2012

Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment

Michael Coenen
Louisiana State University Law Center, michaelcoenen@lsu.edu

COLUMBIA LAW REVIEW

VOL. 112 JUNE 2012 NO. 5

ARTICLE

OF SPEECH AND SANCTIONS: TOWARD A PENALTY-SENSITIVE APPROACH TO THE FIRST AMENDMENT

*Michael Coenen**

Courts confronting First Amendment claims do not often scrutinize the severity of a speaker's punishment. Embracing a "penalty-neutral" understanding of the free speech right, these courts tend to treat an individual's expression as either protected, in which case the government may not punish it at all, or unprotected, in which case the government may punish it to a very great degree. There is, however, a small but important body of "penalty-sensitive" case law that runs counter to the penalty-neutral norm. Within this case law, the severity of a speaker's punishment affects the merits of her First Amendment claim, thus giving rise to categories of expression that the government may punish, but only to a limited extent. This Article defends penalty-sensitive free speech adjudication and calls for its expanded use within First Amendment law. Pulling together existing strands of penalty-sensitive doctrine, the Article identifies five ways in which penalty-sensitive analysis can further important constitutional objectives: (a) by increasing fairness for similarly situated speakers; (b) by mitigating chilling effects on protected speech; (c) by facilitating the "efficient breach" of constitutionally borderline speech restrictions; (d) by rooting out improper government motives; and (e) by promoting transparency in judicial decisionmaking. The Article also considers and rejects potential objections to the penalty-sensitive approach, concluding that it will often generate proper results in difficult First Amendment cases.

* Climenko Fellow and Lecturer on Law, Harvard Law School. Thanks to Akhil Amar, Anna Arkin-Gallagher, Douglas Berman, Anya Bernstein, Michael Burstein, Joseph Blocher, Dan Coenen, John Coyle, Jaime Dodge, Tom Donnelly, Avlana Eisenberg, Barry Friedman, Heather Gerken, Jeremy Golubcow-Teglasi, Zach Gubler, Rebecca Haw, Paul Horwitz, Michael Klarman, Ashley Lott, Dina Mishra, Sonja Ralston, Chris Sherman, Richard Tao, Susannah Tobin, Cora True-Frost, Anthony Vitarelli, Eugene Volokh, and Daniel Winik for helpful comments and suggestions. Thanks also to Jennifer Green and the staff of the *Columbia Law Review* for skillful editorial assistance. All errors are mine.

INTRODUCTION

Governments restrict speech by punishing speakers.[1] They incarcerate inciters,[2] make defamers pay damages,[3] and put pornographers on probation.[4] They fine broadcasters,[5] enjoin publishers,[6] and sanction internet service providers.[7] They lengthen the sentences of hate crime defendants[8] and hold loose-lipped litigants in contempt of court.[9] They fire employees who criticize superiors,[10] discipline schoolchildren who protest in the classroom,[11] and withhold subsidies from applicants who espouse disfavored beliefs.[12] In these and other circumstances, state actors implicate the free speech right not just by imposing restrictions on expressive behavior, but also by fortifying these restrictions with the threat and exaction of punishment.

---

1. See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.").

2. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (reviewing free speech claim of defendant sentenced to one to ten years' imprisonment (and fined $1,000) under Ohio Criminal Syndicalism statute).

3. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964) (addressing First Amendment issues arising from $500,000 defamation verdict).

4. See, e.g., Roth v. United States, 354 U.S. 476, 485 (1957) (rejecting First Amendment challenge to obscenity prosecutions); see also Kingsley Books, Inc. v. Brown, 354 U.S. 436, 444 (1957) (describing sentence of one defendant in *Roth* as two years' probation).

5. See, e.g., Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 323 n.3 (2d Cir. 2010) (noting FCC issued $8 million in fines for indecency violations in 2004), cert. granted, 131 S. Ct. 3065 (2011).

6. See, e.g., Near v. Minnesota, 283 U.S. 697, 722–23 (1931) (reviewing district court order enjoining publication of allegedly defamatory periodical).

7. See, e.g., John Doe, Inc. v. Mukasey, 549 F.3d 861, 864 (2d Cir. 2008) (addressing internet service provider's First Amendment challenge to statutory requirements prohibiting disclosure of investigative requests).

8. See, e.g., Wisconsin v. Mitchell, 508 U.S. 476, 479–81 (1993) (reviewing two-year enhancement of aggravated battery sentence under Wisconsin hate crime statute).

9. See, e.g., Eaton v. City of Tulsa, 415 U.S. 697, 703–04 (1974) (Rehnquist, J., dissenting) (discussing contempt citation and resulting $50 fine issued against witness who used term "chicken shit" in open court).

10. See, e.g., Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 565 (1968) (reviewing school district's dismissal of teacher for criticizing school board in letter to local newspaper).

11. See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) (reviewing public school's suspension of students who wore black armbands in protest of Vietnam War).

12. See, e.g., NEA v. Finley, 524 U.S. 569, 576 (1998) (reviewing statutory requirement that National Endowment for the Arts "'tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public'" in reviewing grant applications (alteration in original) (quoting 20 U.S.C. § 954(d)(1) (2006))).

While punishments lie at the core of real-life First Amendment disputes, they occupy only the peripheries of First Amendment analysis. In particular, the *severity* of the penalty imposed—though of central importance to the speaker who bears it—does not normally affect the merits of his free speech claim. Fighting words doctrine does not distinguish between ordinances that punish with fines and those that punish with imprisonment.[13] Commercial speech doctrine does not distinguish between large and small monetary penalties.[14] Public employment doctrine does not distinguish between temporary suspensions and permanent dismissals.[15] Much free speech review follows this pattern, asking the question of *whether*, and not *to what extent*, the government may punish expressive conduct. Consequently, First Amendment litigation tends to proceed as a winner-take-all affair. Speech is either protected, in which case it may not be punished, or unprotected, in which case it may be punished to a very great degree.[16] In this respect, the standard method of First Amendment analysis is *penalty-neutral*.

This penalty-neutral approach to free speech adjudication is no doubt familiar to students of First Amendment law. Less familiar is its *penalty-sensitive* alternative, which treats the severity of a speaker's punishment as relevant to the merits of his First Amendment claim. On a penalty-sensitive understanding of the free speech right, some forms of expression warrant neither total immunization against nor total exposure to the threat of government-sponsored sanction. Rather, for such expression, the First Amendment permits some forms of punishment but not others. Thus, to the penalty-sensitive analyst, it matters whether prison sentences are long or short, whether civil damage awards are large or small, whether public workplace dismissals are permanent or temporary, and so on. Such an analyst asks not just, "What kinds of speech may the government sanction?" She also asks, "What kinds of sanctions may the government impose on speech?"

Without a doubt, penalty sensitivity is an uncommon feature of the First Amendment landscape. Indeed, it is sufficiently uncommon that,

---

13. Cf. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . insulting or 'fighting' words.").

14. Cf. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489, 493 (1996) (invalidating enforcement action resulting in collection of $400 fine).

15. See Rutan v. Republican Party of Ill., 497 U.S. 62, 75 (1990) (observing "there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy"). But see infra Part II.A.3 (noting limited instances of penalty-sensitivity in public employment cases).

16. See Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 27 (1981) (noting "[l]ong criminal sentences and enormous civil damage awards are not uncommon, even for speech at the margins of constitutional protection").

among those few scholars who have paused to consider the matter, there is general agreement that courts reviewing free speech cases rarely, if ever, employ the penalty-sensitive approach. Hence, Christine Jolls, Cass Sunstein, and Richard Thaler have observed that "no one has suggested that the First Amendment imposes limits on the severity of punishment for speech that the government is entitled to criminalize."[17] Vincent Blasi has similarly noted that, with one "limited" exception, "the Supreme Court has been unwilling to erect constitutional limitations on how severely persons can be sanctioned for engaging in unprotected expression."[18] Such conclusions comport with statements from the Court itself, whose members have sometimes rejected, in no uncertain terms, the idea of imposing penalty-based limits on the government's power to restrict speech. In declining to impose such limits, the Court has proclaimed, for instance, that "the First Amendment . . . protects state employees . . . from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee'"[19] and that "it is not for this Court to limit the State in resorting to various weapons in the armory of the law."[20] Understood in isolation, such statements might be read to indicate that free speech adjudication is an exclusively penalty-neutral affair.

This view, however, is too strong. Penalty-sensitive free speech analysis may be less prevalent than its penalty-neutral counterpart, but it is by no means nonexistent. Indeed, the Court, individual Justices, and some lower courts have tinkered with penalty-sensitive analysis in a variety of free speech settings. One finds penalty sensitivity at work, for example, in Oliver Wendell Holmes's famous dissent in *Abrams v. United States*, which characterized lengthy prison sentences for seditious libel as a significant First Amendment problem.[21] More recently, the Court assumed a penalty-sensitive stance in *FCC v. Pacifica Foundation*, where, in upholding an FCC enforcement action against First Amendment attack, it pointed to the lenience of the sanction imposed.[22] Penalty sensitivity manifests itself in the Court's practice of reviewing First Amendment vagueness and overbreadth claims more aggressively in the criminal context than in

17. Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471, 1517 (1998).

18. Blasi, supra note 16, at 26–27; see also Tom W. Bell, Treason, Technology, and Freedom of Expression, 37 Ariz. St. L.J. 999, 1039 (2005) ("[T]he Supreme Court has at best only suggested that excess punishments may render a restriction on speech more restrictive than necessary.").

19. *Rutan*, 497 U.S. at 76 n.8 (quoting Rutan v. Republican Party of Ill., 868 F.2d 943, 954 n.4 (7th Cir. 1989), aff'd in part, rev'd in part, 497 U.S. 62); see also Smith v. Fruin, 28 F.3d 646, 649 n.3 (7th Cir. 1994) ("[E]ven minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures.").

20. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989) (quoting Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957)).

21. 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

22. 438 U.S. 726, 730 (1978).

the civil context, and in some lower courts' refusal to extend First Amendment protection to public employees who have not suffered sufficiently "adverse" forms of retaliation. Penalty-sensitive analysis underlies the rule of *Gertz v. Robert Welch, Inc.*, which permits states to award "actual damages," but not presumed or punitive damages, in certain categories of defamation actions.[23] In these and other cases, courts have signaled that the scope of the free speech right depends on the harshness of the penalty administered.

The shared penalty-sensitive character of these cases has gone largely unnoticed—and hence unevaluated—by judges and scholars alike. When it has flirted with penalty-sensitive review, the Court has proceeded in an ad hoc manner, neglecting to explain why, how, or when the severity of a speaker's penalty should affect the scope of his First Amendment rights. And legal academics have left this field unexplored. Although some scholars have discussed individual areas of doctrine in penalty-sensitive terms,[24] no one has previously tied these doctrinal lines together or evaluated in general the merits and demerits of the penalty-sensitive approach. One thus searches the case law and legal literature in vain for a systematic assessment of penalty-sensitive free speech analysis.

Given penalty sensitivity's now limited—but still unmistakable—presence within First Amendment law, it is well worth asking whether this sort of analysis ought to be included. Should we regard existing examples of penalty-sensitive analysis as aberrant mistakes not to be repeated? Or should we regard them as the scattered seeds of a promising doctrinal development? What, in short, are the promises and pitfalls of penalty-sensitive free speech analysis? And if this approach does have merit, how should courts pursue it?

---

23. 418 U.S. 323, 349 (1974).

24. See, e.g., Tom Bennigson, *Nike* Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?, 39 Conn. L. Rev. 379, 448 (2006) (inquiring "whether the First Amendment limits the severity of the penalties that may be imposed for false statements by corporations"); Richard A. Epstein, Was *New York Times v. Sullivan* Wrong?, 53 U. Chi. L. Rev. 782, 817 (1986) ("[O]ne clear defect of the actual malice requirement of *New York Times* is that by making basic liability turn on subjective intentions, it blurs the line between actual and punitive damages and thereby unwittingly simplifies the recovery of the latter."); Pierre N. Leval, Commentary, The No-Money, No-Fault Libel Suit: Keeping *Sullivan* in Its Proper Place, 101 Harv. L. Rev. 1287, 1288 (1988) ("I suggest that recognition of a no-damages libel suit, free of *Sullivan*'s actual malice requirement, would improve the efficiency of the cause of action, and reduce its costs and burdens for both defendants and plaintiffs."); Rosalie Berger Levinson, Superimposing Title VII's Adverse Action Requirement on First Amendment Retaliation Claims: A Chilling Prospect for Government Employee Speech, 79 Tul. L. Rev. 669, 693–99 (2005) (discussing emergence of penalty-sensitive "adverse action" requirement for public employees' First Amendment retaliation claims); William W. Van Alstyne, First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution," 25 Wm. & Mary L. Rev. 793, 802-09 (1984) (discussing penalty-sensitive aspects of Holmes's dissent in *Abrams*, as well as problem of punitive damages in defamation proceedings).

This Article addresses these questions. Pulling together existing strands of penalty-sensitive doctrine, it argues that, while penalty sensitivity's utility will vary from case to case, the approach is fully capable of furthering salutary constitutional objectives. Penalty-sensitive analysis can, for example, equalize constitutional treatment of similarly situated speakers, root out improper motives, facilitate "efficient breaches" of constitutionally problematic speech restrictions, and increase the transparency of judicial decisionmaking. What is more, the potential problems presented by the penalty-sensitive approach are not unduly severe. Penalty-sensitive rules and rulings comport with traditional understandings of the judicial role. They are workable in practice. And they do not threaten to vitiate the free speech guarantee. For all these reasons, courts should seek to build upon the penalty-sensitive foundations they have already laid down.

The Article proceeds as follows. Parts I and II advance the descriptive thesis of this Article, with Part I outlining the criteria of penalty-sensitive analysis and Part II cataloging existing examples of penalty-sensitive analysis arising within both First Amendment law and case law involving other constitutional rights. Parts III and IV then defend penalty sensitivity as a worthwhile form of free speech review. Part III explains how penalty-sensitive free speech review serves beneficial purposes: promoting fair judicial outcomes, mitigating chilling effects, "preserving" unprotected speech, screening for improper government motives, and enhancing transparency. Part IV anticipates and rebuts objections to the practice, including the claims that it is illegitimate, that it is too difficult to implement, and that it will undermine the free speech guarantee.

Before proceeding further, let me offer three clarifications regarding the scope of the project. First, this is not an Article about how to conceptualize the relationship between penalty-sensitive doctrine and the precise meaning of the Free Speech Clause. The descriptive analysis sets aside the question whether penalty-sensitive rules derive from a straightforward reading of the First Amendment's prohibition on "*abridging* the freedom of speech"[25] or whether penalty-sensitive doctrine is better regarded as embodying a set of "constitutional decision rules" designed to facilitate indirect or prophylactic judicial enforcement of this prohibition.[26] And the normative analysis does not address the textual or histori-

25. U.S. Const. amend. I (emphasis added).

26. See Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 15 (2004) (distinguishing between "constitutional operative propositions (judicial statements of what the Constitution means)" and "constitutional decision rules (judicial statements of how courts should decide whether the operative propositions have been complied with)" (emphasis omitted)); Richard H. Fallon, Jr., The Supreme Court, 1996 Term—Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 57 (1997) (arguing "the Court must often craft doctrine that is driven by the Constitution but does not reflect the Constitution's meaning precisely"); Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649, 1655–58 (2005) (evaluating

cal legitimacy of penalty-sensitive review. These issues matter, and they may affect some people's attitudes toward the penalty-sensitive approach. But they lie beyond the reach of this Article, which concerns penalty sensitivity's existing presence in First Amendment doctrine and its usefulness as a tool of free speech analysis.

Second, in endorsing penalty sensitivity as a method of First Amendment analysis, this Article takes no position on whether, as a general matter, First Amendment doctrine should be more or less protective of speech than is currently the case. As Part IV.C explains further, penalty-sensitive free speech review is capable of both expanding and shrinking the zone of First Amendment protection, and this Article does not advocate for one application over the other. That is not to say that the long-term consequences of incorporating penalty-sensitive review into First Amendment law are irrelevant to the analysis that follows; any appraisal of penalty-sensitive review must ask, as this one does, whether the method will tend to strengthen or weaken the First Amendment's rights-vindicating effects.[27] In the end, however, this Article is about *how* to draw First Amendment boundaries, not where those boundaries should lie.

Finally, the Article's primary focus on the freedom of speech should not be taken to imply that free speech cases are uniquely amenable to the penalty-sensitive approach. If anything, the arguments here may lead to a different conclusion: namely, that penalty sensitivity is capable of improving not only free speech doctrine but other areas of constitutional doctrine as well. One might, for instance, employ penalty-sensitive analysis in cases involving the free exercise right, substantive and procedural due process rights, and the newly revitalized right to bear arms.[28] To be sure, these observations are only preliminary: How, why, and to what extent penalty-sensitive analysis should occur outside the free speech setting are questions more raised than answered in the discussion that follows. For now, however, it suffices to note that this Article's largely positive story about penalty-sensitive analysis and the freedom of speech sug-

---

decision rules model); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978) ("[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of federal courts' role in enforcing the norm."); David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 190 (1988) (claiming "'prophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law"); see also Paul Horwitz, Three Faces of Deference, 83 Notre Dame L. Rev. 1061, 1140–46 (2008) (reviewing literature on constitutional decision rules).

27. Cf. infra Part IV.C (responding to concern that, over time, penalty sensitivity may undermine free speech protections).

28. See District of Columbia v. Heller, 128 S. Ct. 2783, 2821–22 (2008) (holding Second Amendment protects individual right to bear arms).

gests that there are similarly positive stories to tell about penalty-sensitive analysis and other constitutional liberties.

I. WHAT IS PENALTY SENSITIVITY?

What is penalty-sensitive free speech analysis? And how does it differ from other styles of constitutional review? These questions do not admit of easy answers, and this Article does not purport to offer a rigid classification scheme. As with most attempts to create categories, dividing lines become hazy and contestable at the margins, sometimes making the presence of penalty sensitivity a matter of eye-of-the-beholder judgment. That said, some general guideposts may help to clarify what sorts of rulings do—and do not—qualify as penalty-sensitive.

First, penalty-sensitive free speech review is a method of implementing the *free speech right*; it is not a method of applying other constitutional protections to cases that happen to involve expressive conduct. Penalty-sensitive analysis derives punitive limits from the free speech right itself—it does not derive these limits, at least exclusively, from the Cruel and Unusual Punishments Clause, the Excessive Fines Clause, the Due Process Clause (including its limits on punitive damages), or any other punishment-restricting norm within the Constitution. This is not to say that speech-related punishments could never violate Eighth Amendment or due process requirements. But were such a violation to occur (as would happen, for instance, if a trial court sentenced to death a juvenile purveyor of obscenity[29]), it would implicate Eighth Amendment proportionality analysis, not penalty-sensitive First Amendment analysis.[30] Penalty-sensitive First Amendment analysis, by contrast, asks whether a restriction on speech violates the First Amendment *in light of* the severity of the punishment attached to it.

---

29. See Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding Eighth Amendment prohibits application of death penalty to minors).

30. That said, penalty-sensitive First Amendment analysis need not ignore the presence of independent constitutional restrictions on punishment. Indeed, some readers might be inclined to view the enterprise as grounded in the joint application of the Constitution's independent prohibitions on excessive punishment on the one hand, see Erwin Chemerinsky, The Constitution and Punishment, 56 Stan. L. Rev. 1049, 1052–61 (2004) (comparing Court's Eighth Amendment limits on criminal punishment with its due process limits on punitive damages); Pamela S. Karlan, "Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 Minn. L. Rev. 880, 883–914 (2004) [hereinafter Karlan, Pricking the Lines] (similar), and its protection of the right to free speech on the other. My view is that the penalty-sensitive approach may be conceptualized as a freestanding method of First Amendment review, untethered to Eighth Amendment and due process doctrine. Whether this is so, however, is not a question of great importance to this project. The important point is that penalty-sensitive review involves analyzing the severity of a law's penalties *in connection with* its impact on expressive conduct—not simply applying Eighth Amendment or Due Process analysis to laws that happen to regulate expressive activity.

Second, the term "penalty" in the phrase "penalty-sensitive analysis" encompasses a wide range of government actions. For purposes of this Article, government action is said to constitute a penalty as long as it inflicts some measure of harm on a speaker as a result of his speaking. Thus, the ensuing discussion does not confine itself to criminal punishments; it also deals with other sorts of punitive measures, such as civil penalties, money damage awards, administrative enforcement actions, and the revocation or withholding of government-sponsored benefits. Some of these actions are more punitive than others, and some may accomplish both punitive and nonpunitive aims. (Civil damages awards, for example, compensate plaintiffs even as they burden defendants with the obligation to pay.) But an underlying assumption of this Article is that all of these actions share a common "penalizing" component—disadvantaging a speaker for speaking—and that this shared component brings them under the same conceptual umbrella.[31]

Third, penalty-sensitive review posits a positive correlation between the harshness of the governmental sanction and the strength of the speaker's First Amendment claim. Laws should become more, not less, constitutionally problematic as their penalties increase in severity. Courts can recognize this correspondence in many different ways. They can accord dispositive effect to the severity of a speaker's penalty, commanding that all penalties harsher than a baseline minimum automatically trigger a finding of First Amendment invalidity. Or they can treat the severity of the penalty as a softer variable, which functions as one of many factors weighing on the outcome of a case. Indeed, as Part IV further discusses, courts that promulgate penalty-sensitive doctrine can (and do) proceed down many different paths—relying on categorical penalty-based rules, semicategorical penalty-based presumptions, penalty-inclusive balancing tests, and other intermediate approaches. Whatever the path taken, the analysis counts as penalty-sensitive so long as rising levels in penalty severity correspond, even if roughly, to rising odds of a judicial finding of constitutional invalidity.[32]

---

31. This emphasis on penalties also illustrates how penalty-sensitive free speech analysis differs from more traditional forms of time, place, and manner analysis: Time-place-manner analysis addresses burdens that arise when individuals choose to comply with a speech restriction, while penalty-sensitive analysis addresses burdens that arise when individuals fail to comply. If a municipal ordinance prohibited the posting of signs on public property, see, e.g., Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 791 (1984), time-place-manner analysis would assume full compliance with the ordinance and then ask whether the individual's inability to post signs in his yard unduly burdened his right to free expression. Penalty-sensitive analysis, by contrast, would expand the inquiry to include an assessment of the means by which the city punished defiant sign-posters. The penalty-sensitive analyst might care, for example, about whether the city imposed particularly heavy fines on violators of the ordinance or whether the city ever imprisoned repeat offenders.

32. Penalty-sensitive analysis is different from the sort of "proportionality analysis" that has recently attracted the attention of comparative constitutional scholars. Propor-

Finally, penalty-sensitive free speech review concerns itself with the variable of *severity*. For a decision to qualify as penalty-sensitive, it cannot lean on just any penalty-related property; rather, the analysis must have something to do with the extent to which a penalty penalizes. This criterion is less restrictive than it may initially seem. Penalty-sensitive doctrine need not explicitly compare "severe" against "not severe," or "more severe" against "less severe"; instead, it may (and often does) accomplish this comparison through the use of proxies. In *Gertz*, for example, the

---

tionality analysis, broadly speaking, involves an explicit weighing of the benefits and harms created by constitutionally suspect laws, along with a case-by-case investigation into the closeness of fit between legitimate government aims and the means by which a law achieves them. See, e.g., David M. Beatty, The Ultimate Rule of Law 159–76 (2004) (cataloguing examples of proportionality-oriented rights review, through which judges "assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most"); Aharon Barak, Proportionality and Principled Balancing, 4 L. & Ethics Hum. Rts. 1, 4 (2010) (describing proportionality analysis as "creat[ing] a conceptual framework in which to define the appropriate relationship between human rights and considerations that may justify their limitation"); Alec Stone Sweet & Jud Matthews, Proportionality Balancing and Global Constitutionalism, 47 Colum. J. Transnat'l L. 72, 73–74 (2008) (characterizing proportionality analysis as "overarching principle of constitutional adjudication, the preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest"). In this sense, it bears a close kinship to those areas of U.S. constitutional doctrine that eschew absolutist, category-oriented rules in favor of flexible, balancing-oriented standards. See, e.g., T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 944–45 (1987) (describing "rise and spread of 'balancing' as a method of constitutional interpretation" in America and offering several criticisms); Joseph Blocher, Categoricalism and Balancing in First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375, 381–98 (2009) (summarizing debates between proponents of balancing and categoricalism within First Amendment law); Laurent B. Frantz, Is the First Amendment Law?—A Reply to Professor Mendelson, 51 Calif. L. Rev. 729, 729–32 (1963) (contrasting balancing and absolutist approaches within U.S. constitutional doctrine); Wallace Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821, 821 (1962) (similar). See generally Vicki C. Jackson, Being Proportional About Proportionality, 21 Const. Comment. 803, 832 (2004) (reviewing Beatty, supra) (noting "proportionality analysis shares certain characteristics of balancing approaches, as both may be distinguished from more categorical or conceptual forms of analysis").

In a sense, penalty sensitivity may be attractive to proponents of proportionality analysis, as it moves away from a rigid distinction between "punishable" and "unpunishable" speech and toward a more refined understanding of speech restrictions and the penalties they employ. But it is important not to overstate the connection here. As this Article later explains, penalty-sensitive rights review need not devolve into a case-by-case, "totality of the circumstances"-like weighing of government interests against liberty interests. That is certainly one way of putting penalty sensitivity to work. But penalty-sensitive doctrine may also assume a structure more reflective of categoricalism. (A penalty-sensitive rule might, for instance, divide speech-restricting penalties into a limited number of classifications and assign to each classification a precise rule of constitutional treatment.) Such an approach may be less categorical than certain penalty-neutral alternatives, but it may still qualify as categorical in an absolute sense. As a result, while proportionality analysis can certainly accommodate penalty-sensitive analysis, one may still accept the penalty-sensitive approach without abandoning rule-based categoricalism.

Court disallowed the recovery of punitive damages for certain types of libelous speech but in so doing did not grapple directly with the variable of penalty severity.[33] Nevertheless, the *Gertz* rule qualifies as penalty-sensitive because the in-kind distinction between compensatory and extracompensatory damages corresponds to an in-degree distinction between less severe and more severe penalties. (This is so because, all else equal, jury awards consisting of both actual damages and punitive damages will exceed awards limited to actual damages.) In short, penalty-sensitive rules can rely on qualitative distinctions among *types* of penalties, provided that these distinctions map onto quantitative distinctions in harshness.

II. PENALTY SENSITIVITY IN OPERATION

With penalty sensitivity's definitional criteria in place, this Article now considers some real world illustrations of the practice. Part II.A identifies and describes six examples of penalty-sensitive free speech analysis. It also identifies three "red herrings"—rules and rulings in the First Amendment area that, though perhaps suggestive of the penalty-sensitive approach, do not in fact manifest its hallmark traits. Part II.B then supplements the discussion with examples of penalty-sensitive review from outside the free speech setting. Though not the central focus of this Article, this case law deserves attention, as it illustrates the range of doctrinal contexts in which penalty sensitivity has emerged and highlights the many different forms that such review might take. The ensuing discussion thus demonstrates that (a) penalty-sensitive review underlies a surprising number of free speech rules and rulings and (b) these rules and rulings are in keeping with many other areas of rights-related doctrine. These observations set the stage for the Article's normative defense of penalty-sensitive free speech adjudication, which unfolds in Parts III and IV.

A. *Penalty Sensitivity and Free Speech Doctrine*

1. *Seditious Libel and the* Abrams *Dissent.* — At the center of the pantheon of great First Amendment writings stands Oliver Wendell Holmes's dissent in *Abrams v. United States*.[34] Abrams and his colleagues had written and distributed leaflets encouraging strikes at ammunition factories in response to the U.S. government's intervention in the Russian Revolution. The trial court had convicted them of violating the 1917 Espionage Act, which prohibited, among other things, "urg[ing], incit[ing] and advocat[ing] curtailment of production of things and products . . . necessary and essential to the prosecution of the war."[35] Three

33. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974).

34. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

35. Id. at 617 (majority opinion).

defendants received sentences of twenty years' imprisonment, one defendant received fifteen years, and a fifth defendant received three years.[36]

Abrams marked a change of course for Holmes, who had earlier voted to uphold Espionage Act prosecutions in *Schenck v. United States*,[37] *Frohwerk v. United States*,[38] and *Debs v. United States*.[39] Why he shifted positions remains subject to debate,[40] but one factor may have been the harshness of the penalties imposed on the *Abrams* defendants. Holmes had balked at the sentences in *Schenck* (six months),[41] *Frohwerk* (ten years),[42] and *Debs* (ten years),[43] but he had voted to uphold them nonetheless.[44] As Professor David Bogen has observed, however, "[t]he over-

36. Richard Polenberg, Fighting Faiths: The *Abrams* Case, the Supreme Court, and Free Speech 145–46 (1987); Stephen M. Feldman, Free Speech, World War I, and Republican Democracy: The Internal and External Holmes, 6 First Amendment L. Rev. 192, 234 (2008).

37. 249 U.S. 47 (1919).

38. 249 U.S. 204 (1919).

39. 249 U.S. 211 (1919).

40. Scholars disagree as to whether Holmes's reversal in *Abrams* was prompted by a material shift in his free speech philosophy, see, e.g., Geoffrey R. Stone, Perilous Times: Free Speech in Wartime 198–211 (2004) (discussing Holmes's correspondence with Learned Hand about Espionage Act cases and noting "Holmes had begun to rethink the issue of free speech" by time *Abrams* came before Court); Feldman, supra note 36, at 229–44 (describing "transformation" of Holmes's views on free expression during months preceding *Abrams*); Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 734–44 (1975) (similar); G. Edward White, Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension, 80 Calif. L. Rev. 391, 433–42 (1992) (similar), or whether Holmes had simply been "biding his time until the Court should have before it a conviction so clearly wrong as to let him speak out his deepest thoughts about the First Amendment," Zechariah Chafee, Free Speech in the United States 86 (1942); see also Sheldon M. Novick, The Unrevised Holmes and Freedom of Expression, 1991 Sup. Ct. Rev. 303, 335–50 (claiming Holmes's views on free speech did not change between *Schenck* and *Abrams*). See generally Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 762–63 (16th ed. 2007) (summarizing debate).

41. Polenberg, supra note 36, at 212–13. Schenck's accomplice, Dr. Elizabeth Baer, received a sentence of ninety days. Id.

42. 249 U.S. at 206.

43. 249 U.S. at 212.

44. See, e.g., Letter from Oliver Wendell Holmes to Frederick Pollock (Apr. 27, 1919), *in* 2 Holmes-Pollock Letters: The Correspondence of Mr. Justice Homes and Sir Frederick Pollock 1874–1932, at 11 (Mark DeWolfe Howe ed., 1942) ("Now I hope the President will pardon [Debs] and some other poor devils with whom I have more sympathy."); see also David S. Bogen, The Free Speech Metamorphosis of Justice Holmes, 11 Hofstra L. Rev. 97, 183 (1983) (noting "Holmes had been upset by the prosecutions in the earlier cases and stated to his friends that the sentences there should be sharply reduced and commuted by the President"). Holmes's feelings on this score were by no means unique to him. As a roughly contemporaneous account of the cases explained, "[m]uch of the bitter feeling which these cases have engendered in the United States is due to the manner in which the trials were conducted . . . *and to the length of the sentences*." Notes, 42

reaction of the judges and juries that . . . [Holmes had] perceived in . . . [*Schenck*, *Frohwerk*, and *Debs*] was mild compared to the fervor exhibited against the *Abrams* defendants in sentencing them to a twenty-year imprisonment."[45] What is more, whereas "Debs and Frohwerk addressed significant sympathetic groups and Schenck addressed his message to persons who might respond from self-interest,"[46] the *Abrams* defendants were, as Zechariah Chafee would later describe them, "five obscure and isolated youngsters . . . who hatched their wild scheme in a garret and carried it out in a cellar."[47] In short, the punishments at issue in *Abrams*—far more so than the punishments at issue in its predecessor cases—were strikingly disproportionate to the defendants' underlying crimes.

The heaviness of these sanctions did not escape Holmes's notice, and his dissent in *Abrams* drew attention to their severity. Early in his opinion, Holmes had speculated that the First Amendment might not prohibit the government from prosecuting attempts to disrupt the production of wartime goods, provided that the government could show that a defendant specifically intended to achieve that result.[48] Holmes concluded that the government had not proven specific intent in this case, but his analysis did not stop there. He explained,

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, *even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted*, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow . . . .[49]

In other words, even if Abrams and his collaborators had specifically intended to curtail wartime production (and thereby surrendered their right to absolute constitutional protection), the First Amendment would

---

L.Q. Rev. 1, 14 (1926) (emphasis added).

45. Bogen, supra note 44, at 183.

46. Id. at 182. Charles Schenck was the Secretary of the Socialist Party of America at the time of his prosecution. Schenck v. United States, 249 U.S. 47, 49 (1919). Eugene Debs was a founding member of the Industrial Workers of the World and frequent presidential candidate for the Socialist Party of America. See Kermit L. Hall & John J. Patrick, The Pursuit of Justice: Supreme Court Decisions that Shaped America 78–79 (2006); Novick, supra note 40, at 341.

47. Zechariah Chafee, A Contemporary State Trial—*The United States Versus Jacob Abrams et al.*, 33 Harv. L. Rev. 747, 773 (1920); see also Bogen, supra note 44, at 182 ("Abrams and his codefendants scattered to the winds a message, in a foreign language, that no one had a personal interest in accepting.").

48. Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

49. Id. at 629 (emphasis added).

still have prohibited the trial court from imposing a twenty-year sentence. Indeed, for Holmes, only "the most nominal punishment" would have passed constitutional muster.[50]

The critical point is not hard to see. As Thomas Reed Powell later explained, Holmes's dissent put forth "the suggestion that the First Amendment limits the degree of punishment for speech concededly punishable."[51] Many years later, David Currie offered the same interpretation, crediting this passage with the "the novel and interesting notion that the first amendment . . . limited the punishment that could be imposed even for speech not wholly protected."[52]

2. *Defamation.* — Penalty sensitivity was limited to a dissenting opinion in *Abrams*, but it later made its way into several majority opinions—and hence, operative First Amendment law. A good example comes from the defamation context. *Gertz v. Robert Welch, Inc.*[53] followed in the aftermath of *New York Times Co. v. Sullivan*, the first Supreme Court case to recognize First Amendment limits on state court defamation judgments.[54] In *New York Times*, the Court held that a "public official" could not "recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[55] In so holding, the Court left many ques-

50. Id. Holmes's *Abrams* dissent, moreover, does not present the only example of penalty-sensitive musings from this era. *Whitney v. California*, decided eight years after *Abrams*, involved a prosecution under California's Criminal Syndicalism Act. 274 U.S. 357 (1927). The Court unanimously rejected the defendant's constitutional challenges, but Justice Brandeis, joined by Justice Holmes, concurred separately, expressing concern with the majority's analysis of the free speech claim. Brandeis argued for strict application of the "clear and present danger" test, which would limit the government's power to regulate seditious libel to situations in which "immediate serious violence was to be expected or was advocated, or . . . [where] the past conduct furnished reason to believe that such advocacy was then contemplated." Id. at 376 (Brandeis, J., concurring). But the opinion also appeared to endorse Holmes's earlier suggestion that the clear and present danger test should apply in a penalty-sensitive manner. Specifically, Brandeis noted that "[a] police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive," id. at 377, and that, while the state could certainly criminalize trespass, "it is hardly conceivable that this Court would hold constitutional a statute which punished *as a felony* the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so," id. at 378 (emphasis added).

51. Thomas Reed Powell, Constitutional Law in 1919–1920 (pt. 3), 19 Mich. L. Rev. 283, 292 (1920). Powell went on to wonder whether "Mr. Justice Holmes has the due-process clause of the Fifth Amendment in mind." Id.

52. David P. Currie, The Constitution in the Supreme Court: 1910–1921, 1985 Duke L.J. 1111, 1154–55 n.225.

53. 418 U.S. 323 (1974).

54. 376 U.S. 254, 283 (1964) (holding "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct").

55. Id. at 279–80.

tions unanswered, one of which was whether the "actual malice" rule applied to plaintiffs other than public officials. A subsequent decision, *Curtis Publishing Co. v. Butts*, extended the rule to cover defamatory speech about "public figures."[56] *Gertz* presented the question whether the rule should also apply to defamatory speech about "private citizens" caught up in "public issues."[57]

Rosenbloom v. Metromedia, Inc., decided prior to *Gertz*, had posed the same question, but there a fractured Court failed to answer it.[58] The *Rosenbloom* plurality favored furnishing full *New York Times* protection to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[59] But other Justices put differing options on the table. Of particular note, Justices Marshall and Harlan, in separate dissents, outlined approaches that would have (a) relaxed the "actual malice" requirement for defamation actions brought by private-figure plaintiffs but (b) limited the amount of damages that private-figure plaintiffs could recover.[60] As for how to implement this second part of the plan, the two Justices had different ideas. Marshall favored permitting damages for "actual" injury but forbidding presumed and punitive damages across the board.[61] Harlan, in contrast, would have permitted punitive damages but only when "actual malice" was shown and the damages bore "a reasonable and purposeful relationship to the actual harm done."[62] Notwithstanding these disagreements as to details, both Justices thus endorsed a penalty-sensitive rule.

Three years later, revisiting the issue left open by *Rosenbloom*, the *Gertz* majority built on Marshall's and Harlan's earlier proposals. The Court held (a) that private citizens could recover damages for negligently published defamatory falsehoods, but they could not recover anything beyond compensation for actual injury and (b) that presumed and punitive damages were off limits, unless the plaintiffs could satisfy the

56. 388 U.S. 130, 163 (1967) (Warren, C.J., concurring in result); see also *Gertz*, 418 U.S. at 336 (noting "[a]lthough Mr. Justice Harlan announced the result in [*Butts*], a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials'").

57. 418 U.S. at 325 (considering "the extent of a publisher's constitutional privilege against liability for defamation of a private citizen").

58. 403 U.S. 29 (1971).

59. Id. at 44 (plurality opinion).

60. See id. at 86 (Marshall, J., dissenting) (advocating approach that would "restrict damages to actual losses"); id. at 77 (Harlan, J., dissenting) ("I would hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done.").

61. See id. at 84 (Marshall, J., dissenting) ("The threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proved, actual injuries.").

62. Id. at 77 (Harlan, J., dissenting).

strict actual-malice standard set forth in *New York Times*.[63] Writing for the majority in *Gertz*, Justice Powell defended this rule in penalty-sensitive terms.[64] He reaffirmed the Court's recognition of the "legitimate state interest in compensating private individuals for injury to reputation," but he also stipulated that "this countervailing state interest extends no further than compensation for actual injury."[65] Anything beyond this, he reasoned, would pose a special threat to free expression. With presumed damages, juries could award "substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred."[66] This in turn would "compound[] the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."[67] And with punitive damages, "jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive."[68] Consequently, juries could award these damages "in wholly unpredictable amounts," which could "unnecessarily exacerbat[e] the danger of media self-censorship."[69]

The bottom line for the *Gertz* majority was that neither presumed nor punitive damages substantially furthered the state's interest in compensating injury and both types of damages threatened unpopular expression with severe forms of punishment. Hence the need for a penalty-sensitive rule—that is, a rule that could accommodate the state's interest in making victims whole, while staving off the specter of sky-high damage awards.[70] The penalty-sensitive nature of the rule is thus apparent. The Court in *Gertz* did not limit the state's power to impose liability; it did, however, limit the amount of damages that the state could attach to this liability. And although the scope of the rule has been refined in later cases,[71] its penalty-sensitive framework remains firmly intact. When the rule applies, speech may be penalized but only to a limited degree.[72]

---

63. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[A] private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.").

64. Id. at 343.

65. Id. at 348–49.

66. Id. at 349; see also T. Michael Mather, Experience With *Gertz* "Actual Injury" in Defamation Cases, 38 Baylor L. Rev. 917, 949 (1986) (noting "presumed damage cases have substantially higher compensatory damage awards on average than actual injury compensatory damage awards").

67. 418 U.S. at 349.

68. Id. at 350.

69. Id.

70. Whether the *Gertz* rule achieved its objective of reducing damage awards is not altogether clear. See, e.g., Gerald G. Ashdown, *Gertz* and *Firestone*: A Study in Constitutional Policy-Making, 61 Minn. L. Rev. 645, 669–72 (1977) (arguing *Gertz* rule still allows exorbitant damages awards).

71. See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761–62 (1985) (holding *Gertz* inapplicable when speech at issue does not involve "a matter of pub-

3. *Public Employment.* — Penalty sensitivity has also materialized within case law involving the speech of public employees. The penalties at issue here take the form of disciplinary measures that supervisors direct at their subordinates. These measures vary greatly in their harshness: At one end of the spectrum, disciplinary action might entail nothing more than a verbal reprimand; at the other, it can amount to outright dismissal. Given this wide range of severity levels, one might expect the character of an employer's disciplinary action to figure prominently in judicial analysis of public employees' free speech claims. It would not be implausible, for example, to draw a constitutional distinction between cases in which employers punish speech with short suspensions and cases in which employers punish the same speech with outright termination.

For a number of years, some lower courts assumed as much, interpreting Supreme Court case law to mean that free speech violations were more likely to occur when the government *fired* its employees for speech-related reasons.[73] But in *Rutan v. Republican Party of Illinois*, the Court jettisoned this approach.[74] *Rutan* involved a claim by Illinois civil service employees that their professional situations had suffered on account of their political affiliation. Notably, none of these employees had been fired; rather, they had suffered such lesser harms as promotion denials and targeted exclusions from post-layoff recall appointments.

The Seventh Circuit analyzed the case by asking whether these employment actions amounted to the "substantial equivalent of a dismissal."[75] This approach seemed reasonable under then-existing prece-

---

lic concern").

72. Given the penalty-sensitive nature of the *Gertz* decision, it is perhaps surprising that the Court has not drawn a similar constitutional distinction between civil and criminal libel laws, subjecting the latter to something even more restrictive than the *New York Times* standard. Cf. Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 924 (1963) [hereinafter Emerson, Toward a General Theory] (arguing criminal libel laws should be deemed unconstitutional, in part because "in the context of a public prosecution the dangers in punishing expression under the necessarily loose standards invoked are . . . great" (footnote omitted)). Indeed, the Court had an opportunity to draw just such a penalty-sensitive distinction in a companion case to *New York Times*, *Garrison v. Louisiana*, but it instead chose to apply the same standard to both types of restrictions, without suggesting that governments might enjoy less constitutional leeway when regulating defamation through criminal means. 379 U.S. 64, 76 (1964). In *New York Times*, the Court explained,

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (footnote omitted).

73. See, e.g., Delong v. United States, 621 F.2d 618, 623–24 (4th Cir. 1980) (confining inquiry to dismissal of employee and employment practices "that can be determined to be the substantial equivalent of dismissal").

74. 497 U.S. 62, 72 (1990).

75. Rutan v. Republican Party of Ill., 868 F.2d 943, 956 (7th Cir. 1989) (en banc),

dent,[76] but the Supreme Court rejected it in no uncertain terms. Whether or not substantially equivalent to dismissals, Justice Brennan declared for the majority, the actions represented "significant penalties" that "impermissibly encroach[ed] on First Amendment freedoms." [77] He continued,

> We . . . determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy.[78]

Indeed, Justice Brennan went further, proclaiming that "the First Amendment . . . protects state employees from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'"[79] On his view, any form of retaliation, no matter how minimal, would seem to violate the First Amendment. His stance was avowedly penalty-neutral.

Yet even the far-reaching rhetoric of *Rutan* has not erased penalty sensitivity from the public employment picture. With the discharge/nondischarge distinction now a thing of the past, some lower courts, reluctant to follow *Rutan* to its logical conclusion, have developed a different set of punishment-based boundaries. Dismissing the "birthday party" language as "colorful dicta,"[80] these courts have declared that not every form of speech-based retaliation can violate an employee's free speech rights. Instead, they have held that a First Amendment violation cannot materialize unless the employer has taken an "adverse employment action" against the employee-speaker.[81] In so doing, they have drawn from

---

aff'd in part, rev'd in part, 497 U.S. 62.

76. See, e.g., Branti v. Finkel, 445 U.S. 507, 515 (1980) (holding employee may not be discharged solely on basis of political beliefs); Elrod v. Burns, 427 U.S. 347, 360 (1976) (holding patronage dismissals due to political affiliation violated First Amendment).

77. 497 U.S. at 74–75.

78. Id. at 75 (citing 868 F.2d at 954–57).

79. Id. at 75 n.8 (quoting 868 F.2d at 954 n.4).

80. Lybrook v. Members of Farmington Mun. Sch. Bd. of Ed., 232 F.3d 1334, 1340 (10th Cir. 2000) (noting "[a]lthough . . . employers' acts short of dismissal may be actionable as First Amendment violations, we have never ruled that *all* such acts, no matter how trivial, are sufficient to support a retaliation claim").

81. See, e.g., id.; Suppan v. Dadonna, 203 F.3d 228, 235 (3d Cir. 2000) (arguing "[i]t would trivialize the First Amendment to hold that harassment for exercising the right of

the Supreme Court's Title VII precedents, which make clear that an "adverse employment action" requirement envisions "*materially* adverse" action, thereby "separat[ing] significant from trivial harms."[82] These courts, in other words, have not abandoned penalty sensitivity in *Rutan*'s wake. Rather, they have simply lowered the penalty-sensitive threshold—replacing the old discharge/nondischarge distinction with a new distinction between materially and nonmaterially adverse employment actions.

The new threshold is more demanding than might first meet the eye. Consider the Tenth Circuit's decision in *Lybrook v. Members of Farmington Municipal School Board of Education*.[83] The court there rejected the First Amendment claim of a school teacher whose supervisors had placed her on a "Professional Development Plan" and required her to attend weekly one-on-one meetings with the principal.[84] Lybrook lost her case, but not because the court deemed her speech unworthy of protection. Rather, her problem lay in her penalty—a penalty that, in the court's view, did not rise to the level of an "adverse or detrimental employment decision."[85] In particular, "while the Professional Development Plan and the Monday morning meetings may have been unwelcome[] to her," Lybrook's punishment was "of insufficient gravity to premise a First Amendment violation."[86]

Lybrook's penalty was hardly the stuff of Hammurabi's Code; one can imagine fates far worse than participating in professionalism training and meeting weekly with the principal. But it was a penalty all the same. The school made Lybrook do things she did not want to do, and it took this action because Lybrook had engaged in a form of expressive conduct. What drove the *Lybrook* analysis, then, was not a conclusion regarding the value of Lybrook's speech, but the fact that the state's chosen means of punishment was an especially lenient one. For this reason, the *Lybrook* decision and the adverse action rule it reflects qualify as penalty-sensitive.

4. *Vagueness/Overbreadth.* — The doctrines discussed in the preceding pages draw substantive boundaries between types of speech. The vagueness and overbreadth doctrines, by contrast, impose procedural limits on lawmakers' ability to propound restrictions on speech. Vagueness rules

---

free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise"); Pierce v. Tex. Dep't of Criminal Justice, 37 F.3d 1146, 1150 n.1 (5th Cir. 1994) (explaining Fifth Circuit has "require[d] more than a trivial act to establish constitutional harm").

82. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (emphasis added).

83. 232 F.3d at 1334.

84. Id. at 1337. The plan required Lybrook "to '[s]trive to create an atmosphere that will nurture collaboration with all colleagues'" and "'to conduct affairs with a conscious concern for the highest standards of professional commitment.'" Id.

85. Id. at 1339.

86. Id. at 1341.

permit facial invalidation of laws that set forth imprecise standards of legality, while overbreadth rules permit facial invalidations of laws that restrict both protected and unprotected forms of expression.[87] A brief look at both doctrines reveals further examples of penalty-sensitive review.

Reflecting penalty sensitivity within First Amendment vagueness doctrine is the Court's "greater tolerance of enactments with civil rather than criminal penalties."[88] This "greater tolerance" arises from the fact that "the consequences of imprecision are qualitatively less severe" in the civil context (where punishments generally involve nothing worse than monetary fines),[89] than in the criminal context (where punishments can entail lengthy prison sentences, and where the collateral effects of prosecution and conviction are of the highest order).[90]

Consistent with this notion is the Court's decision in *NEA v. Finley*.[91] This case presented the question whether Congress violated First Amendment vagueness rules when it instructed officials at the National Endowment for the Arts (NEA) to "tak[e] into consideration general standards of decency" when evaluating grant applications.[92] The Ninth

87. Though rooted in the Fifth and Fourteenth Amendments' due process guarantees, void-for-vagueness review is traditionally understood to furnish a special sort of protection to First Amendment rights. This is because the Court has long adhered to the rule that "[w]here a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573 (1974); see also Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287 (1961) ("The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution."); Smith v. California, 361 U.S. 147, 151 (1959) ("[T]his Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

88. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982).

89. Id. at 499.

90. See id.; Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting) (observing "it would be unthinkable to convict a man for violating a law he could not understand"); Winters v. New York, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."); see also Maldonado v. Morales, 556 F.3d 1037, 1045 (9th Cir. 2009) (noting "courts must take extra care in determining whether criminal statutes are vague"); Aaron Xavier Fellmeth, Civil and Criminal Sanctions in the Constitution and Courts, 94 Geo. L.J. 1, 2–3 (2005) (observing criminal sanction "may impose a social stigma that permanently impairs the defendant's quality of life in a manner rarely equaled by a civil judgment"); Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the Chilling Effect, 58 B.U. L. Rev. 685, 697 (1978) ("The possibility of imprisonment coupled with the stigma and disabilities which accompany a criminal conviction will most often lead an individual to view the criminal penalty as more harmful than a civil sanction.").

91. 524 U.S. 569 (1998).

92. Id.

Circuit answered in the affirmative, characterizing the standard as "not susceptible to objective definition" and thus highly vulnerable "to the danger of arbitrary and discriminatory application."[93] The Supreme Court reversed. While never rejecting the lower court's characterization of the statutory language as deeply indeterminate, the Court explained that the Ninth Circuit had applied an unduly stringent standard of precision. As Justice O'Connor explained, "[t]he terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns."[94] This case, however, did not involve a "criminal statute or regulatory scheme," and so "the consequences of imprecision [we]re not constitutionally severe."[95]

Several considerations supported the majority's position, including, for example, the voluntariness of the artists' decision to submit themselves to the guidelines, the inherent subjectivity of artistic judgments, and the inadvisability of second guessing the NEA's (and Congress's) chosen standards. In addition to these points, however, Justice O'Connor emphasized that, given the "penalties" attached to the law, "[i]t is unlikely . . . that speakers will be compelled to steer too far clear of any 'forbidden area' in the context of grants of this nature."[96] This argument makes sense only in penalty-sensitive terms. Grant applicants are less likely to "steer far clear of any forbidden area" because the consequence of entering the area—i.e., the penalty imposed on the speaker—is merely the disappointment of not winning the grant. By contrast, the subjects of an equally vague criminal regulation, faced with the prospect of fines or even terms in prison, would be sure to err on the side of caution.

Similar thinking drove Justice Kennedy's overbreadth analysis in *Ashcroft v. Free Speech Coalition*.[97] The Child Pornography Protection Act (CPPA) criminalized the possession and distribution of images that appeared to depict—but in fact did not depict—minors engaged in sexually explicit conduct.[98] The government defended the Act as a constitutionally permissible restriction of child pornography under *New York v. Ferber*[99] and, in the alternative, a constitutionally permissible restriction of obscenity under *Miller v. California*.[100] The Court, however, rejected both contentions, deeming *Ferber* inapplicable to "virtual" child pornogra-

93. Finley v. NEA, 100 F.3d 671, 680 (9th Cir. 1996), rev'd, 524 U.S. 569.

94. 524 U.S. at 588.

95. Id at 588–89.

96. Id. at 588.

97. 535 U.S. 234 (2002).

98. Id. at 239.

99. 458 U.S. 747 (1982) (holding child pornography not generally entitled to First Amendment protection).

100. 413 U.S. 15 (1973) (establishing guidelines for defining obscenity).

phy,[101] and finding only a small portion of the speech criminalized by the CPPA to qualify as obscene under *Miller*.[102] This left open the question whether the Court should invalidate the CPPA on its face, or only as applied to speech not punishable under *Miller*.

Opting for facial invalidation, Justice Kennedy stressed the severity of the CPPA's penalties:

> The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. While even minor punishments can chill protected speech, this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law.[103]

Accordingly, the Court struck down the CPPA in its entirety, pointing not just to the overbreadth of its coverage, but also to what might be fairly called the "overdepth" of the penalties imposed.[104]

5. *Indecency*. — An additional area of penalty-sensitive doctrine involves "indecent" expression and the communications media. The key case is *FCC v. Pacifica Foundation*.[105] A New York radio station had broadcast George Carlin's "Seven Dirty Words" monologue during a weekday afternoon, thereby prompting an angry listener to complain to the FCC.[106] The FCC responded by issuing a declaratory order, which clarified that, but for the good graces of the agency, the station's broadcast "could have been the subject of administrative sanctions," and warned that "in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the available sanctions it has been granted by Congress."[107] The station owner challenged the order, claiming that it violated the station's free speech rights. The Court found in favor of the FCC.

---

101. *Free Speech Coal.*, 535 U.S. at 249–51.

102. Id. at 246–49.

103. Id. at 244 (citations omitted).

104. Interestingly, Justice O'Connor, who had earlier recognized a penalty-based distinction in *Finley*, refused to go along with Kennedy's overbreadth analysis, and left unaddressed his claims about the CPPA's punishments. Id. at 265–66 (O'Connor, J., concurring in part and dissenting in part).

105. 438 U.S. 726 (1978).

106. The letter, incidentally, utilized four of the seven words but only for the purpose of recounting the content of Carlin's monologue. Angela J. Campbell, *Pacifica* Reconsidered: Implications for the Current Controversy over Broadcast Indecency, 63 Fed. Comm. L.J. 195, 201–02 (2010) (reproducing letter).

107. 438 U.S. at 730.

The Court's analysis in *Pacifica* was fact-specific. In a section of the opinion agreed to by a majority of the Court, Justice Stevens emphasized the "narrowness" of the holding—pointing out, for example, that the Court had not decided whether the FCC could apply similar indecency standards to "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy."[108] Of particular importance, the Carlin monologue teemed with profanities; thus, *Pacifica* did not address whether the FCC could sanction a broadcast in which expletives made only a passing appearance.[109] In addition, the broadcast had aired at an hour when children were likely to be tuned in; thus, the Court did not consider whether the FCC could target equally profane broadcasts that aired late at night.[110]

All of these factors played a role in the Court's analysis in *Pacifica*. But another factor mattered, too: As the Court explained, the penalty at issue was nothing more than a shot across the bow. The FCC had asserted the authority to impose sanctions, but it had not exercised that authority directly. Accordingly, the Court declined to decide whether "an occasional expletive [in different settings] would justify any sanction, or, indeed, [whether] this broadcast would justify a criminal prosecution."[111] The Court elaborated no further on this point, but its message was clear: The government's power to punish indecency on the airwaves was not unlimited. Criminal punishments would bear a higher constitutional burden, and so too might harsher civil sanctions.[112] Indeed, at least two lower court cases later read the case in just this way. In *Carlin Communications, Inc. v. FCC*, the Second Circuit relied on *Pacifica*'s "criminal prosecution" language to hold that a criminal statute would be

---

108. Id. at 750.

109. Id.

110. Id.

111. Id. This qualification may have been included to help bring the *Pacifica* holding in line with the Court's earlier assertion—in *Cohen v. California*—that "the State may not, consistently with the First and Fourteenth Amendments, make the simple public display . . . of [profanity] a *criminal offense*." 403 U.S. 15, 26 (1971) (emphasis added). As Justice Stevens explained, "It should be noted that the Commission imposed a far more moderate penalty on Pacifica than the state court imposed on Cohen. Even the strongest civil penalty at the Commission's command does not include criminal prosecution." *Pacifica*, 438 U.S. at 747 n.25.

112. In *Smith v. United States*, 431 U.S. 291 (1977), decided one year prior to *Pacifica*, Justice Stevens had pushed for a similar approach to the regulation of obscenity. Dissenting from the majority's opinion in that case, Justice Stevens argued that criminal and civil obscenity laws should trigger application of different constitutional standards, noting in particular that

> [a]lthough the variable nature of a standard dependent on local community attitudes is critically defective when used to define a federal crime, that very flexibility is a desirable feature of a civil rule designed to protect the individual's right to select the kind of environment in which he wants to live.

Id. at 317 (Stevens, J., dissenting).

unconstitutional if its prohibitions were construed to encompass the transmission of indecent material.[113] And in *Community Television of Utah, Inc. v. Wilkinson*, a federal district court interpreted the same passage to mean that "[i]f the penalty [in *Pacifica*] had been greater the result in the case may have been different."[114]

The Court reaffirmed the penalty-sensitive aspects of its *Pacifica* ruling in *Reno v. ACLU*.[115] There, the Court passed judgment on the Communications Decency Act (CDA), which criminalized the online transmission of obscene and indecent materials to minors. Arguing against invalidation, the government relied on *Pacifica*, noting that there the Court had withheld constitutional protection from indecent speech. The Court, however, rejected this analysis, concluding that a close look at *Pacifica* "raises—rather than relieves—doubts concerning the constitutionality of the CDA."[116] In particular, among the "significant differences between the order upheld in *Pacifica* and the CDA" was one related to penalties: Unlike the CDA, which called for punishments of up to two years in prison, the "declaratory order [in *Pacifica*] was not punitive."[117] This difference was significant, the Court explained, because in *Pacifica* it had "expressly refused to decide whether the indecent broadcast 'would justify a criminal prosecution.'"[118]

6. *School Speech.* — One further example of penalty-sensitive free speech review comes from Justice Brennan's concurrence in *Bethel School District v. Fraser*.[119] *Bethel* asked whether the First Amendment permitted a public high school to suspend a student for delivering an on-campus speech rife with sexual double entendres. The Ninth Circuit had answered this question in the negative, holding that the Court's earlier decision in *Tinker v. Des Moines Independent Community School District*[120] prohibited the school from disciplining the speaker, Matthew Fraser, in any way at all.[121] The Supreme Court reversed, with a majority of the Justices asserting that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser."[122] Thus, while reaching op-

113. 837 F.2d 546, 560 (2d Cir. 1988) ("*Pacifica* did *not* decide that the indecent broadcast 'would justify a criminal prosecution.' Here the statute specifically authorizes prosecution. Were the term 'indecent' to be given meaning other than *Miller* obscenity, we believe the statute would be unconstitutional." (quoting 438 U.S. at 750)).

114. 611 F. Supp. 1099, 1111 (D. Utah 1985).

115. 521 U.S. 844 (1997).

116. Id. at 864.

117. Id. at 867.

118. Id. (quoting 438 U.S. at 750).

119. 478 U.S. 675 (1986).

120. 393 U.S. 503 (1969).

121. Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1363 (9th Cir. 1985) (finding "the First Amendment prohibited the District from punishing Fraser"), rev'd, 478 U.S. 675.

122. 478 U.S. at 685.

posite results, the Ninth Circuit and the Supreme Court majority at least seemed to agree that the nature of the punishment inflicted on Fraser was not relevant to his First Amendment claim.

In contrast, Justice Brennan suggested in an opinion concurring in the judgment that a school's chosen means of disciplinary action should not lie outside the First Amendment inquiry. Like the majority, Brennan believed that "school officials did not violate the First Amendment in determining that [Fraser] should be disciplined."[123] But unlike the majority, he harbored doubts about the gravity of Fraser's punishment:

> Respondent served two days' suspension and had his name removed from the list of candidates for graduation speaker at the school's commencement exercises, although he was eventually permitted to speak at the graduation. While I find this punishment somewhat severe in light of the nature of respondent's transgression, I cannot conclude that school officials exceeded the bounds of their disciplinary authority.[124]

Thus, although he did not conclude that Fraser's punishment was unduly harsh in this case, Justice Brennan's ruminations left open the possibility that a harsher punishment might have met a different constitutional fate.[125]

7. *Three Red Herrings.* — This subsection turns briefly to three areas of doctrine that, while showing some signs of the penalty-sensitive ap-

---

123. Id. at 690 (Brennan, J., concurring).

124. Id. at 690 n.3. For a survey of recent lower court cases exploring the possibility of punishment-based review of school speech claims, see James F. Ianelli, Note, Punishment and Student Speech: Straining the Reach of the First Amendment, 33 Harv. J.L. & Pub. Pol'y 885, 890–92 (2010) (outlining and critiquing approach).

125. For some of the examples discussed in this Part, it is a fair question whether penalty-sensitive considerations—though expressly entertained by the Court—actually affected the outcome of the cases being decided. "Come on," a skeptic might say, "the severity of the penalty didn't *really* matter in cases like *Pacifica*, *Finley*, or *Free Speech Coalition*. The Court just employed penalty-sensitive reasoning for rhetorical effect; the penalty-sensitive aspects of these holdings amount to nothing more than window dressing applied to cases that were penalty-neutral at their core."

As a descriptive observation, this claim may have some merit. But even assuming its rightness, the point does not much matter. Whatever the Court's motivations for discussing the severity of a speaker's penalty, two things are clear: First, the Court's use of penalty-sensitive reasoning for rhetorical effect would itself be significant; it would tell us that penalty-sensitive reasoning carries rhetorical purchase, and hence some innate appeal, at least to members of the Supreme Court. Second, and more important, if penalty-sensitive arguments find support in the Court's precedents, those arguments are fair game for litigants and judges to cite in future cases, whatever the realist origins for those precedents might be. Yesterday's window dressing can inspire tomorrow's redesign; throwaway language in one decision can become the doctrinal linchpin of another. If penalty-sensitive language appears within prior free speech precedents, then readers of such precedents may take this language at face value. Penalty sensitivity, in other words, may not *explain* the true basis for all of the decisions discussed above, but once invoked, it *belongs* to First Amendment law. And that fact, in itself, must matter to anyone who desires to understand this law in full.

proach, do not quite embody the mode of free speech review that this Article addresses. The primary aim here is to sharpen definitional contours. Having identified illustrations of what falls within the boundaries of the penalty-sensitive approach, the Article will briefly identify some examples that fall outside these boundaries.

a. *Prior Restraints.* — Under the prior restraint rule, governments enjoy greater constitutional leeway to regulate speech through postpublication prosecutions than through prepublication restraint orders.[126] Does this rule count as penalty-sensitive? Initial indicators are positive: The rule draws distinctions based on the government's means of enforcing speech restrictions, and these means of enforcement employ different types of punishments (e.g., contempt citations on the one hand and traditional criminal/civil sanctions on the other). As a result, the rule creates categories of speech that are punishable, but only in certain ways.

Given the criteria identified in Part I, however, the prior restraint rule counts as penalty-sensitive only if the in-kind distinction between prior restraints and subsequent punishments tracks an in-degree distinction between "more exacting" and "less exacting" punishments. Here, such a showing cannot be made, since, as Professor Marin Scordato has noted, "there is no apparent logical or practically necessary correlation between the severity of the sanction imposed in response to a violation of the law and the law's status as either a prior restraint or a subsequent sanction."[127] Indeed, postpublication punishments often are draconian; just ask Jacob Abrams, who faced twenty years' imprisonment based on a postpublication prosecution. Prior restraints in the form of injunction decrees, by contrast, are often quite limited.[128] Consequently, scholarly

126. See Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("The thread running through [many First Amendment] cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). For examples of decisions disfavoring prior restraint, see generally N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (finding government had not met "heavy burden" necessary to justify prior restraint on publication of Pentagon Papers); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (holding government "carries a heavy burden of showing justification for the imposition of such a restraint"); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); Near v. Minnesota, 283 U.S. 697, 713 (1931) (noting "chief purpose [of First Amendment is] to prevent previous restraints upon publication").

127. Marin Scordato, Distinction Without a Difference: A Reappraisal of the Doctrine of Prior Restraint, 68 N.C. L. Rev. 1, 12–13 (1989). But see John E. Nowak & Ronald D. Rotunda, Constitutional Law § 16.16(e), at 1305–06 (8th ed. 2010) (speculating that courts may tend to punish prior restraint violations more harshly because "[c]ourts are more adamant in punishing contempt of their orders than . . . criminal statutes," in which they have no "personal stake").

128. See Blasi, supra note 16, at 27 ("[S]anctions for the violation of injunctions and permit ordinances tend to be light in comparison with those commonly administered under the subsequent punishment regimes.").

discussion of the prior restraint rule has centered on dangers unrelated to the degree of punishment: for example, the relative lack of procedural protections in the prior restraint context,[129] the increased probability of speech suppression through prior restraints,[130] and the tendency of prior restraint proceedings to present free speech claims in the abstract, rather than in the light of a fully developed record.[131] These accounts may provide a satisfactory explanation of the elevated judicial scrutiny of prior restraints, but they have nothing to do with differences in penalty severity.

b. *Unconstitutional Conditions.* — Running through First Amendment law—and constitutional rights review more generally—is the problem of unconstitutional conditions. This problem arises whenever the government conditions receipt of a public benefit—be it a government salary, welfare assistance, a procurement contract, and so on—on the recipient's waiver of certain constitutional protections. The law in this area is complicated and multifaceted, but it is generally understood that, within First Amendment doctrine, the government may more freely regulate speech through the conditional allocation of benefits than through the direct imposition of criminal and civil sanctions.[132] To the extent that such a principle governs First Amendment law, it might be tempting to regard it as embodying the penalty-sensitive approach.[133] Unconstitutional conditions doctrine sometimes permits the imposition

129. See Thomas I. Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648, 657 (1955) [hereinafter Emerson, Prior Restraint] (noting "the procedural protections built around criminal prosecution—many of which are constitutional guarantees—are not applicable to a prior restraint"); Martin H. Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 Va. L. Rev. 53, 55 (1984) (observing that prior restraint schemes present "the threat that expression will be abridged, if only for a short time, prior to a full and fair hearing before an independent judicial forum").

130. See Emerson, Prior Restraint, supra note 129, at 657 (noting "a decision to suppress in advance is usually more readily reached, on the same facts, than a decision to punish after the event").

131. See Blasi, supra note 16, at 49 (noting prior restraints typically involve "adjudication in the abstract," under which "the final authoritative judicial decision regarding the legal status of a disputed communication takes place before the moment of initial dissemination").

132. See Daniel A. Farber, Another View of the Quagmire: Unconstitutional Conditions and Contract Theory, 33 Fla. St. U. L. Rev. 913, 920 (2006) ("Freedom of speech may be the paradigmatic constitutional right. Despite their importance, however, speech rights are alienable, at least in some contexts. The Supreme Court has staunchly defended First Amendment rights in modern years, but it has allowed the government to restrict those rights in exchange for providing benefits.").

133. Indeed, this Article has already shown that within subsets of unconstitutional conditions cases—those involving the speech of public employees and those involving NEA grant awards—courts have unambiguously embraced penalty-sensitive logic. See supra Part II.A.3, 4. The question here, however, is broader: It is whether we can characterize as penalty-sensitive the general rule that funding conditions are reviewed more leniently than direct prohibitions.

of one type of sanction (i.e., the withholding of benefits), but not another (i.e., criminal and civil penalties), and given that the latter type of sanction is often harsher than the former, all key penalty-sensitive criteria seem to be met. When, for instance, the Court in *Connick v. Myers* permitted the government to fire an employee for engaging in speech that could not have given rise to a civil or criminal proceeding,[134] it handed down what could plausibly be characterized as a penalty-sensitive decision.

Conditional funding cases, however, present a special sort of difficulty. Even if we stipulate that (a) governments enjoy greater leeway to regulate speech through funding conditions than through direct prohibitions and (b) the sanction of denying benefits is systematically less severe than the sanction of imposing criminal/civil penalties, penalty-sensitive analysis materializes only to the extent that (b) causes (a)—that is, the relative leeway afforded to a funding condition is a consequence of the relative leniency of its underlying sanctions. And this is not always the case. It is true, for example, that the government is freer to restrict speech as a condition of public employment than it is to restrict speech by way of the criminal law.[135] But does this result obtain because the government as employer inflicts lighter penalties than the government as law enforcer? Or because the government as employer cannot function without enhanced abilities to monitor and restrict the speech of its employees? If the latter (as the Court has often indicated[136]), then the disparity in constitutional treatment arises not from a disparity in penalty severity, but rather from the idea that the special challenges of managing a workforce necessitate an extra degree of constitutional deference to the government's managerial decisions. It is also true that the government is freer to restrict libraries' distribution of information through funding conditions than it is to do the same through criminal prohibitions.[137] But is that because the penalty of subsidies foregone is harsher

134. 461 U.S. 138, 147 (1983) ("[A]n employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.").

135. See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (explaining that First Amendment does not prohibit government employers from punishing employees' speech when speech is not "of public concern" or when employer has "adequate justification for treating the employee differently from any other member of the general public").

136. See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (recognizing government's interest in "promoting the efficiency of the public services it performs through its employees"); see also Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2497 (2011) ("The government's interest in managing its internal affairs requires proper restraints on the invocation of rights by employees when the workplace or the government employer's responsibilities may be affected."); Snepp v. United States, 444 U.S. 507, 510 n.3 (1980) (per curiam) (upholding speech restriction on CIA employee).

137. See United States v. Am. Library Ass'n, 539 U.S. 194, 203–05 (2003) (plurality opinion) (discussing government's broad authority to further policy goals through fund-

than the penalty of fines incurred? Or is it because "'when the Government appropriates public funds to establish a program it is entitled to define the limits of that program'"?[138] Decisions like these may have the effect of permitting light penalties where heavy ones are forbidden, but the effect may be nothing more than a collateral consequence of rules whose justifications lie elsewhere.[139]

That said, it would be incorrect to characterize all of unconstitutional conditions doctrine as unrelated to the penalty-sensitive approach. Some conditional funding cases do incorporate penalty-sensitive considerations into the constitutional analysis—drawing a clear causal link between distinctions in penalty severity and distinctions in constitutional treatment. Indeed, the Court made just such a move in *Finley*, articulating an unambiguously penalty-sensitive justification for its decision to afford the government increased flexibility in setting standards for its allocation of NEA grants.[140] When courts employ reasoning of this sort, the causation problem disappears; in these cases, differences in penalty severity *do* generate differences in constitutional results.

The important point, then, is that the Court's unconstitutional condition cases are sui generis. Decisions in these cases sometimes will rest on penalty-sensitive logic, but other times will not. This being so, one cannot generally categorize this broad and complex area of constitutional doctrine as consistently penalty-sensitive. Penalty sensitivity cer-

---

ing decisions).

138. Id. at 211 (quoting Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

139. There are other non-severity-related reasons for giving the government greater leeway to regulate through funding conditions than direct prohibitions. Courts and commentators have argued, for example, (a) that funding cases are different because they implicate contractual bargains between the government and its subsidy recipients, see Richard Epstein, The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 15, 40–41 (1988) (developing theory of "how the doctrine of unconstitutional conditions does, and should, function in a variety of contexts as a check against the political perils of monopoly, collective action problems, and externalities"); Farber, supra note 132, at 915 (noting that "having a right often means being free to decide on what terms to exercise it" and suggesting that contract theory provides useful framework for analyzing unconstitutional conditions issues), (b) that funding cases are different because the government's freedom not to provide subsidies implies a further freedom to condition their receipt on the waiver of right, cf. Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 597–98 (1990) (discussing and criticizing argument), and (c) that funding cases are different because the government acts as proprietor rather than sovereign, Bd. of Educ. v. Pico, 457 U.S. 853, 908–10, 920 (1982) (Rehnquist, J., dissenting) ("[T]he role of the government as sovereign is subject to more stringent limitations than is the role of government as employer, property owner, or educator."). These arguments do not seem to depend, at least directly, on the relative leniency of the penalties embodied in funding restrictions.

140. See supra Part II.A.4 (discussing *Finley*); see also Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) (noting in abortion context that "[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity").

tainly resides within this body of law, but it is identifiable only on a case-by-case basis.

c. *Sentencing Enhancements.* — In *Dawson v. Delaware*, a sentencing jury heard testimony about a convicted murderer's membership in the white-supremacist "Aryan Brotherhood."[141] The testimony, in the Court's view, "proved nothing more than Dawson's abstract beliefs," which "ha[d] no bearing on the issue being tried."[142] Hence, the First Amendment prohibited the trial court from admitting the evidence, and the Court remanded for resentencing. But the Court did not call into question the validity of Dawson's original conviction; it only undid the results of his sentencing proceeding. In this respect, the *Dawson* holding—which passed judgment on a defendant's sentence without passing judgment on his conviction—may appear to be penalty-sensitive.[143]

On close inspection, however, *Dawson*'s penalty-neutral colors come into plain view. Notice that the question asked and answered in *Dawson* was *whether*, and not *to what extent*, the belief-based evidence could bear on the severity of Dawson's punishment. Even though the Court evaluated a sentencing enhancement, it did so in a way that did not discriminate between large and small sentencing enhancements. The Court would not have cared, that is, whether Dawson's affiliation with the Aryan Brotherhood had accounted for a slight uptick in a term of imprisonment, or had carried the more dramatic effect of converting a noncapital sentence into a capital one. As long as the evidence created a risk of any heightening of punishment, a new sentencing hearing had to be held.

Still, *Dawson* is worth keeping in mind, because it illustrates an important point about penalties and the First Amendment. Central to the Court's conclusion in *Dawson* was its concern that the sentencing jury, once exposed to the belief-based evidence, may have punished Dawson not just for his crime, but also for his beliefs. The Court thus feared that some portion of Dawson's sentence reflected purely belief-based condemnation, driven by nothing more than a disdain for the ideologies espoused by Dawson and his fellow Aryan Brothers. At its core, then, *Dawson* was a case about improper motives. That Dawson received a death sentence was not necessarily a problem; the problem was that this death sentence may have stemmed from considerations that the First Amendment disallows.[144]

---

141. 503 U.S. 159 (1992).

142. Id. at 167–68.

143. In the end, the Court's decision in *Dawson* had no effect on his ultimate fate. Even with the belief-based evidence excluded, the resentencing proceeding assigned Dawson the same sentence that he had originally received. See State v. Dawson, 681 A.2d 407, 411 (Del. Super. Ct. 1995) (noting Dawson was again sentenced to death following Supreme Court's reversal).

144. 503 U.S. at 167 ("Delaware might have avoided this problem if it had presented

In *Dawson*, the source of these considerations could be identified and eliminated; the Court needed only to remand the case with instructions not to admit the Aryan Brotherhood evidence at resentencing. But one can imagine situations in which proper and improper motives are not so easily disaggregated. What if, for example, the jurors in *Dawson* had discovered for themselves that Dawson was a racist and had escalated his punishment accordingly? What if a judge sentences a breach-of-the-peace defendant especially harshly for the covert reason that he loathes the views espoused? To take a more familiar example, what if a legislature ratchets up penalties for draft-card burning, for the unspoken reason that it detests the radicalism of draft-card burners? All of these cases share with *Dawson* the problem of impermissible influences on the punishment imposed on a speaker. Unlike *Dawson*, however, they present the problem in a way that reviewing courts cannot easily unravel. In these cases, jury, judge, and legislature leave no paper trail of their improper motives. Thus, a *Dawson*-like curative of a new and untainted government decisionmaking process becomes difficult to achieve.

Perhaps, however, courts *can* perform the same "cleansing" act undertaken in *Dawson*, by scrutinizing punishments rather than motives. On this approach, rather than identifying improper motives and preventing them from enhancing sentences, a penalty-sensitive court would identify exceptionally onerous sentences and treat them as evidencing improper motive. The finding of bad motives, in other words, would not lead the court to the reduction of excessive punishments; the excessiveness of punishments would lead the court to the detection of improper motives—which, in turn, would require judicial relief.

B. *Penalty Sensitivity in Other Constitutional Contexts*

The previous section identified some examples (and nonexamples) of penalty-sensitive free speech review. The conclusion drawn there was straightforward: Penalty sensitivity exists within First Amendment law, and its presence there is more widespread than typically has been suggested. But the descriptive claim can be broadened, as a look beyond First Amendment borders confirms the solid doctrinal foundations of the penalty-sensitive approach. Indeed, as this next section demonstrates, the Court and its individual Justices have relied on penalty-sensitive review in interpreting not just the free speech right, but many other constitutional protections as well.

Take Justice Powell's concurrence in *Bowers v. Hardwick*.[145] *Bowers* presented a constitutional challenge to a Georgia antisodomy law,

---

evidence showing more than mere abstract beliefs on Dawson's part, but on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible.").

145. 478 U.S. 186, 197 (1986) (Powell, J., concurring).

founded on the claim that the law violated constitutional privacy protections. A five-Justice majority rejected this claim, concluding that criminalizing the acts in question did not infringe on the constitutional right to privacy. Justice Powell joined the opinion, but he wrote separately to express serious hesitations about the penalties authorized by the law. In particular, he worried that, under the law, a judge could impose prison sentences of up to twenty years "for a single private, consensual act," thus creating "a serious Eighth Amendment issue."[146] By fusing concerns about the law's privacy-infringing effects with concerns about its especially severe punishments, and by suggesting that the Eighth Amendment—in joint operation with the privacy guarantee—might limit the government's power to punish private consensual behavior, Justice Powell's analysis of *Bowers* resonated with strong penalty-sensitive overtones.[147]

---

146. Id.

147. It might be argued that, given Justice Powell's express invocation of the Eighth Amendment, his analysis of *Bowers* is better understood as an instance of straightforward proportionality review, not as an instance of penalty-sensitive rights review. But that characterization cannot be squared with the opinion's specific allusion to the "private, consensual" nature of the conduct being criminalized, id., an allusion that makes sense only in reference to the Court's longstanding recognition of a constitutional right to privacy. What seems to have bothered Justice Powell was not merely the prospect of a harsh penalty, nor was it merely the prospect of an intrusion on privacy. Rather, it was the possibility of *a harsh penalty coupled with an intrusion on privacy*. Such an understanding necessarily involves a penalty-sensitive view of the privacy right.

Justice Powell's Eighth Amendment analysis is unusual in suggesting that especially strict proportionality requirements might apply to punishments that target conduct lying on the edge of other freestanding constitutional protections. In theory, however, courts could frame penalty-sensitive free speech analysis in a manner reminiscent of this opinion, reading the Eighth Amendment and Due Process Clause to impose especially strict limits on the government's power to punish expressive conduct. And such an approach would hardly mark a significant departure from constitutional traditions. Equal protection analysis, for instance, calls for heightened judicial skepticism of discriminatory action that implicates fundamental rights. See, e.g., Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628–29 (1969) (noting need for "exacting judicial scrutiny" to review state law giving voting right to some but not others); Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969) (holding statutory denial of social security benefits based on length of residency created unconstitutionally discriminatory classification); Griffin v. Illinois, 351 U.S. 12, 17–20 (1956) (holding law limiting indigent defendants' access to appellate review of criminal convictions was discriminatory and unconstitutional). And free speech protections are said to "take[] on an added dimension" when speech-infringing action also implicates right-to-privacy interests. Stanley v. Georgia, 394 U.S. 557, 564 (1969). Along these lines, Eighth Amendment/Due Process Clause proportionality protections might similarly strengthen when the punishments at issue implicate conduct that falls within the First Amendment's domain. The goal of such analysis would be to locate punishments that, while insufficiently excessive to give rise to a "pure form" Eighth Amendment or due process violation, and also insufficiently speech-infringing to give rise to a "pure form" First Amendment violation, are sufficiently *punitive and speech-infringing* to give rise to a hybrid constitutional violation. Cf. Ariel Porat & Eric A. Posner, Aggregation and Law, 122 Yale L.J. (forthcoming 2012) (manuscript at 37), available at http://ssrn.com/abstract=1974565 (on file with the

Consider also the Court's criminal procedure jurisprudence. Here, the Court has held, for instance, that a criminal defendant acquires a constitutional right to appointed counsel when he faces the possibility of imprisonment but not when he faces the possibility of fines.[148] In like fashion, the Court has refused to apply the constitutional jury trial right in cases involving "petty offenses," which, as a general matter, are crimes "punishable by no more than six months in prison and a $500 fine."[149] And with respect to the Fifth Amendment's grand jury requirement, both the Court and the Federal Rules Advisory Committee have interpreted the provision's reference to "infamous crimes" to encompass only crimes subject to an "infamous punishment," meaning a punishment greater than a one-year prison sentence.[150] All of these rulings are penalty-sensitive in the sense that they link the validity of a constitutional claim to the severity of the punishment that a defendant confronts.

Penalty sensitivity is equally apparent on the civil side of the ledger, where, in outlining the scope of the procedural due process guarantee, the Court has asserted that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."[151] In *Goldberg v. Kelly*, for example, the Court required an expansive pre-deprivation hearing, emphasizing the "immediately desperate" nature of the defendant's circumstances, and the fact that deprivation of his welfare benefits would leave him lacking "the very means by which to live."[152] In *Mathews v. Eldridge*, by contrast, the Court viewed the "hardship imposed upon the erroneously terminated disability recipient" as less severe

---

Columbia Law Review) (showing how hybrid rights analysis can permit "cross-claim normative aggregation," under which a statute that does not independently violate either of two constitutional provisions might nonetheless "violate them jointly"). Regardless of whether such analysis is properly described as "penalty-sensitive" First Amendment review or "speech-sensitive" proportionality review, the end result is the same: penalty-based limitations on the government's power to restrict speech.

148. Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); see also Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding state must appoint counsel where conviction results in suspended sentence that "may 'end up in the actual deprivation of a person's liberty'" if probation is revoked (quoting *Argersinger*, 407 U.S. at 40)).

149. Baldwin v. New York, 399 U.S. 66, 71 (1968). For cases fleshing out the meaning of this rule, see, for example, Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974) (holding jury trial right applies when consecutive sentences exceed six months in aggregate), and Muniz v. Hoffman, 422 U.S. 454, 477–78 (1975) (casting doubt on "the proposition that a contempt [violation] must be considered a serious crime under all circumstances where the punishment is a fine of more than $500, unaccompanied by imprisonment").

150. See Fed. R. Crim. P. 7(a)(2) advisory committee's note (interpreting Supreme Court's Fifth Amendment decision in Duke v. United States, 301 U.S. 492 (1937)).

151. Mathews v. Eldridge, 424 U.S. 319, 341 (1976).

152. 397 U.S. 254, 264–65 (1970).

than "that of a welfare recipient" on the ground that entitlement to disability payments was not need-based.[153] Consequently, there was "less reason [in *Mathews*] than in *Goldberg* to depart from the ordinary principle that something less than an evidentiary hearing is sufficient prior to adverse administrative action."[154]

The Court's equal protection jurisprudence also reveals traces of the penalty-sensitive approach. In *McLaughlin v. Florida*, for example, the Court struck down a Florida cohabitation law as unconstitutionally discriminatory.[155] To support this holding, Justice White's majority opinion emphasized the severity of the law's penalties: "We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause."[156] Likewise, Justice Powell's dispositive opinion in *Wygant v. Jackson Board of Education* drew a constitutional distinction between race-based layoffs and race-based hiring decisions.[157] The latter, he argued, were less problematic than the former because, "[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives."[158] Both *McLaughlin* and *Wygant* illustrate penalty-sensitive conceptions of the equal protection guarantee. Finding a constitutional violation depends not only on the classification employed, but also on the significance of the harm the government imposes.

Further examples come from Takings Clause and Contract Clause doctrine. In *Lucas v. South Carolina Coastal Council*, the Court held that

---

153. 424 U.S. at 342.

154. Id. at 343; see also Goss v. Lopez, 419 U.S. 565, 581, 584 (1975). *Goss* holds that

> [s]tudents facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

Id. It does note, however, that "[l]onger suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures." Id.

155. 379 U.S. 184 (1964).

156. Id. at 192. See also Justice Stewart's concurrence, in which he said,

> There might be limited room under the Equal Protection Clause for a civil law requiring the keeping of racially segregated public records for statistical or other valid public purposes. But we deal here with a criminal law which imposes criminal punishment. And I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se*.

Id. at 198 (Stewart, J., concurring) (citation omitted).

157. 476 U.S. 267, 282–83 (1986) (Powell, J.) (plurality opinion) (contrasting race-based hiring goals with more burdensome race-based layoffs).

158. Id. at 283.

"total" regulatory takings operate in a per se fashion to trigger just-compensation obligations, whereas nontotal takings do not.[159] Likewise, in *Allied Structural Steel Co. v. Spannaus*, the Court held that the government violates the Contract Clause only when it causes "*substantial* impairment of a contractual relationship."[160] "Minimal alteration of contractual obligations," the Court explained, "may end the inquiry at its first stage."[161] But "[s]evere impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."[162] Notice that, for both of these restrictions, the Court has assessed the severity of an individual's harm not for the purpose of determining how much compensation the government owes that individual but rather for the purpose of determining whether the government owes compensation in the first place. Thus, the weightiness of the punitive burden placed by the government on the individual is closely linked to the question of whether the individual's constitutional rights have or have not been violated.

None of this is to say that cases of this kind litter the constitutional landscape, or that these "non-First Amendment" examples correspond in perfect fashion to their counterparts within the First Amendment domain. The existence of this case law does suggest, however, that the Court's forays into penalty-sensitive free speech review are by no means radical or isolated events. Indeed, the examples illustrate that penalty-sensitive analysis has surfaced within many areas of constitutional rights review, thus raising the question whether expanding its presence within free speech doctrine is a worthwhile goal to pursue.

III. JUSTIFYING THE PENALTY-SENSITIVE APPROACH

Part II of this Article catalogued several existing examples of penalty-sensitive free speech doctrine. The intent was not to suggest that modern free speech doctrine is predominantly or even substantially penalty-sensitive. To the contrary, the previously discussed examples may be viewed as departures from the penalty-neutral norm—areas of doctrine that are noteworthy precisely because they deviate from standard First Amendment practice. Even so, as Part II makes clear, penalty sensitivity is certainly present within First Amendment doctrine, and its presence raises important questions: Does penalty sensitivity make sense as a method of free speech adjudication? Should courts increase their use of the penalty-sensitive approach in free speech cases? And, if so, *how* should courts put penalty-sensitive First Amendment analysis to further use?

159. 505 U.S. 1003, 1026–31 (1992).

160. 438 U.S. 234, 244 (1978) (emphasis added).

161. Id. at 245.

162. Id.

This next Part addresses these questions. It argues that penalty sensitivity *does* make sense, and that courts *should* expand its existing presence within free speech law. To support these claims, this Part identifies five ways in which penalty sensitivity can improve courts' implementation of the free speech right. Specifically, it argues that penalty sensitivity can (a) increase the fairness of doctrinal results, (b) mitigate chilling effects on protected speech, (c) facilitate the "efficient breach" of constitutionally borderline speech restrictions, (d) improve courts' understanding of legislative motives, and (e) promote the transparency of judicial decisionmaking. The lesson to draw from this discussion is not that all First Amendment cases should be resolved in a penalty-sensitive fashion; it is rather that courts have thus far underutilized penalty-sensitive analysis, which, if properly undertaken, can assist in the resolution of difficult First Amendment cases.

A. *Fairness*

Penalty-sensitive adjudication promotes fairness. I have in mind here the principle that like cases should receive like treatment,[163] or, more accurately, its corollary that "almost like" cases should receive "almost like" treatment.[164] Governments offend these principles when they mete out substantially different punishments for substantially similar forms of behavior.[165] And courts enable such behavior when they adjudicate free speech claims in a penalty-neutral manner.

To see the point, imagine a one-dimensional axis measuring the constitutional value of various expressive activities. Toward the left end of the axis are activities of low constitutional value, and toward the right are activities of high and recognized constitutional importance. For example, a comparison of different forms of sexually explicit speech might result in a diagram like this[166]:

---

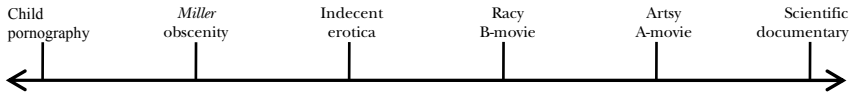
163. This principle has long been recognized as fundamental to the rule of law. See, e.g., Lon Fuller, The Morality of Law 211 (1969) (associating principle with requirement that laws be general in nature); H.L.A. Hart, The Concept of Law 156 (1961) ("[T]he idea of justice . . . consists of two parts: a uniform or constant feature, summarized in the precept 'Treat like cases alike' and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different."); John Rawls, A Theory of Justice 237 (1971) ("The rule of law also implies the precept that similar cases be treated similarly.").

164. Congress has given this principle statutory recognition in 18 U.S.C. § 3553(a)(6) (2006), which instructs sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

165. See, e.g., Richard G. Singer, Just Deserts: Sentencing Based on Equality and Desert 11 (1979) ("Every just scheme of punishment must be fair. And part of fairness is equality. Prima facie, equality would demand that two offenders who have committed the same offense receive the same sentence.").

166. In case it does not go without saying, the chart's estimation of "constitutional value" reflects only an impressionistic and inexact reading of First Amendment law. It does, however, accord with the Court's suggestions that activities toward the left end of the

SPECTRUM OF SEXUALLY EXPLICIT SPEECH



Let us stipulate that speech falling far to the low end of the spectrum merits no constitutional concern, while speech falling far to the high end of the spectrum merits absolute constitutional protection. With these stipulations in place, the doctrinal challenge becomes apparent: We must allocate constitutional protections between these two extremes.

Applying the penalty-neutral approach to First Amendment adjudication, we simply draw a *constitutional borderline* at the point on the spectrum where constitutional value becomes high enough to mandate constitutional intervention. All activities falling to the left of the borderline are fully punishable,[167] while all activities falling to the right of the borderline are not punishable at all. (On a simplified model of existing First Amendment doctrine,[168] this borderline would rest somewhere near the obscenity standard of *Miller v. California*.[169]) Thus, if we were to add to our original diagram a y-axis measuring maximum allowable penalty severity, the penalty-neutral approach would yield something like the following:

---

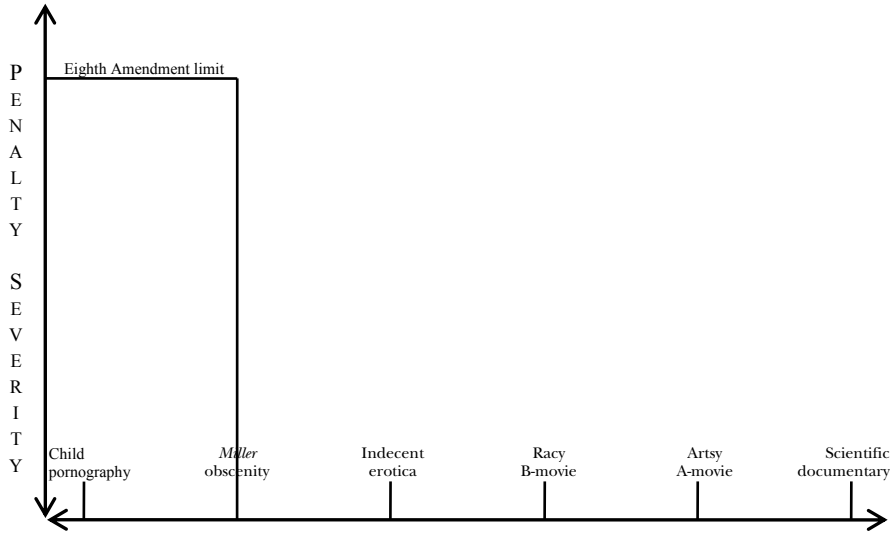
spectrum are of lower constitutional value than the activities toward the right end of the spectrum. See, e.g., New York v. Ferber, 458 U.S. 747, 762 (1982) ("The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."); FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (plurality opinion) (characterizing "patently offensive words dealing with sex and excretion" as "ordinarily lack[ing] literary, political, or scientific value," but "not entirely outside the protection of the First Amendment"); Miller v. California, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas . . . .").

167. Note that "fully punishable" here means something like "punishable to the full extent permitted by independent constitutional limitations, such as the Eighth Amendment or the Due Process Clause."

168. This model omits, for example, the penalty-sensitive distinction introduced in *Pacifica* and *Reno*. See supra Part II.A.5 (discussing evolution of penalty-sensitive doctrine governing "indecent" expression and communications media).

169. 413 U.S. 15 (1973).

PENALTY-NEUTRAL APPROACH



So why does penalty neutrality fail to treat like alike? The problem is that, as this diagram illustrates, when conduct approaches the *Miller* standard, small changes in constitutional value translate into huge differences in constitutional protection.[170] This precipitous drop means that the constitutional regime must assign very different constitutional fates to very similar activities. Suppose, for instance, that Hank and Harry have posted lewd videos on their respective websites, and suppose further that Hank's video qualifies as "barely patently-offensive" while Harry's video qualifies as "almost patently-offensive." On a penalty-neutral application of the *Miller* rule, Hank is subject to grave punishment—potentially many years in prison—while Harry is immune from sanction of any kind. This outcome is not good.[171]

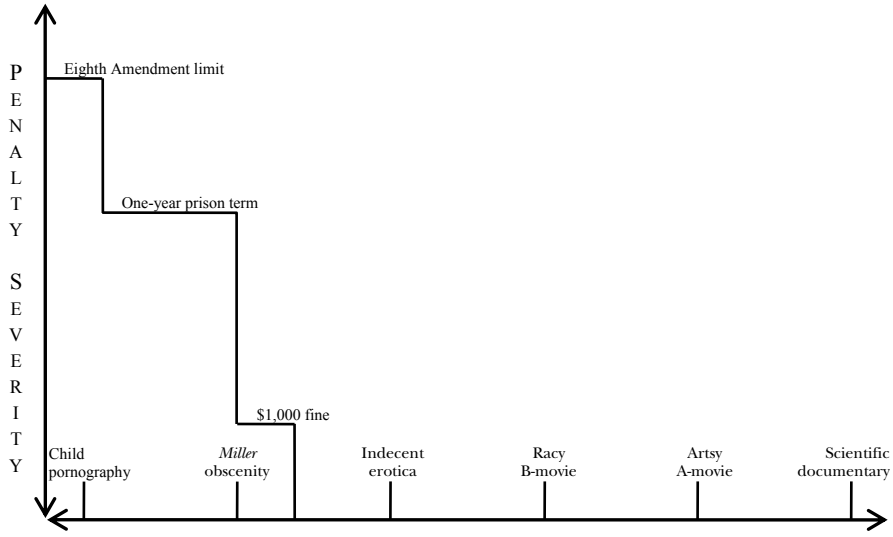
A modified diagram reveals how penalty sensitivity ameliorates the fairness problem. In most areas, the penalty sensitive approach parallels the penalty-neutral approach, with activities at the left end entitled to no

170. This phenomenon is by no means isolated to penalty-neutral modes of constitutional adjudication. For a general analysis of the problem—and a general recommendation in favor of "smoother" laws—see Adam Kolber, Smooth and Bumpy Laws 3–4 (Feb. 14, 2012) (unpublished manuscript), available at http://ssrn.com/ abstract=1992034 (on file with the *Columbia Law Review*) (discussing benefits of "smooth" doctrine in various legal contexts).

171. Notice that this problem has nothing to do with the standard's lack of clarity. The problem, in other words, does not arise from the difficulty of distinguishing between "patently offensive" and "not patently offensive" speech; rather, it arises from the consequences of making such a distinction in the first place—consequences that in no way depend on the coherence of the distinction itself. Hence, courts cannot solve the fairness problem merely by increasing doctrinal determinacy.

protection, and activities at the right end entitled to protection that is absolute. But in the area surrounding *Miller* obscenity, the penalty-sensitive approach employs gradated limits—rather than a single, stark borderline—to achieve a rough correspondence between expressive value and maximum punishability. Such an approach might, for example, permit states to punish publishers of child pornography to the full extent permitted by the Eighth Amendment, publishers of *Miller* obscenity with a prison sentence not to exceed one year, publishers of pornography falling just short of the *Miller* standard with monetary fines, and publishers of indecent erotica to no extent at all.[172]

PENALTY-SENSITIVE APPROACH



This approach does not eliminate fairness problems, but it has a mitigating effect. Under this new scheme, Hank and Harry would still receive substantially different constitutional treatments (with Hank exposed to the possibility of a one-year prison term and Harry exposed to the possibility of a fine), but the difference is less dramatic than the penalty-neutral alternative would dictate. Courts might also improve the picture by introducing new tiers, further lessening the disparities in the treatment of constitutionally similar acts. Eventually, the benefits of further gradations will give way to losses in administrability, but these losses are not likely to be substantial when the tiers are few in number.[173]

---

172. It bears emphasizing that the diagram reflects maximum punishments—not mandatory punishments. That is, the Court would not be telling legislatures that they *must* punish *Miller* obscenity with one-year prison terms. Rather, the Court would be saying that the First Amendment prohibits any such punishment exceeding one year.

173. See infra Part IV.B (discussing and responding to implementation-related objections to penalty-sensitive analysis).

The foregoing discussion has focused on equality, but it also helps to illustrate a related point, grounded in the concept of proportionality. While penalty-sensitive review helps to ensure similar treatment for similar speakers, it also fosters adherence to the time-honored maxim that "the punishment should fit the crime."[174] Penalty neutrality, as the charts above indicate, fails to distinguish between two different inquiries: (a) whether speech has insufficient value to merit total constitutional protection; and (b) whether speech has insufficient value to merit any constitutional protection at all. If a penalty-neutral analyst answers "yes" to the first question, then he must also answer yes to the second; from the conclusion that the government may punish a speech act *lightly*, it automatically follows that the government may do so *harshly* as well. Strict adherence to such a scheme raises the risk of disproportionate punishments, and it permits governments to punish speech carrying some First Amendment value as if it carried no First Amendment value at all. Penalty sensitivity avoids this problem by allowing courts to take note of a speech's constitutional value even after concluding that such speech does not warrant all-out constitutional protection. And in so doing, penalty sensitivity helps to prevent the imposition of punishments that are marked by undue harshness when viewed in relation to the expressive value of the act in question.[175]

B. *Chilling Effects*

Modern First Amendment doctrine manifests a keen awareness of chilling effects. Chilling effects, in the words of Professor Frederick Schauer, occur when "individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental

174. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 n.24 (1996) ("The principle that punishment should fit the crime 'is deeply rooted and frequently repeated in common-law jurisprudence.'" (quoting Solem v. Helm, 463 U.S. 277, 284 (1983))). For philosophical development of this idea, see, for example, H.L.A. Hart, Prolegomenon to the Principles of Punishment, *in* Punishment and Responsibility 1, 25 (2d ed. 2008) (discussing "the principle that different kinds of offence of different gravity (however that is assessed) should not be punished with equal severity").

175. One could achieve similar results by modifying Eighth Amendment doctrine so as to permit a "hybridized" proportionality analysis of speech-restricting punishments, targeting government actions that, though not individually violative of Eighth Amendment proportionality requirements or First Amendment prohibitions, would still violate a proportionality rule informed by First Amendment considerations. See supra note 147 (outlining potential hybrid constitutional analysis arising from joint application of First and Eighth Amendments). Federal sentencing courts, moreover, could engage in a similar analysis in connection with their application of 18 U.S.C. § 3553(a), concluding that the expressive value of an act, while insufficient to bar its punishment under the First Amendment (or Eighth Amendment), at least necessitates a downward variance from the Guidelines range. See 18 U.S.C. § 3553(a)(2)(A) (2006) (providing "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

regulation not specifically directed at that protected activity."[176] That is, governments "chill" protected speech by restricting some other form of speech that, while unprotected, is similar to the speech getting chilled. As Schauer explains, "[I]f a statute which is directed at hard core pornography has the actual effect of deterring an individual from publishing the *Decameron* or *Lady Chatterley's Lover*, that effect is properly deemed a chilling effect."[177] But the same statute does not have a chilling effect if it merely deters the publication of unprotected hard core pornography.

At first glance, the notion of a chilling effect may seem puzzling. If a statute targets only behavior A1, why would it also deter behavior A2? Schauer answers this question by disaggregating two distinct states of mind: fear and uncertainty.[178] Chilling effects can arise, that is, when individuals *fear* that their participation in behavior A2 will result in an erroneous conviction under the ban on behavior A1, or when individuals *do not know* whether the ban on behavior A1 also encompasses behavior A2. A bookseller, for instance, might decline to sell nonobscene books for fear that the state's legal apparatus will misclassify them as obscene (a fear-based chilling effect). Or he might not sell the books because he does not know whether they are in fact obscene (an uncertainty-based chilling effect).[179]

The upshot of these observations is that courts cannot safeguard the exercise of free speech rights by protecting only speech acts that intrinsically deserve free speech protection. Rather, as Schauer explains, courts must take additional steps to counteract the dangers of both fear-based and uncertainty-based chilling effects. One strategy is to extend the range of constitutional protection beyond the range of constitutional value, thereby creating a "buffer zone" between conduct that deserves protection and conduct that receives it.[180] The Court employed this strategy in *New York Times*: What compelled its adoption of the "actual malice" standard was not the intrinsic value of defamatory falsehoods, but rather the need for "a measure of strategic protection" to promote vigorous and uninhibited public debate.[181] Another strategy is to insist on precise legal language, thereby reducing uncertainty regarding the scope of a speech prohibition.[182] The vagueness and overbreadth rules serve this anti-chilling purpose by reducing the risk that individuals will mistakenly decline to engage in protected expression as a result of miscomprehending the ambit of a speech-restricting rule.

176. Schauer, supra note 90, at 693.

177. Id.

178. Id. at 694.

179. Id. at 699.

180. Id. at 707.

181. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (explaining result in *New York Times*).

182. Schauer, supra note 90, at 698–700.

Schauer analyzes these strategies in depth, but he does not discuss a third way in which courts can reduce both fear-based and uncertainty-based chilling effects. This strategy is rooted in Schauer's own suggestion that the intensity of a law's chill "may be likened to the product of the probability of an erroneous verdict times the harm produced by such a verdict," the "most obvious measure" of which "is the harshness of the penalty."[183] Schauer's strategies target the first component of this equation: Strategic buffer zones and heightened clarity requirements reduce the probability of erroneous verdicts, thereby reducing the risk of silencing protected speech. But given that punishment severity also contributes significantly to a law's deterrent effect, penalty-sensitive adjudication also can operate to combat chilling effects.

Consider again the seller of erotic literature, who works in a jurisdiction where purveying obscenity is punishable by twenty years' imprisonment. Even with a pretty clear definition of obscenity, and even with a low likelihood of an erroneous verdict, the prospect of spending two decades in prison may well deter the bookseller from carrying non-obscene books. Here, the best way to reduce chilling effects is to lessen the severity of the punishment—holding, for instance, that the state cannot punish obscenity with anything more severe than a monetary fine or the forfeiture of law-offending publications. While leaving the probability of an erroneous verdict unchanged, this alteration would still reduce the severity of the law's chilling effect, giving the bookseller a worst case scenario he might well be willing to live with.

This example is not fanciful. Indeed, some of the cases discussed in Part II illustrate just this sort of approach to the problem of deterring protected speech. What necessitated *Gertz*'s limit on presumed and punitive damages was not the inherent constitutional value of negligently uttered falsehoods; this much was clear from the Court's assertion that "there is no constitutional value in false statements of fact," whether caused by the "the intentional lie" or the "careless error."[184] Rather, the Court's holding was designed to limit chilling effects on constitutionally valuable speech. But unlike *New York Times*, which mitigated chilling effects by reducing the likelihood of erroneous verdicts, *Gertz* mitigated chilling effects by reducing the harms that erroneous verdicts could generate. As Justice Powell explained, "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."[185] Put

183. Id. at 695–96.

184. *Gertz*, 418 U.S. at 340; see also N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) ("It may be urged that deliberately and maliciously false statements have no conceivable value . . . .").

185. *Gertz*, 418 U.S. at 349.

simply, the Court fashioned restrictions on punitive and presumed damages to guard against the "danger of media self-censorship."[186]

Concerns about chilling effects also account for the penalty-sensitive sides of the vagueness and overbreadth doctrines. Recall Justice O'Connor's assurances in *Finley* that "[i]t is unlikely . . . that speakers will be compelled to steer too far clear of any 'forbidden area' in the context of grants of this nature."[187] Translated into Schauer's terms, the point is that low penalty severity in this context operated to minimize uncertainty-based chilling effects; with relatively little on the line, grant applicants were not likely to temper their artwork to avoid offending even the murky guidelines that the NEA applied.[188] Consider also Justice Kennedy's observation in *Free Speech Coalition* that "[w]ith [the CPPA's] severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law."[189] Here, high penalty severity threatened to exacerbate the chilling effects of the CPPA: Given the terrible consequences of a CPPA violation, individuals would not go anywhere near the law's boundaries.

Gertz, *Finley*, and *Free Speech Coalition* all took account of the close connection between the severity of a law's penalty and the intensity of its deterrent effect on valuable speech. But courts cannot attend to this connection when stuck in penalty-neutral mode. Take the majority opinion in *Bethel*: Having evaluated the content of Matthew Fraser's speech, and having then concluded that such speech should not receive protection, the majority moved on to other issues.[190] Had it looked at Fraser's punishment—a multiday suspension—the Court might well have noticed a chilling effects problem. School officials had imposed, with hardly any warning at all,[191] a serious sanction that most students would take pains to avoid. What is more, Fraser's speech achieved its effect through allusion, relying entirely on innuendo that was inoffensive on its face. These

186. Id. at 350; see also Carol Rice Andrews, The First Amendment Problem with the Motive Restrictions in the Rules of Professional Conduct, 24 J. Legal Prof. 13, 57–58 (2000) (explaining *Gertz* rule in similar terms).

187. NEA v. Finley, 524 U.S. 569, 588 (1998).

188. The Court acknowledged the connection between chilling effects and uncertain legal language in *Spieser v. Randall*, where it noted,

> The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position.

357 U.S. 513, 526 (1958) (citations omitted).

189. Ashcroft v. Free Speech Coal., 535 U.S. 234, 244 (2002).

190. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986).

191. See id. at 691 (Stevens, J., dissenting) (arguing Fraser was not given fair notice of school's prohibitions).

facts in tandem raised a chilling effects problem. Future student speakers, aware of Fraser's punishment, might well hesitate to give public addresses, or they might at least go out of their way to excise potentially controversial material from their prepared remarks. Had Fraser's sanction not been so severe, the increase in self-censorship would not have been as great. By raising the disciplinary stakes to a significant level, the school board's actions threatened to suppress much more than just the "patently offensive" speech that *Bethel* purported to deem out of bounds.

C. *"Preserving" Unprotected Speech*

A related, though distinct, role of penalty sensitivity involves avoiding the overdeterrence of unprotected speech. This strategy begins with the thought that, under certain conditions, courts may wish to deny absolute constitutional protection to an expressive activity, while simultaneously taking measures to protect against that activity's total extinction. Whether prompted by uncertainty about the correctness of the constitutional decision, or by the desire to fashion a compromise solution to a "close" constitutional case, courts may employ penalty-sensitive rules to reduce the deterrent impact of a refusal to protect speech in an all-out way. The predictable effect of such rules would be to suppress some, but not all, instances of the conduct denied protection—permitting the government to soften, but not to silence, speech lying just beyond the zone of absolute constitutional protection.

The benefits of this "speech-preserving" strategy go beyond its capacity to reduce the sum quantity of speech that is deterred: There is a quality dimension, as well. The key idea is this: So long as the Court maintains the "punitive price" of speaking at a nonprohibitive level, individuals can reasonably choose to flout a government's speech restriction, calculating that the benefits of speaking exceed the constitutionally capped costs of punishment. When this happens, we can further surmise that the speech left undeterred is the speech that matters most to would-be speakers. If an individual only marginally desires to engage in the unprotected conduct, then the presence of even limited punishments will deter her from running afoul of the government's restriction; if she yearns to speak, then these same punishments will not deter her. The penalty-sensitive rule thus functions as a screening device, filtering out instances of a speech act of little concern to the speaker, while preserving instances of the act that she values the most.

This point is constitutionally significant for two reasons. First, insofar as the objective constitutional value of a speech act correlates with the subjective value that an individual attaches to it, the penalty-sensitive rule will have the salutary effect of effectively facilitating valuable forms of unprotected speech. Suppose, for example, that the Court were to adopt hard-and-fast limits on punishments accompanying contempt citations—i.e., punishments that judges impose on individuals engaging in aggres-

sive, profane, or otherwise disruptive forms of in-court expression.[192] Even if there were no substantive free speech restrictions on the contempt power (i.e., rules identifying forms of contempt of court that were absolutely unpunishable),[193] placing limits on the degree of punishments for contempt may go a long way toward preserving those forms of contemptuous conduct that are most worth preserving. That is because, in this context, an individual's subjective desire to breach courtroom decorum should at least roughly correlate with the objective constitutional value of his conduct. Compare, for example, two speakers: the witness who peppers his testimony with gratuitously profane language, and the defendant who vigorously protests treatment he believes to be unfair. Generally speaking, the penalty-sensitive rule should end up deterring the former sort of conduct more intensely than the latter, as individuals will tend to value more greatly the opportunity to protest treatment they perceive to be unfair than the opportunity to toss about profanities. From a constitutional perspective, this may be as it should be: We might well prefer to preserve vigorous protestations of perceived government oppression over needless embellishments of in-court speech, on the ground that the former type of communication is more likely than the latter to further First Amendment values.[194] In this respect, a penalty-

192. For general discussions of First Amendment limitations on the contempt power, see Louis S. Raveson, Advocacy and Contempt: Constitutional Limitations on the Judicial Contempt Power, 65 Wash. L. Rev. 477, 497–506 (1990); Ronald J. Rychlak, Direct Criminal Contempt and the Trial Attorney: Constitutional Limitations on the Contempt Power, 14 Am. J. Trial Advoc. 243, 272–86 (1990); see also Ira P. Robbins, Digitus Impudicus: The Middle Finger and the Law, 41 U.C. Davis L. Rev. 1403, 1476–84 (2008) (examining contempt power as it applies to use of middle finger gesture in court).

193. I assume here that a desirable constitutional regime permits the suppression of some, but not all, disruptive or disrespectful speech acts in the courtroom. Cf. United States ex rel. Lynch v. Werksman, 319 F. Supp. 353, 354 (N.D. Ill. 1970) ("If every disrespectful comment of losing counsel and litigants were to constitute criminal contempt, the prison population in the United States would be substantially increased and the First Amendment would have a substantial new exception to its protection.").

194. The defendant's "vigorous protestations" seem to me more valuable than the witness's "gratuitous slurs" under any number of free speech theories. One might defend the distinction, for instance, by reference to Professor Meiklejohn's "self-government" framework, arguing that the defendant's conduct represents a vital act of public dissent, whereas the witness's conduct does not in any meaningful way promote democratic self-government. See generally Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948) (outlining First Amendment theory based on role of free speech in ensuring proper functioning of democratic system). The distinction also makes sense within a Millian "marketplace-of-ideas" framework: The defendant's vigorous protestations draw attention to a competing assessment of a judge's decision, while the witness's gratuitous embellishments add little of substance to a view already being espoused. Cf. John Stuart Mill, On Liberty 86–120 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (defending freedom of speech as allowing for airing of competing opinions and, through this process, facilitating eventual emergence of truth).

sensitive denial of speech protection creates room for a sort of "efficient breach" of government imposed speech restriction.[195]

Second, the penalty-sensitive rule fits well with the First Amendment values of enhancing autonomy and promoting individual self-realization. When compared to an absolute denial of speech protection, a penalty-sensitive denial furnishes a greater degree of choice to individuals contemplating participation in expressive activity. This choice, to be sure, is not unrestrained. By withholding absolute protection, the Court denies individuals the freedom to speak without facing punishment as a result. But with strict enough limits on punishment in place, the choice remains open in the sense that speakers can reasonably decide to absorb the costs of punishment—purchasing, as it were, their right to speak at a manageable and predictable price.[196] Whereas penalty-neutral denials of speech

195. Cf. Matthew Stephenson, The Price of Public Action, 118 Yale L.J. 2, 4–6 (2008). Professor Stephenson's article, which is also about constitutional rights review, draws a similar lesson from the efficient breach phenomenon. In particular, Stephenson argues that "courts often can, do, and should craft doctrines that raise the costs to government decisionmakers of enacting constitutionally problematic policies, rather than attempting to designate certain government actions, or categories of government actions, as permissible or impermissible." Id at 4. His argument begins from the thought that many types of constitutional cases call for an implicit weighing of legitimate governmental purposes against constitutionally relevant harms. Id. at 5. In an ideal world, all-knowing courts could strike the appropriate balance between these interests, but in the real world, courts face serious informational difficulties in determining what this balance should be. As a result, a strictly category-oriented approach to judging will produce constitutional rules that either overprotect or underprotect individual rights. To reduce informational difficulties, Stephenson favors an "enactment cost" strategy, which permits the passage of constitutionally problematic laws, but only in a manner that imposes significant costs on their enactors. Id. at 11. Such a strategy—implemented, for example, by way of clear statement rules, narrow tailoring requirements, legislative history canons, etc.—allows courts to delegate informational burdens to the legislature without fully abdicating their rights-protecting responsibilities. Id. at 6. As Stephenson explains, "constitutional doctrines that raise the costs associated with problematic government enactments may help deter policies that are 'inefficient'—in the broad sense of failing a hypothetical ideal constitutional balancing test—while allowing what might be thought of as 'efficient breaches' of constitutional rights." Id.

While Stephenson's analysis identifies a means of managing informational difficulties on the "government interest" side of the balancing equation, my analysis here identifies a means of doing so on the "liberty interest" side. When, that is, the bulk of a court's informational difficulties relate to estimating the "value" of the liberty interests implicated by a constitutionally problematic enactment, penalty-sensitive doctrine provides an indirect means of preserving the most valuable instances of a speech act while filtering out its less valuable variants. Just as Stephenson's enactment cost strategy creates room for "efficient constitutional breaches" by public officials, a penalty-sensitive strategy creates room for "efficient constitutional invocations" by private actors.

196. Penalty-sensitive doctrine of this sort might also be conceived of as implementing a sort of constitutional liability rule, under which speakers are permitted to purchase the entitlement to circumvent a speech-infringing law at a preset price. See generally Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1092 (1972); cf. David A. Strauss, First Amendment Entitlements and Government Motives: A Reply to Professor Merrill, 93 Nw.

protection allow the government to set the punitive prices at levels that individuals cannot seriously contemplate paying (such as a lengthy term in prison), a penalty-sensitive denial of speech protection may set costs that, given the right conditions, individuals can and will choose to endure (for example, a small fine). Thus, for courts and scholars who see the free speech right as grounded in the value of autonomy,[197] this penalty-sensitive approach dovetails with one of the First Amendment's animating purposes.

In this respect, civil libertarians disaffected with the Court's indecency jurisprudence should find some consolation in the penalty-sensitive aspects of the *Pacifica* holding. *Pacifica* may not have ushered in a golden age of no-holds-barred programming, but the decision at least deserves credit for staving off a dark age of enforced blandness. And that is because, by stressing the importance of limited punishments, *Pacifica* withheld from the government the tool of total, nonnegotiable censorship. Under the reasoning of *Pacifica*, when broadcasters strongly desire to air the seven dirty words, the government can do only so much to dissuade them: It can exact a price for the broadcaster's act of defiance, but it cannot erect insurmountable barriers to indecent broadcasts.[198] Thus, whatever screen *Pacifica* and its progeny have placed in the way of indecent programming, the penalty-sensitive aspects of this case law have

U. L. Rev. 1205, 1212 (1999) ("Even if the government may not forbid, buy out, or condemn tobacco advertising, perhaps it should be allowed to require tobacco advertisers to pay for the harm that their advertising inflicts."). For elaboration on this idea, see Gerard N. Magliocca, Constitutional Liability Rules 23–26 (2011) (unpublished manuscript), available at http://www.law.northwestern.edu/colloquium/constitutionallaw/documents/Fall2011Magliocca-Constitutional-Liability-Rules.pdf (on file with the *Columbia Law Review*) (proposing, among other things, tax-oriented campaign finance doctrine that "hold[s] that corporations have the First Amendment entitlement that *Citizens United* identified, but that this right can be taxed in the interest of protecting the political system from corruption or the appearance of corruption"). It bears noting that this sort of approach might present untoward distributive consequences, insofar as it affords deep-pocketed parties greater freedom to flout speech restrictions than their shallow-pocketed counterparts. Whether this problem merits attention from courts charged with implementing constitutional doctrine—as opposed to policymakers with direct control over the distribution of wealth—is an important and interesting question, but it is ultimately one that lies beyond the scope of this project.

197. See, e.g., Martin H. Redish, Freedom of Expression: A Critical Analysis 11 (1984) (arguing "the constitutional guarantee of free speech ultimately serves only one true value, . . . labeled 'individual self-realization'"); Emerson, Toward a General Theory, supra note 72, at 879–81 (identifying "individual self-fulfillment" as First Amendment value, in light of idea that "[t]he right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual").

198. See supra notes 113–115 and accompanying text (discussing penalty-sensitive aspects of *Pacifica* and lower courts' reading of case as prohibiting excessive punishment of indecency).

loosened its mesh, ensuring that some forms of "unprotected" speech can still get through.[199]

D. *Government Motives*

Courts often face difficulties in ascertaining the purposes underlying a law with speech-infringing effects. These difficulties prompted the Court in *United States v. O'Brien* to declare that it "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[200] As then-professor and now-Justice Elena Kagan has shown, however, this motive-neutral approach to First Amendment law has not won the day. In fact, the Court often probes the reasons underlying a law's enactment, and it has crafted doctrines with an eye to the problem of improper motive.[201] Kagan has thus explained in motive-based terms the Court's distinction between "content-based" and "content-neutral" laws, as well as its distinction between direct and incidental restrictions on speech. While these doctrinal categories do not explicitly reference government motives, they provide tools that courts routinely use to "flush out bad motives without directly asking about them."[202]

Penalty-sensitive review works the same way. Just as, for example, testing for content neutrality can serve as a "prox[y] for a direct inquiry into motive," so too can scrutinizing the severity of a law's penalties.[203] Recall, for example, Justice Holmes's observation that anything more than a nominal punishment would have caused the *Abrams* defendants "to suffer not for what the indictment alleges but for the creed that they

199. That broadcasters continue to show indecent material notwithstanding the threat of punishment is illustrated by the agency's omnibus order of March 15, 2006. See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 FCC Rcd. 2664 (2006) (cataloging and imposing fines for multiple television broadcasts deemed indecent); see also FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808–10, 1812 (2009) (describing order and upholding it against challenge under Administrative Procedure Act), remanded to 613 F.3d 317, 319 (2d Cir. 2010) (invalidating order on First Amendment vagueness grounds), cert. granted, 131 S. Ct. 3065 (2011). What matters for our purposes is not whether the FCC correctly identified the broadcasts deserving of punishments, or whether the policy underlying the order was unconstitutionally vague. Rather, what matters is that broadcasters, fully aware of the potential for punishment, have continued to show indecent material.

200. 391 U.S. 367, 383 (1968).

201. Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996) (contending "First Amendment law, as developed by the Supreme Court . . . has as its primary, though unstated, object the discovery of improper governmental motives"); see also Paul Brest, The Conscientious Legislator's Guide to Constitutional Interpretation, 27 Stan. L. Rev. 585, 590 (1975) (using *O'Brien* to support proposition that Supreme Court "decisions inform the conscientious legislator that some motives are unconstitutional"); Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 776 (2001) (arguing "the real function of the *O'Brien* test is nothing other than ascertaining the law's purpose").

202. Kagan, supra note 201, at 443.

203. Id. at 414.

avow."[204] If pressed to elaborate on this idea, Holmes might have said something like the following:

> Look, I recognize that the government has a legitimate interest in safeguarding wartime production, and I recognize that Abrams and his colleagues may have undermined this interest. But when I turn to their punishments, I become extremely skeptical of the government's stated motivations. These people were puny anonymities, whose leaflets circulated within a super-limited sphere! Any adverse effects on wartime output would have been negligible at best. The twenty-year prison sentences thus speak volumes about the government's true motives here, motives relating not to a benign interest in preventing industrial disturbances, but to a more sinister interest in persecuting dissenters.

Applied in this manner, penalty-sensitive review serves an evidentiary function, smoking out illegitimate purposes in much the same way as the motive-oriented proxies that Justice Kagan has identified.

The *Abrams* example reveals how penalty sensitivity facilitates ex post review of government motives. But motive-based monitoring of penalties can assume an ex ante perspective, as well. This Article earlier characterized *Gertz*'s bar on presumed and punitive damages as a prophylactic measure designed to alleviate chilling effects.[205] But the rule also carries a motive-based justification, reflected in Justice Powell's observation that permitting juries to go beyond compensation for actual injury would open the door to improperly motivated defamation awards. Allowing presumed damages, he explained, "invites juries to punish unpopular opinion," and allowing punitive damages leaves juries "free to use their discretion selectively to punish expressions of unpopular views."[206] Put briefly, the less regulated the jury's power to punish, the greater the danger of belief-based condemnation. Thus arises the need for a limitation on damage awards, which guards against the risk of punishing unpopular views.

The idea can also be viewed through the lens of means-end analysis. In its traditional formulation, this commonplace form of inquiry asks whether the regulatory sweep of a speech restriction is no more expansive than is appropriate to achieve a legitimate (or important) government interest. Frequently surfacing within First Amendment law, for example, is the rule of *O'Brien*, which asks whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [an important or substantial government] interest."[207] Penalty-sensitive analysis can involve much the same sort of exami-

204. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

205. See supra notes 184–186 and accompanying text (discussing *Gertz*'s role in mitigating chilling effects).

206. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974).

207. United States v. O'Brien, 391 U.S. 367, 377 (1968).

nation, focusing attention on whether a law's sanction is harsher than a legitimate government interest would require. Both Holmes's *Abrams* dissent and the *Gertz* opinion can be understood in this way. As Holmes saw it, the Espionage Act did not just cover more speech than was necessary to achieve the legitimate interest of protecting wartime supplies; it also punished the speech more severely than necessary to achieve the interest. Similarly, as the *Gertz* majority saw it, defamation actions are constitutionally problematic not just because they threaten to restrict more speech than necessary to remedy the injuries of private citizens but also because they threaten to punish defendants more harshly than necessary to achieve this interest. Both opinions identified a less restrictive means in a less punitive means, diagnosing tailoring defects not just in the scope of a speech restriction, but also in the severity of the penalties connected to it.

The Court's disposition of *O'Brien* itself might well have benefited from an analysis informed by these considerations. The tailoring question in that case was whether the 1965 Amendment to the Selective Service Act (SSA)—which criminalized the willful destruction or mutilation of draft cards—went beyond advancing the government's interest in "further[ing] the smooth and proper functioning of the system that Congress has established to raise armies."[208] The Court concluded that the Act did not, reasoning that the prohibition covered no more speech than necessary to serve the substantial government interest in administering the Selective Service System.[209] But by asking only the penalty-neutral question of whether the SSA's substantive restrictions were narrowly tailored, the Court ignored troubling facts about the severity of O'Brien's punishment. As Professor Lucas Powe has noted, the district court sentenced O'Brien to "six years under the Youth Offenders Act, which meant that he might serve four years at the Federal Youth Correctional Center in Chillicothe, Ohio."[210] This fact alone should have raised eyebrows, given that "[e]ven those who refused to report for induction in the armed forces received lighter sentences, typically between one and three years."[211] Indeed, *anyone* convicted under the recently amended Act "was subject to punishment that would last longer than a voluntary enlistment in the armed forces."[212] And on top of everything else, some evidence suggested that the trial judge had imposed the maximum sentence as a direct consequence of O'Brien's refusal to renounce his political beliefs.[213] In short, these and other considerations indicated that "the

208. Id. at 378–81.

209. Id. at 382.

210. Lucas A. Powe, Jr., The Warren Court and American Politics 326–27 (2000).

211. Id. at 327.

212. Id. at 326.

213. Id.; see also Brief for David Paul O'Brien at 9–10, 75–76, *O'Brien*, 391 U.S. 367 (Nos. 232, 233), 1968 WL 129291, at *9–10, *75–76 ("[T]he sentencing judge imposed a

punishment was keyed not to the conduct of burning a small piece of paper but to the hated message the burning conveyed."[214]

The critical point is this: Even if the law's substantive prohibitions reflected an adequate "fit" with the government's interest in administering the SSA, the law's penalties seemed far more exacting than achievement of that interest would require. In O'Brien's case, the six-year sentence was hard to square with the permissible objective of implementing the draft and easier to square with the impermissible objective of suppressing dissent. Thus, much like the sentencing enhancement struck down in *Dawson*,[215] O'Brien's punishment could plausibly have been characterized as carrying an impermissible belief-based "enhancement"—penalizing him not just for the noncommunicative aspects of his actions but also for the message that his actions conveyed. A determination to this effect would not have supported a wholesale invalidation of O'Brien's conviction; insofar as his conduct was punishable to some extent, the proper remedy would have been merely a remand for resentencing. The Court, however, failed to consider this possibility. In doing so, it overlooked an especially problematic element of the *O'Brien* prosecution.

E. *Transparency*

Recall that Justice Holmes's decision to dissent in *Abrams* stemmed in part from a visceral unease with the lengthy sentences involved in that case. Along the same lines, the Court's willingness to uphold the NEA guidelines in *Finley* derived from its comfort with the mildness of the "sanction" at issue there, just as its willingness to strike down the CPPA's child pornography prohibitions in *Free Speech Coalition* derived from its discomfort with the high severity of that law's punishments. These examples are noteworthy because they involve judges openly acknowledging the First Amendment significance of a penalty's severity. In another sense, however, they may represent the tip of the iceberg. There almost surely exist other, perhaps many other, cases in which penalty-related considerations have exerted real, but invisible, effects on the outcomes of cases.

---

six-year maximum indeterminate sentence with the express intent that respondent would serve less than the maximum if he changed his beliefs and associations.").

214. Powe, supra note 210, at 326.

215. Dawson v. Delaware, 503 U.S. 159, 160, 163 (1992). *Dawson* is not itself a penalty-sensitive case, but it nonetheless illuminates the purposivist potential of penalty sensitivity analysis. See supra text accompanying notes 141–144. Understood, that is, as a case about motives, *Dawson* underscores the relationship between penalties and purposes, suggesting that, all else equal, the more severe an individual's punishment, the more likely it is to bear the taint of improper motives. See id. And when that is true, courts can mitigate the influence of improper motives by limiting the penalty that the government may impose.

Empirical study is needed to test this hypothesis, but it requires no great leap of imagination to see how penalty-sensitive considerations might, sub silentio, affect judicial resolution of First Amendment claims. The literature on federal sentencing is telling in this respect. Numerous commentators, including some members of the federal judiciary, have observed that judges manipulate legal and factual findings so as to avoid imposing sentences they perceive to be unfair.[216] Similarly, it has been observed that jurors become less likely to return convictions after learning that these convictions will result in especially serious sentences.[217]

---

216. See, e.g., Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 90 (1998) (suggesting "[m]any judges are not at ease operating within [the Guidelines system], and may be sorely tempted to manipulate their Guidelines calculations to avoid the results called for by the Guidelines"); Andrew D. Liepold, Why Are Federal Judges So Acquittal Prone?, 83 Wash. U. L.Q. 151, 200–01 (2005) (speculating "judges may acquit more often because they [find] it to be the only way to avoid imposing an unjust sentence that they know would follow a conviction" and providing limited empirical evidence supporting claim); Joanna Shepherd, *Blakely*'s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime, 58 Hastings L.J. 533, 560–61 (2007) ("[B]oth judges and juries are more likely to acquit as the punishment following a conviction increases."); Jack B. Weinstein, A Trial Judge's Second Impression of the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 357, 365 (1992) (quoting anonymous colleague's concession that he and his colleagues "spend . . . time plotting and scheming, bending and twisting, distorting and ignoring *the law* in an effort to achieve a just result" (internal quotation marks omitted)).

217. See, e.g., Shannon v. United States, 512 U.S. 573, 579 (1994) (justifying longstanding rule against providing jurors with sentencing information on grounds that doing so would "invite[] them [inter alia] to ponder matters that are not within their province"); Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33, 79–80 (2003) (arguing "although it is admittedly more difficult for juries to check laws that would, in their estimation, produce overly harsh results when they are unaware of what the actual sentence will be," modern jury "does attempt to make such predictions, and if it predicts that the punishment will be disproportionate to what the defendant did, it is less likely to convict"); Neal Kumar Katyal, Deterrence's Difficulty, 95 Mich. L. Rev. 2385, 2450–51 (1997) ("As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught."); Erik Lillquist, The Puzzling Return of Jury Sentencing: Misgivings About *Apprendi*, 82 N.C. L. Rev. 621, 656 (2004) (arguing that, in rational choice model, "the jury's guilt decision may be based upon assumptions about the probable sentence"); Leading Cases, Sixth Amendment—Allocation of Factfinding in Sentencing, 121 Harv. L. Rev. 225, 235 (2007) ("A jury verdict will meaningfully reflect the community's conscience and rein in an overly punitive legislature only when it is the product of knowledge, not ignorance, about sentencing."). Although the law review literature provides only anecdotal evidence for this claim, social scientists have accumulated some experimental support. See Martin F. Kaplan, Setting the Record Straight (Again) on Severity of Penalty: A Comment on Freedman et al., 18 Law & Hum. Behav. 697, 698 (1994) (reviewing experimental attempts to verify existence of this phenomenon and concluding "there [is] evidence that penalty does affect decisions under some circumstances"). But see Jonathan L. Freedman, Kristen Krismer, Jennifer E. MacDonald & John A. Cunningham, Severity of Penalty, Seriousness of the Charge, and Mock Jurors' Verdicts, 18 Law & Hum. Behav. 189, 190 (1994) ("[T]here is no convincing support for [this] effect."). And there is historical support as well. During the seventeenth and eighteenth centuries, for example, it was not uncommon for English juries—sometimes with the encouragement of their overseeing

Based on these examples, it is not hard to infer that penalty-sensitive free speech review sometimes occurs behind closed doors, with judicial actors contorting an outwardly penalty-neutral analysis to achieve a result that satisfies inwardly penalty-sensitive aims.

This possibility points to a further benefit of the penalty-sensitive approach: If penalty-sensitive concerns are already functioning as a hidden variable within the First Amendment calculus, then further recognizing the legitimacy of these concerns should increase the *transparency* of judicial decisionmaking, which in turn should help everyone involved in First Amendment analysis—from litigants to scholars to legislatures to speakers—better understand the actual contours of the law.

It is true, of course, that not every hidden influence on constitutional decisionmaking should be thrust into the light of full disclosure. Even if we could prove the realist maxim that breakfast food influences judicial decisionmaking,[218] we would still discourage judges from writing opinions about bacon, toast, and eggs. A similar claim applies to penalty severity: Even if judges are inwardly motivated by penalty-sensitive concerns, this fact alone does not indicate that they should publicize, rather than suppress, such inclinations. But, as we have seen from the discussion above, far from being a problematic influence on free speech adjudication, penalty-sensitive analysis is in fact a meritorious method of First Amendment review, capable of generating fairer and more finely tailored rules of speech protection. Thus, to the extent that penalty sensitivity already operates as a hidden adjudicatory influence, judges should not hesitate to make its presence known.

IV. OBJECTIONS TO THE PENALTY-SENSITIVE APPROACH

With the justifications for penalty-sensitive review now laid on the table, it is worth considering potential criticisms to the practice. This Part takes on that task. Part IV.A speaks to a legitimacy-based critique, asking whether penalty-sensitive analysis usurps the legislative role. Part IV.B turns to objections based on administrability, evaluating the extent to which courts are capable of conducting penalty-sensitive analyses without generating arbitrary or abstruse doctrinal rules. And Part IV.C addresses the claim that penalty-sensitive analysis will underprotect the free speech right.

---

judges—to commit what Blackstone called "pious perjury," deliberately convicting defendants of lesser charges so as to spare them from especially harsh punishments. See John H. Langbein, The Origins of Adversary Criminal Trial 57–60 (2003) (describing this phenomenon).

218. Cf. Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, Extraneous Factors in Judicial Decisions, 108 Proc. Nat'l Acad. Sci. U.S. 6889, 6890 (2011) (observing outcomes of parole board hearings bear statistically significant correlation to temporal proximity to food breaks).

In parrying these thrusts, I do not mean to imply that penalty sensitivity is immune to criticism. In fact, as the ensuing discussion will demonstrate, the practice has its vulnerabilities, and these vulnerabilities, if not carefully attended to, can create problems. That penalty-sensitive analysis might cause problems, however, does not mean that courts should forsake the practice altogether. Rather, the presence of potential downsides means only that penalty-sensitive analysis should proceed in a manner that takes them into account. In this respect, the objective of this last Part is twofold: In addition to demonstrating that the problems with penalty sensitivity are manageable, the ensuing discussion proposes some ways in which courts can avert its dangers.

A. *Legitimacy*

A legitimacy-based attack on penalty-sensitive review might advance the claim—often articulated in Eighth Amendment and due process cases—that unelected judges have no business reviewing a legislature's chosen means of punishment. In the criminal context, the Court has declared that "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals."[219] In the civil context, this same principle—though perhaps less rigidly adhered to[220]—finds expression in admonitions that courts should afford "'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[221] Along these lines, one might criticize penalty-sensitive review as insufficiently deferential to coordinate branches, arguing that it gives unelected judges too much authority to meddle with the difficult punitive judgments made by democratically elected officials. These concerns weighed on the Court, for instance, in *Fort Wayne Books, Inc. v. Indiana*. There, in explaining the majority's refusal to consider the harsh penalties attached to an anti-obscenity law, Justice White reasoned that "'it is not for this Court . . . to limit the State in resorting to various weapons in the armory of the law.'"[222]

Arguments of this sort, however, overlook a critical distinction between pure-form proportionality review and penalty-sensitive free speech

---

219. Solem v. Helm, 463 U.S. 277, 290 (1983).

220. See Karlan, Pricking the Lines, supra note 30, at 920 ("Having embraced and then largely abandoned a judicially enforceable constitutional requirement of proportionality under the Eighth Amendment in criminal cases, the Court has articulated an increasingly robust requirement of proportionality under the Due Process Clause in punitive damages cases.").

221. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300–01 (1989) (O'Connor, J., concurring in part and dissenting in part).

222. 489 U.S. 46, 60 (1989) (alterations in original) (quoting Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957)).

review. The former asks whether the severity of a penalty is justifiable in light of traditional punitive objectives such as retribution, deterrence, incapacitation, and the like. But the latter adds a key variable to the proportionality equation: the *constitutional value* of the behavior being sanctioned. What is involved here is not simply the determination that a particular punishment is, as a policy matter, too harsh or too unfair; it is rather the determination that First Amendment priorities demand application of light penalties, trumping whatever policy considerations might otherwise counsel in favor of more exacting sanctions. Because penalty-sensitive review requires this second sort of judgment—a judgment well within courts' purview—the legitimacy objection does not carry persuasive force.[223]

Indeed, the legitimacy of penalty-sensitive review may be said to follow a fortiori from the unquestioned legitimacy of penalty-neutral review. Penalty-neutral analysis empowers courts to strike down sanctions in their entirety, while penalty sensitivity merely adds the option of lessening sanctions' severity. The argument is not difficult to see. So long as courts wield the sledgehammer of statutory invalidation, why not hand them the chisel of punitive moderation? Along with the greater power to bludgeon penalties out of existence should come the lesser power to chip away at their severity.[224]

This last point helps to illustrate why penalty-sensitive review, far from facilitating illegitimate judicial power grabs, actually comports with a minimalist conception of the judge's role.[225] By offering courts an intermediate option between the twin extremes of "full constitutional protection" and "no constitutional protection," penalty sensitivity can promote evolutionary, rather than abrupt, doctrinal change. If the Court wishes to protect a new category of speech, penalty sensitivity allows it to make this

---

223. Cf., e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

224. Along similar lines, Professor William Stuntz once claimed that, to the extent that constitutional law prohibits legislative constraints on juries' power to acquit criminal defendants, it should a fortiori prohibit legislative constraints on juries' power to reduce criminal sentences:

> It is hard to understand why constitutional law should make it impossible for legislatures to command that a given course of conduct be punished (the power to acquit for any reason does away with that legislative power, at least in theory), and yet leave legislatures free to require that, if behavior is to be punished, it should be punished at least so much. Logically, the greater mercy ought to include within it the lesser.

William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 596 (2001).

225. See generally Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999) (developing theory of judicial minimalism).

change gradually, transitioning into a rule of partial constitutional protection, letting coordinate constitutional actors respond accordingly, and, if conditions seem appropriate, then proceeding to a rule of total protection. The Court may likewise use penalty-sensitive adjudication to "phase out" existing rules of speech protection—replacing them at first with rules that furnish partial speech protection, followed eventually by rules that furnish no protection at all. Penalty sensitivity, in short, makes possible constitutional change through small steps rather than giant leaps. It is therefore capable of "reduc[ing] the burdens of judicial decision," "mak[ing] judicial errors less frequent," "promot[ing] more democracy and more deliberation," and providing other benefits attendant to the minimalist approach.[226]

B. *Administrability*

A more powerful objection to penalty sensitivity centers on implementation concerns. This objection posits that penalty-sensitive review—while perhaps attractive in theory—is simply too difficult to operationalize in practice. Here, rather than the dishonoring of doctrinal traditions or the arrogation of too much judicial power, the nightmare scenario envisions tangled webs of penalty-sensitive rules that cannot be easily applied or understood. On this view, penalty-sensitive adjudication is bad because it threatens to undermine the coherence and predictability of free speech doctrine.

This objection has some merit. Suppose, for example, that Holmes had gotten his way in *Abrams*, such that seditious libel was subject only to "nominal punishments." This rule would leave important matters unresolved: What counts as a "nominal punishment"? Where do the boundaries lie between speech that is fully punishable, nominally punishable, and not punishable at all? Does the nominal-punishment limitation apply only to criminal sanctions, or does it extend to civil sanctions as well? Are all prison sentences per se not nominal? Can fines not be nominal? If so, how hefty would the fines have to be? Does the rule tolerate higher punishments when the prosecution involves repeat offenders? And so on.

Such questions do not answer themselves, and they would create uncertainty for courts, legislatures, and potential litigants. Moreover, questions like these are likely to arise in connection with almost every penalty-sensitive holding the Court hands down. To address the implementation objection, then, one must ask whether the costs of this confusion are likely to outweigh the benefits penalty sensitivity can provide.

---

226. Id. at 3–4; see also Amanda Frost, The Limits of Advocacy, 59 Duke L.J. 447, 481 (2009) ("Minimalists favor incremental steps over sweeping changes in legal norms because they fear that broadly worded decisions will undermine democratic processes, lead to unintended consequences, and put in place rigid rules that leave no flexibility for the future.").

At least as a general matter, this does not appear to be a likely outcome. To begin, one must remember that some amount of doctrinal indeterminacy is, and will always be, a fact of legal life. The Court routinely adopts doctrinal formulations that require further clarification; indeed, "it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution."[227] First Amendment doctrine is no stranger to this process. The Court, for instance, has recognized constitutional distinctions between "public" and "private" speech,[228] between "content" and "viewpoint" discrimination,[229] between "primary" and "secondary" effects,[230] between "substantial" and "insubstantial" disruptions,[231] and between many other conceptual categories of uncertain definition.[232] It is difficult to see why similar distinctions between and among types of sanctions would be any more difficult to flesh out.

Recall, too, that the Court has already drawn, and continues to draw, penalty-based distinctions within many other areas of rights-related doctrine.[233] This point is significant for two reasons. First, it suggests that the line drawing required by penalty-sensitive judging is not an impossible task. Courts have exercised sober judgment in performing this task, and

227. Walz v. Tax Comm'n, 397 U.S. 664, 679 (1970).

228. See, e.g., Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (noting that "[w]hether the First Amendment prohibits holding [the defendant] liable for its speech in this case turns largely on whether that speech is of public or private concern").

229. See, e.g., Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 830 (1995) (noting operator of limited public forum may engage in "content discrimination, which may be permissible if it preserves the purposes of that limited forum," but not "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations").

230. See, e.g., United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000) ("We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech.").

231. See, e.g., Morse v. Frederick, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring) (noting First Amendment "permits the regulation of student speech that threatens a concrete and 'substantial disruption'" (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969))).

232. See, e.g., Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2984 n.11 (2010) (summarizing different doctrinal rules governing speech regulations in "traditional public forums," "designated public forums," and "limited public forums"); United States v. Williams, 128 S. Ct. 1830, 1835–36 (2008) ("We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment. But . . . we have limited the scope of the obscenity exception, and have overturned convictions for the distribution of sexually graphic but nonobscene material." (citation omitted)); Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1190 n.6 (2008) ("[A] law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional . . . ." (quoting New York v. Ferber, 485 U.S. 747, 769–71 (1982))).

233. See supra Part II.B (discussing, among other things, due process, equal protection, and Takings Clause jurisprudence).

the consequences have not been disastrous. To take one example, the Contract Clause rule that only "substantial" impairments of contracts create a right to compensation is not a rule that lends itself to mechanical application. But that fact has not stopped judicial actors from recognizing a core constitutional distinction between substantial and nonsubstantial impairments, while leaving disputes at the margins to be resolved as they arise.[234]

Second, the existence of an already-developed body of penalty-sensitive case law means that penalty-sensitive First Amendment analysts need not paint on a blank canvas. In developing penalty-sensitive free speech doctrine, courts can incorporate distinctions they have already made within other areas of law—areas in which they have already spent time and energy elaborating on these distinctions' meaning. We have seen such a move, for example, in the public employment context, where some lower courts employ a penalty-sensitive rule of speech protection derived from Title VII's "adverse employment action" requirement. So too, we might imagine First Amendment adjudicators plucking other formulations from other doctrinal branches—for example, the "petty offense" rule from right-to-counsel case law, the "infamous crimes" rule from grand jury case law, or even the "substantial impairment" rule from Contract Clause case law. In this field, as in others, courts can build on their prior work, at once easing administrative burdens for themselves and reducing doctrinal uncertainty for others.

The implementation objection must also deal with the demonstrated adaptability of penalty-sensitive analysis. In some cases, such as *Pacifica*, the severity of an individual's penalty can function as a soft doctrinal variable, exerting some force on the validity of the free speech claim, but not carrying outcome-determinative weight. In other cases, such as *Gertz*,

234. A potential problem with case-by-case identification of constitutionally problematic penalties is highlighted by Professor Eugene Volokh's discussion of judge-drawn distinctions based on the severity of crimes. See Eugene Volokh, Crime Severity and Constitutional Line-Drawing, 90 Va. L. Rev. 1957, 1978 (2004). As Professor Volokh notes, these distinctions may become (and in some cases have become) unstable. Having identified a limited category of crimes as sufficiently severe to warrant application of a special constitutional rule, courts may feel "tempted to move the lines down, treating more and more crimes as severe." Id. at 1983. So too, we might suppose that having declared that some speech is not punishable by one means, courts will find it difficult in subsequent cases to declare the speech punishable by a more severe means; or, conversely, having declared that some speech *is* punishable by one means, courts may be unable to declare it not punishable by a less severe means. The concern, in other words, is that what sets out to be penalty-sensitive doctrine ultimately will collapse into penalty-neutral doctrine, owing to courts' reluctance to follow through on promises to distinguish penalties based on their severity. That is a valid concern, to be sure. At the same time, the doctrines discussed in Part II indicate that this outcome, while possible, is far from inevitable. What is more, even if an attempt at implementing a penalty-sensitive rule ends up reverting back to the penalty-neutral norm, it is perhaps better to have tried and failed than never to have tried at all.

the severity of the penalty can function as a hard variable, taking on dispositive constitutional significance by way of a categorical doctrinal command.[235] Courts might also formulate rules that occupy a middle place on the soft-hard spectrum, employing weak presumptions of constitutional invalidity, conditioning application of a categorical rule on soft-at-the-edges definitional criteria, or finding some other way to reconcile the need for flexibility with the competing need for doctrinal clarity.

This point is important because it means that courts can tailor the penalty-sensitive aspects of their holdings to further whatever implementation-related priorities they have chosen to pursue. *Pacifica*, for example, was a self-consciously narrow decision—a point that Justice Stevens took pains to emphasize at the conclusion of his opinion. Among the many non-penalty-related factors on which the Court relied were (a) the timing of the broadcast, (b) the number of expletives used in the broadcast, (c) the nature of the broadcast medium, and (d) the type of program on which the expletives were featured. *Pacifica*, in short, "require[d] consideration of a host of variables,"[236] no one of which exerted outcome-determinative force. Thus, in deciding *Pacifica*, the Court committed itself to a highly contextualized, balancing-oriented type of constitutional analysis, accepting as a necessary evil the holding's failure to provide clear guidance to future litigators and adjudicators of indecency-related claims. Having made a commitment to multifactor analysis, the Court did not much increase implementation difficulties by adding penalty-sensitive considerations to the mix. *Pacifica*'s import was going to be cloudy whether or not its holding took into account the significance of the broadcaster's penalty. Consequently, the Court could employ penalty-sensitive analysis without much adding to administrative difficulties.[237]

Gertz, by contrast, built on the foundation of the *New York Times*'s "actual malice" requirement—a requirement crafted in the interest of clarity and predictability. Here, a *Pacifica*-like "soft" rule would have disserved these values, introducing too much uncertainty into an area of doctrine in which the Court sought to outline a clear First Amendment boundary. But the Court could (and did) still embrace penalty sensitivity by way of a hard rule, articulating the penalty-sensitive aspects of the *Gertz*

235. For an especially helpful discussion of the distinction between categoricalist and balancing modes of First Amendment adjudication, see Blocher, supra note 32, at 381–98.

236. FCC v. Pacifica Found., 438 U.S. 726, 750 (1978).

237. This is not necessarily to say that indecency cases are best dealt with by way of ad hoc balancing. All told, *Pacifica*'s reliance on this approach may have created more problems than it solved—providing too little guidance as to the scope of the First Amendment's indecency protections and leaving too much up to the subjective preferences of regulators and lower court judges. But whether or not *Pacifica*'s doctrinal strategy was the correct one, the point here is that this strategy, once adopted, did not suffer on account of the Court's willingness to treat penalty severity as one of the "host of variables" bearing on its resolution of the case. Id.

holding in precise and outcome determinative terms. Thus, just as the *Pacifica* Court structured its penalty-sensitive analysis to cohere with ad hoc balancing, the *Gertz* Court structured its analysis to cohere with rule-based categoricalism.

There is a final implementation-related point worth considering here—primarily applicable to penalty-sensitive rules of the hard variety. In contrast to soft rules, which purposively strive for abstractness, hard rules raise the problem of arbitrariness, because, under them, constitutional results may hinge on criteria that appear to be unduly specific and untethered to the First Amendment text. Many would not respond well, for example, to a hypothetical rule forbidding sixty-month prison sentences for an obscenity violation but permitting fifty-nine-month prison sentences for identical conduct or to a rule permitting school administrators to punish student speakers with five-day suspensions but not six-day suspensions. Constitutional borderlines of this sort would strike most people as ad hoc, if not absurd.

As *Gertz* reveals, however, judicial use of hard-edged penalty-sensitive rules can sidestep this problem by focusing on distinctions in kind rather than distinctions in degree. Thus, rather than locate a constitutional borderline somewhere in between the sixty- and fifty-nine-month prison sentence, a reviewing court might locate the borderline between probation and imprisonment, fines and probation, or other distinctions that capture qualitatively different forms of government-imposed punishment. This way of articulating limits has the added virtue of linking the penalty-sensitive rule to other considerations of constitutional relevance. In *Gertz*, for example, the wall erected between actual damages on one side and presumed/punitive damages on the other cohered with a separate argument about state interests—tracking, that is, the qualitative distinction between a state's distinctively strong interest in compensating proven injuries and its lesser interest in simply discouraging defamatory speech.[238]

The key point is that penalty-sensitive analysis can come in different shapes and sizes. When circumstances demand flexibility, soft penalty-sensitive holdings can accommodate this need. When circumstances de-

238. Additionally, to the extent that numerical distinctions are a necessary component of penalty-sensitive review, their introduction would not constitute some sort of dramatic transformation of the constitutional terrain. On more than one occasion, the need for clear guidance has compelled the court to incorporate numerical boundaries into constitutional doctrine. Thus, for example, the Court has speculated that the Due Process Clause generally forbids juries from awarding punitive damages that are at least ten times greater than compensatory damages, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424–45 (2003), it has specified that certain self-incrimination protections of criminal suspects lapse fourteen days after their release from custody, Maryland v. Shatzer, 130 S. Ct. 1213, 1223 (2010), and it has read the Seventh Amendment to permit six-person juries in civil cases, while acknowledging that "at some point the number becomes too small to accomplish [the Amendment's] goals," Colgrove v. Battin, 413 U.S. 149, 160 n.16 (1973).

mand predictability, hard penalty-sensitive rules can be developed. And when circumstances demand a middle course, "in-between" penalty-sensitive approaches are there for courts to use. None of this is to say that penalty-sensitive review will never raise problems in implementation. The wide range of options for implementing penalty-sensitive doctrine, however, suggests that challenges of implementation are manageable.

C. *Liberty*

A third objection to the penalty-sensitive approach focuses on judges and, in particular, penalty sensitivity's potentially adverse effects on judicial decisionmaking. This objection stems from the concern that, over time, penalty sensitivity may vitiate the strength of the free speech right by offering judges an all-too-tempting escape hatch from difficult, but necessary, decisions to protect unpopular speech.

Suppose, for instance, that Judge Sympatico has before him a defendant sentenced to ten years in prison for violating a fighting words law of questionable constitutional validity. The defendant raises a First Amendment claim, arguing that his conviction should be reversed because the law is unconstitutional. Judge Sympatico is torn: On the one hand, he thinks the First Amendment argument is pretty strong; on the other hand, he is reluctant to let the defendant get off scot-free. He recognizes, however, that his failure to protect the speech in question will result in an especially harsh deprivation of the defendant's liberty, and he therefore reluctantly, but unambiguously, declares the speech protected.

If we approve of Judge Sympatico's decision, then we might worry about the consequences of introducing him to the penalty-sensitive approach. Under a penalty-sensitive framework, Judge Sympatico need not have chosen between letting the defendant completely off the hook and subjecting him to ten years in prison. Rather, Judge Sympatico could have said,

> It's tough to know whether the speech was constitutionally protected; certain elements of it had expressive value, but other elements seemed to me plainly punishable. But at the very least, a ten-year prison sentence looks plainly impermissible to me. Therefore, I rule that you may be punished, but that your punishment may not exceed one year.

Penalty sensitivity would thus prompt Judge Sympatico to uphold a one-year sentence under circumstances that otherwise would have led him to allow no sentence at all.

This is a troubling scenario. But does it prove that penalty-sensitive analysis is biased against the protection of speech? In answering this question, consider the same hypothetical case from the perspective of Judge Draco, who, unlike his colleague Judge Sympatico, tends to err on the side of denying speech protection. In a penalty-neutral world, Judge

Draco would have upheld the ten-year sentence; but in a penalty-sensitive world, he might prefer the one-year constitutional remedy. For Judge Draco, then, penalty sensitivity exerts a liberty-promoting effect, causing him to uphold a one-year sentence when he otherwise would have upheld a ten-year sentence.

As illustrated by the crosscutting examples of Judge Sympatico and Judge Draco, it is hard to know whether, on the whole, penalty sensitivity is likely to expand or curtail the free speech right. It will give some judges an easy way out of the distasteful decision to protect speech absolutely, letting them furnish partial protection to speech whose punishment they would otherwise fully disallow. But it will give other judges an easy way out of the distasteful decision to uphold a speech restriction, allowing them to furnish partial First Amendment protection instead of no protection at all. Which of these two effects is likely to predominate? Does the judiciary consist of more Judge Dracos or Judge Sympaticos? The answer to these questions is not clear.

It is worth noting, however, that within other constitutional settings, scholars have suggested that when the only constitutional remedy at a judge's disposal is to strike down a punishment in its entirety, the judge is more likely to uphold the punishment than to strike it down—an instance of what Professor Daryl Levinson has characterized as "remedial deterrence."[239] For example, Judge Guido Calabresi has identified the drastic remedial consequences of the exclusionary rule as a central source of judges' reluctance to identify Fourth Amendment violations,[240] and Professor Sonja Starr has made a similar argument with respect to prosecutorial misconduct claims.[241] Along similar lines, Professor Pamela Karlan has speculated that the "windfall" remedy of per se reversal for *Batson* violations has resulted in appellate courts "surreptitiously redefin[ing] the right."[242] If a similar hypothesis obtains within the free speech setting, then the penalty-sensitive approach might ultimately expand the contours of the free speech right, by affording judges the op-

239. See Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 889–99 (1999) [hereinafter Levinson, Rights Essentialism].

240. Guido Calabresi, The Exclusionary Rule, 26 Harv. J.L. & Pub. Pol'y 111, 112 (2003); see also Harry M. Caldwell & Carol A. Chase, The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call To Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom, 78 Marq. L. Rev. 45, 53 (1994) (observing that "courts tend to strain the Fourth Amendment to avoid the suppression of reliable evidence").

241. Sonja B. Starr, Sentence Reduction as a Remedy for Prosecutorial Misconduct, 97 Geo. L.J. 1509, 1511 (2009) (noting that, because sentencing reduction remedy does not offer "windfall" to defendant, "courts will likely be more willing to invoke it than current, nominally stronger remedies—thus serving all remedial purposes better than the current all-or-nothing choices that usually drive courts to pick 'nothing'").

242. Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2020–21 (1998); see also Levinson, Rights Essentialism, supra note 239, at 890–92 (discussing Karlan's analysis in similar terms).

portunity to protect speech in a manner that does not commit them to the significant constitutional remedy of absolutely precluding its punishment.

CONCLUSION

Decades ago, Hugo Black and Felix Frankfurter waged their famous debates over the "balancing" and "absolutist" approaches to free speech adjudication. Black vigorously defended the absolutist position, arguing that "the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field."[243] Frankfurter, who carried the balancing banner, strongly disagreed; he believed that "[a]bsolute rules would inevitably lead to absolute exceptions," and that "[t]he demands of free speech in a democratic society . . . are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved."[244]

In assessing the competing virtues of the penalty-neutral and penalty-sensitive approaches, one sees obvious parallels to the Black-Frankfurter debate. Penalty neutrality brooks no compromise within the punitive realm and in so doing affords comfort to those who view the qualified protection of civil liberties as a danger to be avoided at all costs. Penalty sensitivity, on the other hand, comports with the idea that the drawing of First Amendment boundaries is a difficult and delicate task, and it enables judges to carry out this task with a degree of nuance and refinement that penalty neutrality woodenly eschews. On the whole, then, penalty sensitivity should be more attractive to Frankfurter-like balancers and penalty neutrality to Black-like absolutists.

This Article has taken the position that penalty sensitivity's upsides outweigh its downsides and that judges grappling with difficult First Amendment problems would do well to consider the penalty-sensitive approach. Underlying this claim is a Frankfurterian belief that penalty neutrality's "all-or-nothing" framework will often prove too blunt a tool for courts confronting the free speech complexities of a modern democratic society. That is not to say that penalty neutrality has no place within First Amendment doctrine; the penalty-neutral approach, like the absolutist approach, may merit unflinching adherence in some, perhaps many, circumstances. But it is to say that penalty-sensitive analysis has been, and remains, a useful tool of free speech adjudication and that courts should look to expand its presence in First Amendment law.

---

243. Konigsberg v. State Bar, 366 U.S. 36, 61 (1961) (Black, J., dissenting).

244. Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring).