JUMPING TO CONCLUSIONS: FREE SPEECH AND IMPUTED SPEECH

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It is well understood that a free speech regime needs principles of speech regulation that delineate what speech is protected from sanctions and what speech may be subject to sanctions. It is less well recognized, yet increasingly important, for a free speech regime to articulate principles of interpretation that delineate what content may be attributed to speakers for the purpose of imposing otherwise legitimate legal sanctions. Drawing on both doctrinal and philosophical arguments, this Article defends a heretofore unarticulated First Amendment principle of interpretation that places guardrails on attributing content to lay speakers that they do not explicitly articulate.

Specifically, an anti-imputation principle, implicit in a number of First Amendment decisions, imposes a strong (though rebuttable) presumption against levying legal sanctions against lay speakers for objectionable content they do not explicitly say. This presumption holds even when explicit assertions of that objectionable content could permissibly be subject to sanctions and even when that objectionable content may be reasonably or is commonly inferred from what the speakers have explicitly said. The breathing space this sanction-resistant zone creates is essential for speakers to articulate and refine their thoughts and to make, identify, and correct their mistakes through interchange with others. It protects speakers from the prospect of adverse or uncharitable interpretative audiences.

This principle unifies some disparate areas of First Amendment doctrine and offers guidance to resolve some contemporary free speech controversies. It also commands substantial theoretical support. To realize the values of freedom of

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speech and to provide speakers breathing room, especially about divisive issues, the principles of interpretation that ground sanctions should not reflexively track conversational meaning and the reasonable understanding and inferences of audiences or observers. When speech on matters of public concern is at issue, an adverse audience's interpretation should not dictate the legally operative interpretation of what a speaker has said. A normatively grounded and more speaker-protective principle is necessary, rather than a principle driven by linguistic practices and predictions. To protect an expansive common dialogical space for speakers and audiences to air, discuss, and better understand matters of public concern, legal sanctions should only be triggered by what speakers explicitly say absent strong contextual evidence that they and their audience should converge on a distinct, regulable meaning.

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INTRODUCTION

Some important contemporary controversies involve battles over regulating speech based on the inferences audiences draw from that speech. A speaker's statement encounters resistance based on the audience's objection not to the statement's explicit content alone, but to some other content that the audience imputes to the speaker given inferences from what the speaker explicitly said.[1] These controversies underscore that we need First Amendment principles to guide our interpretation of speakers when we contemplate sanctioning speech. This Article contends that there is an important general First Amendment principle that presumes against imposing legal sanctions on the basis of such inferential reasoning, reasoning that imputes content to a speaker that they did not explicitly voice. The principle is immanent in many First Amendment cases and explicitly surfaced in some. Yet, this principle remains under-articulated and under-defended.

This Article offers a specific articulation of the anti-imputation principle and a typology of its applications in First Amendment doctrine and its further potential applications. Further, it offers an extended defense of the principle as essential to protecting critical features of a free speech environment, particularly the ability of lay individuals to engage in the free, protected *process* of considering and coming to conclusions through discourse and engagement with the thoughts of others.

So that the subject matter is clear, consider two recent, fraught, and highly contested examples in which audience inferences seem to drive the putative case for legal sanctions.

The first example: many people, including some congressional representatives, regard the delivery of the slogan "from the river to the sea, Palestine will be free" as per se antisemitic[2] and, when issued without repercussions in a campus environment, as an element of a possible violation of Title VI.[3] The Trump

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1. Throughout, I use "speaker" to refer to a person who makes statements, whether orally or in writing, and I use "audience" to refer to the human recipient(s) of these statements, whether they receive them in person or at a physical or temporal distance.

2. *See, e.g.*, H.R. Res. 883, 118th Cong. (2024); HOUSE COMM. ON EDUC. & WORKFORCE, *Calling for Accountability: Stopping Antisemitic College Chaos*, at 3:06:17 (YouTube, May 23, 2024), https://www.youtube.com/watch?v=4bu4eGIDNss (on file with *Arizona Law Review*) (detailing Missouri Representative Eric Burlison's demand that three college presidents answer whether they "[w]ould . . . acknowledge that 'from the river to the sea' and 'intifada revolution' . . . are antisemitic calls for the destruction of Israel and the slaughter of Jews"). Queensland, Australia, has issued a specific ban on the public use of the phrase "from the river to the sea" (and also "globalize the intifada") "in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended," unless the speaker has a reasonable excuse such as an artistic or educational purpose. *See Criminal Code Act 1899* (Qld) sch 1 s 52DA (Austl.).

3. The First Circuit declined to find that the failure to sanction such speech on the MIT campus constituted a Title VI violation. *See* StandWithUs Ctr. for Legal Just. v. Mass. Inst. of Tech., 158 F.4th 1, 19 (1st Cir. 2025); *accord* Canel v. Art Inst. of Chi., 824 F. Supp. 3d 686, 706–07 (N.D. Ill. 2026); *cf.* Gartenberg v. Cooper Union for the Advancement of Sci. & Art, 765 F. Supp. 3d 245, 273–74 (S.D.N.Y. 2025) (finding that graffiti with this slogan could contribute to a Title VI case *where the context also included* its presentation in

Administration regards the phrase as per se indicating support for a terrorist organization and as grounds for revoking student visas and deporting noncitizens under the Immigration and Nationality Act.[4] Absent further details about the specific context in which the slogan is delivered by a particular speaker, what connects the slogan per se, phrased in terms of an explicit call for freedom of a nation (or perhaps a territory) of some people, to the expression of animus toward other people?[5]

There are two common pathways.[6] One works by a chain of association. The first link is that some (or many) use the slogan in conjunction with, and as a motivation for, advocacy of violent resistance to Israel or animus against Israelis. The second link is that some (or many) who evince hostility to Israel or to Israelis are motivated by antisemitic animus or a culpable insensitivity toward the vulnerability of Jewish people in the wake of the Holocaust and ongoing global episodes of antisemitic violence, harassment, discrimination, and persecution. Although many of its proclaimers take the slogan to advance a distinct meaning, one *without* antisemitic animus, the audience interprets the slogan through its association with the use, behavior, other speech, or meanings of some salient speakers.

A second path works through an appeal to means–end reasoning. The audience reasons that the only viable path by which the freedom of Palestine from the Jordan River to the Mediterranean Sea could be accomplished is through the violent toppling of Israel, or the seizure of the Israeli territory in the way, with ensuing deaths of many Jewish residents.[7] The issuance of the slogan is considered antisemitic because, given the posited method to achieve Palestinian freedom, the

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the font style associated with *Mein Kampf*). *See generally* Benjamin Eidelson & Deborah Hellman, *Antisemitism, Anti-Zionism, and Title VI: A Guide to the Perplexed*, 139 HARV. L. REV. F. 1 (2025) (analyzing the "formidable hurdles" faced by the Title VI claims emerging from recent campus protests concerning Israel and Gaza).

4. Transcript of Trial at 34–35, Am. Ass'n of Univ. Professors v. Rubio, 802 F. Supp. 3d 120 (D. Mass. 2025) (No. 25-10685), https://knightcolumbia.org/documents/qov536jek1 [https://perma.cc/7247-H923]. These efforts were rebuffed. *See Am. Ass'n of Univ. Professors*, 802 F. Supp. 3d at 151, 175.

5. I assume that the dominant, objective meaning of "from the river to the sea" is not imbued with animus, even if the phrase is used by some (or many) to convey antisemitic animus. For my purposes, it is not necessary to settle whether the slogan has multiple meanings or whether it has a clear, objective meaning free from animus that is misunderstood by some because of its possible practical implications or because of the accompanying behavior and speech of some of its users who do display animus. If, in fact, it has evolved to carry a clear, dominant, objective meaning of animus, in the way that the N-word has (subject to some context-dependent exceptions), then it is not an apt example for my purposes and readers should work with other examples. For a discussion of the evolution of the meaning of terms and phrases relating to racial identity and the moral and social dynamics giving rise to them, see Benjamin Eidelson, *The Etiquette of Equality*, 51 PHIL. & PUB. AFFS. 97, 118–23 (2023).

6. *See, e.g.*, *StandWithUs Ctr. for Legal Just.*, 158 F.4th at 16–19 (discussing the divide between the audience interpretation of the Gaza protests and the explicit speech used in those protests).

7. As John Armstrong, senior bureau official in the Bureau of Consular Affairs (the U.S. office that grants visas), put it, "It's basically calling for genocide of all Israelis, because there's no space for Israelis in that 'river to the sea.'" *See* Transcript of Trial, *supra* note 4, at 34.

slogan is taken as an attack on the existence of a designated safe haven from antisemitism.

Here is a second example of my subject matter. A middle school student attending a public school wears a T-shirt to campus that says: "There Are Only Two Genders."[8] The shirt is banned on the grounds that it demeans transgender and gender-nonconforming students and thereby would be "materially disruptive to the learning environment because of its negative psychological impact."[9] The T-shirt's statement *could* be affirmed alongside a range of positions about gender expression and gender identity, including that people should be free not to conform to any set gender expectations or identities, that they should be free to present or identify as they choose, or that the social expectations associated with the posited two genders are objectionably restrictive. Wearing the shirt *could* be compatible with the student's uncertainty about the implications of the asserted claim and an interest in further discussion. Absent further details about the particular context in which a student wears this shirt, what connects this slogan to an expression that demeans transgender and gender-nonconforming students?[10]

Here, we might posit three possible pathways. One is by association. Many who declaim there are only two genders do so in conjunction with, and often as a premise for, advocacy against rights of gender expression. They deny a prominent argument for the rights of gender-nonconforming students, namely that the exclusive binary division between men and women is artificial and inaccurate and that, therefore, a wider array of gender identities should be recognized and respected.[11]

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8. L.M. v. Town of Middleborough, 103 F.4th 854, 861, 881 (1st Cir. 2024) (upholding a public school's decision to ban that T-shirt), *cert. denied*, 145 S. Ct. 1489 (2025).

9. *Id.* at 880. The district and appellate courts also upheld a ban on a sequel shirt with the message: "There Are CENSORED Genders," which might have been interpreted as protesting the school district's censorship rather than as an effort to circumvent the district's ban on the original shirt. *See id.* at 883–84. I discuss the case, with respect to the first shirt, at greater length *infra* Subsection III.B.1. The case arose before the second Trump Administration and its policy endorsing the shirt's statement. *See* Exec. Order No. 14,168, 90 Fed. Reg. 8615, 8615–16 (Jan. 20, 2025). To discuss the case as presented, I put aside any distinct questions that may arise due to the federal administration's policy shift. *See generally* ELANA REDFIELD & ISHANI CHOKSHI, IMPACT OF THE EXECUTIVE ORDER REDEFINING SEX ON TRANSGENDER, NONBINARY, AND INTERSEX PEOPLE (2025), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sex-Definition-EO-Jan-2025.pdf [https://perma.cc/8MSS-5YMD] (providing a preliminary overview of the potential impact of the executive order).

10. I assume for the purposes of this paper that the dominant, objective meaning of "only two genders," taken alone, is not imbued with animus, even if the phrase is used by some (or many), in context, to convey animus toward trans people and gender-nonconforming people. If, in fact, it has evolved to carry a clear, dominant, objective meaning of animus, in the way that the N-word has (subject to some context-dependent exceptions), then it is not an apt example for my purposes and readers should work with other examples.

11. MedicineNet lists 74 genders. Shaziya Allarakha & Pallavi Suyog Uttekar, *What Are the 72 Other Genders?*, MEDICINENET, https://www.medicinenet.com/what_are_the_72_other_genders/article.htm [https://perma.cc/7H26-Y9JR] (last visited May 24, 2026).

A second path attributes an additional premise to the wearer, namely that the two exclusively posited genders provide the only available or permissible options for students to present or identify with or, more strongly, that the only permissible gender identity to occupy in social life is the one that is socially associated with one's assigned sex at birth. With the addition of this premise, the shirt may be interpreted as encouraging intolerance toward gender-nonconforming people and thereby generating a hostile environment.

The third path points to an entailment. If there are (and could be) only two genders, then a person who identifies with neither and posits an alternative gender must be mistaken. Given that entailment, the T-shirt wearer is taken to assert that those who claim an alternative gender posit an "invalid or nonexistent" identity.[12] To claim that someone does not exist under a central, core description of themselves is to demean them.

In both examples, the case for restricting speech works by inferring that the speaker expressed animus that legitimates a sanction, although the speaker's explicit speech did not directly express animus. Sometimes, depending on the statement, such inferences (as well as reactions of affront or offense) are understandable or reasonable reactions by an audience. These inferences may be grounded speculations of what the speaker thinks. They may even be reasonable interpretations of what the speaker meant for purposes of conversational discourse and response. For one or perhaps both of these statements, we may think these speakers, morally, should exercise much greater sensitivity about how their expressions (and in particular the blunt expressions of slogans) will strike their audience.

Nonetheless, I will argue that the use of such reasoning to impose legal sanctions is inconsistent with the First Amendment and with a free speech culture. Specifically, as part of the "breathing space" required by the First Amendment and by a free speech culture, there is a strong rebuttable presumption against levying legal sanctions for objectionable content that speakers do not explicitly articulate (or explicitly signal they presuppose).[13] This presumption holds even when explicit

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12. The appellate court affirmed the district court's interpretation that the shirt "may communicate that only two gender identities—male and female—are valid, and any others are invalid or nonexistent." *L.M.*, 103 F.4th at 880.

13. A presupposition is (purported) information that a speaker linguistically marks "as being taken for granted, rather than being part of the main propositional content of a speech act." David I. Beaver, Bart Geurts & Kristie Denlinger, *Presupposition*, STAN. ENCYC. PHIL. ARCHIVE: FALL 2024 ED. (Jan. 7, 2021), https://plato.stanford.edu/archives/fall2024/entries/presupposition/ [https://perma.cc/Z5AX-CYJ2]; *see also* Gordon v. Dalrymple, No. 07-CV-00085, 2008 WL 2782914, at *4 (D. Nev. July 8, 2008) (affirming that statements that presuppose defamatory factual statements may be defamatory). For example, "Mary stopped masking after John did" explicitly presupposes that John once masked and has stopped. Or "President Trump, the convicted felon, prefers Florida to New York" explicitly presupposes that President Trump has been convicted of a felony. Some (purported) facts may be presupposed by a statement but not explicitly signaled; for purposes of this principle, the speaker should not be taken to have stated those facts merely on the basis of the *implicitly* signaled presupposition. For example, "Sheila legally registered to vote before Carlos did" implicitly presupposes that Sheila is 18 (or of qualifying voting

statements of that objectionable content could permissibly be subject to sanctions and the objectionable content may be reasonably or is commonly inferred from what the speakers have explicitly said.[14]

For one thing, freedom of thought demands that a reasonable inference about what a speaker may *think*, but did not say, should not ground a legal sanction, even if one's inference is correct.[15] Further, a *reasonable* interpretation of a speaker's statement (one that goes beyond its explicit content) may be compatible with other competing reasonable interpretations. Indeed, a reasonable interpretation of a speaker's statement may be compatible with other competing, *more* reasonable interpretations.[16] To provide breathing space for unarticulated thoughts and the possibility of competing interpretations, this presumption may only be rebutted through decisive evidence showing that the objectionable content is not merely reasonably inferred from what the speaker said, but is the only plausible interpretation of the shared objective meaning of the speaker's statement onto which the speaker and audience could be expected to converge.[17]

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age) and that she is not a felon registered in a felon-disenfranchising state. But absent further contextual evidence, the speaker should not be taken to have averred that Sheila is 18 for purposes of imposing legal liability.

14. In saying that the objectionable content could "reasonably" be inferred from what the speakers have explicitly said, I mean "reasonably" in the sense of "understandably and with at least some warrant." A reasonable inference, so understood, may be mistaken.

15. For the purposes of this Article, I assume that the speaker has not explicitly avowed or disavowed the imputed premises in temporally proximate, pertinent communications and that taken together, the speaker's temporally proximate communications do not render the imputed content the only plausible interpretation of what they have said. At the same time, I assume that it is possible that the speaker would endorse the imputed premises and the attributed position, either mentally or even in speech through further conversation. Nonetheless, for the purposes of levying sanctions, it should be significant that for the speech in question, the speaker did not explicitly endorse those premises nor voice explicitly the content that purportedly triggers justified sanctions.

16. The second indictment of former FBI Director James Comey may provide an example of this point. The government alleges that his posting a photograph of seashells arranged to spell "86 47" constituted a threat to the President because "a reasonable" recipient of that photograph would interpret it as the "serious expression" of an intent to do harm. *See* Indictment at 1–2, United States v. Comey, No. 26-cr-00016 (E.D.N.C. Apr. 28, 2026). Even were that a reasonable interpretation of that photograph, a competing and *more reasonable* interpretation is that it conveyed the suggestion that the President simply be fired or impeached. *Cf.* Accountability NOW USA v. Griess, No. 26-1385, 2026 WL 1533402, at *6, *10 (D.D.C. June 1, 2026) (refusing to find that a protester's flag with "86 47" on it could reasonably be interpreted as a threat to the President or as incitement and issuing a preliminary injunction against various federal officials to restrain them from revoking demonstration permits in response to that flag).

17. A weaker version of the anti-imputation principle would substitute "most plausible interpretation" for "only plausible interpretation." For further elaboration, see *infra* Subsection I.B.1 and Section III.A.

I'll call this the "anti-imputation principle" for short because it presumptively blocks imputing content (or responsibility for content) to speakers that they have not expressly articulated.[18]

Some version of an anti-imputation principle is vital to fostering a free speech regime and culture that realizes the values of free speech: the process of intellectual exploration; the individual and social discovery, appreciation, and sharing of beliefs, justifications, experiences, truth, and knowledge; and the individual formation of sincere opinions and achievement of understanding.[19] The key point of emphasis here is that free speech protections are not merely meant to insulate pronouncements of conclusions from legal repercussions. The more substantial contribution that free speech protections make to social debates and discussions is to insulate the *process* of arriving at conclusions supported by justifications.

That process operates through gathering (putative) information and ideas; articulating preliminary thoughts or hypotheses (whether one's own or those of others); encountering questioning, criticism, additional information, objections, and other forms of resistance and enrichment; and recalibrating one's initial thoughts. Engaging in this process requires the input and reactions of others within a shared dialogic space that has room for speakers and audiences to air and react to preliminary ideas, including mistaken ones, so as to elicit the responses that generate refinements, corrections, and understanding. An anti-imputation principle protects the boundaries of this shared dialogic space by ensuring that it is not encroached upon by a more expansive interpretation of the reach of legitimate rules of speech regulation by way of adverse audience interpretation. To protect against that encroachment and ensure the legitimacy of these rules, speech right up to the boundary and speech questioning the boundary must be zealously protected.

The task of this Article is to articulate and defend this principle, by explaining why individual nongovernmental (and noninstitutional) speakers should

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18. Eugene Volokh criticizes the use of a distinct inferential chain, namely from a speaker's statement to conclusions about a speaker's *intention*, e.g., inferring the intent to annoy or harass from harsh criticism of a person. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731, 775 (2013). It is an element of his broader skepticism about the constitutionality of using a speaker's intention to distinguish between regulable and protected speech. *See* Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366 *passim* (2016); *see also* Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion) (invalidating a statutory inference of the intent to intimidate from the fact of intentional cross-burning). By contrast, the anti-imputation principle concerns only what inferences we may draw in characterizing what a speaker has said. It operates independently from questions about how to infer intentions and what constitutional relevance they have.

19. *See, e.g.*, Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ."); *see also* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 303 (2011) (defending freedom of speech as a necessary condition of respecting and developing rational agency); SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 79–115 (2014) [hereinafter SHIFFRIN, SPEECH MATTERS] (further elaborating a thinker-grounded theory of free speech).

enjoy a broad sphere of legal impunity to say things whose unspoken entailments (as well as their unspoken implicatures, implicit presuppositions, and perceived connotations) would otherwise be regulable if explicitly articulated.[20]

The defense I will offer imagines the principle's regular application only to the speech of lay individuals about matters of public concern, offered in the public forum and other spaces and fora to which strong or unqualified free speech norms generally apply (such as university campuses and the press).[21] Whether exceptions arise in special institutional settings, such as in primary and secondary education, will be discussed in Part III.

The principle may not apply to speakers when they occupy and speak from within particular social roles, including roles of representation and power, such as government officials, experts, advertisers, and employers. Put roughly, their activity as speakers is not to form ideas and opinions through public speech but to convey decisions, policies, and authoritative information effectively.[22] When their audience is lay individuals, they may have greater responsibilities, even enforceable responsibilities, than do lay speakers to be precise and clear and to counteract

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20. Although I focus only on *legal* sanctions levied by the state, the arguments for the principle may support a wider range of application. Where employers face legal restrictions in disciplining employees' off-duty speech, the principle could be used to assess whether an employer has engaged in a wrongful termination. Absent legal regulation, the principle may also provide moral guidance when powerful social actors consider applying social sanctions in response to unwelcome speech. The topic of social sanctions introduces additional complexities, including how we should distinguish between a social expressive reaction and a social suppressive sanction. Given those complexities, I postpone a discussion of the anti-imputation principle's application to social sanctions for another occasion.

21. For the purposes of this Article, in addition to bracketing speech that is purely of private concern, I bracket the largely overlapping category of private speech that is predominantly situation-altering conduct, such as private speech that solicits, forms, performs, breaches, or terminates a contract or a conspiracy, privately conveys a personal threat, or issues an order. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 5–7 (1989). In the text, I apply the anti-imputation principle to some speech about matters of public concern delivered in the public forum and alleged to convey a threat. The public nature of the speech may render a more speaker-protective interpretative posture appropriate in part because the speaker's public and open declaration makes them more of a target of attention and in part because private communications, at least between acquaintances, may often be presumed to draw on prior and privately established mutual understandings. In collaborative situations of joint authorship and the voluntary generation of responsibilities and duties, norms of attribution and interpretation may diverge from an anti-imputation principle, in part because sanctions may not be at issue and also because the cooperative interactions between the parties may call for and support a greater degree of nonliteral interpretation. Thus, endorsement of the anti-imputation principle does not entail endorsement of literal approaches to interpretation in all other legal domains, including that of contracts. *See also infra* note 33 (discussing why a nonliteral approach to contractual interpretation is consistent with the anti-imputation principle).

22. Teachers, librarians, researchers, and some other intellectual laborers may constitute a special case not only because of the special protections and encouragements of academic freedom, but because their role-based responsibilities direct them to engage in and to lead independent intellectual exploration that may challenge common assumptions and inferences.

predictable audience misinterpretations.[23] For like reasons, the principle may also not apply to institutional speech pertaining to an institution's sphere of responsibility, such as commercial speech about a business's goods, services, and modes of operation; to government speakers; and to legal interpretation. To be sure, there are some institutions that are relevantly similar to individuals, such as voluntary expressive associations, to which the principle should apply when they speak in the public forum. Nonetheless, for simplicity, the Article will focus on speech by a noninstitutional speaker (a "lay speaker") who speaks simply as an individual and not from the perch of any institutional role.

Part I elaborates the principle and some of the primary occasions for its application. It begins with a brief review of other distinct examples of the exceptional treatment offered to speech in order to generate breathing space for freedom of speech. It then turns to the "of and concerning" requirement in defamation law, which serves as a core example of well-entrenched legal resistance to sanctions based on imputed speech. But the issue of imputed content arises in several other contexts, as I catalog. In many of those contexts, legal presumptions already impede the imputation. In others, I suggest, we *should* block the imputation.

Part II develops a principled argument about why the First Amendment and a free speech culture require adherence to an anti-imputation principle. The "of and concerning" requirement is often justified in a compressed way that appeals to considerations unique to the operation of the legal system of enforcement, including concerns about rejecting the crime of seditious libel and preventing excessive litigation.[24] But there are principled reasons for this doctrine that are not confined to ensuring the conditions for free and robust criticism of government and facilitating a workable litigation environment. These principled reasons reference the conditions necessary for the free development of ideas through social discourse, conditions important to a First Amendment environment and a free speech culture. These reasons justify an anti-imputation principle that ranges more broadly than solely limiting defamation liability.

To clarify the anti-imputation principle further and to illustrate how the anti-imputation principle's presumption may be overcome, Part III compares and contrasts the anti-imputation principle to the close precursor Judge Hand advanced in his famous opinion in *Masses v. Patten*.[25] It also analogizes the adverse-interpretative-audience problem to the hostile-audience problem. This analogy motivates the argument for endorsing a shared-objective-meaning approach to characterizing situations in which the anti-imputation presumption is overcome. Part III also discusses whether special contexts, such as schools (or the public

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23. *See* Seana Valentine Shiffrin, *Unfit to Print: Government Speech and the First Amendment*, 69 UCLA L. REV. 986, 1004–05 (2022) [hereinafter Shiffrin, *Unfit to Print*]; Seana Valentine Shiffrin, *Learning About Deception from Lawyers*, 93 ARISTOTELIAN SOC'Y SUPPLEMENTARY VOLUME 69, 86 (2019) [hereinafter Shiffrin, *Learning About Deception from Lawyers*].

24. *See, e.g.*, Blatty v. N.Y. Times Co., 728 P.2d 1177, 1183–84 (Cal. 1986) (citing case discussions and describing various rationales for the "of and concerning" requirement).

25. 244 F. 535, 541–42 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

workplace), may call for limits and exceptions to the anti-imputation principle. It does not offer a comprehensive treatment but points toward a general approach by discussing the salient case of student speech in primary and secondary educational settings. The discussion in Part III also highlights the tension between speech regulation based on the actual or predicted effects of speech and the values underlying the anti-imputation principle.

I. THE SCOPE OF THE PRINCIPLE

A. More Familiar Forms of Exceptionalism

To support and encourage the exercise of freedom of expression, our First Amendment tradition and our free speech culture treat speech in some exceptional ways.

As many have observed, the occasions under which the law may regulate speech in light of its effects differ substantially from those under which the law may regulate conduct in light of its effects.[26] Speech that offends an audience because of its content will generally not be eligible for regulation on that basis,[27] though conduct that generates noxious and offensive fumes may be. When speech persuades (but does not coerce, facilitate, incite, or enlist) competent listeners to do harm or violence, the persuaded audience member will bear sole responsibility for her conduct.[28] Yet when an actor's non-speech *conduct* causes another to inflict harm, both parties may be liable. This differential treatment is integrally related to the realization of free speech values that require the opportunity to subject ideas to testing and trial. There must be space for ideas to be articulated and evaluated by others. That space requires that audience members, not speakers, be responsible for how the audience responds to those ideas.

Creating that breathing room may also involve refraining from regulating up to the line between protected and unprotected speech. Some examples: the Court decided in *Counterman v. Colorado* that to avoid overly chilling protected speech, criminal prosecutions of true threats, which do not fall within the First Amendment's protection, must also establish that the speaker issued the threat with reckless

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26. *See, e.g.*, Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284, 1292 (1984) ("[T]he first amendment protects speech more than it protects non-speech conduct."); Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1180–81 (2003); Frederick Schauer, *Free Speech on Tuesdays*, 34 LAW & PHIL. 119, 124, 135 (2015); *see also* Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFFS. 87, 89–91, 96, 103–05, 116–17 (2017) (defending the position that free speech is a special right against skepticism and evaluating whether its status as a special right depends on it protecting harmful speech).

27. *See* Terminiello v. City of Chicago, 337 U.S. 1, 5 (1949); Texas v. Johnson, 491 U.S. 397, 414 (1989); Snyder v. Phelps, 562 U.S. 443, 458 (2011).

28. *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (per curiam). Arguably, this principle has been importantly qualified by *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7–9, 14–15, 39 (2010), which upheld the constitutionality of a prohibition on providing directed service, training, or other specialized knowledge, including the provision of advice about engaging in legal and peaceful advocacy, to designated foreign terrorist organizations.

disregard or knowledge that it would be taken as a threat by the speaker's audience.[29] In the defamation context, even though false defamatory speech does not fall within the First Amendment protection, states may not regulate up to the line of strict liability. Instead, they must require proof of speaker fault in all cases and must meet the actual malice standard when the speech involves a public figure, public official, or candidate, or when punitive damages would be assessed for defamatory speech about a matter of public concern.[30] In all these cases, some may be harmed as a side effect of rules that are designed to preclude the creation of a chilling legal atmosphere in which speakers would feel apprehensive about the safety of exercising their rights to engage in protected speech.

B. The Anti-Imputation Principle and a Core Example

1. Elaborating the Anti-Imputation Principle

There is another important way in which an environment conducive to free expression must protect speakers, namely by conditioning sanctions, whether legal or social, on the relevant expression being (explicitly) specific and directed, rather than imputed to the speaker. This requirement is encapsulated in the anti-imputation principle:

> As part of the "breathing space" required by the First Amendment and by a free speech culture, there is a strong rebuttable presumption against levying legal sanctions for objectionable content that speakers do not explicitly articulate (or explicitly signal they presuppose), even when explicit statements of that objectionable content could permissibly be subject to sanctions and the objectionable content may be reasonably or is commonly inferred from what the speakers have explicitly said.[31]

This presumption may be rebutted through decisive contextual or other evidence, such as other proximate statements, showing that the content of the objectionable statement is contained in the demonstrable shared objective meaning of the speaker's statement.[32] By "shared objective meaning," I have in mind a meaning that is not private, idiosyncratic, or uniquely accessible to the audience or to the speaker. Further, given the context of the statement (or statements), the meaning would be a salient interpretation upon which both the audience and the particular speaker have sufficient reason to converge and to expect convergence. Moreover, it is a meaning that the audience has sufficient reason to interpret the particular speaker as advancing and the speaker has sufficient reason to expect the

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29. Counterman v. Colorado, 600 U.S. 66, 73 (2023).

30. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974); *see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985).

31. *See supra* text accompanying notes 18–19.

32. Stated as a presumption, this principle differs from the expressness standard discussed, partly defended, and partly criticized by Charlotte Taylor. *See* Charlotte Taylor, *Free Expression and Expressness*, 33 N.Y.U. REV. L. & SOC. CHANGE 375 *passim* (2009). Taylor criticizes an expressness standard as ratifying a "highly artificial" approach to interpretation that limits judicial interpretation at substantial cost. *Id.* at 383. A rebuttable presumption would avoid many of her criticisms. *See infra* note 115 and accompanying text.

audience to understand. Often, the shared objective meaning will not diverge importantly from the literal meaning of what was expressly said.

"Shared" does not connote subjective meaning. It is possible that the shared objective meaning of a statement might be one that a speaker did not subjectively mean. For instance, failing to take care with her diction, a speaker might, without specific intention, negligently or even recklessly implicate some defamatory content that in context was the salient interpretation of her statement upon which audience and speaker had reason to converge (and to expect the other party to either advance or understand). Thus, rendering sanctions for speech contingent upon what is expressly stated unless contextual factors dictate a different (or more expansive) shared objective meaning is complementary to, but distinct from, a requirement that sanctions be contingent upon proof of the speaker's intent to advance a particular meaning, i.e., on the speaker's subjective meaning.[33] That is, it is a distinct question whether, as an additional layer of speech protection, a free speech regime must also impose a requirement that the speaker knew or intended the objective or explicit meaning of her statement to be liable for the statement.[34]

The strongest version of the anti-imputation principle would require that unless the *only plausible* interpretation of the demonstrable shared objective

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33. The idea of shared objective meaning is familiar from contract law, although its relevance and its application differ in the contractual context. Contractual overtures and contractual language are primarily between two parties, while speech about matters of public concern may have larger intended audiences as well as bystander observers. *See supra* note 21 (tracing some differences between contracts and speech about matters of public concern). For instance, in contract law, the default for assessing whether parties' "manifestations" form contracts is through shared objective meaning, subject to the exception that if one party knows or has reason to know of another party's different meaning (but the latter party is unaware of the discrepancy), the different meaning may govern. *See* RESTATEMENT (SECOND) OF CONTRACTS § 20 (A.L.I. 1981). There is also jurisdictional variation as to whether the explicit text of the contract governs its interpretation, absent ambiguity, or whether its shared objective meaning, the text enriched by context, governs.

In both cases, there are reasons to adopt a different interpretative approach to contract formation and interpretation than to sanctions for speech. With respect to contract formation, when parties are navigating whether to enter a relationship with one another and assume substantive duties with respect to one another, there is much to be said for the more knowledgeable party to either accede to the other party's meaning (of which the former is aware) or to clarify for both parties. With respect to contract interpretation, the Article's argument does not necessitate a plain meaning approach since, in this context of expression as opposed to that of the public forum, contractual parties have forged a substantive relationship for which a more expansive form of interpretation may be apt.

In the public forum and other contexts governed by free speech norms, however, where speaker and audience may not even be as close as arm's length, there should be no strong legal expectation that a speaker will accommodate audience meaning, even if the speaker is aware of it. Of course, it will often be morally appropriate for a speaker to avoid unintended audience misunderstanding or offense, if the speaker can convey their meaning another way and has the timely wherewithal.

34. *See also* Martha A. Field, Brandenburg v. Ohio *and Its Relationship to* Masses Publishing Co. v. Patten, 50 ARIZ. ST. L.J. 791, 794–97 (2018) (emphasizing the difference between the hazards of using speaker's intent as an element of liability vs. its use as an additional speech protection mechanism).

meaning of a speaker's statement in context is something distinct from its literal meaning, we have no warrant to impose sanctions as a response to any content other than what is contained in the statement's literal meaning (and its explicitly signaled presuppositions). A weaker, but still robust, version of the view would permit the presumption to be overcome by pointing to the *most plausible* shared objective meaning of the statement (should it diverge from its literal meaning) but would afford the speaker a complete defense if she could point to a different, plausible, and free-speech-protected interpretation of what, in context, she said. Importantly, the alternative plausible interpretation need not amount to a rejection of the imputed regulable meaning. It might instead be consistent with ignorance, uncertainty, or a noncommittal stance toward its content.

To return to the opening examples: regardless of an audience's suspicions about what is *really* going on, the anti-imputation principle would direct that the protester who recites the river-to-the-sea slogan cannot be sanctioned for antisemitic speech or cited as evidence of the university's tolerating a hostile environment absent evidence of additional temporally proximate speech or context that renders the interpretation of animus the only plausible objective meaning of *that recitation* of the slogan. So too, bracketing arguments that the primary and secondary school contexts are special, the student wearing the only-two-genders T-shirt cannot be sanctioned on the basis of this shirt alone for demeaning gender-nonconforming peers. Some further evidence, such as pointing to gender-nonconforming peers in reference to the shirt or demanding their attention to it, would be required.

It is important to stress that the anti-imputation principle is not, and does not depend upon, a theory of conversational meaning, although some philosophers defend related theories of conversational meaning that favor literal meaning as a starting point.[35] The anti-imputation principle is not a semantic principle but a normative principle that governs when *we may impose legal sanctions* for what speakers have said.

In some cases, audiences may reasonably take speakers to mean more than what is contained in their explicit statements. The anti-imputation principle does not demand, morally or legally, that *audience members* always exercise charitable interpretation or interpretative hesitation. To be sure, when the speaker's apparent meaning seems provocative or objectionable, the morally apt stance of an audience should often be one of curiosity rather than reflexive reaction. Often, a morally constructive response will be to clarify whether the speaker did in fact mean to convey the provocative or objectionable connotation or entailment.[36] Such inquiries

35. *See, e.g.*, Tyler Burge, *Individualism and the Mental*, 4 MIDWEST STUD. PHIL. 73, 88 (1979) (Speaking of speaker interpretation generally, "there is a methodological bias in favor of taking natural discourse literally, other things being equal. For example, unless there are clear reasons for construing discourse as ambiguous, elliptical or involving special idioms, we should not so construe it. Literal interpretation is *ceteris paribus* preferred.").

36. For a rich and sophisticated discussion of the important social functions and hazards of nonliteral interpretation, and the moral dynamics of audience interpretation and speaker response that ensue, see Eidelson, *supra* note 5, *passim*.

may provoke conversation, revision, and retraction; or they may clarify that the speaker did aim to convey the posited objectionable content.[37]

Still, the anti-imputation principle does not direct that audiences or observers *must* refrain from responding directly and immediately to that (stipulated) reasonable interpretation, whether through sharp criticism, heightened emotion, agreement, or other forms of emotional or dialogic response. The principle more modestly advances a heavy presumption against applying *legal sanctions* in response to speech based on imputing content that is not contained in the speaker's explicit statements. Indeed, given the predictable inferences that audiences may draw, even where sanctions are inappropriate, observers, institutions, and the state may have good reason to engage in speech and action to refute any inferred objectionable content, to mitigate the troubling effects on audiences who draw such inferences, and to attempt to persuade speakers to use more constructive language less likely to provoke the suspicion of animus.[38]

Importantly, the anti-imputation principle only articulates a *limit* on state authority that serves as a (rebuttable) safe harbor for speakers. It does not positively *authorize* sanctions based on explicit content when other contextually based interpretations are available. A free speech regime must be alive to and make room for nonliteral and creative uses of language, offering the benefit of the doubt to speakers. The anti-imputation principle, thus, is just one component of a principle of interpretative charity toward speakers, but its distinctive features are worth attention and defense.

The anti-imputation principle has the effect of insulating the speaker from responsibility for liability or restriction based on inferences by an audience—even some reasonable inferences and even some logical entailments. This insulation may require the audience to do more emotional, interpretative, or clarificatory work to protect themselves or others from harm or misunderstanding. Where the audience does not or cannot refrain from making the inference, this speech protection may render the audience (or the target of the inference should they differ) vulnerable to speech-inflicted harm. Hence, the principle needs further justification, a task that will occupy Part II after the scope of the protection is further elaborated in this Part.

2. A Core Example: the "Of and Concerning" Requirement

A central example of this protection is found in the requirements for recovery for defamation. A condition of defamation recovery in the common law is that the defamatory statement be "of and concerning" the plaintiff.[39] That is, for liability to attach, the defamatory statement must specifically name the plaintiff, or the audience must understand the defamatory statement specifically to pick out the plaintiff. A false statement that could be injurious to reputation will not satisfy this element if it denigrates a large group of people, even if an audience member could reasonably infer that if it is true of the group, it therefore is true of a member of the group. Classic examples of defamation claims that would fail on this score include

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37. Of course, not all speech in the public forum allows for colloquy.

38. Some examples of successful initiatives of such persuasion are described in CHRISTOPHER L. EISGRUBER, TERMS OF RESPECT 58–59, 71 (2025).

39. *See* RESTATEMENT (SECOND) OF TORTS §§ 558, 564, 564A (A.L.I. 1977).

a lawyer suing a commentator who says, "All lawyers are shysters," or a parking lot operator suing a writer whose article refers to the "parking lot racket."[40] Of course, if the commentator made the disparaging general remark in a context in which it was clearly meant to refer to a particular lawyer, the "of and concerning" requirement could be met. The context, sufficiently salient prior statements, or contemporaneous statements may combine with the general claim in ways that single out particular people.

In addition to establishing the actual malice standard (that defamation liability requires knowledge or reckless disregard of the falsity of defendants' statements), *New York Times Co. v. Sullivan*[41] incorporated the "of and concerning" requirement into the First Amendment's protection with respect to public official plaintiffs. *Sullivan* concerned a political advertisement that criticized the conduct of the "police" in Alabama towards civil rights activists. Some of the allegations in the advertisement were false. The commissioner in charge of the police (Sullivan) sued for defamation on the grounds that as commissioner, he would have been responsible for the alleged misconduct had it occurred. So charges of police misconduct, he alleged, disparaged his reputation.[42] One of the constitutional grounds for overturning liability was that the ad did not name or refer to the commissioner specifically. As the Supreme Court construed the matter, it is a First Amendment requirement for defamation liability that the defamatory material be (more explicitly and specifically) "of and concerning" the plaintiff.[43] These are interesting holdings since the identity of the commissioner is public and the authority of the police commissioner over the police is not arcane information.

Sullivan and its successor case *Rosenblatt v. Baer*[44] understood the First Amendment requirement as linked to what was necessary for democratic discourse, democratic criticism, and government accountability. Hence, the protection was articulated with respect to public officials. Subsequent cases have applied the protection more broadly to other classes of plaintiffs, either as a First Amendment

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40. Both examples are discussed in *Michigan United Conservation Clubs v. CBS News*, 485 F. Supp. 893, 898 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981). The first example was offered by William Prosser in WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 750 (4th ed. 1971) and the second was the basis of the case in *Service Parking Corp. v. Washington Times Corp.*, 92 F.2d 502, 503, 505–06 (D.C. Cir. 1937). *See also* Schuster v. U.S. News & World Rep., Inc., 602 F.2d 850, 851 & n.2, 852 n.3, 854 (8th Cir. 1979) (holding the general characterization of Laetrile distributors as quacks, medical charlatans, and "fast-buck artists" was insufficiently specific to generate liability for defaming two particular distributors). See ROBERT D. SACK, SACK ON DEFAMATION § 2:9.4 (5th ed. 2017) for a discussion and survey of the not-entirely-uniform treatment by courts of the question of how large the group (under 100? 50? 25?) must be for a speaker's disparagement of a group to be insufficient to ground a defamation suit by a specific group member.

41. 376 U.S. 254, 288 (1964).

42. *Id.* at 258.

43. *Id.* at 288–92.

44. 383 U.S. 75, 82 (1966) (holding that editorial criticism of a local government body could not, consistent with the First Amendment, be understood as "of and concerning" a specific supervisor who was not specifically named or singled out).

doctrine or as a principle of constitutional avoidance. It has also been applied to other causes of action that are predicated upon an injurious falsehood.

For example, in *Blatty v. New York Times Co.*, the California Supreme Court held that William Blatty, the author of *The Exorcist*, could not bring a variety of causes of action, including trade libel, interference with prospective economic advantage, and negligence, against the *New York Times* for the latter's failure to list his book *Legion* on its bestsellers list, which was described as based upon reported sales figures from a national sample of bookstores.[45] Blatty alleged that the omission implied the false claim that *Legion* was not a bestseller and that this omission was injurious to his reputation and the overall sales of *Legion*. The Court did not hesitate to apply the "of and concerning" requirement to Blatty, even though Blatty was not a public official and some of his claims did not sound in defamation.

As the *Blatty* Court explained:

> The "of and concerning" or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt. To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society.[46]

Even though it was a logical implication of the list and Blatty's absence from it that *Legion* was not a *New York Times* bestseller, the Court found it an insuperable obstacle that Blatty and *Legion* were not named as also-rans, so to speak. That is, the list could not be understood by implication to pick out *Legion* in particular. Rather, the negative implication applied to a large number of books, and the Court echoed the general doctrine that when an injurious statement concerns a large group, for legal purposes, that statement does not qualify as "of and concerning" any particular member.[47] The California Supreme Court relied primarily on the First Amendment of the California Constitution but cited the First Amendment of the U.S. Constitution as well.[48] A similar finding by a federal court in Michigan interpreted the large-group rule in terms of constitutional avoidance, applying it to private plaintiffs and to both defamation and a false-light invasion of privacy claim.[49]

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45. 728 P.2d 1177, 1178–79 (Cal. 1986).

46. *Id.* at 1183.

47. *Id.* at 1185.

48. *Id.* at 1181, 1187 n.4 (indicating that the opinion "primarily" relied on the California Constitution's First Amendment); *see also* Lively v. Wayfarer Studios LLC, 786 F. Supp. 3d 695, 755 n.36 (S.D.N.Y. 2025) (citing *Blatty* for the large group rule and referencing California law).

49. Mich. United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900, 904 (W.D. Mich. 1980) ("To avoid [a] conflict with First Amendment values . . . this court must reaffirm the general tort principle which requires that a publication specifically refer to or point to the plaintiff before he is permitted to maintain a suit." (citation omitted)), *aff'd*, 665 F.2d 110, 112 (6th Cir. 1981) (referencing Michigan law).

Although the "of and concerning" requirement in defamation is a leading example of the anti-imputation principle in action, other aspects of defamation law do not clearly conform to it. Liability for republishing defamatory speech may seem to reflect an inference that sharing another's message may be taken as an endorsement of that message, an inference the anti-imputation principle would resist.[50] On the other hand, it is not evident that the republication doctrine is predicated on an inference of endorsement, since absent a special privilege, one can be liable for republication even as one explicitly disavows the content of the defamatory remark.[51] The republication doctrine may instead be viewed as a requirement not to repost false defamatory material when one knows it to be false (or is culpably insensitive to its falsity), even when one explicitly identifies it as false. Whatever its merits or demerits, viewed in that way, it is not in tension with the anti-imputation principle.

Another partial tension with the principle surfaces in the doctrine concerning defamation by implication and innuendo, around which there is significant jurisdictional variation and conflict.[52] Some jurisdictions recognize a wide range of claims for implied defamation when a speaker's statement may be *reasonably understood* as implying defamatory content, thereby applying a lower standard than the shared objective meaning standard defended here. Other jurisdictions demand, at least for speech about public figures, evidence that the speaker intended to communicate the implied defamatory content. The even more speech-protective innocent construction rule applied in Illinois is more consistent with the approach defended here. That rule does not permit an action for defamation where the statement at issue may be given an innocent interpretation without strain.[53]

To be sure, not all liability for implied defamation is in conflict with the anti-imputation principle. Some leading cases do not involve speech about matters of public concern but instead are about private figures and matters of private concern.[54] In other cases, the degree of connective contextual tissue suffices to meet

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50. *See infra* Subsection I.C.2.a.

51. *See, e.g.*, Hoover v. Peerless Publ'ns, Inc., 461 F. Supp. 1206, 1209 (E.D. Pa. 1978); RESTATEMENT (SECOND) OF TORTS § 578 cmt. e (A.L.I. 1977).

52. *See generally* Shiffrin, *Learning About Deception from Lawyers, supra* note 23 (discussing cases within this doctrine).

53. *See* Tuite v. Corbitt, 866 N.E.2d 114, 121–27 (Ill. 2006) (discussing evolution of innocent construction rule and affirming it with respect to defamation per se); SACK, *supra* note 40, § 2:4.14; *see also* Soloway v. ALM Global, LLC, No. 24-3104, 2026 WL 2409057, at *1–6 (7th Cir. Aug. 18, 2026) (applying Illinois's innocent construction rule in affirming the dismissal of a defamation per se action).

54. For instance, in *Memphis Publishing Co. v. Nichols*, the court found a truthful report defamatory by implication. 569 S.W.2d 412, 414, 420 (Tenn. 1978). The report was that Mrs. Newton shot Mrs. Nichols after Mrs. Newton "arrived at the Nichols home and found her husband there with Mrs. Nichols." *Id.* at 414. The report omitted to mention that Mr. Newton and Mrs. Nichols were found talking with three others in the living room and thereby the statement falsely insinuated that Mr. Newton and Mrs. Nichols were alone, engaging in adultery, when Mrs. Newton shot Mrs. Nichols. *Id.* While the shooting is arguably a matter of public concern, the identity of the victim and whether she was engaged in adultery are not. While *Florida Star v. B.J.F.* upheld a newspaper's truthful report of a government-supplied name of a rape victim and characterized the report of the crime as a matter of public

the anti-imputation principle. For example, what is explicitly stated may not be defamatory, but the explicit statement coupled with extrinsic facts that are known to speaker and audience may be defamatory.[55] But in those jurisdictions allowing liability for (merely) reasonable false implicatures about matters of public concern, that liability is in tension with the anti-imputation principle.

3. A Doctrinal Cousin: Bronston v. United States

A hesitance to impute speech or to regulate based on inference arises in other legal contexts as well. Consider the interpretation of the federal perjury statute in *Bronston v. United States*,[56] which restricted the statute's application to lies and disallowed a perjury conviction based on the witness's literally true testimony that carried a false implicature that could mislead. In *Bronston*, when asked whether he had any Swiss bank accounts, the witness truthfully said no; to the follow-up question of whether he had *ever* had a Swiss bank account, he answered truthfully that *his company* had had an account in Zurich for six months.[57] By switching the subject from himself to the company, the witness provided a truthful answer that seemed to suggest, by conversational implicature,[58] that *he* had never had a Swiss bank account, but this was false. In fact, he personally had had one.[59]

Although the Court's holding that a true statement that falsely implicates does not qualify as perjury was not grounded in the First Amendment, the core rationale appealed to concerns about chilling valuable speech. The Court evinced concern that the witness's answers might be shaped by the witness's incomplete understanding of the question, their nervousness, or their embarrassment or shame.[60] The jury should not be encouraged or empowered to speculate about what any witnesses intended the audience to conclude yet did not say, because "[w]itnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of 'intent to mislead' or 'perjury by implication.'"[61] This fear of a perjury conviction grounded in speculative reasoning, in turn, might

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significance, it distanced itself from affirming that the specific identity of the victim was a matter of public concern and instead emphasized that the name was supplied by the government. *See* 491 U.S. 524, 527, 536–37, 539, 541 (1989).

55. Sack offers a streamlined hypothetical in which a newspaper falsely reports that Mr. Johnson withdrew funds from the bank account of Johnson, Smith, and Jones. *See* SACK, *supra* note 40, § 2:8.3. That report, taken alone, is not defamatory but may be when coupled with the extrinsic fact known to readers of the paper that Johnson had been fired from the firm the month before (and so no longer had the authorization to withdraw funds). *Id.*

56. 409 U.S. 352, 360 (1973).

57. *Id.* at 354.

58. Implicature is the linguistic act of implying one meaning by saying something else. Conversational implicature is the linguistic act of implying a meaning one does not say through reliance on features and informal conventions of the conversational context, including but not limited to expectations that one's speech will be cooperative and relevant. *See* Wayne Davis, *Implicature*, STAN. ENCYC. PHIL. ARCHIVE (Edward N. Zalta & Uri Nodelman eds., Fall 2024), https://plato.stanford.edu/archives/fall2024/entries/implicature/ [https://perma.cc/V7T7-NKNJ].

59. *Bronston*, 409 U.S. at 354.

60. *Id.* at 358.

61. *Id.* at 359.

discourage witnesses from agreeing to testify and might deprive the judicial system of vital information; whereas, the interest in avoiding false conclusions could be achieved through the exercise of the examiner's responsibility to pose follow-up questions.

C. A Preliminary Typology of the Anti-Imputation Principle

The defamation and perjury cases offer some elaborated examples of a presumption of anti-imputation at work. They are not isolated. Indeed, there are at least four major categories of examples where the presumption does or would do significant work, involving: (a) generalizations; (b) associations; (c) means–end reasoning; and (d) omissions. For all the examples, an anti-imputation principle either seems to underlie their disposition or offer important guidance to resolve them. The list below outlines some of the more important categories and instances of application, but it is not intended to be comprehensive. Some examples may fall into multiple categories. The list does, however, illustrate that the anti-imputation principle may underlie and unify a wide range of cases. In doing so, the list renders more explicit what is at stake in affirming the principle.

1. Generalizations

One category contains a variety of blocked inferences *from* a speaker's general, abstract, or ambiguous statements about groups or ideas *to* imputing conclusions about specific people, institutions, places, or times to the speaker.

a. From critical, derogatory generalizations about a large group to a corollary claim about an individual member of the group.

Speakers may make critical or derogatory generalizations (whether as assertions or imperatives) about a group or its members without thereby incurring liability toward individual members in situations where a corollary explicit claim about an individual group member might form the basis of liability. The principle would block the inference from the mere expression of the generalization to a specific claim about an individual group member, absent explicit or rich contextual connective tissue linking the speaker to a public statement about or directed towards a specific individual.[62]

A leading variant of this category is the previously discussed inference that was blocked in *New York Times Co. v. Sullivan*, from a speaker's explicit allegations about an institution (the police) to imputing to the speaker allegations about particular leaders or decision-makers.[63] *Sullivan* articulated a constitutional protection for speakers to issue critical or derogatory claims about a government body that might be false in situations where a corollary explicit claim about the specific people who are accountable for that institution's actions could constitute a basis for liability.[64] This protection has been extended to block inferences from

62. In fighting words cases, issuing a derogatory generalization to a member of the group face to face could constitute that contextual connective tissue.

63. *See supra* notes 41–44 and accompanying text.

64. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).

critical claims about large groups to attributing more specific claims about group members.[65]

b. From the issuance or use of an ambiguous claim, symbol, or slogan to a particular disambiguation of it.

For example, the principle would block the inference from a person's wearing a Palestinian keffiyeh in the United States to imputing an antisemitic or an anti-Israeli message to its wearer, as opposed to (simply) a message of solidarity or identification with the Palestinian people. It would block an inference from a person's wearing a Star of David to imputing to its wearer endorsement of the actions of the government of Israel, as opposed to (simply) a message indicating one's Jewish identity. Likewise, the principle would block the inference from the wearing of a Confederate flag T-shirt to imputing a message of racial hostility to the wearer, as opposed to (simply) a message of solidarity or identification with a more hazily conceptualized pride in one's "Southern heritage."[66] The failure to respect this application of the principle is one of the flaws of the indictment of former FBI Director James Comey for posting a photograph of seashells arranged to read "86 47."[67] The government alleges that a reasonable recipient of that post would interpret it as a threat on the 47th President's life but fails to explain why that interpretation crowds out and dominates the innocuous (and more common) interpretation of "86" to mean that the 47th President should be fired or impeached.[68]

These applications are closely related to the plurality opinion's stance in *Virginia v. Black* that while cross-burning with the intent to intimidate may be prohibited, the fact of cross-burning by itself cannot be taken as presumptive or conclusive evidence of the intent to intimidate; additional evidence is necessary to distinguish an intimidating meaning from core political expression.[69] Although the issue presented was whether the *mens rea* of intent to intimidate could be inferred from the fact of cross-burning, Justice O'Connor's opinion was framed in terms of which *meaning* could be imputed to the speaker.[70]

c. From a general call to action to a call to action at a particular time and place.

The *Brandenburg* doctrine extends First Amendment protection to incendiary speech unless it is intended and likely to cause imminent illegal action.[71]

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65. *See* Blatty v. N.Y. Times Co., 728 P.2d 1177, 1185 (Cal. 1986) (discussing cases across jurisdictions offering this protection); *supra* notes 45–49 and accompanying text.

66. *See* Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1317 (2011). Michael Dorf's article contains an excellent discussion of the Confederate flag and other symbols, slogans, activities, and statuses that carry multiple (and multiple alleged) meanings. *Id.* at 1316–23. Dorf's primary focus is on law's social meaning and thus on the government as speaker or as issuer of meaning. *Id.* at 1275. As mentioned in the Introduction, there are reasons to doubt that the anti-imputation principle is appropriately applied to government speakers.

67. *See supra* note 16.

68. *See id.*

69. *See* 538 U.S. 343, 365 (2003) (plurality opinion).

70. *See id.*

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

It protected the *Brandenburg* speaker who rehearsed details about the size of the Klan, who threatened that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken," and who used a racial slur to opine that Black people should be "returned to Africa" and Jewish people to Israel with the insinuation that the process would be involuntary and violent.[72] Similarly, in *Hess v. Indiana*, it protected from a disorderly conduct conviction an anti-war protester who, on the occasion of the dispersal of a protest, exclaimed, "We'll take the fucking street later."[73] One might understand the *Brandenburg* doctrine, as applied, either as a specification of the anti-imputation principle or as presupposing and working in tandem with the anti-imputation principle. The sorts of threats these speakers issued can only gain protection if one resists inferring a specific threat from the generally worded threat.[74]

2. Associations

A second category would block inferences *from* what a speaker says, quotes, or hosts *to* the conclusion that the speaker has endorsed ideas often closely associated with her statement.

a. Speakers may read, study, quote, describe, or repost the speech of another party without being taken to endorse or affirm that other party's content. The speech may be interpreted more narrowly as indicating that the content or the fact of another party's speech bears notice.[75]

Even as it upheld the convictions of the leaders of the U.S. Communist Party for organizing an association that advocated violent revolution, the Court in *Dennis v. United States* still affirmed that the peaceful study of *others*' such advocacy was constitutionally protected.[76] Further, in a number of cases involving

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72. *Id.* at 446–47, 449.

73. 414 U.S. 105, 106–07, 109 (1973). As the Court notes, memories are unclear as to whether Hess threatened to take the street "again" or "later." *See id.* at 107.

74. *See also* Taylor, *supra* note 32, at 391–96 (discussing lack of clarity in judicial interpretations of *Brandenburg* with respect to whether a speaker must explicitly call for imminent illegal action).

75. In some ways, this is the most obvious case. To discuss and evaluate the ideas of other people, we must be able to describe and quote them. As witnessed in the historical controversies over teaching about communism and recently, over critical race studies, those who miss this point often elide the distinction between teaching *about* and teaching *that*. A similar point is made about quoting epithets for purposes of referring to them, *mentioning* them vs. *using* epithets to insult or subordinate. *See, e.g.*, Randall Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U. L. REV. 1, 10–12 (2021). I disagree with Kennedy and Volokh, however, about when it could be morally appropriate or necessary to quote epithets rather than to describe them another way. *See id.*

76. 341 U.S. 494, 502 (1951). The methodology underpinning *Dennis*'s affirmance of the convictions, though, was later implicitly rejected in *Yates v. United States* and *Brandenburg v. Ohio*. *See* Yates v. United States, 354 U.S. 298, 318, 320–24 (1957) (reiterating the distinction between "advocacy of abstract doctrine and advocacy directed at promoting unlawful action" though claiming fidelity to *Dennis*); *Brandenburg*, 395 U.S. at 447 (requiring advocacy be directed to and likely to incite imminent unlawful activity as a condition of regulation).

state requirements that property owners host others' speech, the Court has invoked the capacity of individuals, including children, to distinguish between the views of a host of speech and the views of the speaker.[77] If children may be expected to make this distinction, then surely state actors administering sanctions may be expected to do so.

b. Speakers may endorse a premise or a justification without warranting the conclusion that the speaker has endorsed the end or the policy (or its rejection) that the premise or justification may likely or commonly be used to support.

For example, absent other contextual information, the principle would block the inference from a speaker's saying, "There are only two genders," to the conclusion that the speaker has publicly endorsed disrespect, or the rejection of equal rights, for people who identify as trans, nonbinary, or otherwise gender-nonconforming.

c. Speakers may endorse a proposition without warranting that they endorse it for the same reasons that others do.

For example, the principle would block the inference that a speaker's criticism of Israel or of Zionism was motivated by antisemitism, even though some (or many) speakers' criticism of Israel or of Zionism is so motivated. "[O]ne person does not lose the right to express a political opinion on a matter of public concern merely because another who expresses the same view does so for condemnable reasons."[78]

d. Speakers may join a voluntary association without thereby warranting the conclusion that they endorse each or any particular tenet or message of the association.

The freedom to associate with others without bearing responsibility for their speech is the culmination of our eventual rejection of the holdings of cases like *Whitney v. California*[79] in the decades-long battle over seditious speech.

e. Speakers may indicate admiration for another's illegal action or the character behind its production without advocating that others engage in illegal action themselves.

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77. *See, e.g.*, Rumsfeld v. F. for Acads. & Institutional Rts., Inc., 547 U.S. 47, 65 (2006); Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (plurality opinion); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980).

78. StandWithUs Ctr. for Legal Just. v. Mass. Inst. of Tech., 158 F.4th 1, 17–18 (1st Cir. 2025).

79. In *Whitney v. California*, the Court upheld the conviction of Anita Whitney for criminal syndicalism (advocating, teaching, aiding, or abetting a crime) in virtue of her organizing and attending the convention of the Communist Labor Party of California, although her own advocacy consisted of urging policies of peaceful reform. 274 U.S. 357, 364–68, 371 (1927). Although it did not then overturn *Whitney*, the Court in *De Jonge v. Oregon* held that mere attendance at a Communist Party meeting was constitutionally protected and that De Jonge could not be convicted for criminal syndicalism by pointing to the advocacy contained in Communist Party pamphlets that he neither wrote nor distributed nor to the actions of other members of the Communist Party. 299 U.S. 353, 362, 365–66 (1937). *Whitney* was explicitly overruled in *Brandenburg*. 395 U.S. at 449.

Despite the Court's early embrace of the contrary position in cases such as *Debs v. United States*,[80] *Bond v. Floyd* solidified the legal proposition that admiration of others' illegal activity, or of the character necessary to produce it, does not constitute illegal incitement.[81] In that case, the Georgia legislature refused to seat Julian Bond, who had been elected as a representative on the grounds that he endorsed a statement of sympathy and support for Vietnam War draft resisters, issued by the Student Nonviolent Coordinating Committee, for which he was the communications director. This endorsement was taken to show that Bond could not, in good faith, take an oath of loyalty to the governments of Georgia and the United States. Bond stated that he admired the courage of the convictions of those who acted in the face of severe consequences but did not himself counsel illegal action. The Supreme Court held that Georgia's refusal to seat Bond violated the First Amendment and that his criticism of the war and sympathy for draft resisters was insufficient to constitute counseling, aiding, or abetting the evasion of draft registration.[82]

3. Ends or Values and the Means of Their Achievement

A third range of examples involves blocked inferences *from* speakers' endorsements of ends (spanning goals, outcomes, values, or valued states of affairs) *to* conclusions that they have endorsed the necessary (or likely or perceived) means of achieving those ends or the common justifications for those ends.

a. Speakers may endorse or call for general outcomes where explicit calls for the necessary or likely means of achieving those ends might (partially) ground liability. Yet, absent explicit or rich connective tissue linking the speaker to advocacy of the means, the speaker cannot be liable.

Failure to attend to this principle is a large part of the defect in Justice Holmes's opinion in *Schenck v. United States*.[83] Justice Holmes conceded that the authors of the pamphlet in *Schenck* only explicitly called for resisting conscription by means of repealing the Conscription Act and asserting a right against conscription.[84] Nonetheless, citing the authors' call that readers "must do [their] share to maintain, support and uphold the rights of the people of this country," Holmes imputed an expressed intent to *obstruct* the war effort to the authors that went beyond what the pamphlet said: "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out."[85] *Schenck* and its dangerous-tendency approach have been supplanted by the *Brandenburg* requirement that liability for advocacy of illegal activity must be intended and likely to produce imminent illegal action.[86]

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80. *See* 249 U.S. 211, 215–17 (1919) (upholding the conviction of Eugene V. Debs for expressing sympathy and admiration for draft resisters during wartime).

81. *See* 385 U.S. 116, 133–34 (1966).

82. *See id.*

83. 249 U.S. 47, 51 (1919).

84. *Id.* at 50–51.

85. *Id.* at 51.

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

b. Speakers may endorse an end without being taken to express endorsement of the necessary, likely, strongest, common, or imagined *justification* of the means of achieving that end. Likewise, speakers may reject an end without being taken to reject the necessary, likely, strongest, common, or imagined justification for that end.

For example, without further context, the principle would block the inference from a speaker's call for a defendant's exoneration to attributing to the speaker a call to the jury to engage in jury nullification or an endorsement of any theory of nullification's justification. Or a speaker could call for freedom in Palestine without being taken to have called for any particular means of achieving that freedom, whether through a negotiated peace treaty, violent measures, or some other way.

4. Omissions

Of course, the essence of the anti-imputation principle is to underscore the significance of what is omitted, in the sense of what is not said. In that respect, every application of the anti-imputation principle draws a distinction between what is said and what is omitted. Nevertheless, there are some omissions the negative significance of which are worth highlighting.

In particular, absent richer contextual information, the anti-imputation principle presumptively blocks inferences *from* a speaker's explicit substantive statements about specific subjects, such as identified persons or positions, *to* impute *contrasting* content about closely related subjects not mentioned by the speaker. *Bronston* represents one such case in which a witness's assertion about the existence of one bank account did not warrant imputing the affirmative denial of another for the purpose of a perjury conviction.[87] Other salient examples, sketched below, concern the familiar social temptation to read between the lines and to impute further assertions to speakers where their speech concerns other people or ideas associated with other people.

a. Speakers may praise *some* identified persons or groups without thereby being taken to issue a criticism of others (or to make factual claims) by negative implication.

For example, as previously discussed, the absence of a particular book on a list of bestsellers was not taken to constitute a positive assertion that that particular book was not a bestseller. The mere, unnoted omission (whether accurate or inaccurate and whether reckless or inadvertent) could not itself constitute an "injurious falsehood" that would ground liability because the omission was not "of or concerning" the author or the book.[88]

b. Speakers may affirm an idea without being treated as thereby issuing a personal criticism of those who affirm its rejection or who affirm a contradictory idea.

For example, the principle would block the inference from a speaker's explicitly saying, "I affirm radical Catholicism," to imputing to the speaker a critical

87. *See supra* Subsection I.B.3.
88. *See* Blatty v. N.Y. Times Co., 728 P.2d 1177, 1184–86 (Cal. 1986).

statement such as, "You, of the Jewish faith, are wrong."[89] The first statement provides a description of oneself, while the second statement delivers a pointed criticism of another, illustrating that "there is a world of difference between logical entailment and social meaning."[90] Steven Shiffrin points to the difference between the two statements to defend the distinction between teaching that evolution is true in public schools vs. teaching that Christian fundamentalists are wrong, which could raise religion clause issues.[91]

c. "Speakers" may be silent in the face of another's salient speech or conduct without, absent further contextual information, being taken to *disagree* with that statement or conduct from their silence and failure to endorse it. (Likewise, "speakers" may be silent in the face of another's salient speech or conduct without, absent further contextual information, being taken to endorse that speech or conduct through their failure to distance themselves from it.)

* * *

These categories and cases represent some of the major examples that fall in the scope of the anti-imputation principle. Many of the doctrinal examples offer some support for the claim that the anti-imputation principle is immanent, if not fully realized, in First Amendment doctrine. The anti-imputation principle may help to explain these examples and cases, as well as why they seem connected. The suggestion is that the anti-imputation principle grounds them and they are branches off the same trunk.

Although its ability to illuminate and unify some core cases about which we have strong convictions is an argument in the principle's favor, the immanence of the principle in some parts of the doctrine does not suffice to justify the principle completely. Some might be inclined to explain these examples in other ways and some other parts of the doctrine may seem in tension with it. Moreover, adherence to the principle requires audiences and third parties to shoulder a range of burdens associated with interpretative restraint.

Thus, Part II turns to a more direct and sustained normative argument for the anti-imputation principle, rooted in the First Amendment values of free speech and freedom of thought. This defense of the principle grounds and connects the cases that seem to rely on the anti-imputation principle. Further, it provides the foundation for a critique of those doctrinal areas in tension with the principle and a rationale to shift toward a more consistent methodological approach to the question of what content to attribute to the speaker in those doctrinal areas that permit content-based regulation.

II. JUSTIFYING THE ANTI-IMPUTATION PRINCIPLE

The unease that courts express toward imputing inferences as a pathway to liability is sometimes tersely explained as an aspect of the "breathing room" necessary for freedom of speech. When that explanation was further unpacked in

89. *See* Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 726 (2003).

90. *Id.*

91. *See id.*

Sullivan, the hesitancy was associated with the rejection of seditious libel.[92] Citizens and other subjects must enjoy the space to engage in criticism of government that reflects their concerns and frustrations. Absent deep expertise about the mechanisms of government or the time and resources to conduct intensive research, ordinary people may issue criticism that naturally, at points, turns to the speculative, trades on rumor, or uses exaggerated or imprecise language. Ordinary people cannot enjoy the freedom to criticize government and air their frustrations if such criticism is reflexively interpreted as criticism of particular leaders of government and, thus, potentially subject to defamation liability and legal action. The doctrine must supply people the breathing room to criticize government in broad terms without worrying that particular powerful officials will be aggrieved and equipped with the power to retaliate. With respect to defamatory speech that does not concern public officials, the hesitancy has been justified by appealing to the need to avoid inciting litigation waves and their downstream chilling effects.[93]

While these are sound rationales, they seem incomplete and omit some of the deeper reasons for the legal protection that are rooted in central values of freedom of speech. Those deeper philosophical reasons illuminate other doctrinal stances and are reasons to affirm the anti-imputation principle. My specific claim is that to achieve the core values of freedom of speech, the law must protect dialogic space for the development, refinement, and evolution of thoughts and understanding, which I take to span both the justifications behind beliefs and also the connections between beliefs. The development of thoughts and understanding in turn requires the operation of some sort of anti-imputation principle.

A. A Normative Justification

The justificatory arguments to support the various applications of the anti-imputation principle are not identical, but they are thematically similar. To permit a more concrete discussion, I will start by articulating an extended defense of doctrines like the "of and concerning" requirement that in effect block an imputation from explicit general or abstract speech to a more specific implicit claim. Then, I will more briefly indicate how this defense generalizes to other applications.

1. "Of and Concerning"—a Preliminary Justification

Start with statements containing qualified generalizations, such as "nearly all grocers are corrupt," "nearly all grocers have taken or given illegal bribes," or "if you meet a grocer, you've probably just shaken hands with a felon." Suppose that some statements about specific corrupt grocers could be legally sanctioned. For example, "Apu Nahasapeemapetilon pays illegal bribes" could be sanctioned, e.g., if the statement's explicit claim were false, issued to a third party with the requisite degree of fault, and about a real person.[94] Suppose also that it is predictable that some audience members will infer the specific regulable content from the qualified general statement alone (without further encouragement in that direction by the

92. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 291–92 (1964).

93. *See, e.g.*, *Blatty*, 728 P.2d at 1183–84; Mich. United Conservation Clubs v. CBS News, 485 F. Supp. 893, 900 (W.D. Mich. 1980), *aff'd*, 665 F.2d 110 (6th Cir. 1981).

94. Apu Nahasapeemapetilon is a fictional grocer in *The Simpsons*' fictional town of Springfield.

speaker or from contextual cues like the issuance of the generalization while nodding at A.N.'s store). Despite the predictable false inference, the speaker should be protected. Consequently, the burden of the false apprehension would be borne by the audience and by specific members of the class, here a particular grocer. Why?

First, the qualified generalization may be true, and there is an important presumption against regulating and deterring the publication of true speech, given that the discovery and distribution of the truth is a significant aim of the free speech protection. To preserve this presumption, the audience should bear the responsibility not to jump to a conclusion and not to draw an inference about a specific case without more information.

Nonetheless, where some specific instances of the qualified generalization are false, why not hold the speaker responsible for clarifying and specifying the exceptions and for explicitly refuting the inference herself? Why should other parties—such as the audience or the subjects of the generalization—shoulder either the obligation of specifying the gap cases or the burden of mischaracterization?

The main difficulty of allocating such responsibility to the speaker is that to do so would be, in essence, to expect the speaker to command total mastery of a topic and all its applications prior to articulation. That is an unreasonable expectation at the stage of exploration. That expectation represents a form of the mistake of supposing that freedom of speech is solely for the expression of fully formed, well-considered conclusions. It neglects the fact that freedom of speech is necessary for the process of arriving at and forming conclusions through exchange with others. Thoughts, ideas, beliefs, and views are formed and refined in part by the efforts required by articulation and the formulation necessary for comprehension by others, but in even larger part through the enhancement, pushback, and other forms of intellectual friction that occur through conversational exchange and the contributions of other people.[95]

Suppose, however, that the exceptions are known to the speaker and the audience mistake is not merely predictable, but foreseen by the speaker? In that case, why not allocate responsibility to the speaker to qualify more carefully and to issue specific disclaimers to stave off audience misapprehension?

Of course, achieving greater precision and audience understanding while satisfying one's expressive aims should be an intellectual and moral aspiration of all speakers, but this is no simple task. Imposing a legal responsibility to achieve this aspiration on lay speakers risks both distorting expression and chilling speech. To comply, a speaker may have to prioritize issuing disclaimers or resort to drawn-out explanations, which in turn may detract from a focused or full expression of the main issue or idea of the speaker's concern. Compliance measures could occupy a nonnegligible portion of a speaker's time or strain the audience's attention. This prospect could affect the speaker's decisions about what topics to discuss, suppressing a speaker's exploration and revelation of generalizations that may figure

95. *See* SHIFFRIN, SPEECH MATTERS, *supra* note 19; *see also* Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 NW. U. L. REV. 839, 840–41, 865–73 (2005) (discussing the role of voluntary associations in the production and refinement of thought).

prominently in their thought and drive their motives. Shifting legal responsibility to the lay speaker for foreseen misunderstandings may also chill less hardy and confident speakers who worry that unforeseen audience inferences may be mistakenly judged as foreseen. In either case, deterring speakers from issuing generalizations that feature in their current thinking may prevent interpersonal understanding, as well as intellectual development, refinement, and correction. Such deterrence works to the detriment of the speaker, the discursive community, and democratic dialogue.

Second, suppose the qualified generalization is false, so that the speaker cannot take refuge in the claim that their speech was true and that it was the audience that introduced the false application. Still, the same central difficulty holds. If, as a regular matter, discovering the truth is a communal affair and its discovery and refinement unremarkably involve making mistakes along the way, while we might expect speakers only to make sincere assertions, we cannot legitimately expect speakers to make only *true* claims from the outset.

But it may be objected: why should the audience members bear the responsibility of harboring false beliefs, withholding judgment, or finding the error in the speaker's claim? There is no a priori reason to think the audience is better positioned to protect themselves than the speaker. The speaker, after all, is the one who took the initiative to introduce the false generalization and to influence the audience; even if the speaker was unaware it was false, shouldn't the first mover bear the responsibility for any consequent harm?

Of course, the speaker may be criticized for issuing false generalizations and counseled to pursue her inquiry with greater diffidence, care, and qualifications. Nonetheless, levying legal repercussions for mistaken generalizations seems inconsistent with fostering a lively free speech environment for thematically similar reasons. A free speech environment should be structured to foster and encourage speech and potentially illuminating exchanges by all sorts of speakers, not only the speech of the most informed, precise, careful, and reticent.

These considerations about the social conditions for the development of thought support a like position, even for *unqualified* generalizations. Many speakers are prone to exaggeration and overgeneralization in thought and in speech as they formulate ideas. Further, many are unaware of what they do not know and of the exact limits of what their evidentiary base can support. To demand that the issuance of generalizations be true or carefully phrased, on penalty of legal sanctions, seems insensitive to the abilities and disabilities of most speakers and thinkers and to the process by which ideas come to be formulated. Such a demand runs the substantial risk of chilling the voicing of preliminary thoughts and foreclosing important intellectual investigations.

Even when those preliminary thoughts are entirely offensive and misguided, chilling their sincere expression may deprive audiences of important information about where these speakers harbor misunderstandings that need to be addressed. It may deprive audiences of information about and the opportunity to address the speakers' underlying motives, suspicions, concerns, and complaints. Those concerns and complaints may be misdirected or entirely invalid, but the stability and health of a democratic polity require that we attempt to face and

understand the causes of discontent, rather than suppress its expression or require its articulation to be well-formed.

2. Distributing the Burdens of the Anti-Imputation Principle

To be sure, the anti-imputation principle, if adhered to, may impose burdens on audiences and those spoken about to endure the consequences associated with the distribution of false claims or true claims from which, in practice, others derive false inferences. But these burdens may be mitigated by the adoption of a range of audience attitudes towards speakers, including an analog of the anti-imputation principle, one that would counsel not merely restraint when issuing sanctions but caution about one's cognitive and emotional responses to what others say.

Specifically, for the same reasons that ground the anti-imputation principle with respect to sanctions, audiences should exercise caution in drawing their own conclusions from a speaker's generalization. One site for hesitation is in assuming that any particular speech item represents the speaker's final or refined take on a subject. Much may be gained by way of social equanimity by regarding a speaker's forays onto a subject as an early or evolving draft that may not represent their considered or final take. When interpreting speakers in the public forum, audiences should be sensitive to the propensity of some speakers to exaggerate or use hyperbole. Sometimes this exaggeration functions as a (perhaps ill-considered) method of gaining attention, but often it is the product of an early effort at self-understanding that cannot be refined until it is first given initial expression.

Emotionally saturated topics may be especially prone to blunt initial treatments. Of course, some speakers are remarkably precise and balanced in their first drafts, whether verbal or written, but many are not; their considered convictions and self-understanding emerge over time, often through intellectual and interpersonal wrangling. The fledgling stage may last some time, just as human adolescence is rather temporally extended.

We might advise audiences to be more diffident both in taking speakers' articulations as settled, well-formed, and well-informed, and in drawing conclusions about particular cases (or about what the speaker intends to assert about particular cases). For example, absent corroborating and specific evidence, audiences should exercise particular caution in applying defamatory generalizations to particular people, even from universal generalizations from which the specific application is a logical entailment.

We may reasonably advise speakers to be more tentative in their preliminary articulations, although, as noted before, speakers often do not know what they do not know before confronting the reception of others. For that reason and because, for reasons of convenience, haste, and unpretentiousness, much colloquial speech unconsciously follows relaxed norms of precision and draws on exaggeration, metaphor, and hyperbole for emphasis and attention, it may be too demanding to ask speakers to alter their standard speech patterns; the rejection of the anti-imputation principle would likely chill a significant amount of exploratory speech. It would also likely chill speech in the public forum, because the reactions of unknown audience members may be difficult to predict.

By contrast, it seems less demanding of speakers to alert them that they must take great care and exercise responsibility about what they say about specifics, such as particular allegations about particular people. Speakers who are uncomfortable about that responsibility or unsure of the accuracy of what they say would still enjoy a safe harbor. They may retreat to discussing the general topic at a higher level of abstraction or by deploying dampening qualifiers to steer clear of direct, confident assertion. The specific, personal form of the speech puts a speaker on notice that they should be especially careful of what they say and that the stakes of what they say may be high for a particular person.

Importantly, the stakes are higher for a person who is specifically named in an unflattering statement than for that same person to whom an otherwise identical unflattering universal generalization applies. Let's call that person the "token." For one thing, when the speech is general, some members of the audience may be unaware that the token is a member of the criticized class, which gives the token some degree of privacy and remove from the criticism. Audience members may also reasonably interpret general claims as potentially admitting of exceptions or as loosely formulated. They may, out of charity, remain agnostic about whether aspersions on any particular person are intended or valid. By contrast, naming the token eliminates the wiggle room for agnosticism or charitable interpretation. It directly alerts all audience members that the allegations pertain to the token, upon whom there is now a spotlight.

Furthermore, calling explicit attention to a particular person may compel them, as a matter of dignity and an inculcated communicative reflex, to engage with the criticism and the critical gaze.[96] By contrast, for the reasons just rehearsed, a more abstract, general, or oblique criticism need not always compel their response. The haze of generality may afford tokens some emotional and dignitary distance from the criticism. This in turn may allow tokens the social and the emotional space to let it pass or to issue a measured response, rather than being provoked into issuing something more defensive and fraught.

Given these dynamics, assuming other conditions for liability are met, it seems reasonable to impose greater legal responsibility on lay speakers for their specific claims about individuals but to draw a line when it comes to more general claims. This line, when respected legally and culturally, protects the dialogic space for the generation and evaluation of challenging ideas, criticism, and intellectual change. At the same time, this line facilitates the conditions for practicing a peaceful pluralism that is not dependent on mutual ignorance or avoidance of controversial topics.

This structure of divided responsibility, wherein speakers have greater responsibility for accuracy about specific allegations about particular people and audiences have greater responsibility to take care about how they interpret and process generalizations, has costs. It leaves room for damaging insinuations and dog

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96. This may account for why explicitly saying "Catholicism gets it right about the Holy Trinity" can be inoffensive (if controversial), whereas saying "and therefore *you*, a devout Protestant, are wrong" can be offensive, even if the former implies the latter. *Cf.* Shiffrin, *Liberalism and the Establishment Clause*, *supra* note 89 (discussing a similar point and example).

whistles by canny speakers.[97] These can be insidious, especially if audiences are not vigilant in exercising critical thinking, decrying irresponsible or invidious speakers, or using communicative measures to hold speakers accountable for clarification—whether to endorse their statements' implicatures, repudiate them, or explain their agnosticism. The public (and state) must also undertake efforts to support and defend those who bear any disproportionate burdens of the side effects of a free speech regime. These potential costs underscore that the success of a healthy free speech culture requires a nonapathetic and active public, one that engages critically and vociferously with speech in the public forum and is sensitive and attentive to ameliorating the unavoidable costs of free speech principles. Although the application of the anti-imputation principle can have significant harmful consequences, those consequences can be somewhat contained through such preventative and mitigating cognitive and communicative activities by the public.

Given these other measures of containment, a healthy social environment does not require rejecting the anti-imputation principle. On the other hand, the affirmation of (some version) of the anti-imputation principle is a necessary condition of a healthy free speech environment, given the serious risks that its rejection would exert a strong chilling effect on speech and the effective development of thought.

I have dwelled, at some length, on why realizing the values of freedom of speech requires the recognition and application of the anti-imputation principle, both legally and socially, in the context of explicit generalizations. That is, it is essential to freedom of speech and its consequent benefits, including the development and refinement of thought and knowledge, that absent special conditions, a speaker should not be subject to sanction for specific statements she did not explicitly voice but might be inferred (whether correctly or merely predictably) from her explicit generalizations. These considerations illuminate the theoretical underpinnings of the "of and concerning" requirement in defamation law as well as the reach of the fighting words doctrine; the application of the latter seems to demand that an insulting remark, whether a generalization or a narrow insult, be clearly directed at individuals, thereby rendering the claim specific to its subjects.[98]

3. Other Applications of the Anti-Imputation Principle

As canvassed above, there are many other contexts of application of the anti-imputation principle, including bars on imputing missing premises to speakers, bars on imputing content to speakers based on their omissions or the speech of their associates, and bars on assuming that a speaker who endorses an end must endorse the likely or even necessary means to its achievement. Many of the arguments offered for blocking the inference from the general to the specific extend to these

97. For a recent philosophical exploration of dog-whistling, see generally JENNIFER MATHER SAUL, DOGWHISTLES & FIGLEAVES: HOW MANIPULATIVE LANGUAGE SPREADS RACISM AND FALSEHOOD (2024).

98. *See generally* Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009) (discussing the "strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence").

other categories simply and straightforwardly. To permit these inferences to ground sanctions would largely eliminate the shared dialogic ground for speakers and their audiences to discuss and evaluate ideas, the articulation of which may fall right outside the boundaries of strictly regulable speech (in its penumbra, so to speak). Among other problems, to require that speakers avoid triggering these inferences through more precise speech would require them to have greater knowledge and mastery of the substantive terrain about which they are speaking before they have had access to the communally sourced information and substantive feedback through which such knowledge is forged.

For example, just as speakers may issue a generalization without knowledge of to whom it would apply or where the exceptions lie, speakers may endorse an associate's position without knowledge of the associate's other views or the uses to which the associate puts the shared position. An alternative interpretative principle that, in effect, would require a speaker to learn and master all the facts about an associate's views before endorsing *one* of their views would be overdemanding and chilling. An alternative interpretative principle that, in effect, would require a speaker to distance themselves from an associate's other principles or uses of their shared position would also be overdemanding and would overburden and distort the articulation of the shared position. Burdening speakers by demanding that they take an "in for a penny, in for a pound" approach to articulated agreement would deter the sorts of conversations and coalition-building around initially isolated consensus points that are the key to intellectual growth as well as democratic mutual governance.

Similar points follow from the recognition that speakers may reasonably endorse an end without any knowledge of how it could be achieved as a way of articulating their preliminary take of their values and instincts. A colloquy may be necessary for a speaker to become aware of the necessary or likely means of achieving that end, and therefore to have the chance to come to an understanding of why the disvalue of those means might motivate the rejection or revision of the end. Public discussion of ends and the means thought necessary to achieve them may do more than simply expose and correct understandable ignorance. A colloquy about the desirability of the end may alert audiences to speakers' values and complaints, even if the ends or actions (or the available means to achieve them) for which the speaker advocates are illegal or deplorable. In some circumstances, the airing of grievances may stimulate creativity about alternative or compromise measures. Or working through the matter may trigger the realization by the speaker or the audience that the core problem lies elsewhere. These realizations may not be possible, however, if this contested speech is deterred by sanctions based on inferences that go beyond what the speaker strictly says.

B. The Anti-Imputation Principle and the Void-for-Vagueness Principle

The anti-imputation principle draws from some of the same values as the void-for-vagueness principle.[99] The void-for-vagueness principle operationalizes

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99. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

concern for clarity about the conditions of levying a sanction. One argument one may give for the anti-imputation principle is that if speakers were responsible for the inferences audiences might make from their explicit statements, the boundaries of this responsibility might be unclear to them. As with vague statutes, an approach that permits liability-via-implication may fail to give speakers fair notice about exactly what statements are subject to liability.[100] Further, it may enable government actors to use power in arbitrary ways that do not submit to clear accountability measures.[101] As with vague statutes,[102] the lack of notice about how a speaker may be interpreted may chill speakers from issuing protected speech due to fear of crossing a submerged line or being accused of doing so. Drawing the parallel to the void-for-vagueness doctrine and its concerns about lack of notice reinforces the need for the interpretative discipline that the anti-imputation principle imposes. Although interpretation based on reasonable inferences may be the entirely appropriate and cooperative methodology to implement in *conversational* discourse, imposing the stricter bar of interpretation for levying legal sanctions protects speakers who may be unsure of how their statements may be reasonably interpreted, whether by audiences or the state. Alternative principles of interpretation and attribution would introduce greater uncertainty for speakers, in part because what is perceived as the reasonable or likely interpretation of a statement is often contingent on the particular state actors and audiences evaluating the speech. Anticipating such interpretations may require information and confidence that a speaker lacks.

Nonetheless, the principles and their justifications are not identical. The void-for-vagueness protection primarily polices the wording of a statute, focusing on its clarity and notice; the anti-imputation principle complements this protection by focusing on how a statute is applied to specific speakers. The principles are not fully coextensive, as attested by the cases in which the anti-imputation principle would preclude liability merely for quoting or paraphrasing the regulable speech of another party, on the basis of the speech of a close associate, or for the logical implications of a speaker's general statements (e.g., insulating a speaker from any applicable liability for asserting or implying that X_1 in particular is corrupt on the basis of a general statement that "all Xs are corrupt"). A liability rule that held one responsible for all the direct logical entailments of one's general statements or for the statements of one's close associates (assuming that relationship was well defined) would not be vague and so would not be precluded by the void-for-vagueness principle, its fair-notice justification, or its concern that vague laws afford government agents too much discretion over "basic policy matters."[103] But the other arguments for the anti-imputation principle, including the need to protect the conditions under which ideas may be freely and safely investigated, evaluated, and endorsed, revised, or rejected, would counsel against such a rule.

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100. *See id.*

101. *Cf. id.* at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). Concerns about notice and government latitude underpin Charlotte Taylor's qualified defense of an expressness standard. *See* Taylor, *supra* note 32, at 376.

102. *See Grayned*, 408 U.S. at 109.

103. *See id.* at 108–09.

III. LIMITS AND EXCEPTIONS

I have argued that the anti-imputation principle is immanent in important parts of our free speech doctrine and, more importantly, our free speech values. This principle imposes a strong presumption against sanctioning speakers by imputing content to them that they did not explicitly say. In this Part, I discuss some of the principle's boundaries. I begin by comparing and contrasting the anti-imputation approach with the approach Judge Hand advanced in his famous opinion in *Masses Publishing Co. v. Patten*.[104] I offer some examples in which the presumption should be overcome, even within the public forum. Then I discuss, more briefly, potential contexts where that presumption might be overcome. My aim is not to be comprehensive but to illustrate how one might assess the principle's application and limits in special contexts.

A. Anti-Imputation and Hand's Opinion in Masses

As many readers will have noticed, the anti-imputation principle bears a strong resemblance to Judge Hand's pronouncement in *Masses* that "the literal meaning is the starting point for interpretation."[105] That case concerned whether a magazine containing criticism of the war effort and admiration of draft resisters violated the Espionage Act. Guided by his understanding of freedom of speech, Judge Hand was willing to find that direct advocacy of illegal conduct (e.g., direct advocacy of ignoring a draft order) would violate the Espionage Act's prohibition on willful obstruction of the recruiting and enlistment effort. But in distinguishing between the expression of admiration for a draft resister and advocating draft resistance, he refused to impose liability for speech that stopped short of such advocacy, even if that speech fomented dissatisfaction with the war that in turn blossomed into insubordination.[106]

The *Masses* opinion is often discussed for its analysis of incitement. Rather than assessing speech by its speculated effect—whether speech had a bad tendency or posed a clear and present danger—Hand advanced a content-based rule. Speech that alleged that it was one's duty or in one's interest to violate the law fell outside the scope of protection (and in this case, into the scope of statutory authority), but speech that fell short of such advocacy was protected.[107]

What has attracted less discussion is the second component of Hand's approach, namely the methodology of interpreting the speaker's statement to assess whether it satisfies the content standard. For Hand's test to be speech-protective in the way he intended, it is not enough to delineate the line between unprotected content and protected content. It is also essential that speakers have substantial control over how they are interpreted and that the interpretation of their speech is not subject to expansive readings by audiences or government. There are really two elements in Hand's *direct* advocacy approach: (a) its liability rule—speech critical of government should not be vulnerable to regulation because of its effect, but only

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104. 244 F. 535, 541–42 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

105. *Id.* at 542; *cf.* Burge, *supra* note 35 (making a similar point about speaker interpretation generally).

106. *See Masses*, 244 F. at 540–42.

107. *See id.* at 540.

when and because its content urges violation of law (as a matter of duty or interest); and (b) its interpretative rule—to assess whether speech does urge violation of law, we should examine whether the speech *directly* says so through its literal content and only advert to more expansive interpretative methods if warranted by more specific contextual evidence.

One might replace (a), the liability rule, with a different test, as *Brandenburg* does.[108] *Brandenburg* advances a hybrid test that combines elements of content, effect, and intent, namely whether: (1) the speech is directed at inciting or producing imminent illegal action; (2) it is likely to produce imminent illegal activity; and (3) the speaker intended this effect.[109] The hybrid nature of the *Brandenburg* test eliminates the problem that Hand's test authorizes too much regulation of direct advocacy, including the regulation of the "harmless inciter" who asserts illegal activity is in the duty or interest of an audience, but has no chance of persuading that audience,[110] and the penalization of speakers in cases where there is plenty of time for reflection, counter-speech, and direct government efforts to prevent the actual illegal activity or neutralize its harmful effects.

But even when one replaces Hand's analysis of the relevant content of the speech, one will need an interpretative method that ensures that the content element of the incitement test is meaningful and has limits. My claim is that *something like* (b), Hand's interpretative rule, must be retained to provide those limits.

In addition to worrying that Hand's liability test was too permissive of state regulation, Gerald Gunther, citing Hand's contemporary Zachariah Chafee, worried that Hand's interpretative approach could be too permissive toward speakers.[111] Chafee worried that it could not handle Marc Antony's speech at Caesar's funeral, in which Antony incited a crowd through sarcastic praise of the crowd's target. The Marc Antony problem is, in essence, a particularly blatant version of the problem of dog whistles. Is the presumption for literal interpretation overly speech-protective? Although Hand said the *starting place* is literal interpretation, he was also clear that

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108. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

109. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754–55 (1975) ("In one sense, *Brandenburg* combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage."); *see also* James Weinstein, *The Story of* Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet*, *in* FIRST AMENDMENT STORIES 61, 80–81, 81 n.96 (Richard W. Garnett & Andrew Koppelman eds., 2012) (discussing how explicit the advocacy of illegal activity must be to meet the *Brandenburg* standard); GREENAWALT, *supra* note 21, at 207 (arguing that *Brandenburg*'s requirement that the words be "directed" towards inciting an illegal action requires that the speaker's purpose to incite should be "evident" in their spoken words). *But see* Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment:* Masses Publishing Co. v. Patten, 61 U. COLO. L. REV. 1, 4 n.20 (1990) (construing the *Brandenburg* hybrid test as requiring only "some level of intent to cause lawless action" plus likely effect).

110. *See* Gunther, *supra* note 109, at 729.

111. *Id.* at 729, 747.

"the words are to be taken, not literally, but according to their full import."[112] What does this mean?

Judge Hand's meaning may be illuminated by his own brief discussion of the Marc Antony problem in *United States v. Nearing*.[113] He characterized Antony's oration as one that "in fact counsel[ed] violence while it even expressly discountenance[d] it," but remarked that "that raises only the situation, familiar enough everywhere in the law, and already mentioned, of the actual meaning of words to their hearers."[114] Hand stressed the objective meaning of words, which he associated with the listeners' understanding. Typically, that objective meaning will be captured by the literal interpretation, but in some contexts, the audience may fairly and correctly interpret the words otherwise.

Judge Hand was right to advocate an objective meaning test for purposes of levying legal sanctions. But the examples animating this paper suggest some limitations of describing the objective test solely in terms of audience understanding. Hand was eager to distinguish between the speaker's intention to cause illegal draft resistance through criticism of the war from the speaker's actual advocacy of illegal draft resistance; the former should be protected so long as it does not manifest as the latter. Hand's point was that what the speaker says should not be interpreted by reference to the speaker's intended effect. Agreed.

But Hand's attention was not on the case where the speaker (merely) criticizes the war without advocating for illegal draft resistance, yet the audience incorrectly understands the speech to amount to advocacy for the illegal act.[115] That is, Hand was not considering adverse or uncharitable audience interpretation. Keeping in mind both the hazard of interpolating the speaker's intended effect on the audience's actions *and* the hazard of interpolating adverse audience interpretation into the interpretation of the speaker's statement, we might instead say that the presumption for literal interpretation may only be overcome when there is evidence that, in context, the determinate shared objective meaning differs from the literal interpretation.

This approach achieves similar outcomes to a First Amendment rule that layers an intent requirement on top of Hand's audience-centered interpretative approach, but they are not equivalent. One can see the difference in another recently litigated context, albeit one that does not involve speech about matters of public concern. A determinate objective-meaning approach absent a speaker's intent

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112. *Masses*, 244 F. at 542.

113. 252 F. 223, 227–28 (S.D.N.Y. 1918).

114. *Id.* at 228.

115. Charlotte Taylor advances a different criticism of Hand's handling of this issue, namely that judicial assessments of audience interpretation will inject greater judicial (or jury) discretion and bias. *See* Taylor, *supra* note 32, at 388. Because Taylor rejects Hand's approach and because her understanding of the expressness standard is absolute, rather than framed as a presumptive approach to interpretation, she understands the standard as incompatible with finding liability for Antony. *See id.* at 390. This consequence can be avoided through adopting a presumption in favor of what is explicitly said that may be overcome where the only plausible objective interpretation in context differs.

requirement would produce a different result in *Counterman v. Colorado*[116] and other cases in which the speaker was unaware of or negligent with respect to the objective meaning of his threatening messages, despite having sufficient reason to be aware of their objective meaning. That problem, if it is taken to be a problem, can be addressed by adding a speaker's intent requirement as, indeed, *Counterman* did.[117]

The troubling case for my purposes is that of the speaker in front of the adverse interpretative audience whose speech does not have a single, determinate, objective meaning. Rather, her statements support multiple meanings within the culture, some of which are legally permissible and some of which may be subject to sanctions. One might be tempted to assign her responsibility to issue disclaimers to head off potential, predictable misinterpretations and inferences that an audience might draw as a condition on speaking with impunity. But this responsibility would demand greater knowledge of one's subject matter and of one's audience than would be reasonable. Assigning that responsibility would also generate excessive audience power over what speakers say and could functionally alter the boundaries of protected speech.

To illustrate: Suppose that S is a competent user of the language. She knows that her statement "X" will be interpreted by all or part of her particular audience to convey Y, which differs from or adds to X, the literal meaning of "X." But S does not mean to convey Y; she means to convey X, which is what she explicitly says. So, S persists with the statement "X." She intends to say something that she knows will be misunderstood or interpreted in a way that diverges from her intended, literal meaning. If stating "Y" would submit her to liability but stating "X" would not, then an audience-centered interpretative approach that attributes Y to her, despite her explicit speech that X, would overly constrain speaker freedom beyond the limits of the liability rule. It would render speakers instead subject to the limits imposed by hostile, rigid, or mistaken interpretative audiences. By permitting private actors' interpretations, in effect, to expand the circumference of regulable speech beyond the line of the official First Amendment boundary, this consequence of an audience-centered interpretative approach would also represent a circumvention of the rule of law and would impinge upon the equal right of unorthodox speakers to articulate their ideas.[118]

An intent requirement that requires the speaker to be aware of the audience's interpretation will not solve this problem. (Hence, an anti-imputation principle is distinct from an intent requirement.) Even where the interpretations are predictable, a requirement to reword or qualify to stave off misunderstandings and

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116. *See* 600 U.S. 66, 77–78, 82–83 (2023) (holding that the First Amendment requires a showing that the defendant had some understanding their speech was threatening for criminal liability to attach).

117. *Id.* at 78–79 (requiring at least a showing of recklessness).

118. *Cf.* Agnes Callard, Opinion, *Should We Cancel Aristotle?*, N.Y. TIMES (July 21, 2020), https://www.nytimes.com/2020/07/21/opinion/should-we-cancel-aristotle.html [https://perma.cc/ZB2P-6VGG] (strongly associating a free speech culture with the "freedom to speak literally" and observing that cancel culture is part of an over-interpreting approach to communication that gives rise to a social environment "in which literal content can barely be communicated").

misinterpretations could threaten to dominate the speaker's message. These tasks and effects could chill some speakers, particularly those who are not especially discursively confident or agile. It may deter speakers who face particularly unfriendly or uncharitable audiences. For others, they would distort their message in ways that stymie freedom of thought and communication and impede the unfettered exploration of their idea as they seek to express it. *Requiring* speakers to adjust their preferred articulation of their ideas to avoid adverse audience interpretations is in tension with the holdings of *Cohen v. California* and *Snyder v. Phelps*, both of which upheld the right of speakers not to adjust their preferred (offensive) articulation of their ideas to accommodate reasonable audience concerns and sensibilities.[119] By contrast, a defeasible presumption for the literal interpretation of the speaker's statement empowers the speaker to express herself and gives her safe harbor from encroaching adverse interpretative audiences. That presumption may be overcome when the only plausible objective meaning of the statement, representing the warranted convergence of speaker and audience meaning, in context, diverges from the literal meaning.

Some examples of such divergence may help. To return to the Marc Antony case—given Antony's publicly known relationship to Caesar, his opposition to Brutus, and his tone—the speaker and audience should converge on an objective meaning that diverges from the literal meaning of Antony's words.[120] Or take the facts underpinning *Thompson v. United States*, a recent Supreme Court case.[121] The speaker had taken out loans for $219,000 that, with accrued interest, came to a debt of $269,000. The speaker contested the bill to Federal Deposit Insurance Corporation representatives, alleging a "discrepancy," and said that he had taken out a loan for $110,000.[122] It was true that he had taken out a loan for $110, 000 . . . along with other loans totaling $219,000.[123] The doctrinal issue was whether the statute regulating claims to the Corporation imposed liability for true but misleading claims, although the textual language of the act only barred "false" claims.[124] The Court decided that the statute did not impose liability for true but misleading claims.[125] Still, two members of the Court strongly and plausibly intimated that on

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119. Cohen v. California, 403 U.S. 15, 25 (1971) (reasoning that the state has "no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us," as, after all, "one [person's] vulgarity is another's lyric"); Snyder v. Phelps, 562 U.S. 443, 458 (2011). Again, the concerns about overaccommodating audiences have most power with respect to lay speech in the public forum. The arguments have less purchase with respect to commercial speech. The measures that are reasonable to demand that a market actor, with a limited range of attention and interests, take in its advertisements to avoid consumer misunderstanding about pharmaceuticals, e.g., are not a good model for the regulation of individual speakers in the public forum. *See also* Shiffrin, *Unfit to Print*, *supra* note 23, at 1023–25 (discussing the different expectations of accuracy we may have of commercial agents, government officials, and other experts compared to laypeople).

120. *See* WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2, ll. 82–117.

121. *See* Thompson v. United States, 604 U.S. 408, 410–12 (2025).

122. *Id.* at 411.

123. *Id.* at 410–11.

124. *Id.* at 413.

125. *Id.* at 416–18.

remand, the defendant might face liability anyway for making a false claim.[126] Although the literal meaning of his claim that he had taken out a loan for $110,000 was true, in the context of his actively disputing a bill and claiming a discrepancy, the only credible objective meaning of that volunteered statement was that he had *only* borrowed $110,000 and not more.[127]

Finally, for simplicity, the focus thus far has been on isolated statements. But, of course, a speaker may issue a number of statements that should be taken together, or they may make their statement in a context that renders it appropriate to impute expressed content to them that they did not explicitly say. Taking the speaker's statements together or taken in context, the speaker may not have reserved any room for ambiguity, an alternate meaning, or under-specification. Issuing a defamatory generalization about a group while pointing to a member of the group or in the close temporal proximity of additional speech linking a target to a generalization (e.g., identifying a plaintiff in particular as a salient member of a group ten minutes before issuing a defamatory generalization of that group) may appropriately warrant the inference that could not be made through the issuance of the generalization alone. Similarly, other statements or contextual indications may move quotation or paraphrase of another's speech from acknowledgement for consideration and review to endorsement or the use of another's speech as one's own. The import of the anti-imputation principle is not to preclude such contextual interpretation. Rather, it is to impose discipline about inferring too broadly from isolated statements in ways that preclude an atmosphere of open and free investigation—one that facilitates the clarification of thought, the expression of emotion, and the often slow and circuitous process of reason-based correction of error.

B. Special Contexts: Primary and Secondary Education

Although this Article's consideration of the anti-imputation principle has centered on lay speech in the public forum, the examples rehearsed at the outset of the paper concern statements issued in educational contexts. One may think there are some reasons to apply a more expansive interpretative standard outside the

126. *See id.* at 421–22 (Jackson, J., concurring); *id.* at 421 (Alito, J., concurring).

127. How does this assessment square with *Bronston v. United States*, discussed *supra* Subsection I.B.3? The context of *Bronston* differed. There, the witness-speaker issued a true literal statement during cross-examination, another context in which we have strong reasons to insist on literal interpretation and to place the burden on the questioner to ask follow-up questions. *See* Bronston v. United States, 409 U.S. 352, 352–53, 358–59 (1973). The witness's answer did misdirect in a possibly misleading way, but a careful listener could discern that it did not squarely address the question and could reiterate the demand for a response. In *Thompson*, the context was one in which the speaker initiated the colloquy, claiming a discrepancy on his bill and disputing the amount on his bill. *Thompson*, 604 U.S. at 411. Given that his statement elaborated upon his claim that there was a discrepancy and that the bill for $269,000 was too high, the only plausible interpretation of his statement was that $110,000 was the ceiling of his debt, not a mere portion of it. *See id.* at 410–11. In contrast with the answer given in *Bronston*, a careful listener to Mr. Thompson's volunteered assertion would not be able to discern from the statement's content or context that the statement did not provide a full account of what was borrowed and would have no reason supplied by the colloquy to ask whether more was borrowed.

public forum, such as in educational or employment contexts that are dedicated to pursuing focused aims. A complete discussion of such special contexts is beyond the scope of this paper, but to exemplify how we might think about them, I will focus on primary and secondary education. These settings may present the strongest case for relaxing the anti-imputation principle with respect to individual lay speakers.

Although the issue of the appropriate interpretative standard has not been directly confronted as such in the student speech context, in at least one case the Court endorsed restrictions on student speech based on a contested interpretation that went beyond its mysterious explicit content. In *Morse v. Frederick*, the Court interpreted a "cryptic" high school student's banner reading "BONG HiTS 4 JESUS" to be "reasonably viewed" as advocating drug use for minors.[128] This interpretation imputed content to the banner's message that went beyond its explicit, nonsensical content.[129] Was this departure from an anti-imputation principle warranted?

Four relevant factors may distinguish the primary and secondary education contexts from the public forum. First, minors have constrained exit options. They are required to attend school and thus must interact within a relatively closed space with other minors. They may lack the opportunity to remove themselves from hearing or seeing unwelcome speech. Second, the greater typical immaturity of minors may render it more challenging for some of them as audience members to muster a charitable or disciplined interpretation of what was said or to deal with difficult speech without escalation, violence, or heightened emotional trauma to what are (or are perceived as) personal attacks. Third, in both the primary and the secondary public education contexts, there is a dedicated purpose for which the context is established (and that underpins the requirement of attendance). Fourth, government has a special responsibility to ensure equal access to its educational offerings and thus to an environment free of exclusionary harassment to all students.

These sorts of considerations underpin the lesser First Amendment protections extended to public school students. In this context, the Court has countenanced an approach that is more speech-restrictive than what must be allowed in the public forum. While the disruptive tendency of speech is protected in the public forum and speakers are generally insulated from responsibility from how they affect audiences,[130] *Tinker v. Des Moines Independent Community School District*

128. *See* 551 U.S. 393, 397, 401–02 (2007).

129. *See id.* at 402, 407–10 (declining to apply *Tinker*'s material disruption standard and finding against the student speaker given the compelling state interest in deterring drug use by children). Justice Stevens's dissent lodges a specific complaint against the prohibition of student speech that references drug use but falls short of express advocacy for its use. *Id.* at 434–35 (Stevens, J., dissenting).

130. *See* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("[Free speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.").

protects student speech unless it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[131]

This divergent First Amendment treatment of student speech vs. speech in the public forum does not settle the question of whether the anti-imputation principle should be applied to student speech or in the educational context. Even granting that the special features of the school setting warrant a lower First Amendment standard than would be applied in the public forum, both the disruption component and the rights-invasion component of this lower standard may be applied in ways either more or less consistent with the anti-imputation principle.[132]

To be sure, because it assesses speech based on its actual or suspected effect, the disruption standard is vulnerable to implicit disregard of the anti-imputation principle. Without qualification, a disruption standard does not investigate whether audiences are reacting (or may be reasonably predicted to react) disruptively to what is said or to what they take to be suggested, implied, or associated with what is said.[133] An unqualified disruption standard seemingly authorizes a great deal of speculation and projection by administrators about how others will interpret and respond to speech. But we might imagine a more nuanced application of the disruption standard that is more sensitive to whether the student's explicit speech causes a material disruption or whether the speech-only-as-interpreted does so.

The question is whether we should draw such a distinction. The special features that are invoked to justify the lower *Tinker* standard may also be thought to justify the relaxation of the anti-imputation principle.[134] That is, the close, involuntary association of members of an immature population may exacerbate the harm associated with the dog-whistling and hurtful insinuations to which the anti-imputation principle may give cover. Moreover, the dedicated purpose of the educational context, and particularly the classroom, may preclude the sort of free-wheeling discourse and exchange upon which the defense of the anti-imputation

131. 393 U.S. 503, 512–13 (1969). In addition to the *Tinker* limitations on speech based on disruption and invasion of the rights of others, the Court has also permitted restrictions for sexually explicit speech, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986), for speech published under the school's imprimatur, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271, 273 (1988), and for speech interpreted as promoting drug use, *Morse*, 551 U.S. at 403.

132. Justin Driver traces three distinct interpretations of *Tinker*, one focusing on predicted disruption, one focusing on actual disruption, and one distinguishing between speaker-caused and audience-caused disruption. *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE 76–77, 87–88 (2018). The last interpretation may be consistent with the anti-imputation principle, but as Driver notes, lower courts have favored the first interpretation. *See id.* at 76.

133. In *Speech, Death, and Double Effect*, a related point is made about the secondary effect doctrine, namely that, problematically, it endorses regulations on speech in light of the effects of speech without investigating how the effects came about and whether the effects are a response to the speaker's content. *See* Shiffrin, note 26, at 1167–68.

134. In the employment context, one may identify similar features that may seem to merit relaxation of the principle. Although the environment is populated by adults, there is an analogous anti-discrimination aim. Also, many workplaces function as something akin to a captive environment given the close quarters and long hours shared by many workers coupled with economic barriers to exit.

principle rests and through which dog whistles and other culpable implicatures may be exposed and refuted through the countermeasure of counter-speech.

To investigate, we might explore three potential approaches. I diffidently support the intermediate approach outlined below, but my main purpose here is to outline some of the alternatives.

1. The Middleborough *Approach*

L.M. v. Town of Middleborough, in effect, took the approach of setting aside the anti-imputation principle, at least with respect to speech that bears on topics of equality and inclusion.[135] It upheld a ban on a student's T-shirt that declared, "There Are Only Two Genders," on the grounds that although there was no evidence of prolonged interruption of teaching activities or clamor that threatened safety elsewhere, the T-shirt *materially* disrupted the learning environment for transgender and gender-nonconforming students by broadcasting a demeaning message that infringed upon their rights to equal access.[136] In his thoughtful opinion, Judge Barron sensitively captured the contextual considerations, grounded in the features of a mandatory education and an environment with immature minors, that render wearing the "two genders" T-shirt at a public school different than wearing it on the public streets.[137] At the same time, the opinion unfortunately did not seize the opportunity to reflect on how to acknowledge those considerations while leaving room for the airing and discussion of difficult topics in a forum that is meant to "prepare youth for life in a democracy."[138]

As the *Tinker* Court held, students do not leave their First Amendment rights (or responsibilities) at the schoolhouse gate, and students may engage in political speech at school.[139] The school setting is an important one for students to encounter the disparate opinions and divergent factual beliefs of other sectors of the population and to learn how to engage in the sort of civil responses that we expect from members of the public. Indeed, we may aspire to teach students how to respond thoughtfully and not merely civilly to provocative or disturbing speech. Such aspirations can only be met if students encounter challenging speech and have opportunities to engage in difficult conversations in which they may practice how to refine their initial rough reactions into more accurate and nuanced positions. There is something to be said for the opportunity to manage some of the risks associated with such conversations in a supervised environment, especially given the reality that these conversations cannot be entirely suppressed and will occur outside the school if not in it.[140]

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135. *See* 103 F.4th 854, 880 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1489 (2025).

136. *Id.* at 860, 880–81.

137. *See id.* at 877–78.

138. *See* Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1027 (1930); Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 190 (2021) ("America's public schools are the nurseries of democracy.").

139. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506, 510–11 (1969).

140. As the *Mahanoy* Court observed, speech-restrictions that may, during school activities, be warranted to further the aim of on-campus collective endeavors may not extend

Permitting school officials to bar the display of any peer speech that may reasonably be understood to challenge the foundation of a student's conception of themselves could, in principle, take off the table a wide array of sincere, exploratory speech about, for example, religion, metaphysics, gender, race, nationality, foreign policy, and meritocracy. Even if the K–12 public school setting authorizes greater restrictions on speech than would be allowed in the public forum, there must be some limits to the authorized restrictions. The training ground for democracy cannot only tackle hypothetical debates about issues from the past or distant people. There must be substantial room to discuss contested and difficult topics and for participants to falter as they explore the questions.

Furthermore, even if the school context does merit different principles of freedom of speech that may take certain issues off the table or severely restrict the way they are discussed, it is not clear that the sound approach is to dilute or abandon the anti-imputation principle. The reasonable anticipation of material disruption standard does not provide much material for offering notice of what speech can be brought to the training ground and what student speech is eligible for suppression. The notice issue is also closely tied to issues associated with viewpoint neutrality, speaker equality, and avoiding opportunities for the exercise of arbitrary authority. How would the *Middleborough* approach tackle a T-shirt that said, "Gender Is Contestable"? Would it matter who wore it—a student who explicitly identified as nonbinary or a student who explicitly challenged others' declared gender identities? Does it serve the interests in nurturing a free speech culture and a stable anti-discrimination culture for teachers and administrators to decide whether that T-shirt is materially disruptive and who may wear it?

2. A Strong Anti-Imputation Approach

One alternative approach, what we might call a *strong* anti-imputation approach, would affirm for schools the same anti-imputation principle that applies to the public forum. It would depart from *Middleborough* (and some earlier precedents) in two ways.

First, it would disallow findings of material disruption based on imputed speech. Students who directly and explicitly threatened the rights of other students (or staff) through targeted comments that singled out individuals as appropriate targets of discriminatory treatment might be sanctioned for materially disruptive speech. But nontargeted comments merely associated with or suggesting discriminatory views or attitudes would not be subject to sanction, although they would be appropriate subjects of pointed criticism and could reasonably instigate targeted and responsive efforts to teach more respectful methods of discourse.

Second, when applying the disruption standard, the strong approach would distinguish between unruly behavior directly caused by a speaker (such as persistently interrupting other students or a teacher), unruly behavior erupting from an audience's reaction to the speaker's explicit speech, and unruly behavior from an audience's reaction to speech imputed by the audience or by observers. A strong anti-imputation approach would disallow sanctions for unruly behavior that took the

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so far off-campus that they preclude adequate space for students to engage in unhampered and entirely sincere discourse. *See Mahanoy*, 594 U.S. at 189–90.

last form, on the grounds that a focus on "disruption," full-stop and without differentiating its causes, empowers audience-based sanctions on imputed speech; it thereby considerably expands the heckler's veto already embedded in some interpretations of the disruption standard.

The application of the strong anti-imputation approach to the *Middleborough* facts would yield a different result than the court's disposition. The student plaintiff would be vindicated because to interpret the T-shirt as endorsing discriminatory treatment or a demeaning attitude requires a court to add premises to the T-shirt's content to arrive at the conclusion that the wearer was displaying or endorsing animus (and to show the T-shirt targeted any particular person). An advocate of this approach may acknowledge the rehearsed distinctions between the public forum and the school setting but contend that the immaturity of the student population does not so much counsel for greater restrictions on speech as it provides a greater reason to view the student speaker as speaking from ignorance and in need of education, rather than suppression. The approach would also recommend support and affirmation for audience members harmed by the connotations of the T-shirt.

This strong approach might, however, encounter (at least) two criticisms, a full evaluation of which I leave to another occasion. First, a granular investigation of the cause of the audience's disruptive behavior may prove difficult to administer and overly contestable.[141] Second, the strong approach might obstruct schools from sanctioning students for issuing gross derogatory generalizations about identity groups, such as claims that particular races, ethnicities, genders, or orientations are inferior or are characterized by certain negative attributes, unless they were targeted at or tailored to specific victims.[142] To some, these consequences and implications may seem insufficiently sensitive to the developmental stages, capacities, and vulnerabilities of minors as well as the unique challenges associated with maintaining discipline and equal access in public school settings, particularly those with budgetary constraints.

3. Intermediate Approaches

An intermediate approach might retain the anti-imputation principle as a methodological principle but partially allay the concerns embedded in the two

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141. At the same time, it is worth noting that the Court has recently endorsed an administratively intensive approach to protect the First Amendment free exercise rights of parents in *Mahmoud v. Taylor*. *See* 606 U.S. 522, 569 (2025).

142. A similar approach for workplace harassment is advanced by Eugene Volokh. *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1863–66 (1992); *see also* Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1, 42, 54–55 (discussing the special disvalue associated with unwelcome face-to-face encounters and targeted speech in workplaces and on campuses while also suggesting an openness to considering unwelcome speech in intimate workspaces as akin to face-to-face encounters); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 306–07 (1990) (discussing the possibility of limited hate speech regulation focused on face-to-face encounters and the limited expressive value of insults and epithets in such contexts).

articulated criticisms of the strong approach by adopting one or both of the following modifications to its application in primary and secondary school settings.

First, an intermediate approach might draw a sharp distinction between speech in the classroom or during official school activities and speech outside those settings, such as speech in the hallways, in the schoolyard, and on social media. The concerns about captive audiences and disrupting the dedicated purpose of instruction are heightened in the former settings, whereas the latter settings operate more like a public forum. Even if imputed speech may be the basis for a claim of material disruption when it occurs during instruction and other official activities, a more speech-permissive standard for off-campus speech and on-campus speech outside of school activities would apply the anti-imputation standard in those venues. It would thereby provide greater breathing room for free speech and the informal educative processes that provocative, and even offensive, speech initiates. Hewing to this sharper distinction would also reflect the qualitative difference between the cramped maneuvering room in the close quarters of the classroom and the greater freedom to avoid noxious speech outside it.

Second, given the interest in assuring equal access and equal treatment within a confined space to which exit opportunities are limited, school regulations might *explicitly* bar a somewhat greater range of speech than could be banned in the public forum. That express bar might take the form of a requirement of student civility that would prohibit, unless directly relevant to a class discussion or school activity, the explicit use of identity epithets and slurs, general statements about protected identity groups that use pejorative or derogatory language, direct advocacy of discriminatory treatment of protected classes and of other students, and perhaps some ambiguous speech and symbols that, culturally, are predominantly used in a derogatory or discriminatory way. It would be crucial for this approach that the opportunity to discuss and criticize the bar itself was clearly protected, even if discussion would have to be conducted in ways consistent with the bar's strictures. Notably, on this approach, the methodology of the anti-imputation principle would be retained. The range of explicitly barred speech would expand, but the presumption against imputing regulable content to a speaker that the speaker did not explicitly say would still apply.

One virtue of this approach would be to render it clear to both the community and potential speakers where the lines of prohibition and free speech lie. This clarity would facilitate greater accountability and notice than an approach that imputes speech to speakers or that allows audiences to impute speech to speakers, as an unqualified material disruption standard does.[143] On an intermediate approach that adopted both modifications, some speech that the anti-imputation principle protects in the public forum would be unprotected in school settings (specifically, derogatory generalizations), but that speech would be *explicitly* unprotected. This regulatory expansion may reduce some of the space for the missteps that ultimately contribute to intellectual development and learning but might also contribute to a more effective climate for learning by those who would otherwise be subject to derogatory generalizations.

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143. *See supra* text accompanying notes 130–33.

Importantly, this modification would preserve the anti-imputation principle's true methodological force—which demands, roughly, that the application of a regulation hinge upon what the speaker explicitly says and not on what may be inferred from it absent specific contextual evidence warranting a more expansive interpretation. Adhering to the methodological discipline of the anti-imputation approach would ensure significant breathing room for discussion of the issues and considerations behind anti-discrimination rules and norms. On this approach, the *Middleborough* plaintiff might still prevail because that plaintiff's speech neither targeted individuals nor articulated animus toward transgender or gender-nonconforming people. But a student who explicitly used pejorative language about identity groups, including transgender or gender-nonconforming people, could be subject to sanction. Should the school go further and explicitly adopt a rule against an "only two genders" statement on the ground that the statement is, in fact, ambiguous speech predominantly used in a derogatory way, then the *Middleborough* plaintiff might lose, but free speech and democratic values would be advanced through the transparency of the rule, the discussion that would accompany its adoption, and the affirmation that the rule itself could be discussed and challenged.[144]

In the primary education setting, the tension between freedom of speech and anti-discrimination norms is especially strong. Immature students need the breathing room to learn what they believe, through articulating fledgling thoughts and eliciting feedback and resistance from peers and teachers. On the other hand, young students, whose self-esteem is particularly fragile, may be especially emotionally vulnerable to hostile speech issued by their peers and may not have developed yet some of the resources of resilience, resistance, avoidance, and solidarity with others similarly situated that help one withstand hostile speech.

To the extent that developmental considerations drive the more speech-restrictive approach taken in the public schools, those reasons may have considerably less purchase in higher education and employment settings.[145] There may still be reasons to adopt more speech-restrictive regulations in close, functionally captive settings (such as classrooms or the factory floor) to ensure that the function of those settings may be pursued without disruptive distraction or the subjection of employees or students to abuse or unequal treatment. Those reasons diminish in force when it comes to speech that will be encountered in a fleeting or avoidable way, such as impermanent speech issued in hallways, pathways, and break rooms, on campus lawns, and in student publications, as well as off-campus and off-duty speech.[146]

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144. The right to discuss and challenge speech-restrictive rules suggests that the "There Are CENSORED Genders" shirt should be protected speech, even if the original "two genders" shirt could be barred on an intermediate approach on the grounds that its meaning is predominantly derogatory. *See supra* note 9.

145. A related argument that criticism and reactions to criticism of workplace conditions and policies should not qualify as disruption for constitutional purposes is advanced in SHIFFRIN, SPEECH MATTERS, *supra* note 19, at 207–10.

146. There are exceptions. For some job positions, some publicly issued off-duty speech may be inconsistent with core job responsibilities. An employee charged with administering an anti-discrimination policy may undermine his leadership by issuing group-

CONCLUSION

It is well-understood that a free speech regime needs principles of speech regulation, that is, principles that delineate what speech is protected from sanctions and what speech may be subject to sanctions. Although the issue is often confronted in particular cases, what is less often discussed is the complementary need to identify principles of attribution and interpretation, delineating what content may be attributed to speakers when applying sanctions based on speech.

To realize the values of freedom of speech, those attributive principles should not reflexively track conversational meaning and the *reasonable* understanding and inferences of audiences or observers. A normatively grounded and more speaker-protective principle is necessary, rather than a principle driven by linguistic practices and predictions. There must be a strong presumption against sanctioning speakers for statements or content they did not say but that others impute to them (even if those imputations represent reasonable estimations of what speakers think or how they will be understood). To protect an expansive common dialogical space for speakers and audiences to air, discuss, and come to understand issues, questions, concerns, and skepticism about matters of public concern, including those approaching the boundaries of speech regulation, sanctions should only be triggered by what speakers explicitly say absent strong contextual evidence that they and their audience should converge on a distinct, regulable meaning.

Throughout, I have implicitly focused on how speech should be interpreted for the purposes of the application of content-based regulations that, for example, impose sanctions for defamatory speech, discriminatory speech, or inciting speech. With respect to regulations that are facially content-based, much of the free speech function performed by the anti-imputation principle I champion here can be pursued through its case-by-case application. I will end by observing that the arguments for an anti-imputation principle, however, also supply reasons for strong concern about how content-neutral regulation that is triggered and largely driven by the production of an effect, whether it is obstruction of the war effort, disruption of the peace, the material disruption of the school environment, or the efficient operation of the government workplace, is applied to speech

When applied to speech, effect-based standards of regulation are vulnerable to implicit disregard of the anti-imputation principle. For example, unless further qualified, a rule against materially disrupting the school environment or the workplace is not sensitive to whether audiences are reacting (or may be reasonably predicted to react) disruptively to what is said or to what they take to be suggested, implied, or associated with what is said. To be sure, when combined with express guidelines about what content is regulable, subject to an anti-imputation principle of interpretation, *further* conditioning liability on the production of a detrimental effect can serve a further speaker-protective function. But absent those additional protections, effect-driven speech regulation can offer cloaked opportunities for

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identity-based derogatory statements in off-duty speech; an employee charged with overseeing a disciplinary process who declares contempt for due process in off-duty speech may call her good faith and impartiality into question.

adverse audiences to attribute to the speaker things they did not say and thereby can create occasions for sanctioning speakers for things they did not say.