carrier without First Amendment protections.<sup>456</sup> This perspective would bolster claims that net neutrality rules of equal access and nondiscrimination are constitutionally required. However, this affirmative view of First Amendment protection, where regulation is required by the First Amendment, is somewhat untested and shaky at best given the general reluctance of the Court to impose obligations on private actors.<sup>457</sup>

On the other hand, if the broadband provider starts to create more of its own content and this content becomes indistinguishable from that of edge providers, then the broadband providers begin to look more like the *Tornillo* newspaper—a common carrier with First Amendment protections.<sup>458</sup> There would be large incentives for the broadband providers in this case to use “editorial discretion” in deciding to promote its own content at the expense of the content of edge providers.<sup>459</sup>

An amicus brief filed in *U.S. Telecom Ass’n* on behalf of the FCC claims that “[b]roadband Internet access service . . . is not the provision of a curated body of the Internet’s ‘greatest hits,’

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<sup>456</sup> See *Pruneyard*, 447 U.S. at 87 (“The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition [in a shopping center] thus will not likely be identified with those of the owner.”).

<sup>457</sup> See Nunziato, *supra* note 198, at 42 (arguing that the Supreme Court has adopted an affirmative conception of nondiscrimination obligations for common carriers).

<sup>458</sup> See *Tornillo*, 418 U.S. at 258.

<sup>459</sup> See, e.g., Frieden, *supra* note 34, at 1289-90 (showing that beyond just the pure economic incentives to pushing their own content, broadband providers also have incentives to “secure safe harbor exemption from liability for the torts and copyright infringement committed by their subscribers [and] claim that they had nothing to do with the creation, editing, monitoring, and packaging of the content”).



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nor is there any technological reason why it has to be.”<sup>460</sup> Just because the Internet does not have to be curated by broadband providers does not mean that it will not be. The amici and, eventually, the D.C. Circuit Court both lose sight of the potential that broadband providers will have more of a role in deciding what content to push. Therefore, under current free speech jurisprudence, broadband providers should, *sua sponte*, be viewed more like newspapers and cable television networks than passive shopping centers and telephone companies. The implications of this view are that, regardless of classification by the FCC, broadband providers would have First Amendment protections from regulations requiring them to carry all content.

#### IV. CONCLUSION

Net neutrality is a First Amendment issue, albeit a surprising one. Americans, it would seem, would be quick to conclude that end users and edge providers have First Amendment protections against the broadband providers’ nefarious actions in blocking and interfering with content. The simplicity of this conclusion is its fallacy. The First Amendment issues in net neutrality are complex and vast. The debate is far from settled, given that the FCC has just repealed the net neutrality rules, Congress can act in reestablishing net neutrality rules, and briefs for certiorari have been filed in *U.S. Telecom Ass’n* for U.S. Supreme Court review. Given this uncertain future, net neutrality is poised to remain one of the most important issues for some time.

This paper addressed how net neutrality is a First Amendment issue and who has First Amendment claims under various policy schemes for the Internet. Because the Internet is a space where speech occurs, if the government provided this space then the First Amendment analysis

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<sup>460</sup> Brief of First Amendment Scholars as Amici Curiae Supporting Respondents, *U.S. Telecom Ass’n*, 825 F.3d 674 (D.C. Cir. 2016) (No. 15-1063), 2015 WL 6083208 at \*10.



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turns to *Frisby* and the time, place, and manner analysis. End users and edge providers could raise First Amendment claims regarding any actions by this public Internet provider to block or interfere with content. If, on the other hand, broadband providers remain as private providers of Internet service, then the analysis turns to common carriage and compelled use of private property. Broadband providers would likely have First Amendment claims against regulations requiring them to provide indiscriminate access to all content on the Internet.

Despite what is likely to happen given past First Amendment precedent, this paper is sympathetic to Nunziato, the Obama Administration, and others in supporting the open Internet. Whether the Supreme Court will develop new law on common carriers (perhaps holding that common carriers are the government in a constitutional sense and therefore restrictions by them are limited) or whether private ordering of rules for an open Internet are feasible amongst the corporate telecommunication behemoths, the open Internet is a preferred social outcome. The Internet has fundamentally changed the world and open access to it can and should be the great equalizer.



## *Forgotten Children: Alabama Daycare Law and the Effects of Religious Licensure Exemptions*

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### I. INTRODUCTION

In August of 2017, Kamden Johnson, a five-year-old from Mobile, Alabama, was found dead in a driveway several miles from his daycare center.<sup>461</sup> Kamden’s autopsy revealed that he died of exposure after being locked in a 92-degree daycare van for several hours.<sup>462</sup> It was then discovered that the driver of the daycare van had a criminal record dating back to the early 1990s, including charges of theft and negligent driving with a child in the car.<sup>463</sup> The van driver was ultimately arrested on charges of manslaughter and abuse of a corpse for attempting to dispose of Kamden’s body.<sup>464</sup> When Kamden’s mother attempted to sue the daycare center for failing to adequately conduct a background check of their van driver, she discovered that it was operating as a religiously affiliated facility, meaning that the center was not required to perform background checks on their employees.<sup>465</sup> Moreover, under Alabama state code, any daycare claiming this affiliation is completely exempt from state daycare licensure requirements. As a

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<sup>461</sup>Vollers, Anna Claire, “After death of 5-year-old, a look at the Alabama laws that left his day care unlicensed,” AL.com (2017), [http://www.al.com/news/index.ssf/2017/08/after\\_day\\_care\\_van\\_death\\_of\\_5-.html](http://www.al.com/news/index.ssf/2017/08/after_day_care_van_death_of_5-.html) (last visited Feb 5, 2018).

<sup>462</sup>*Ibid.*

<sup>463</sup>*Ibid.*

<sup>464</sup>*Ibid.*

<sup>465</sup>Al. Code §38-7-3



result, these facilities are subject to little state oversight and maintain minimal childcare standards.<sup>466</sup>

As of 2017, 35% of all Alabama childcare facilities and 49% of Alabama daycares claim this religious licensure exemption, and these percentages are expected to rise steadily in coming years.<sup>467</sup> The religious exemption allows these facilities to avoid otherwise standard state requirements, such as conducting background checks on prospective employees and undergoing regular health and safety inspections.<sup>468</sup> Alabama is one of only six states to take such a lax position on religiously affiliated daycares, and the result has been a decrease in state oversight, and in Kamden Johnson's case, tragedy.<sup>9</sup> Such senseless loss is entirely preventable, and the responsibility falls squarely on the state's religious licensure exemption legislation.

## II. PROPOSED REVISIONS AND THE CHILD CARE SAFETY ACT

The increased interest in Alabama daycare law in recent years culminated in 2017 with the proposal of HB 277, otherwise known as the Child Care Safety Act.<sup>10</sup> The Child Care Safety Act, proposed by State Representative Pebblin Warren, passed the house overwhelmingly in 2017 but never reached the senate floor, and a nearly identical version of the bill will be voted on during the 2018 legislative session. Both versions focus heavily on restricting the qualification

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<sup>466</sup> *Ibid.*

<sup>467</sup> "Child Care Facilities | Kids Count Data Center | Child Care Facilities." KIDS COUNT Data Center: A Project of the Annie E. Casey Foundation. Annie E. Casey Foundation, n.d. Web. 5 Feb. 2018.

<sup>468</sup> Al. Code §38-7-3

<sup>9</sup> Harris, Amy Julia, and Scott Pham. "These 6 States Have Little to No Regulation for Religious Day Cares." *Reveal*. The Center for Investigative Reporting, 27 Feb. 2016. Web. 3 Feb. 2018.

<sup>10</sup> The Child Care Safety Act, H.B. 277 (2017). Print



for religious licensure exemption, increase oversight and childcare standards for facilities that remain exempt, and ensure that exempt facilities maintain transparency.

The Child Care Safety Act implements several key changes in the requirements for religious licensure exemption. Under the bill, preschools would now also be classified as daycares in order to correct existing legal ambiguity, and any facility that receives state or federal funds or enrolls at least one student who receives a government child care subsidy becomes ineligible for the licensure exemption.<sup>11</sup> This disqualification ensures that facilities receiving state and federal subsidies must operate at the standards set by the state and federal governments. Additionally, the bill disqualifies any for-profit facility from obtaining the exemption. This comes in response to criticism that the vague requirements of qualifying as a religiously affiliated daycare might encourage some disreputable institutions to seek the exemption and thereby sidestep oversight.<sup>12</sup> By eliminating the profit motive from the licensure exemption, the Child Care Safety Act allows only daycare facilities that are affiliated with legitimate religious organizations to become license exempt.

For facilities that remain unlicensed, the proposed legislation institutes several additional oversight requirements. License-exempt facilities would be subject to annual fire and health inspections, the same standard to which licensed facilities are held.<sup>13</sup> Additionally, the unlicensed facilities would be required to provide annual records on employee names and criminal histories as well as proof of property, casualty, and liability insurance to ensure a safe

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<sup>11</sup> *Ibid.*

<sup>12</sup> The Child Care Safety Act, H.B. 277 (2017).

<sup>13</sup> *Ibid.*



and protected environment for children.<sup>14</sup> Unlicensed facilities must also be able to provide immunization records and medical history documentation for all enrolled children, and the latter for staff as well.<sup>15</sup> These increased levels of accountability provide both peace of mind to parents and meaningful improvements to the health and safety of prospective students.

All unlicensed facilities are held to a much higher standard of transparency under the Child Care Safety Act. License-exempt facilities are required to provide parents or guardians of prospective students with information on the curriculum and policies of the facility, including staff qualifications, student-staff ratios, disciplinary policies, and the religious teachings covered.<sup>16</sup> A statement explaining that the facility is unlicensed must be displayed in plain view, and the parents of students enrolling in an unlicensed facility must sign an affidavit recognizing their knowledge of the daycare's licensure status.<sup>17</sup> This transparency allows parents to make properly informed decisions regarding the education of their children, and makes the qualifications of the facility clear.

### III. THE INHERENT INEQUITY OF RELIGIOUS EXEMPTIONS

While the Child Care Safety Act would usher in a great deal of positive change for Alabama's daycare system, it fails to address the root problem: the religious exemption to licensure inherently disadvantages children enrolled in exempt institutions.<sup>18</sup> While critics argue that the elimination of the exemption altogether would trample on personal rights to religious

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Dwyer, James G. "The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors." *North Carolina Law Review*, vol. 74, June 1996, pp. 1321-1478. LexisNexis Academic [LexisNexis].



freedom, both versions of the Child Care Safety Act maintain that the increase in standards for licensed and unlicensed facilities does not create an undue burden to religious freedom, particularly because the bills expressly refrain from creating any restrictions as to what religious lessons can be taught in these facilities.<sup>1469</sup> The elimination of the exemption forces all daycare facilities in the state to operate under a single set of standards and ensures that all children are given equal opportunities and care. At present, however, this is far from the case.

While parents do have the right to secure a religious education for their children, prioritizing it over the child's well-being is a clear violation of the Equal Protection Clause. In Alabama, license-exempt daycares are allowed to operate at lowered standards of health, safety, and education, and the children placed into these daycare facilities have no power over their placement in a daycare. It is the parents who decide where and how a child will be educated, and while the law respects parents' freedom to rear their child in a religious manner, denying the child a decent education to achieve that goal is a severe disservice to the child.<sup>20</sup> Additionally, since all children are eligible to receive a licensed daycare education that is held to much higher standards, the choice to place a child into a lower-quality program to accommodate a parenting decision illuminates how children enrolled in these unlicensed daycares are not given truly equal protection under the law.<sup>21</sup>

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<sup>19</sup> *Supra* note 12.

<sup>20</sup> Dwyer, James G. "The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors." *North Carolina Law Review*, vol. 74, June 1996, pp. 1321–1478. LexisNexis Academic [LexisNexis].

<sup>21</sup> *Ibid.*



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The Supreme Court's decision in *Plyler v. Doe* set the precedent for children having a 14<sup>th</sup> Amendment right to adequate education.<sup>22</sup> The Court found that the state of Texas could not deprive undocumented immigrant children of a public school education because the children did not choose to enter the country illegally and therefore have no control over their immigration status. As an extension of this, the Constitution guarantees equal protection not only to citizens, but rather to "any person within [a state's] jurisdiction".<sup>23</sup> The Court found that barring these individuals from attending school serves no purpose other than to deprive the children of an opportunity to obtain a decent education.<sup>24</sup> Much in the same way that these children had no say in their immigration status, children in license-exempt daycare facilities have no say in the daycare facility in which they are enrolled. Considering that such unlicensed facilities are not, by definition, subject to state standards for child education, it becomes clear that children enrolled in unlicensed daycares are at a distinct educational disadvantage. If non-citizen children have a clearly defined right to a quality state-funded education, don't the children of religious parents have that right as well? While not all religious schools fall short of state education standards, children enrolled in those that do have a constitutional right to a better education. Such findings lend more credence to the idea that religious exemptions inherently disadvantage children.

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<sup>22</sup> Leigh, Monroe. "Decisions: U.S. Constitution -- Equal Protection -- Deprivation of Education to Illegal Alien School-Children Not Justified by Substantial State Goal." *The American Society of International Law American Journal of International Law* 77.151 (1983): 151-53. LexisNexis Academic [LexisNexis]. Web. 3 Feb. 2018.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*



Religious exemptions to daycare licensure also fails the third party harm test.<sup>25</sup>

Established by the Supreme Court decision in *Texas Monthly Inc. v. Bullock*, the test holds that if a law benefits religious groups exclusively, does not remove a barrier to religious freedom, and causes harm to third parties, then the law violates the Establishment Clause.<sup>26</sup> Using this test to examine Alabama's existing daycare system, it is clear that the religious exemption to daycare licensure benefits religious organizations exclusively.<sup>27</sup> Secondly, the daycare legislation fails to remove any substantial obstacle to free exercise, as the licensure exemption serves only to allow religiously affiliated facilities to operate under lower standards than can non-exempt Alabama daycare programs.<sup>28</sup> Both versions of the Child Care Safety Act have included provisions explicitly stating that increased oversight of unlicensed daycares would not require the facilities to change their religious practices in any way, but would instead provide a healthier and safer environment for children. The final aspect of the test, whether the daycare legislation harms third parties, again demonstrates a failure in the daycare system. Children in license-exempt facilities under the existing daycare law have lower standards of health and safety, lowered educational standards, and a history of neglect and in the most extreme cases, death.<sup>29</sup> To say that the religious licensure exemption for Alabama daycares harms children is a gross understatement,

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<sup>25</sup> Roantree, Bronwyn. "Challenging Statutory Accommodations for Religiously Affiliated Daycare: An Application of the Third-Party-Harm Doctrine." *Fordham Law Review* 86 (2017): 1407-1408. LexisNexis Academic [LexisNexis]. Web. 3 Feb. 2018.

<sup>26</sup> *Ibid.*

<sup>27</sup> Al. Code §38-7-3

<sup>28</sup> *Ibid.*

<sup>29</sup> *Supra* note 1.



and by failing the third and final aspect of the test from *Texas Monthly*, the inherent inequality created by this flawed system is shown again to be a harrowing problem for Alabama.

#### **IV. BENEFITS OF INCREASED DAYCARE STANDARDS AND OVERSIGHT**

If Alabama's daycare system adopted higher standards of childcare and education, the effects on Alabama's children and its society as a whole would be overwhelming. Psychological research into early childhood development has shown that children who receive high quality daycare have better educational outcomes and are more emotionally well-developed than their peers in lower quality daycare centers. Additionally, increased oversight would lead to fewer instances of neglect, abuse, and death in the daycare system. Implementing elevated health and safety standards and increasing oversight in the daycare system would greatly benefit the children of Alabama.

Research shows that higher standards of education in daycares correlates strongly with improved education outcomes. Heightened daycare standards of education correlate strongly with increased language mastery among children and significant, yet smaller, advances in mathematics abilities.<sup>30, 31</sup> These results also indicate little to no interaction between main effect results and parent background, meaning that these results control for variance in family background, further supporting the conclusion that better preschool standards translate to better student outcomes.<sup>32</sup>

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<sup>30</sup> McCartney, Kathleen. "Effect of Quality of Day Care Environment on Children's Language Development." *Developmental Psychology*, vol. 20, no. 2, Mar. 1984, pp. 244-260. EBSCOhost, doi:10.1037/0012-1649.20.2.244.

<sup>31</sup> Keys, Tran D., et al. "Preschool Center Quality and School Readiness: Quality Effects and Variation by Demographic and Child Characteristics." *Child Development*, vol. 84, no. 4, Jul-Aug, 2013, pp. 1171-1190. EBSCOhost, doi:10.1111/cdev.12048.

<sup>32</sup> *Ibid.*



Not only do increased preschool standards benefit children intellectually, they also lead to improved emotional development. Children at more highly regulated daycare centers receive more consistent and more adequate care, which leads to secure emotional attachment and healthy emotional development.<sup>33</sup> Failure to receive such care, however, can lead to insecure emotional attachment, which can manifest as the child being largely unresponsive to caregivers, exhibiting a sense of aloofness or disinterest.<sup>34</sup> In some children, receiving such inconsistent care results instead in the creation of a “false self”, which is an insincere display of positive emotions and compliant behavior adopted by a child in the face of emotional distress.<sup>35</sup> The “false self” serves to simultaneously hide emotional distress from the caregiver while also attempting to manage the caregiver’s unreliable behavior as a way to ease the child’s own distress.<sup>36</sup> This attachment style can cause long term negative effects even after the child is grown, including anger, depression, and behavioral problems such as lying and stealing. Daycares need to be held to a high standard of childcare, otherwise the facility may end up doing more damage to the child than good.

Continuing on the topic of psychological damage, religiously affiliated daycares in Alabama and several other states are allowed to use corporal punishment on children as long as the parents of the child have given prior consent to this punishment, a practice which is both

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<sup>33</sup> Becker-Blease, Kathryn and Patricia K. Kerig. "Maltreatment of Preschool-Age Children." *Child Maltreatment: A Developmental Psychopathology Approach.*, American Psychological Association, 2016, ppA1. 37-54. Concise guides on trauma care book series. EBSCOhost, doi:10.1037/14898-003.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Harris, Amy Julia, and Scott Pham. "These 6 States Have Little to No Regulation for Religious Day Cares." *Reveal*. The Center for Investigative Reporting, 27 Feb. 2016. Web. 3 Feb. 2018.

<sup>38</sup> Gershoff, Elizabeth T.; Sattler, Kierra M. P.; Ansari, Arya, "Strengthening Causal Estimates for Links Between Spanking and Children’s Externalizing Behavior Problems." *Association for Psychological Science*, vol 29, no 1, January 2018, pp. 110-120.



prohibited in licensed daycares and is illegal in all but three other states.<sup>37</sup> Corporal punishment of daycare-aged children is largely ineffective, however, and in some cases can lead to the opposite of the intended effect.<sup>38</sup> Children of this age have difficulty making the cognitive connection between their misconduct and their punishment. These children can, however, very easily make the association between a caregiver being upset and employing corporal punishment. This forms an association between anger and the use of force in the child's mind, which has been shown to increase violent behavior in children who receive corporal punishments and can even increase the likelihood that the child punished this way will one day physically abuse his or her own children.<sup>39, 40</sup> Additionally, when daycare-aged children experience neglect or abuse, they are far more likely to exhibit a less developed theory of mind, meaning that the child has underdeveloped social skills, has trouble empathizing with others, and has difficulty understanding that other people are unique individuals.<sup>41</sup> With proper childcare standards in place, the psychological damage done to children through corporal punishment, neglect, and abuse could be eliminated entirely.

## V. ALABAMA MOVING FORWARD

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<sup>39</sup> Gershoff, Elizabeth T.; Sattler, Kierra M. P.; Ansari, Arya, "Strengthening Causal Estimates for Links Between Spanking and Children's Externalizing Behavior Problems." *Association for Psychological Science*, vol 29, no 1, January 2018, pp. 110-120.

<sup>40</sup> Becker-Blease, Kathryn and Patricia K. Kerig. "Maltreatment of Preschool-Age Children." *Child Maltreatment: A Developmental Psychopathology Approach.*, American Psychological Association, 2016, ppAl. 37-54. Concise guides on trauma care book series. EBSCOhost, doi:10.1037/14898-003.

<sup>41</sup> *Ibid.*

<sup>42</sup> Vollers, Anna Claire. "As Number of Licensed Child Care Centers Declines in Alabama, Nonprofits Work to Reverse the Trend." *AL.com*. N.p., 9 Feb. 2017. Web. 7 Feb. 2018.

<sup>43</sup> The Child Care Safety Act, H.B. 277 (2017). Print



The Alabama daycare system in its current form offers exemptions for many and meaningful childcare for few. With roughly half of the daycare facilities in the state operating without a license, the standards for child health, safety, and education have fallen shockingly low.<sup>42</sup> A previous attempt to amend this law came in the form of the Child Care Safety Act, but this bill neither passed nor addressed the true problem plaguing the Alabama daycare system: the religious exemptions themselves.<sup>43</sup> The religious exemption to licensure creates a wildly inequitable system of childcare whereby children placed into unlicensed facilities receive a lesser education and quality of childcare than children whose parents placed them into licensed facilities. This inequity not only violates the Equal Protection Clause of the 14<sup>th</sup> Amendment, but also causes a great deal of harm to the students of unlicensed facilities more broadly.<sup>44, 45</sup> Eliminating the exemption would drastically improve the intellectual and psychological development of Alabama's children, leading to truly beneficial daycare programs.<sup>46, 47</sup> Therefore, in the interest of the children of Alabama, the religious exemption to daycare licensure should be eliminated in its entirety.

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45 Roantree, Bronwyn. "Challenging Statutory Accommodations for Religiously Affiliated Daycare: An Application of the Third-Party-Harm Doctrine." *Fordham Law Review* 86 (2017): 1393–431. LexisNexis Academic [LexisNexis]. Web. 3 Feb. 2018.

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47 Becker-Blease, Kathryn and Patricia K. Kerig. "Maltreatment of Preschool-Age Children." *Child Maltreatment: A Developmental Psychopathology Approach*, American Psychological Association, 2016, pp.A1. 37–54. Concise guides on trauma care book series. EBSCOhost, doi:10.1037/14898-003.



## *Should Fido Be Allowed in a Courtroom? The Effects of Courthouse Therapy Dogs on the Psychological Wellbeing of Abused Children*

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### ABSTRACT

First pioneered in the late 1700s, Animal-Assisted Therapy has rapidly grown in the last few decades. Animal-Assisted Therapy is the process of using animals as a therapeutic medium for human rehabilitation. Common examples of this include guide dogs and emotional support animals. As the uses for therapy animals have expanded outside of its initial boundaries, there has been an increasing presence of therapy dogs in the field of trauma rehabilitation. Due to the success of this animal therapy, there has been a shift in the focus of these programs to childhood trauma victims in order to assist them in overcoming their current trauma and to prevent long-term psychological damage. The increasing popularity of these programs has influenced judges and prosecutors alike across the United States to take notice of the benefits these therapies provide. Piloted in several courtrooms in the United States, therapy dogs have been introduced into the courtroom in order to ease the stress and emotional pain that accompanies children facing their past aggressors in an overwhelming courtroom environment. These pets are allowed to accompany their human companions to the stand, and are also used in depositions and



psychotherapy sessions before and after the trial. By evaluating the history of service animals in the therapy field and the psychological effects of childhood abuse, this essay seeks to emphasize the benefits of therapy dogs in a courthouse setting, and argue for their use in all child abuse cases.

## I. INTRODUCTION

The idea of incorporating Animal-Assisted Therapy into the courthouse system is a relatively new one. Beginning in the 20<sup>th</sup> century, the first well-known instance of the use of therapy dogs in the retrieval of a testimony in a child abuse case dates back to a child molestation case in Queens, New York, in 1989.<sup>470</sup> Since then, judges across the United States have begun to allow the presence of courthouse therapy dogs within their jurisdictions. Independent programs developed by non-profit organizations have sprung up in the last decade, which raises the question of the effectiveness and constitutionality of such a practice. Opponents argue that the presence of courthouse therapy dogs alters the jury's view of the victim, making it more likely than not that the jury will soften their view of the victim, and as a result not evaluate the defendant's argument with a fair mind. In contrast, proponents of the program argue against this position and claim that the courthouse therapy dogs offer far more benefits to the victim that will result in a more accurate testimony. Furthermore, proponents of these services point to the psychoanalytical research behind similar programs, and claim that the comfort provided by these service animals will potentially lead to less long-term psychological damage than previously shown.

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<sup>470</sup> See Lin, "A Prosecutor's Best Friend: Retired Guide Dog Tips Scales of Blind Justice Toward Victims"



This essay will begin examining this topic by delving into the short-term and long-term psychological effects of abuse on the brain to demonstrate why therapy dogs are used in these cases in the first place. Next, the essay will explore the history of the use of pets as a therapeutic medium, with careful attention dedicated to the history of pets in courtroom cases. Thirdly, the purpose of animal therapy usage in courtroom settings will be outlined, followed by an account of the benefits of Animal-Assisted Therapy in the courtroom. Finally, the essay will represent arguments against the use of courthouse therapy dogs, as it pertains to consistent legal standards. The essay will conclude with rebuttals to these arguments and will outline the primary arguments of the author by using supporting evidence from prior sections.

## **II. PSYCHOLOGICAL EFFECTS ON THE BRAIN DUE TO CHILDHOOD**

### **ABUSE**

To fully understand the need for Animal-Assisted Therapy in courtrooms for childhood trauma cases, it is extremely important to understand the ramifications traumatic experiences have on the brain and the child's overall well-being. In a study completed in Ohio in October 2014, it was proven that children witnessing cases of domestic violence or other related charges are deeply affected by these interactions, with many of the children eventually developing post-traumatic stress disorder.<sup>471</sup> Childhood trauma has both short-term and long-term psychological effects on the brain. In the long term, researchers have found that both mental and physical abuse during the pre-pubescent stage has led to increased vulnerability to depression, post-traumatic

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<sup>471</sup> See Levendosky, Bogat, Martinez-Torteya, "PTSD symptoms in young children exposed to intimate partner violence," Pages 187-188



stress disorder, and addiction among these victims.<sup>472</sup> Further, researchers have discovered that childhood abuse victims tend to have a general reduction in brain size.<sup>473</sup> In a study completed at Harvard Medical School, researchers found up to a 6.3% reduction in the volume of two portions of the hippocampus, and up to a 4.3% reduction in the subiculum and presubiculum portions of the brain in victims of childhood abuse.<sup>474</sup> Reduction in volume of these brain areas can lead to a host of problems in the child's adult life, such as increased risky behavior and intensified anxiety.<sup>475</sup> Although the long term effects of childhood abuse are as important as the short term effects, the true reasoning behind the use of courthouse therapy dogs relates to the short term effects of it. Regarding short term effects on the brain, researchers have found that victims of childhood abuse show signs of increased aggression, anxiety, depression, and eating disorders, along with many other physical, behavioral, and economic issues.<sup>476</sup> With this altered brain activity affecting the well-being of the child, the stresses of court proceedings in an overwhelming environment and being forced to immediately face their aggressor can heighten these conditions.<sup>477</sup> Children have been known to refuse to give testimonies against their aggressors, or give false or misleading testimonies due to the emotional stress associated with

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<sup>472</sup> See Szalavitz, "How Child Abuse Primes the Brain for Future Mental Illness," Lines 10-13

<sup>473</sup> See Teicher, Anderson, Pocari "Childhood maltreatment is associated with reduced volume in the hippocampal subfields CA3, dentate gyrus, and subiculum," E563, Lines 1-4

<sup>474</sup> See Teicher, Anderson, Pocari "Childhood maltreatment is associated with reduced volume in the hippocampal subfields CA3, dentate gyrus, and subiculum," E563, Lines 12-26

<sup>475</sup> See Szalavitz, "How Child Abuse Primes the Brain for Future Mental Illness," Lines 56-57

<sup>476</sup> See Runyan, Wattam, Ikeda, Hassan, Ramiro "Child abuse and neglect by parents and other caregivers," Pages 69-70

<sup>477</sup> See Goodman, Taub, Jones, England, Port, Rudy, Melton "Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims," Pages 44-60



their respective traumatic experiences.<sup>478</sup> At times, children have even been deemed ‘uncredible witnesses,’ as their testimonies were inconclusive or inconsistent.<sup>479</sup> With this predicament persisting in the courtroom, it is of the utmost importance to find a solution to the issue at hand. Thus, many have turned to the benefits of Animal-Assisted Therapy as an answer to this challenging question.

### III. HISTORY OF THE USE OF PETS AS A THERAPEUTIC MEDIUM

Pets have long been used as a therapeutic medium for their human companions. Although there are records indicating the use of pets as a comforting presence in ancient times, the first recorded intentional use of animals as a therapy dates back to the founding of the York Retreat, a treatment center for the mentally ill, located in England in 1792.<sup>480</sup> By encouraging patients to care for domesticated animals, they benefitted both physically and psychologically.<sup>481</sup> Reports from the York Retreat indicate that patients became more socially aware after interacting with the animals, as well as more calm and collected in their interactions with the other guests and physicians.<sup>482</sup> A forerunner in the field of mental health, the York Retreat introduced a revolutionary concept into a seriously misunderstood topic.<sup>483</sup> By opening up the idea of using animals for therapeutic mediums to assist the mentally ill, the York Retreat created a new era within the field of medicine. The next documented use of domesticated animals within the

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<sup>478</sup> *Id.* Pages v-15

<sup>479</sup> See Koriat, Goldsmith, Schneider, Nakash-Dura “The Credibility of Children’s Testimony: Can Children Control the Accuracy of Their Memory Reports?” Pages 405-408

<sup>480</sup> See Cusack, *Pets and Mental Health* Chapter 1

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Id.*



medical field appears in the work of Florence Nightingale.<sup>484</sup> In the late 1800s, she was among the first in her field to note the therapeutic potential of domesticated animals in the assistance of improving the psychological wellbeing of hospital patients.<sup>485</sup> Noting the decreasing rates of anxiety within children and adults in psychiatric institutions, Nightingale opened the door to the thought of Animal-Assisted Therapy permanently remaining in hospital settings.<sup>486</sup> However, as important as her work was, these ideas propagated by Nightingale would not be fully incorporated into the field of medicine until the beginning of the 20<sup>th</sup> century.

With the re-introduction of the use of dogs in psychotherapy by Sigmund Freud in 1933, Animal-Assisted Therapy has grown rapidly in the last few decades.<sup>487</sup> As Animal-Assisted Therapy has evolved over the ages, there has been particular growth with regards to the connections between the benefits associated with it and mental health.<sup>488</sup> In regards to the use of pets within the court system, the introduction of therapy dogs into legal proceedings is quite recent. Beginning in 1989, the concept of using retired guide dogs as companions for children in abuse cases arose with the famous Sheba, a guide dog used in a sexual abuse case involving a child in Queens, New York.<sup>489</sup> Not long after in 2005, two Labrador Retrievers were officially hired by the Prosecutor's Office of King County in Seattle, Washington, in order to assist young children in abuse cases and in drug court.<sup>490</sup>

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<sup>484</sup> See Ernst, "Animal-Assisted Therapy: An Exploration of Its History, Healing Benefits, and How Skilled Nursing Facilities can Set Up Programs" Page 27-28

<sup>485</sup> *Id.* at 28

<sup>486</sup> See Ernst, *supra* note 16

<sup>487</sup> *Id.* at 28-29

<sup>488</sup> *Id.* at 29-32

<sup>489</sup> See Lin, *supra* note 1

<sup>490</sup> See Clarridge, "Dogs led comfort to kids in court," Lines 1-10



As the use of therapy dogs has become increasingly popular, non-profit organizations dedicated to providing therapy dogs to parties going through court proceedings, such as Canine Companions for Independence, have sprung up across the United States.<sup>491</sup> Currently, seven states have laws specifically protecting the victims right to use a therapy dog in court, while others maintain court-to-court rules on the appropriate use of therapy dogs in a legal setting.<sup>492</sup> As awareness of the effects of abuse on mental health has spread, the argument towards promoting the use of therapy dogs within courtroom settings has grown as well. With this particular form of Animal-Assisted Therapy gaining popularity, many predict that it will be available in almost all courtrooms across the United States, in part due to the benefits Animal-Assisted Therapy offers.<sup>493</sup>

#### IV. THE PURPOSE OF ANIMAL USE IN COURTHOUSE SETTINGS

One of the most important issues to understand in this debate of whether or not animals may assist victims in child abuse cases is the context in which the animals will be used. Before trial proceedings, victims are often brought in to give a testimony within the confines of the Prosecutor's office.<sup>494</sup> In this scenario, without a trusted companion in the room, children often refuse to speak or give such small bits of information that a complete deposition is impossible to obtain.<sup>495</sup> Allowing the victim to have a therapy dog accompany them in these scenarios encourages them to share their experience.<sup>496</sup>

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<sup>491</sup> *Id.* at 30-33

<sup>492</sup> See Bergal, "Canines Helping Out In The Courtroom," Lines 23-34

<sup>493</sup> *Id.* at 23-28

<sup>494</sup> *Id.* at 19-22

<sup>495</sup> See Lin, *supra* note 1

<sup>496</sup> See Bergal, "Canines Helping Out In The Courtroom," Lines 8-12



During the actual trial proceedings, the context in which the dog is used is somewhat similar. During the trial, children are often called to the stand to give a testimony of the traumatic events they experienced in front of a full courtroom. When children are permitted to use a therapy dog, the handler typically walks the dog in prior to the jury entering the courtroom.<sup>497</sup> Then, the child will approach the stand when called and will be able to pet the dog while providing their testimony.<sup>28</sup> In certain circumstances, judges will allow the child to approach the stand with the dog by their side.<sup>28</sup> This experience of having to explain how their caretaker or another party abused them to a room full of unfamiliar people can be extremely traumatic for the child, which is why many judges across the United States allow children to use therapy dogs within the courtroom setting.<sup>498</sup>

## V. BENEFITS OF ANIMAL-ASSISTED THERAPY IN THE COURTROOM

The benefits of Animal-Assisted Therapy to victims of abuse are the most important topic within this discussion. Animal-Assisted Therapy offers many physical and psychological benefits to their prospective recipients. However, as mentioned in the above sections, courtroom therapy dogs primarily assist the children with the psychological effects of abuse.

One of the primary benefits associated with Animal-Assisted Therapy relating to childhood trauma victims is the ability of the animal to reduce their patron's anxiety levels.<sup>499</sup> When approaching the stand or being asked to explain a horrific event, the victim often becomes very

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<sup>497</sup> *Id.* at Courtroom Dog Rules Section

<sup>498</sup> See Lin, *supra* note 1

<sup>499</sup> See Ernst, "Animal-Assisted Therapy: An Exploration of Its History, Healing Benefits, and How Skilled Nursing Facilities can Set Up Programs," Page 27



anxious.<sup>500</sup> At times, children have refused to even speak of the events that have occurred due to their heightened anxiety.<sup>501</sup> When therapy dogs are allowed to accompany a child, either to the stand or to a deposition, this additional presence reduces the victims' anxiety levels in order to allow the victim to give a clear testimony of the events that have occurred.<sup>502</sup> Although this benefit is one of the most crucial aspects of the use of courtroom therapy dogs, it is actually a byproduct of Animal-Assisted Therapy's two other most important effects on the child: increased socialization and mental clarity.<sup>503</sup> It has been shown that with the introduction of a pet into a tumultuous environment, victims show increased levels of socialization, which often result in the victim willingly giving full testimonies even if they are still suffering from some of the other effects of their trauma.<sup>34</sup> This fact is not only important for the victim's health, but it is also important for the outcome of the case. In addition, due to increased mental clarity, victims are able to give a more reliable testimony to the court.<sup>34</sup> By ensuring that the testimony is as reliable as possible, the case becomes more credible and typically results in a fairer trial proceeding.

Furthermore, therapy dogs help to reduce a victim's susceptibility to depression.<sup>504</sup> After experiencing any type of emotional or physical abuse, there is always a possibility that the child in question will experience depression either immediately after or even long after the incident occurs.<sup>35</sup> With the introduction of therapy animals into the child's situation, there are reports of

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<sup>500</sup> See Goodman, Taub, Jones, England, Port, Rudy, Melton "Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims," Pages 40-41

<sup>501</sup> See Clarridge, "Dogs led comfort to kids in court," Lines 26-40

<sup>502</sup> See Bergal, *supra* note 28

<sup>503</sup> See Ernst, "Animal-Assisted Therapy: An Exploration of Its History, Healing Benefits, and How Skilled Nursing Facilities can Set Up Programs," Page 28-29

<sup>504</sup> See Runyan, Wattam, Ikeda, Hassan, Ramiro "Child abuse and neglect by parents and other caregivers," Pages 69-70



increased positive emotions, such as increased confidence.<sup>505</sup> Additionally, these positive emotions can drive down feelings of fear, loneliness, and sadness, which all result in better mental health for the victim.<sup>36</sup> After being subjected to emotional or physical violence, some children become extremely aggressive due to their situation, and courtrooms tend to heighten this aggression.<sup>35</sup> As shown in other behavioral studies, it has been found that pets can actually lessen these levels of agitation and promote a more amicable relationship between the child and their prospective council.<sup>36</sup>

Overall, it is the culmination of these benefits that represents the true value of Animal-Assisted Therapy in a courtroom setting, and thus represents the foundation for the argument of incorporating Animal-Assisted Therapy into every courtroom in the United States.

## **VI. ARGUMENTS AGAINST THE USE OF ANIMALS IN COURTHOUSE SETTINGS**

The primary argument against the use of animals in courtrooms relates to the concept of bias.<sup>506</sup> Many defense attorneys have argued that by allowing the witness to bring a dog onto the stand, the judges and juries are made more partial to and accepting of the witness's testimony, thereby creating a bias against the defendant's case.<sup>507</sup> Some attorneys even argue that the mere presence of the dog reinforces belief in the jury's mind that the witness is innocent.<sup>38</sup> The primary reason many defense attorneys have an issue with this bias is because it may hurt their

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<sup>505</sup> See Ernst, "Animal-Assisted Therapy: An Exploration of Its History, Healing Benefits, and How Skilled Nursing Facilities can Set Up Programs," Page 28-30

<sup>506</sup> See Bergal, "Canines Helping Out In The Courtroom," Prejudicing the Jury? Section

<sup>507</sup> *Id.*



case.<sup>508</sup> Many attorneys argue that bias in a courtroom provides sufficient grounds for an appeal.<sup>39</sup> Over the years, there have been a number of cases and appeals brought to challenge the use of therapy dogs.<sup>39</sup> For example, in *State of Washington v. Duane Allen Moore*, Moore argued that the presence of the service dog unfairly violated due process rights and that “the trial court improperly commented on the evidence.”<sup>509</sup> The judge ruled that there was no evidence to suggest that the animal’s presence had a marked effect on Ms. Moore’s appearance, and thus did not violate Mr. Moore’s due process rights.<sup>40</sup> Further, the judge noted that in this case, it also provided no evidence that the presence of the dog acted as a comment on the presented evidence.<sup>40</sup> Currently, as with this case, all appeals made on the basis of this perceived bias have been overturned.<sup>39</sup>

## VII. ARGUMENTS FOR ANIMAL-ASSISTED THERAPY USE IN COURTS

Although the previous arguments have a valid foundation, their proponents fail to consider the actions that can be taken in order to mitigate these concerns. For example, many states within the United States have specific rules and guidelines that the handlers and dogs must follow in order to reduce bias.<sup>510</sup> By arriving to the stand prior to the jurors entering the room, the argument that the visible presence of the dog will affect jurors’ mindset is completely addressed by having the visibility of the dog severely reduced.<sup>511</sup> Further, judges can require that the dogs

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<sup>508</sup> See Ensminger, “Cases and Statutes on the use of Dogs by Witnesses While Testifying in Criminal Proceedings” Introduction Section

<sup>509</sup> See *State of Washington v. Moore*

<sup>510</sup> See Ensminger, *supra* note 39

<sup>511</sup> See *California v. Chenault*



lie down completely next to the victim, therefore preventing the jurors from ever seeing the dog at all.<sup>512</sup> In addition, when choosing the jury, the judge may preclude that people especially partial to dogs, based on either their profession, extracurricular activities, or any other convicting evidence, may not be selected to serve on the jury.<sup>513</sup> By removing this possible source of bias, this concern of the opposition is also addressed.

## VIII. CONCLUSION

In conclusion, the arguments presented by the opposition are easily addressed with regulation to the specific use of therapy dogs within the United States court system. The benefits provided to the victims of these horrible abuses is of far greater value than the minimal implication of bias that is risked in the process of allowing dogs to enter the courtroom. Not only is the use of therapy dogs a benefit to the justice system by fostering an environment that allows for more accurate testimonies from traumatized children, but it is also the humane action to take for the sake of the children's mental health. The children in these circumstances have experienced some of the most unspeakable horrors, and to ask that they be provided with emotional support is the least the court system could do. Overall, by implementing these programs in jurisdictions across the nation, the victims of these abuses will not go unheard, and the traumatizing events connected to the court proceedings will no longer cause further harm to the victim.

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<sup>512</sup> See *Tennessee v. Reyes*

<sup>513</sup> See Streicker, "Jury Selection in Criminal Cases" Challenges to the Venire Section