

**HEXING, VEXING, AND FLEXING: A LOOK AT THE LEGAL AND
FIRST AMENDMENT IMPLICATIONS OF CURSES, SPELLS,
AND WITCHCRAFT**

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“Do that which is good, and no harm shall come to thee.”
— John Proctor, *The Crucible*¹

TABLE OF CONTENTS

INTRODUCTION 897
I. HEXES, CURSES, AND SPELLS 902
II. THE WITCHES V. JUSTICE KAVANAUGH 905
III. CRIMINAL LAW: FIGHTING WORDS, INCITEMENT,
OR TRUE THREATS 907
IV. CIVIL LIABILITY 913
 A. Liability: Don’t Start ‘Believin’ 916
 B. Highs and Lows 920
CONCLUSION 925

INTRODUCTION

Shortly after Brett Kavanaugh was confirmed as an Associate Justice on the United States Supreme Court, a group of witches convened to put a hex on him.² The witches met at an occult bookstore in Brooklyn, New York, to call on supernatural authorities to punish both Kavanaugh and President Trump for their transgressions toward women and their

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1. ARTHUR MILLER, *THE CRUCIBLE* 95 (Penguin Books 1971) (1956).

2. Sarah Sloat, *The Witches Who Cursed Brett Kavanaugh Were Exercising Free Speech*, *INVERSE* (Oct. 24, 2018), <https://www.inverse.com/article/50132-brett-kavanaugh-free-speech-hex>.

history of accused sexual abuse of women.³ The witches placed dolls representing Kavanaugh and Trump on an altar and burned penis-shaped candles before applying the curse.⁴ The group's Facebook page called on participants to go to the bookstore, pay a ten-dollar cover fee, and join the three-hour event and participate in the hexing of a soon-to-be Supreme Court Justice:

Please join us for a public hex on Brett Kavanaugh, upon all rapists and the patriarchy at large which emboldens, rewards and protects them. We are embracing witchcraft's true roots as the magik of the poor, the downtrodden and disenfranchised and it's [sic] history as often the only weapon, the only means of exacting justice available to those of us who have been wronged by men just like him.⁵

The event generated a wave of news coverage from around the world as well as commentary and discussion on social media, with at least one critic deeming the call a terroristic act.⁶ Denouncing the witches, a priest in California held a mass for Kavanaugh and challenged the witches' free speech rights.⁷

While skeptics might raise questions about the efficacy of either hexes or exorcisms, these events conjure up more than simply questions of higher spirits, good versus evil, faith, or disbelief. Hexes, curses, and spells, as well as blessings and exorcisms, also raise questions of the limits or the extent to which First Amendment and free speech rights extend to those invoking the supernatural in their speech. While these speakers might be calling on a higher authority to exact justice, revenge, or protection, the laws of the land, the Constitution, and the First Amendment would declare this to be protected speech.

3. See Allyson Chiu, 'It Is a Scary Time,' *Trump Backer Amy Kremer Tells MSNBC. Witches 'Are Placing a Hex on Brett Kavanaugh.'*, WASH. POST (Oct. 15, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/10/15/a-scary-time-trump-backer-amy-kremer-tells-msnbc-witches-are-placing-a-hex-on-brett-kavanaugh/>.

4. Sloat, *supra* note 2.

5. See Catland, *Ritual to Hex Brett Kavanaugh*, FACEBOOK (Oct. 20, 2018) [hereinafter Catland Event], https://www.facebook.com/events/179836286297165/?active_tab=about.

6. See, e.g., Patti Maguire Armstrong, *Exorcist and Catholics Respond to Curse Against Kavanaugh*, NAT'L CATHOLIC REG. (Oct. 17, 2018), <https://www.ncregister.com/blog/exorcist-and-catholics-respond-to-curse-against-kavanaugh>; Carol Kuruvilla, *Catholic Exorcist Prays for Brett Kavanaugh in Response to Witches' Planned Hex*, HUFFINGTON POST (Oct. 19, 2018, 4:33 PM), https://www.huffpost.com/entry/catholic-exorcist-brett-kavanaugh-witches-hex_n_5bca0b45e4b055bc94803fde.

7. See discussion *infra* Parts I-IV; Armstrong, *supra* note 6; Kuruvilla, *supra* note 6.

As a form of speech, this raises novel questions of potential legal liability, both in criminal and tort law. Though potentially quirky, and definitely a narrow area of speech, this topic is ripe for both academic and legal analysis. While the issues related to hexes, curses, spells, and witchcraft occasionally find their way into reported legal opinions, no legal precedent addresses the free speech implications of this form of speech head-on.⁸ Similarly, legal scholarship related to the issue mostly focuses on practitioners' rights under the First Amendment's religion clauses.⁹

This Article will look at the legal and free speech implications of hexes, curses, and spells, which, while intended to cause harm to the target, would nevertheless be difficult, if not impossible, to rein in under the law. The broad protections under the First Amendment would call for a categorical approach to determine whether such speech could be penned into a category of either high or low value speech that might render it unprotected and subject the speaker or the person calling for the hex to be punished either through criminal sanction or civil tort liability.¹⁰

This Article will present a brief description and history of hexes, curses, and spells and their intersection with First Amendment rights, particularly within the Kavanaugh hearing. Then this Article will analyze potential liability under a categorical approach: first analyzing the speech under criminal law as incitement or a true threat; and second, as tortious speech, whether placing a hex or curse on a target constitutes intentional infliction of emotional distress.

Many people around the world, and in the United States, believe in witchcraft, sorcery, and the occult.¹¹ Even in recent years it is not

8. In a criminal harassment case, *People v. Isakov*, discussed *infra* Section IV.A, a trial court considered a hex, curse, or spell an example of "pure speech." 110 N.Y.S.3d 485, 485 (Crim. Ct. 2018).

9. Cf. Bradford S. Stewart, *Opening the Broom Closet: Recognizing the Religious Rights of Wiccans, Witches, and Other Neo-Pagans*, 32 N. ILL. U. L. REV. 135, 159–61 (2011); see also Danielle N. Boaz, *Dividing Stereotype and Religion: The Legal Implications of the Ambiguous References to Voodoo in U.S. Court Proceedings*, 14 SCHOLAR 251, 275–81 (2011).

10. See *United States v. Stevens*, 559 U.S. 460, 470–72, 477–80 (2010) (rejecting carving out a new category of unprotected speech with videos depicting animal cruelty).

11. See PEW RSCH. CTR., RELIGIOUS BELIEF AND NATIONAL BELONGING IN CENTRAL AND EASTERN EUROPE 82, 90 (2017), <https://www.pewresearch.org/religion/2017/05/10/religious-belief-and-national-belonging-in-central-and-eastern-europe/>; see also Michael Lipka, *Latinos in the U.S. Have a Strong Belief in the Spirit World*, PEW RSCH. CTR. (May 15, 2014), <https://www.pewresearch.org/fact-tank/2014/05/15/latinos-in-the-u-s-have-a-strong-belief-in-the-spirit-world/>; *Resources on Islam and Christianity in Sub-Saharan Africa*, PEW RSCH. CTR. (Feb. 17, 2011), <https://www.pewresearch.org/religion/2011/02/17/resources-on-islam-and-christianity-in-sub-saharan-africa/#downloads-pdf>.

unusual for individuals or vigilante groups to attack and even kill people accused or associated with witchcraft.¹² As much as the law seeks to curtail violence and provide a mechanism for conflict resolution, both criminal and civil law have notable gaps in dealing with the occult.¹³

As far-fetched as a modern discussion of legal liability related to hexes, curses, or spells might be, American history is not devoid of such litigation. The Salem Witch Trials, though more than three centuries old, can serve as both a historical anomaly and a footnote but also a cautionary lesson on how a community can be whipped into a “frenzy” and act under color of law.¹⁴ Scholars have called the trials “[t]he most notorious criminal” trials in Colonial America, in which nineteen women were hanged as witches and one man pressed to death after he refused to plead to charges.¹⁵

In the colonial era, “blackened” by witchcraft “hysteria,” it was a crime, punishable by death to place a curse on someone, though actual enforcement was not determined.¹⁶ In contemporary times, the modern courtroom—replete with open proceedings, court rules on procedure, and evidence—has replaced the kangaroo courts, gallows, or burning stakes in many parts of the world, but criminal and civil litigation on this form of speech still raises multiple legal challenges. Even in contemporary times, accusations of witchcraft “remain[] a potent weapon against marginalized people.”¹⁷ Canadian legal scholars Bahkt and Palmer recounted twenty-first century enforcement of section 365 of the Canadian Criminal Code, which formerly criminalized “pretend[ing] to

12. *Witches in the 21st Century*, WOMEN'S U.N. REP. NETWORK (Aug. 24, 2009), <https://wunrn.com/2010/10/witches-in-the-21st-century-accusations-persecutions-women-girls-3/> (“Throughout history, people described as witches have been persecuted, tortured and murdered and the practice continues today. Statistics are not easy to come by but it is known that every year, thousands of people, mostly older women and children are accused as witches, often abused, cast out of their families and communities and in many cases murdered.”); see also David S. Clark, *Witchcraft and Legal Pluralism: The Case of Celimo Miquirucama*, 15 TULSA L.J. 679, 682–83 (1980) (summarizing and translating a 1970 judicial opinion by the Supreme Court of Colombia, overturning the conviction of a remote tribesman who killed a man labeled as a witch).

13. See Mohammed A. Diwan, *Conflict Between State Legal Norms and Norms Underlying Popular Beliefs: Witchcraft in Africa as a Case Study*, 14 DUKE J. COMP. & INT'L L. 351, 378–80 (2004) (detailing how individual countries across the continent deal with witchcraft and the occult as both a criminal and civil matter).

14. See KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY* 51 (1991).

15. *Id.*

16. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 70–71 (2d ed. 1985).

17. Natasha Bahkt & Jordan Palmer, *Modern Law, Modern Hammers: Canada's Witchcraft Provision as an Image of Persecution*, 36 WINDSOR REV. LEGAL & SOC. ISSUES 123, 130 (2015).

exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration.”¹⁸

Thus, a question of potential legal liability linked to potentially harmful speech may call first for a categorical approach, which is often raised in discussions and critiques of hate speech.¹⁹ But we are faced with the legal question of whether this particular form of speech should fall outside First Amendment protections.²⁰ Again, this raises questions of values of speech and how far the law may bend to develop restrictive new categories of unprotected speech.²¹

Some critics, like Lisa Feldman Barrett, equate ugly, offensive, or controversial speech to physical violence.²² In a famous commentary in the *New York Times*, Dr. Barrett wrote, “[w]ords can have a powerful effect on your nervous system. Certain types of adversity, even those involving no physical contact, can make you sick, alter your brain—even kill neurons—and shorten your life.”²³ So-called dangerous speech, particularly hate-filled online speech, has been attributed to inciting harm, riots, and ethnic-based violence.²⁴

The questions then become: What form of speech would hexes, curses, and spells fall into, and should they receive protections under the First Amendment? Though such speech would also likely raise First

18. *Id.* at 131 (discussing section 365 of the Canadian Criminal Code, which has since been repealed).

19. See NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 122–24 (2018); see also P.E. MOSKOWITZ, THE CASE AGAINST FREE SPEECH 86–92 (2019) (discussing the perceived harm of Nazis marching through Skokie, Illinois, in 1976).

20. See SUZANNE NOSSEL, DARE TO SPEAK 138–39 (2020) (“Although speech can cause genuine harm, it is important not to overstate such harms or use them as an excuse to shut down disfavored speech. Most research on harms refers to derisive speech—taunts, slurs, microaggressions, misgendering, and the like. But the language of harm is invoked promiscuously to point to far less proximate effects, such as feelings of unease . . .”).

21. See Clay Calvert, *Escaping Doctrinal Lockboxes in First Amendment Jurisprudence: Workarounds for Strict Scrutiny for Low-Value Speech in the Face of Stevens and Reed*, 73 SMUL. REV. 727, 740–41 (2020) (“There must be something *in addition* to the consideration of the value of the speech. As described earlier, that additional something is a long history of the speech being considered unprotected in the United States, even if the Supreme Court has not directly considered whether the First Amendment shelters it.” (footnote omitted)); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171–72 (2015) (“The distinction between high- and low-value speech thus provides an important mechanism by which courts ensure the workability of the First Amendment by cabining, but only in limited circumstances, the libertarian breadth of its command.”).

22. See Lisa Feldman Barrett, *When Is Speech Violence?*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html>.

23. *Id.*

24. JACOB MCHANGAMA, FREE SPEECH: A HISTORY FROM SOCRATES TO SOCIAL MEDIA 370–71 (2022).

Amendment questions under the free exercise clause to the First Amendment, which allows citizens to practice or not practice any religion, this Article will focus on the free speech implications of this speech. However, it is important to note that under *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,²⁵ the Supreme Court merged the issues of free exercise and free speech.²⁶ And more recently, in *Kennedy v. Bremerton School District*, the Court wrote that free speech and freedom of religion under the Free Exercise Clause “work in tandem.”²⁷ Specifically, the Court in *Kennedy* found that a high school football coach’s kneeling prayers on the field after games were protected under two parts of the First Amendment.²⁸

I. HEXES, CURSES, AND SPELLS

The belief in a higher authority capable of good or evil is as ancient as mankind.²⁹ Hexes, curses, and spells—while in modern times fall into the occult—are also woven into religious beliefs, both mainstream and fringe.³⁰ Spells and curses, elements of witchcraft and other fringe religions, are still an area of concern in many parts of the world and are closely associated with magic and the occult.³¹

Domestically, even outside Salem, Massachusetts (known as the Witchcraft City), witchcraft, hexes, curses, and spells have deep roots. In Pennsylvania, for example, Dutch and German influences gave rise to the term “hex.”³² Explaining their origins, one expert wrote “[i]n Europe and the United States witches have long been thought capable of

25. 138 S. Ct. 1719 (2018).

26. *Id.* at 1723 (“Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality.”).

27. 142 S. Ct. 2407, 2421 (2022).

28. *Id.* at 2421, 2431 (“That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers’ distrust of government attempts to regulate religion and suppress dissent.”).

29. HARRY E. WEDECK, *A TREASURY OF WITCHCRAFT* 3–6 (1961).

30. In religious, mystical, and anthropological circles there are nuanced differences between hexes, curses, and spells. For simplicity purposes, this Article will use the terms interchangeably. See 4 *MAN, MYTH & MAGIC: THE ILLUSTRATED ENCYCLOPEDIA OF MYTHOLOGY, RELIGION AND THE UNKNOWN* 520–21 (Richard Cavendish ed., 1995) [hereinafter *MAN, MYTH & MAGIC*]; *THE OXFORD ILLUSTRATED HISTORY OF WITCHCRAFT AND MAGIC* 121 (Owen Davies ed., 2017).

31. WEDECK, *supra* note 29, at 4–5 (“Fundamentally, magic is the imposition of the human will on the phenomena of nature: and that imposition extends, in the actual practice of Black Magic, into a conflict between two forces, one beneficent, the other malefic: constantly at war, over the entire cosmos.”).

32. See *MAN, MYTH & MAGIC*, *supra* note 30, at 20–22.

harming people by 'ill wishing' them, usually by means of some magical action that may be as simple as spitting, pointing a finger, or merely glancing an eye."³³ Examples of people believing to be the victims of a hex or curse come from all over the world: Australia, France, Africa, and across the United States, including Arizona and Pennsylvania.³⁴

The word *hex* derives from the Pennsylvania Dutch and Old High German word "hagazussa," also "hag," which in common parlance means putting an evil spell or curse on another.³⁵ Though they all fall into the same general category, experts write that there are ostensibly no differences between hexes, spells, or curses.³⁶

Occult scholar Rosemary Ellen Guiley defined the terms "hex death" and "voodoo death" as a death from a hex or curse. Guiley added:

The critical factor in hex death is belief. If a person believes that a WITCH or sorcerer can make him die by cursing him or by pointing a finger or bone at him, he probably will expire, and no amount of Western conventional medicine can save him. Hex death is largely a self-fulfilling prophecy.³⁷

Though no special accreditation is required for a hexter or spell-caster, they tend to be within the province of practicing witches, shamans, or occultists.³⁸ The spells can be part of a ritual with statements, songs, or chants and can be accompanied by effigies, burning candles, or mixing potions or brews.³⁹ Results can be immediate with

33. *Id.* at 520.

34. *Id.*

35. ROSEMARY ELLEN GUILLEY, *WITCHES & WITCHCRAFT* 147, 159 (2d ed. 1999). *But see* NEVILL DRURY, *DICTIONARY OF MYSTICISM AND THE ESOTERIC TRADITIONS* 134 (1992) (defining "hex" as "[i]n witchcraft, a spell or curse inflicted upon a person or property. The term derives from the German *Hexse*, 'a wizard.' In Pennsylvania, where the art of hexing became popular, there are still hexters who make amulets and talismans to ward off evil influences.").

36. GUILLEY, *supra* note 35, at 79 (defining "curses" as "[s]pells intended to bring misfortunate, illness, harm or death to a victim. The most dreaded form of magic, curses are universal. They are 'laid' or 'thrown' primarily for revenge and power but also for protection, usually of homes, treasures, tombs and grave sites. A curse can take effect quickly or may be dormant for years. Curses have been laid upon families, plaguing them for generations.").

37. *Id.* at 159.

38. *See id.* at 79-80.

39. *Id.* at 317. The author added: "A spell-casting ritual raises power through a combination of visualization, meditation, identification, body movement, incantation (statement of goal), petition to deities and projection of will. The success of a spell rests on the power and will raised and the skill with which they are focused and projected. Words, chants, songs, movements and objects such as ritual tools, effigies, poppets, cords, candles or nail clippings facilitate spell casting." *Id.*

instant death or suffering or can lie dormant, only to emerge at another time befalling generations of a single family.⁴⁰ Curses or spells can be “laid” or “thrown” for “revenge and power but also for protection, usually of homes, treasures, tombs and grave sites.”⁴¹ However, there is sufficient scholarly⁴² and judicial skepticism on the subject.⁴³

Anthropologists studying the societal implications of hexes and spells describe an emotional and physical relationship between the mental state and the effect.⁴⁴ Influential French anthropologist Claude Lévi-Strauss explained the impact of a spell as a physical and emotional effect on the target and its relationship to the community:

An individual who is aware that he is the object of sorcery is thoroughly convinced that he is doomed according to the most solemn traditions of his group. His friends and relatives share this certainty. From then on the community withdraws. Standing aloof from the accursed, it treats him not only as though he were already dead but as though he were a source of danger to the entire group. On every occasion and by every action, the social body suggests death to the unfortunate victim, who no longer hopes to escape what he considers to be his ineluctable fate.

40. *Id.*

41. *Id.* at 79.

42. See CHRISTOPHER I. LEHRICH, *THE OCCULT MIND: MAGIC IN THEORY AND PRACTICE* 159–60 (2007) (noting that the study of magic was deemed controversial, often receiving little to no support while research and scholarship on the subject is often dismissed or not accepted in traditional academic circles).

43. For example, in *Leonard v. Leonard*, a federal magistrate characterized allegations of hexing as “frivolous” and “baseless and fanciful allegations.” No. 17-0650, 2017 WL 3883709, at *4 (W.D. La. Aug. 11, 2017). There, Gabriel Leonard, acting *pro se*, filed a civil action claiming his brother’s girlfriend and other parties placed a hex on him during a “supernatural” activity at his house. *Id.* at *1. The alleged hex inhibited sales of plaintiff’s “mix tape,” suppressed advertising on his YouTube channel, and caused his head “to grow about two to three inches.” *Id.* at *2–3. Leonard sought \$999,999,999.99 in damages and also asked the court to remove the hex and institute “the electric chair for all defendants.” *Id.* With no viable or even remote plausibility cause of action the court dismissed the claim under FED. R. CIV. P. 12(b)(6). *Id.* at *4. Further discovery would not yield any viable evidence, the court held, writing, “[a] well-pleaded complaint may proceed even if it strikes the court that actual proof of the asserted facts is improbable, and that recovery is unlikely. Nevertheless, a court is compelled to dismiss an otherwise well-pleaded claim if it is premised upon an invalid legal theory.” *Id.* (citation omitted).

44. For example, anthropologist Joan Halifax-Grof described that curses can be “1) secretly administered poisons or other physical agents; 2) the relationship between physical and emotional factors in the victim; 3) societal reactions in a particular culture; and 4) parapsychological influences.” See GUILLEY, *supra* note 35, at 159.

Shortly thereafter, sacred rites are held to dispatch him to the realm of shadows.⁴⁵

II. THE WITCHES V. JUSTICE KAVANAUGH

The contentious nomination of Justice Brett Kavanaugh prompted live media coverage of the bruising, emotional, and graphic Senate confirmation hearing.⁴⁶ Along with hours of intense media coverage, President Trump's second Supreme Court nomination also generated public animus.⁴⁷ The hearing's moving testimony by Christine Blasey Ford, the woman alleging sexual impropriety and attempted rape at a high school party in the 1980s, as well as Kavanaugh's impassioned defense, forged a dramatic, historic moment and intense political theater.⁴⁸ The nomination and hearings also inspired criticism and protests. Perhaps the most colorful protest emerged from a small, cultist bookstore in Brooklyn, New York—Catland.⁴⁹

The Catland bookstore, billed as “Brooklyn’s favorite little witch shop,” announced plans to host a three-hour ritual ceremony to place a hex on Kavanaugh.⁵⁰ Organizers declared:

45. CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 167 (Claire Jacobson & Brooke Gundfest Schoepf trans., Basic Books 1963) (1958).

46. Alex Horton, *Christine Blasey Ford Says Her Kavanaugh Testimony ‘Was Simply Doing my Duty as a Citizen’*, WASH. POST (Nov. 18, 2019, 12:29 PM), <https://www.washingtonpost.com/nation/2019/11/18/christine-blasey-ford-says-her-kavanaugh-testimony-was-simply-doing-my-duty-citizen/>.

47. See Nail Stangne, *Five Landmark Moments of Testimony to Congress*, HILL (Nov. 12, 2019, 6:00 AM), <https://thehill.com/homenews/house/469991-five-landmark-moments-of-testimony-to-congress/> (“The most emotionally charged congressional testimony of recent times came when Ford accused Kavanaugh of sexual assault, a charge that could have upended his nomination to the Supreme Court.”).

48. Kristine Phillips, *Christine Blasey Ford’s Sisters-in-Law Say Kavanaugh’s Testimony Was Confusing and ‘Belligerent’*, WASH. POST (Sept. 29, 2018, 1:24 PM), <https://www.washingtonpost.com/politics/2018/09/29/christine-blasey-fords-sisters-in-law-say-kavanaughs-testimony-was-evasive-belligerent/>; John Wagner & Seung Min Kim, *Kavanaugh Accuser Christine Blasey Ford Releases Sworn Declarations from Husband and Three Friends*, WASH. POST (Sept. 26, 2018, 11:01 AM), https://www.washingtonpost.com/politics/kavanaugh-accuser-christine-blasey-ford-releases-sworn-declarations-from-husband-and-three-friends/2018/09/26/2f5e8302-c173-11e8-90c9-23f963eea204_story.html.

49. Alix Langone, *Brooklyn Witches Plan to Put a Hex on Supreme Court Justice Brett Kavanaugh*, TIME (Oct 14, 2018, 3:14 PM), <https://www.time.com/5424289/brooklyn-witches-hex-supreme-court-brett-kavanaugh/>.

50. See *id.*; Catland, *Ritual to Hex Brett Kavanaugh Announcement*, FACEBOOK (Oct. 20, 2018), <https://www.facebook.com/CatlandBooks/posts/pfbid02yDLt7BamjnxD25WzjTsrHiVWLqfigHVbngTurft2WEfuxtvGZrZTd2jcRyASeQNI>; *About Us: Our Story*, CATLAND, <https://www.catlandbooks.com/pages/about> (last visited Apr. 24, 2023) (explaining that the bookstore was founded in 2013 “to provide a supply

He will be the focal point, but by no means the only target, so bring your rage and [] all of the axes you've got to grind. There will also be a second ritual afterward—"The Rites of the Scorned One" which seeks to validate, affirm, uphold and support those of us who have been wronged and who refuse to be silent any longer.⁵¹

The lead organizer, Dakota Bracciale, a self-proclaimed witch, had earlier laid down a similar curse against Donald Trump in 2017.⁵² Bracciale hoped the ceremony would provide a sense of hope and inspiration to participants.⁵³ During the ceremony, Bracciale led a chant: "Foster within us bravery and cloak us in armor as we face an enemy who seems insurmountable."⁵⁴ They were expecting more than sixty people to attend and pay ten dollars for the opportunity to participate in the spell-casting.⁵⁵ Bracciale told a newspaper, "[t]he harm we want to inflict on Kavanaugh and Trump is that they be exposed and shown for what they are and ousted or at least discredited."⁵⁶

Not to be outdone, a California priest, Father Gary Thomas, the exorcist for the Diocese of San Jose, was so "appalled" that he countered with a two-day exorcism.⁵⁷ "This is a conjuring of evil—not about free speech. . . . Conjuring up personified evil does not fall under free speech," he told the *National Catholic Register*.⁵⁸ In dramatic, if not hyperbolic tones, he added, "[s]atanic cults often commit crimes; they murder and sexually abuse everyone i[n] their cult."⁵⁹

house and community space to the many local witches, wanderers and wildfolk of all stripes").

51. See Catland Event, *supra* note 5. Organizers also announced fifty percent of the proceeds would be donated to charities—the Ali Forney Center and Planned Parenthood. *Id.*

52. Peter Stublely, *Brett Kavanaugh: Witches Placed Mass Hex on Supreme Court Justice During New York Protest Ritual*, INDEPENDENT (LONDON) (Oct. 21, 2018, 5:30 PM), <https://www.independent.co.uk/news/world/americas/us-politics/brett-kavanaugh-hex-new-york-witches-protest-brooklyn-supreme-court-sexual-assault-a8594581.html>.

53. Lise Hand, *Rise of Witchcraft Could Spell Change*, TIMES (LONDON), Nov. 20, 2018, at 20.

54. Christine Emba, *Kavanaugh Hearings Spotlights Allure of the Occult*, CHARLESTON GAZETTE-MAIL, Nov. 18, 2018, at P11C.

55. Wagner & Min Kim, *supra* note 48.

56. Stublely, *supra* note 52.

57. Armstrong, *supra* note 6.

58. *Id.*

59. *Id.*

The controversy surrounding the witches versus the Justice was tantalizing to the media and generated international headlines.⁶⁰ Also, in 2018, dozens of witches garnered international headlines after they gathered outside Trump Tower in New York City, and a week later there was a fire in the building.⁶¹

III. CRIMINAL LAW: FIGHTING WORDS, INCITEMENT, OR TRUE THREATS

Categorizing hexes, curses, and spells poses a significant challenge under the law. *Chaplinsky v. New Hampshire* introduces the categorical approach for banning or criminalizing certain speech in certain situations.⁶² This Part will address the potential, though difficult, task of categorizing this speech as criminal or otherwise illegal, especially in light of Justice Murphy's explanation that some categories of speech offer

60. See, e.g., Emma Parry & Mark Hodge, *Hocus Potus: Thousands of Witches Wait to See if Their 'Binding' Spell Cast on Donald Trump Actually Does Spell Disaster at Today's Midterms Elections*, SUN (Nov. 6, 2018, 2:39 PM) (U.K.), <https://www.thesun.co.uk/news/7672483/witches-binding-spell-cast-donald-trump-disaster-us-midterm-elections/>; Hannes Stein, *Als die Hexengöttin mit Bart Brett Kavanaugh verflucht* [When the Bearded Witch Goddess Cursed Brett Kavanaugh], WELT (Oct. 21, 2018) (Ger.), <https://www.welt.de/politik/ausland/article182465000/Oberster-Richter-Als-die-Hexengoettin-mit-Bart-Brett-Kavanaugh-verflucht.html>; RT, *Exorcist Holds Ritual to Shield Justice Kavanaugh from Coordinated Hexing by Witches, Sorcerers*, EURASIA REV. (Oct. 19, 2018), <https://www.eurasiareview.com/19102018-exorcist-holds-ritual-to-shield-justice-kavanaugh-from-coordinated-hexing-by-witches-sorcerers/>; Yerepouni Daily News Staff, *'Modern Exorcist' Holds Ritual to Shield Kavanaugh from Coordinated Hexing by Witches & Sorcerers*, YEREPOUNI DAILY NEWS (Feb.), Oct. 19, 2019; Aletha Adu, *Brett Cursed: Witches Are Planning a Mass Hex on Supreme Court Justice Brett Kavanaugh with Coven Told to 'Bring Your Rage'*, SUN (Oct. 17, 2018, 9:55 AM) (U.K.), <https://www.thesun.co.uk/news/7513184/witches-hex-brett-kavanaugh-new-york-trump/>; Chelsea Ritschel, *Witches Plan Ritual to Hex Supreme Court Justice Brett Kavanaugh*, INDEPENDENT (Oct. 17, 2018, 1:19 PM) (U.K.), <https://www.independent.co.uk/life-style/hex-brett-kavanaugh-witches-brooklyn-new-york-supreme-court-a8587521.html>; Sam Wolfson, *Cursed: Witches Are Planning a Public Hexing of Brett Kavanaugh*, GUARDIAN (Oct. 16, 2018, 2:00 PM) (U.K.), <https://www.theguardian.com/us-news/2018/oct/15/witches-public-hexing-brett-kavanaugh>; Katerina Havlicka, *Americké čarodějnice proklejí soudce Kavanaugha. Sabat má už teď vyprodáno* [American Witches Curse Judge Kavanaugh. The Sabbath Is Already Sold Out], IDNES (Oct. 16, 2018, 8:41 PM) (Czech), https://www.idnes.cz/zpravy/zahranicni/carodejnice-proklejou-soudce-sabat-new-york-brett-kavanaugh-spojene-staty.A181016_103255_zahranicni_kha.

61. Aletha Adu, *Love Foolosophy: American Witch Who Cast Hex on Donald Trump Claims She's 300 Years Old and Reveals Her Spell for Finding True Love*, SUN (Nov. 19, 2018, 3:31 PM) (U.K.), <https://www.thesun.co.uk/news/7776823/amanda-yates-garcia-donald-trump-witch-hex-spell/>.

62. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”).

“no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁶³

Chaplinsky defined fighting words as “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” and could pose liability for the speaker who cast the hex or spell.⁶⁴ Additionally, categorizing this type of speech as either high- or low-value also informs how courts might view the speech.⁶⁵

As *Chaplinsky* points out, the context of the speech under the fighting-words doctrine narrows the category of speech to require practically an immediate breach of the peace, thus possibly removing hexes from this categorization.⁶⁶ As occult experts and scholars note, some curses could result in immediate or delayed harm.⁶⁷ Either way, pinpointing resulting harm for criminal liability could be murky at best.

Similarly, whether the speech is suppressible as an issue of incitement also implicates *Brandenburg v. Ohio* to weigh whether the speech creates a clear and present danger of imminent lawless action.⁶⁸ Though the KKK leader’s hate-filled speech used racist and anti-Semitic verbiage, the Court recognized he did not explicitly call for direct advocacy of criminal activity.⁶⁹ The Court famously wrote:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁷⁰

As an issue of incitement, criminalizing the speech associated with hexes, curses, or spells could be problematic under the question of whether the speech is a direct call for advocacy of illegal activity. Criminal liability would require some sort of immediate illegal activity

63. *Id.* at 572.

64. *Id.*

65. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (holding that the First Amendment permits “restrictions upon the content of speech in a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality’” (quoting *Chaplinsky*, 315 U.S. at 572)).

66. See *Chaplinsky*, 315 U.S. at 572.

67. See GUILLEY, *supra* note 35, at 79.

68. See *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

69. *Id.*; see also Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L.Q. 339, 349–50 (2011).

70. *Brandenburg*, 395 U.S. at 447 (footnote omitted).

or violence enacted by someone who heard the call and acted on it. But, like the underlying facts in *Brandenburg* itself, if there was no call for direct advocacy, liability under incitement theory would likely be extremely problematic.⁷¹ It would not be reasonable to hold a speaker liable for calling on mystical or supernatural authorities to act or effectuate a curse. Even if an occultist or witch took credit for some harm, proof of proximate causation would be extremely problematic. For example, some witches took special pride in the 2017 fire at Trump Tower in New York City, days after they placed a hex on Trump.⁷² But proving direct causation would be unclear, if not impossible.

Perhaps the strongest categorization for this speech would be under the true-threat doctrine, which may be a closer call, but still likely unavailing. If the speaker placing the hex or curse seriously wants some sort of malady to befall the subject, then could this reasonably satisfy the elements of the true threat?

As a category of speech, the true threat could straddle the line between crude, offensive, and vituperative and could be understood as an unprotected threat to commit an act of violence.⁷³ The doctrine emerged from *Watts v. United States*, in which a speaker at an anti-war political rally declared that if he were to carry a rifle in the war, “the first man I want to get in my sights is L.B.J.”⁷⁴ Robert Watts, an eighteen-year-old draftee protesting the Vietnam War and the racial implications of the draft, was convicted of threatening the life of the President under a federal statute.⁷⁵

While the underlying statute served an important purpose in protecting the President, there was no evidence that the speaker objectively intended to assassinate the President, nor that he had the means to commit the specific violence.⁷⁶ In fact, both Watts and the crowd of listeners laughed at the absurdity of his statement.⁷⁷ Further, in reversing the conviction, the Supreme Court categorized the speech as “political hyperbole” and part of a robust political debate.⁷⁸

The Court’s operative rationale was: “What is a threat must be distinguished from what is constitutionally protected speech.”⁷⁹ Thus, from a criminal law standpoint, the Court intoned that in order to prove

71. See Strasser, *supra* note 69, at 349–51.

72. See Parry & Hodge, *supra* note 60.

73. *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam).

74. *Id.* at 706.

75. *Id.*

76. *Id.* at 707–08.

77. *Id.* at 707.

78. *Id.* at 708.

79. *Id.* at 707.

a case for a true threat, particularly under the statute in question, the government must prove willfulness or intent.⁸⁰ However, *Watts* does not define what exactly a true threat could be.⁸¹

More than two decades later, the Court provided additional context for determining a true threat in a cross-burning statute case in *Virginia v. Black*.⁸² For the 7–2 majority, Justice O'Connor established that the government must prove the direct threat toward one or more individuals was made with the intent to convey to the listener fear of bodily harm or death.⁸³ The speaker need not actually intend to carry out the threat.⁸⁴ Arousing anger or hurt feelings is not enough, even with a burning cross, to criminalize the speech.⁸⁵

Protecting political speech, even offensive and potentially threatening speech like cross-burning, lies at the heart of the First Amendment, the Court noted in *Black*.⁸⁶ In analyzing hexes, curses, and spells, if courts substituted political speech with religious belief, perhaps, it would come to the same conclusion.⁸⁷ The Court wrote: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."⁸⁸ Following *Virginia v. Black*, all but the Ninth and Tenth Circuits employed an objective standard, meaning based on a reasonable person's perception that the speech contained a threat.⁸⁹

The Court's recent precedent on true threats, *Elonis v. United States*,⁹⁰ emanated from a self-styled suburban rapper whose online rants, in rhyme and verse, prompted his prosecution under a federal law prohibiting interstate threats.⁹¹ Anthony Elonis had been indicted by a federal grand jury and convicted by a jury in district court, finding his

80. *Id.*

81. See Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 559 (2004); G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 921 n.232 (2002).

82. 538 U.S. 343, 359, 364–66 (2003).

83. *Id.* at 360.

84. *Id.* at 359–60.

85. *Id.* at 366.

86. *Id.* at 365.

87. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723–24 (2018), which straddles the line between religion and speech.

88. *Black*, 538 U.S. at 360.

89. See Paul T. Crane, "True Threats" and the Issue of Intent, 92 VA. L. REV. 1225, 1261–65 (2006).

90. 575 U.S. 723 (2015).

91. *Id.* at 726, 731 (analyzing 18 U.S.C. § 875(c)).

verse intimidated he would stab, shoot, or blow up his ex-wife and certain law enforcement officials.⁹²

Though eschewing the First Amendment question and focusing on statutory and criminal law interpretation, the Court overturned his conviction.⁹³ The Court found problems with essentially importing a civil negligence liability standard to a criminal statute because the conviction was based on how a reasonable viewer or listener would perceive the statements.⁹⁴ The mental state—*mens rea*—requirement would require the defendant to issue the threat knowing “that the communication will be viewed as a threat.”⁹⁵ Justice Alito, concurring with the judgment but dissenting on the rationale, wrote that the First Amendment would not provide protection for reckless speech because it would “inflict great harm and have little if any social value.”⁹⁶

On remand, the Third Circuit provided more guidance on both the objective and subjective elements within the speech’s context.⁹⁷ The circuit court wrote:

If a defendant transmits a communication for the purpose of issuing a threat or with knowledge that the recipient will view it as a threat, and a jury determines that communication is objectively threatening, then the defendant has violated Section 875(c) whether or not he agrees the communication was objectively threatening.⁹⁸

The subjective element focuses on the speaker’s intent, requiring proof that the speaker knowingly communicates a message that will intentionally cause harm.⁹⁹ The court did note that in some cases

92. *Id.* at 729–32 (“Me thinks the Judge needs an education / on true threat jurisprudence . . . Little Agent lady stood so close / Took all the strength I had not to turn the b**** ghost / Pull my knife, flick my wrist, and slit her throat.”).

93. *Id.* at 740; see also David Barney, *Elonis v. United States: Why the Supreme Court Punted on Free Speech*, 44 PEPP. L. REV. 1, 6 (2016) (“Thus, [the Court] dismissed any hope lawyers, lower courts, and scholars had that it would clarify unanswered questions regarding its ‘true threats’ doctrine.”).

94. *Elonis*, 575 U.S. at 737–38.

95. *Id.* at 740.

96. *Id.* at 746 (Alito, J., concurring in part and dissenting in part).

97. *United States v. Elonis*, 841 F.3d 589, 596–97 (3d Cir. 2016).

98. *Id.* at 597.

99. *Id.* at 596–97; see also Renee Griffin, Note, *Searching for Truth in the First Amendment’s True Threat Doctrine*, 120 MICH. L. REV. 721, 730 (2022) (“After *Black*, a circuit split developed over whether the First Amendment required the government to prove that the defendant had an *objective* intent to threaten (based on a ‘reasonable person’s’ perception of the speech) or a *subjective* intent to threaten (based on the

involving social media, it may be difficult to identify a recipient of the message.¹⁰⁰

“The evidence overwhelmingly shows that Elonis posted those two messages with either the purpose of threatening his ex-wife, or with knowledge that she would interpret the posts as threats. No rational juror could conclude otherwise,” the court held.¹⁰¹

Under current precedent, imposing criminal liability to hexes, curses, and spells poses a number of practical and constitutional problems. Every first-year law student learns a crime is comprised of the *mens rea* and *actus reus*.¹⁰² Though *mens rea* generally stands for intent, courts have also applied the term to mean “vicious will” or “evil-meaning mind.”¹⁰³ But simply having ill-will or hoping something bad happens to another person is not a crime. Imposing criminal liability on the simple act of calling upon deities, spirits, or some supernatural authority to cause some sort of harm on another person would overturn centuries of criminal law. Under *Brandenburg*, mere advocacy alone would not render speech criminal.¹⁰⁴

Imposing criminal liability on the act of placing a curse or hex on someone, on its face, may not carry much weight to an outside observer. But how much weight should law enforcement or courts give the effect of that ill-will on the target of that hex or curse?

Liability would require that the target is not only aware that a hex has been placed, but also bear some belief that there would be attendant impending harm. From witch hunts and witch trials to other examples, even in modern times, there are potential victims who believe in the power of the hex.¹⁰⁵ Should that knowledge and personal disturbance alone be enough to impose criminal liability? Even if the speech is categorized as low-value or disfavored, the imposition of criminal liability would be a big ask of criminal law.¹⁰⁶

defendant’s own state of mind). The majority of federal appellate courts initially adopted some version of the objective test.” (footnote omitted)).

100. *Elonis*, 841 F.3d at 597 n.7; see also P. Brooks Fuller, *The Angry Pamphleteer: True Threats, Political Speech, and Applying Watts v. United States in the Age of Twitter*, 21 COMM. L. & POL’Y 87, 91–92 (2016) (analyzing that the courts’ ambiguity on true threats may leave some social media posts carrying political statements unprotected under the First Amendment).

101. *Elonis*, 841 F.3d at 599.

102. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 101–02 (2d ed. 1995).

103. *Id.* at 102.

104. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

105. See *infra* Section IV.A (discussing specific modern cases).

106. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”). See

IV. CIVIL LIABILITY

The difficulty with potential criminal liability will flow into the civil arena. Though civil liability offers a lower standard and fewer constitutional restraints, the potential for tort liability poses difficulties as well.¹⁰⁷ The first question is what cause of action would be best suited for litigation on hexes, curses, and spells. In the seventeenth century, witchcraft was considered akin to slander.¹⁰⁸ But defamation would not be a viable cause of action because the speech does not involve a false factual statement harming a person's reputation.¹⁰⁹ In states that recognize the general catch-all of the prima facie tort,¹¹⁰ perhaps this would provide a valid cause of action.¹¹¹ But the vague and unspecified elements of both the speech and the purported harm would make this difficult, too.

Perhaps the most appropriate civil cause of action would be the tort of intentional infliction of emotional distress, known as "IIED." Though recognized in every state, and potentially viable, this is still not a simple or easily proven cause of action.¹¹² Prosser and Keeton summarized how the tort poses difficulties for plaintiffs and judges:

There is virtually unanimous agreement that such ordinary defendants are not liable for mere insult, indignity, annoyance, or even threats, where the case is lacking in other circumstances of aggravation. The reasons are not far to seek. Our manners, and with them our law, have not yet progressed to the point where we are able to afford a remedy in the form of tort damages for all

generally Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1268–70 (2014) (arguing that a speaker's intent should be considered in assessing whether criminal or tort liability would be appropriate); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 287–88 (2001) ("Even though the Supreme Court has made clear that true threats are punishable, it has not clearly defined what speech constitutes a true threat.")

107. See *Leonard v. Leonard*, No. 17-0650, 2017 WL 3883709, at *4 (W.D. La. Aug. 11, 2017).

108. See Rita Volmer, *The Witch Trials*, in THE OXFORD ILLUSTRATED HISTORY OF WITCHCRAFT AND MAGIC 97, 121 (Owen Davies ed., 2017).

109. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974).

110. See *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904).

111. Prima facie tort, which requires proof of intentional infliction of harm resulting in special damages without any justification or privilege through an act that would ordinarily be unlawful, appears to be a tort mostly recognized, but rarely awarded in New York State. 2 ROBERT SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 13:5 (4th ed. 2010) (stating that New York courts have repeatedly held that prima facie tort should not be a catch-all alternative for every cause of action that cannot stand on its own).

112. *Id.* § 13:6.

intended mental disturbance. Liability of course cannot be extended to every trivial indignity.¹¹³

This tort affords a means for recovery for mental injury, different from assault. But practical questions perpetuate about quantifying mental pain, harm, or injury resulting from language directed at someone that could fall short of threatening, harassing, or insulting the person.¹¹⁴ Prosser and Keeton trace IIED's origins to early cases involving insults to passengers on railroads and guests at inns and hotels in the late 1800s and early 1900s, often invoking breach of contract and other liability issues.¹¹⁵ Assessing and quantifying mental anguish has been vexing judges and scholars for more than a century, with the issue first broached by *Wilkinson v. Downton*, an 1897 British case establishing the availability of damages for mental anguish.¹¹⁶ In that case, a woman was awarded £100 (gold sovereigns) as compensation for her anxiety and nervous breakdown after being told, as a joke, that her husband suffered devastating injuries including two broken legs in an accident that never happened.¹¹⁷ Mrs. Wilkinson's maladies have become ingrained in tort law.¹¹⁸

Historically, assessing mental harm for tortious actions and attaching a reasonable monetary figure to the alleged harm has always been vexing.¹¹⁹ Modern blackletter law under the Second Restatement of

113. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 59 (W. Page Keeton ed., West Publ'g Co. 5th ed. 1984).

114. *Id.* at 55–56.

115. *Id.* at 57–58.

116. *Wilkinson v. Downton* [1897] 2 QBD 57 at 58 (Eng.) (“The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.”).

117. *Id.* at 58, 61.

118. See, e.g., P.R. Glazebrook, *Wilkinson v. Downton: A Centenary Postscript*, 32 IRISH JURIST 46, 48 (1997); Chris D.L. Hunt, *Case and Comment: Wilkinson v. Downton*, 74 CAMBRIDGE L.J. 392, 392 (2015); KEETON ET AL., *supra* note 113, at 60–61.

119. See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936) (“Of course there is danger of getting into the realm of the trivial in this matter of insulting language. No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam.”). Professor Magruder summarized the difficulty early courts wrestled with on assessing monetary harm for mental anguish, noting specific tort categories including defamation, false imprisonment, malicious prosecution, battery, seduction, and others. *Id.* at 1049 nn.65–70.

Torts describes liability as action by “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another . . . [w]here such conduct is directed at a third person.”¹²⁰

Because this potentially distressing conduct manifests itself through speech, a First Amendment element came into the analysis in 1988’s *Hustler Magazine, Inc. v. Falwell*.¹²¹ The facts of the *Falwell* case are well-known: the publisher of an adult magazine published an ad parody accusing the plaintiff, a televangelist, of a drunken, incestuous rendezvous in an outhouse with his mother, giving rise to a jury award of \$150,000 for intentional infliction of emotional distress.¹²²

Virginia’s four-prong definition of IIED is representative of what plaintiffs in most states must prove: 1) intentional or reckless conduct; 2) that offends generally accepted standards of decency or morality; 3) that is causally connected with plaintiff’s emotional distress; and 4) that caused severe emotional distress.¹²³

Prosser and Keeton stress that the emotional distress not only must in fact exist, but it truly has to be severe and distressing to a reasonable person.¹²⁴ More recently, Chief Justice Roberts addressed the intersection between IIED and speech in *Snyder v. Phelps*,¹²⁵ which also had a religious component to the offensive speech.¹²⁶ The First Amendment offers protection from liability for IIED.¹²⁷ Because the Westboro Church members in that case were engaged in speech on matters of public interest, the \$10.9 million IIED judgment violated the First Amendment.¹²⁸ If the speech is considered that of a private matter, the outcome might be different.¹²⁹

Applying *Dun & Bradstreet, Inc. v. Greenmoss Builders*, “content, form, and context” are critical to determine whether the speech at issue concerns a public or private matter.¹³⁰ Chief Justice Roberts wrote of

120. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).

121. 485 U.S. 46, 50–51 (1988).

122. *Id.* at 48–49. The Supreme Court subsequently reversed the judgment. *Id.* at 57.

123. *See id.* at 50 n.3.

124. KEETON ET AL., *supra* note 113, at 63.

125. 562 U.S. 443 (2011).

126. *Id.* at 447–50. Here, members of the small Westboro Baptist Church protested against Americans’ acceptance of homosexuality by gathering at funerals of fallen soldiers. *Id.* at 448–49. The Supreme Court held the protestors could not be liable for damages under IIED. *Id.* at 461.

127. *Id.* at 451.

128. *Id.* at 450, 458–59.

129. *See id.* at 452.

130. *Id.* at 453 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

“refined social or political commentary,” more or less acknowledging the malleability of this categorical approach as well as the interpretation of outrageousness.¹³¹ The Chief Justice added:

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.¹³²

In his dissent, Justice Alito wrote that the First Amendment does not protect a speaker from “brutaliz[ing]” a potential victim from harmful speech.¹³³

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate. To protect against such injury, “most if not all jurisdictions” permit recovery in tort for the intentional infliction of emotional distress (or IIED).¹³⁴

Much like some of the criminal theories, IIED might also be difficult to successfully apply in these cases. Sure, being the target of a hex, curse, or spell might upset someone, but in a modern world, it might not satisfy the outrageousness and proximate causation for harm required under the tort. Liability would also hinge on actual belief, which will be discussed below.

A. *Liability: Don't Start Believin'*¹³⁵

A legal analysis can borrow a three-point complementary model from anthropologist Levi-Strauss: 1) the “sorcerer’s belief in the effectiveness of [the magical or supernatural] techniques”; 2) the target or “victim’s belief in the “sorcerer’s power”; and 3) the belief within the community

131. *Id.* at 454, 458–59.

132. *Id.* at 460–61.

133. *Id.* at 463 (Alito, J., dissenting).

134. *Id.* at 464 (quoting *Hustler Mag. v. Falwell*, 485 U.S. 46, 53 (1988)).

135. The band, Journey’s, inspirational rock anthem, “Don’t Stop Believin’,” concludes: “Don’t stop believin’ Hold onto that feelin’ . . .” JOURNEY, *Don’t Stop Believin’*, on *ESCAPE* (Columbia Records 1981).

and “the relationship between [the] sorcerer” and the target of the curse or spell.¹³⁶

Belief, however, would be a critical element to support any legal action associated with this type of speech.¹³⁷ But as the courts have noted in both true-threat cases and other cases involving hexes, spells, and curses, there needs to be a lot more than belief: actual harm.

The viability of legal action in the face of a hex, curse, or spell, would employ a similar legal analysis regardless of whether it is the state seeking to enforce criminal law under the true-threat or incitement doctrines or a plaintiff seeking monetary damages for the emotional harm inflicted by the potential tortfeasor. The key similarity is both objective and subjective, viewed under *Elonis*.¹³⁸

Analyzing how courts have dealt with elements of the occult or witchcraft offers insight into how courts might deal with future cases of criminal or civil liability in such cases. In cases referencing or incorporating the occult or witchcraft, courts are often dismissive of or reluctant to incorporate the supernatural.¹³⁹ Belief in witchcraft has been an important element for some defendants who plead insanity.¹⁴⁰ In other

136. LÉVI-STRAUSS, *supra* note 45, at 168.

137. *See id.* (“There is, therefore, no reason to doubt the efficacy of certain magical practices. But at the same time we see that the efficacy of magic implies a belief in magic.”).

138. *Elonis v. United States*, 575 U.S. 723 (2015).

139. *See, e.g., Hotema v. United States*, 186 U.S. 413, 419–21 (1902) (disregarding defendant’s mental state while upholding the conviction of a man who—in a drunken fit—killed a woman he thought was a witch); *Bieganowski v. United States*, No. EP-04-CA-180, 2006 WL 2259710, at *91 (W.D. Tex. Aug. 4, 2006). In *Bieganowski*, a federal court ignored a criminal defendant’s claim that he was the victim of prosecutorial misconduct in his conspiracy case, claiming prosecutors practiced witchcraft to secure his conviction. *Bieganowski*, 2006 WL 2259710, at *91 (“The Court has afforded Bieganowski’s argument the degree of consideration it deserves, and concludes that his claim is patently frivolous.”).

140. For example, in *Lopez v. State*, a Texas man who brutally stabbed two elderly women to death because he believed they were witches who put a spell and curse on him had his murder conviction reversed so he could posit an insanity defense. No. 13-05-148-CR, 2007 WL 2471396, at *5–8, *10–12, *15 (Tex. Crim. App. Aug. 31, 2007). In the weeks leading up to the crime, the defendant had been disturbed by and talking about witches, witchcraft, voodoo, and hexes. *Id.* at *3. A psychiatrist who examined the killer testified:

“In fact, he loudly announced in the hospital ‘if you want to see what witchcraft is,’ and so in his mind he is ridding the world of evil.” . . . “I don’t say it lightly, I mean, this was a brutal murder. But yes, I do believe that he was insane at the time and that he was so mentally ill, it distorted his mind that he saw that he was ridding the world of evil witches.”

Id. at *9. The court wrote: “Based on the circumstances of the crime, we conclude that appellant’s demeanor before and after the crime supports the conclusion that his conduct was delusional such that he did not know it was wrong or illegal.” *Id.* at *11. But in another case, *Villanueva v. State*, testimony from experts confirming that a delusional woman thought the devil was casting hexes and curses on her when she killed her five-year-old

types of cases, while litigants are afforded their day in court, courts are understandably skeptical of accusations, such as Tyler Perry hacking into a computer to exercise “voodoo and witchcraft” against an alleged victim,¹⁴¹ or an assault and battery victim placing a lethal curse on a defendant’s parakeet,¹⁴² or a defendant claiming they were incited to kill someone who was believed to have placed a hex on them as a form of self-defense.¹⁴³

In *Gilstrap v. State*,¹⁴⁴ a Texas case that revolved around a dead parakeet, the court characterized the witchcraft defense as unorthodox and in conflict with “modern dogma.”¹⁴⁵ The court wrote:

Any bias or ill will was caused by death of the bird, not the hex. The testimony concerning the hex only served to prejudice the jury against [the defendant], and cast her in the light of a person who holds unpopular or unorthodox beliefs. The prejudicial effect of such testimony far outweighs probative value on the question of bias.¹⁴⁶

For insight into witchcraft, curses, and a “love spell,” a California court trying a murder case allowed the defense to call as an expert a UCLA folklore scholar who testified that the defendant’s murder charge could be explained or mitigated by her belief that she had been the target of a hex and that she believed her life was in jeopardy.¹⁴⁷ Though the appellate court upheld the murder conviction in *People v. Gomez*,¹⁴⁸ the expert explained the cultural influence and belief of witchcraft and the occult in certain cultures, both domestic and international.¹⁴⁹ Further, the expert testified that after interviewing the defendant, he concluded

daughter was not enough to convince a jury of her insanity defense. No. 01-20-00303-CR, 2021 WL 2832974, at *6–7, *13 (Tex. Crim. App. July 8, 2021).

141. *White v. United States*, No. 1:15-cv-271, 2015 U.S. Dist. LEXIS 171345, at *1–2 (E.D. Tex. Nov. 30, 2015). Despite the outlandish claims, the court held a hearing to let the plaintiff “clarify the factual and legal basis for her claims.” *Id.* at *2.

142. *Gilstrap v. State*, 945 S.W.2d 192, 193–95 (Tex. App. 1997) (per curium) (holding that the trial judge did not err in denying the defendant’s request to cross-examine the victim about her statement that the defendant’s sister put a “witchcraft hex” on victim’s pet bird).

143. *People v. Cotner*, 2011 IL App (5th) 090666-U, ¶ 4; see also *Robinson v. State*, 598 S.W.2d 421, 423 (Ark. 1980).

144. 945 S.W.2d 192.

145. *Id.* at 194–96.

146. *Id.* at 196.

147. *People v. Gomez*, No. B204672, 2008 WL 5133228, at *2 (Cal. Ct. App. Nov. 17, 2008).

148. *Id.* at *6.

149. *Id.* at *2.

that the defendant “sincerely believed she was going to die and killing [the victim] was her only option.”¹⁵⁰

Belief in the power of the spell is important on both sides of the courtroom: plaintiff/prosecutor and the defendant speaker. For example, in one California case, a man convicted of multiple counts of stalking and making criminal threats against his ex-wife, her husband, and their children also claimed that their cousin’s fatal car crash was the result of his witchcraft and a spell he cast.¹⁵¹ The defendant told the boys, “that wasn’t an accident. I’ve been practicing witchcraft, and I put a curse on [the boy]. That’s why he died. And I put a curse on the rest of the family, and all you guys will die before you turn [eighteen].”¹⁵²

Upon hearing the threat, the court wrote that the “boys were devastated.”¹⁵³ Being “devastated” might not establish enough harm to create liability on its own with an isolated curse or spell, as in the Kavanaugh situation.¹⁵⁴ But when coupled with multiple other facts, threatening conduct or actual violence, perceived harm could constitute something illegal with the speech or words used as evidence of malice or an aggravating factor.

In a New York case, *People v. Isakov*, the court came closer than any others to a precise ruling on this issue.¹⁵⁵ Here, the trial court held that a threat to put a curse on his wife by an estranged husband, causing her “annoyance, alarm and fear for her safety,” did not constitute aggravated harassment under New York’s penal code.¹⁵⁶ As an example of “pure speech,” the court reverted to basic true-threat doctrine and incitement law, which would “inflict injury or tend naturally to evoke immediate violence.”¹⁵⁷

“A threat to place a curse, hex, jinx, spell, voodoo, root, evil eye, enchantment or other such spiritual, mystical or magical attack on

150. *Id.*

151. *People v. Garza*, No. E044237, 2009 WL 190850, at *4–8, *10 (Cal. Ct. App. Jan. 28, 2009). The unsuccessful appeal centered on evidence, prosecutorial misconduct, and judicial bias. *Id.* at *12–16.

152. *Id.* at *10 (first alteration in original).

153. *Id.*

154. *See supra* Part II.

155. *See People v. Isakov*, CR-010583, 2018 WL 3824184, at *2 (N.Y. Crim. Ct. June 20, 2018). Section 240.30(1) of the New York Penal Code defines second degree aggravated harassment as

when . . . [w]ith intent to harass another person, the actor . . . communicates, . . . by telephone, . . . a threat to cause physical harm to, . . . such person, . . . and the actor knows or reasonably should know that such communication will cause such person to reasonably fear harm to such person’s safety

N.Y. PENAL LAW § 240.30(1) (McKinsey 2019).

156. *Isakov*, 2018 WL 2834184, at *1, *2.

157. *Id.* at *2 (citing *People v. Golb*, 15 N.E.3d 805, 813 (N.Y. 2014)).

another neither inflicts actual injury nor naturally invokes immediate violence,” the court held.¹⁵⁸ Even a complainant’s subjective belief that there was an actual threat as a matter of law and would constitute “constitutionally protected, pure speech.”¹⁵⁹

B. *Higs and Lows*

Scholars have wrestled with not only the categorization of high or low value speech, but figuring out a mechanism to determine what it is in the first place.¹⁶⁰ For example, in his seminal article arguing for anti-pornography regulations, Professor Cass Sunstein argued that laws regulating pornography could be justified by analyzing four points: 1) whether the speech is “far afield” from a discussion on public issues; 2) whether the speech includes cognitive or noncognitive elements, with the latter afforded less protection; 3) the speaker’s purpose; and 4) the categorization of the speech, which would assist in determining its value and protection, considering commercial speech, private libel, or pornography.¹⁶¹

Critical of the Sunstein approach, Professor Larry Alexander posited a more open three-prong approach: 1) can we view the speech as undifferentiated or distinguish the speech from protected or unprotected based on the harm or harm linked to the message; 2) can the speech easily fit into a category of high-, low-, or no-value speech regardless of how the message is sent; and 3) can the speaker be viewed as trustworthy, “intelligentsia” or untrustworthy, “the unwashed,” or “completely untrustworthy.”¹⁶² Alexander ultimately concluded that the low-value designation “is an unavailing dodge.”¹⁶³

Applying Alexander’s rationale to hexes, curses, and spells, though, could cut either way because of the purported harm that a believer could assign to the speech while making a cultural judgment about both the speaker and the target. But ultimately the analysis should yield an answer that this speech should not be categorized as low- or no-value or unprotected.

158. *Id.*

159. *Id.*

160. Lakier, *supra* note 21, at 2173; see also P. Brooks Fuller et al., *Porn Wars: Serious Value, Social Harm, and the Burdens of Modern Obscenity Doctrine*, 28 AM. U. J. GENDER SOC. POLY & L. 121, 130–134 (2020).

161. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 603 (1986).

162. Larry Alexander, *Legal Theory: Low Value Speech*, 83 NW. U. L. REV. 547, 554 (1989).

163. *Id.*

Assessing the value of this type of speech is not the simplest task. On one hand, since *Chaplinsky*, courts have not had difficulty determining that fighting words or insults have little value in the marketplace of ideas.¹⁶⁴ Similarly, how can there be value in casting a spell or wishing bad things happen to another person? Standing alone, the isolated hex, curse, or spell would be random and somewhat untethered. Putting the speech into context could be part of a more complicated dispute, an aggravating or mitigating element to a criminal case.¹⁶⁵

However, witchcraft scholars describe a more powerful free speech component to this type of speech. Accusations of witchcraft or witch-hunts were not only part of overall societal control, particularly from organized churches throughout Europe and into the Americas, but also a mechanism used to control the poor and women.¹⁶⁶ Thus, if the crime of witchcraft was most commonly applied to poorer or marginalized members of a community,¹⁶⁷ then in some ways casting a spell could be viewed as speech equalizing the playing field, akin to Thomas Emerson's safety-valve theory.¹⁶⁸ Free speech as the great equalizer is an important theme across First Amendment jurisprudence.¹⁶⁹

One recent case further highlights the social implication looming under the surface of a free speech controversy: *Mahanoy Area School District v. B.L.*¹⁷⁰ Here, an aggrieved Pennsylvania high school

164. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992) (“[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.”).

165. See generally *George v. State*, 333 So. 3d 1022, 1037 (Ala. Crim. App. 2019).

166. EDWARD O. WILSON, *ON HUMAN NATURE* 181–82 (1978). Wilson details a common scenario where a poor woman asked a farmer for food and, after denying the request, the farmer faced crop failure, death, or some other misfortune. *Id.* Blaming the woman through the accusation of witchcraft sought to put an explanation on the unknown while making a societal judgment on members of the poorer underclass. *Id.*

167. See GUILLEY, *supra* note 35, at 79 (“Curses are believed to have more potency—and therefore more danger—when they are laid by persons in authority, such as priests, priestesses, or royalty; persons of magical skill, such as witches, sorcerers and magicians; and persons who have no other recourse for justice, such as women (in most societies), the poor and destitute and the dying.”).

168. See THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 11–14 (Vintage Books 1971) (1970).

169. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911–13 (1982) (holding that nonviolent civil rights protestors boycotting white businesses are entitled to the protection of the First Amendment) (“Through exercise of these First Amendment rights, petitioners sought to bring about political, social and economic change. Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.”).

170. 141 S. Ct. 2038 (2021).

sophomore cheerleader, Brandi Levy, vented her frustration with being passed over for the varsity team in place of an incoming freshman by posting a profanity-laced rant on social media.¹⁷¹ Levy's sense of powerlessness and frustration, with some underpinnings based on class and social status, influenced her speech and actions.¹⁷² Because of her offensive speech, school administrators punished her by suspending her from the team.¹⁷³

In holding for the student's free speech rights, Justice Breyer wrote:

Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection.¹⁷⁴

Attaching liability to speech could be a form of control. The abuse of libel law during the fight for civil rights was a common tactic to suppress critical speakers and journalists, as Professor Aimee Edmondson has explained.¹⁷⁵ Granted, journalism during the civil rights movement is not quite in the same vein as casting a spell. Witch trials and witch hunts were examples of "vast conspiracies or attempts to supernaturally subvert the social order, not coincidentally tied to both invisible violence (termed 'poison') and vulnerable communities."¹⁷⁶ These abuses also incorporated a blatant element of misogyny under the color of law.¹⁷⁷

171. *Id.* at 2043.

172. *See generally id.* Regarding the freshman student's selection for varsity, Levy's second post read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" *Id.* (alterations in original). Levy later described her reasoning for the posts: "I was frustrated, I was [fourteen] years old, and I expressed my frustration the way teenagers do today." Jeremy Roebuck, *A Pa. High School Cheerleader's Profane Snapchat Rant Didn't Warrant Suspension*, PHILA. INQUIRER (June 23, 2021), <https://www.inquirer.com/news/scotus-mahanoy-school-cheerleader-snapchat-brandi-levy-20210623.html>.

173. *Mahanoy*, 141 S. Ct. at 2043.

174. *Id.* at 2046.

175. AIMEE EDMONDSON, IN SULLIVAN'S SHADOW 66–68 (2019) (describing a case of a journalist who faced a specious libel lawsuit because "[h]er statement was a direct challenge to public authorities in the Deep South desperate to defend decades of racial segregation and keep blacks in their place as second-class citizens").

176. Bahkt & Palmer, *supra* note 17, at 126.

177. Cf. Caitlin R. Carlson, *Misogynistic Hate Speech and Its Chilling Effect on Women's Free Expression During the 2016 U.S. Presidential Campaign*, 14 J. HATE STUD. 97, 103–06 (2017–2018) (describing how the prevalence of misogynistic hate speech online and the lack of effective hate speech regulation has led women to self-censor, discouraged them from running for political office, and ultimately chilled their civic engagement).

One legal scholar wrote: “Women’s speech, particularly when it challenges the power and authority of men, has been prohibited, regulated, and punished from ancient times to the present.”¹⁷⁸

Another element to this discussion revolves around the speech as an extension of religious speech, which may be employed to raise the value of this speech by equating it with truly religious speech. Though this Article does not focus on the First Amendment religious elements as either free exercise or a branch of establishment, *Masterpiece Cakeshop*¹⁷⁹ and *Snyder v. Phelps*¹⁸⁰ inevitably link the two First Amendment issues.¹⁸¹ The religious aspect has been litigated in employment discrimination cases.¹⁸² More interestingly, there is a small body of First Amendment law dealing with witchcraft and the occult in prisons.¹⁸³

In *O’Bryan v. Bureau of Prisons*,¹⁸⁴ the Seventh Circuit provided a thoughtful analysis on a prisoner’s First Amendment challenge.¹⁸⁵ Though viewed through the First Amendment’s religion clause, a federal prisoner who practiced wicca, described as “benign witchcraft,” may clash with the Bureau of Prisons’ Policy Statements which prohibit “casting of spells/curses” because it could be disruptive and incite fights, the court explained.¹⁸⁶ The complaint here, under the Religious Freedom Restoration Act, was considered premature and required further inquiry by the district court.¹⁸⁷

178. Mary Anne Franks, *Witch Hunts: Free Speech, #MeToo, and the Fear of Women’s Words*, 2019 U. CHI. LEGAL F. 123, 133 (2019).

179. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018).

180. 562 U.S. 443 (2011).

181. See *supra* notes 25, 124–29 and accompanying text.

182. See, e.g., *Smith v. U.S. Dep’t of Homeland Sec.*, No. 12-cv-1087, 2018 WL 1626525 (N.D.N.Y. Mar. 30, 2018) (dismissing a religious discrimination claim by a TSA worker who argued she was fired for practicing wicca).

183. See, e.g., *Winford v. Frank*, No. 06-C-1000, 2008 WL 359728 (E.D. Wis. Feb. 8, 2008) (upholding a ban on prisoner access to books on satanism, which included a book on casting spells, because the prison’s ban on potentially disruptive or dangerous materials satisfied a legitimate state interest in the penological and security policies in prison); *Borzych v. Frank*, 439 F.3d 388 (7th Cir. 2006) (holding prison authorities did not violate an Odinst inmate’s First Amendment rights by denying access to religious books); *Carpenter v. Wilkinson*, 946 F. Supp. 522, 530 (N.D. Ohio 1996) (rejecting a Satanist inmate’s First Amendment argument that the denial of books violated his rights).

184. 349 F.3d 399 (7th Cir. 2003).

185. *Id.* at 399–400.

186. *Id.*

187. *Id.* at 401. Applying *Boerne v. Flores*, 521 U.S. 507 (1997), the court questioned whether the government policy unduly burdened the prisoner’s religious freedom and whether the policy furthered a compelling government interest and was the least restrictive means to furthering the government’s interest. *O’Bryan*, 349 F.3d at 400–02.

The Seventh Circuit wrote:

“If an inmate were to cast a spell on another inmate, for example, and the other inmate were to find out about it, a fight or other serious disruption could easily occur.” This is not as self-evident as the Bureau of Prisons may believe; relying on other inmates’ *reactions* to a religious practice is a form of hecklers’ veto.¹⁸⁸

The *O’ Bryan* court, like others, spoke to the uncertain nature of the underlying content. Though access to editorial content in prison and criminal or tort liability touch on different legal principles, they are linked here as two distinct examples of potential prior restraints on content that likely would not be joined by a compelling or legitimate government interest.¹⁸⁹ In a library case, however, a Louisiana school board’s removal of a book about witchcraft and voodoo violated the First Amendment as a content-based restriction devoid of a compelling government interest, a federal court ruled.¹⁹⁰

The First Amendment affords political speech the highest level of protection.¹⁹¹ Likewise, *Masterpiece Cake* and *Kennedy* illustrate that religious speech has taken on a broader appeal in recent years; categorizing hexes, curses, and spells in this category would transport them into perhaps an even more protective category. A broader definition of what constitutes religious speech seems equitable but is nonetheless controversial as well. As noted earlier in this Article, the chief exorcist in California who held a ceremony to counter the hex against Kavanaugh publicly said the controversy was not a free speech issue.¹⁹²

If this is not a free speech issue, then it raises an important First Amendment question of who is defining what constitutes free speech, regardless of assigning actual value to that speech. What makes a Catholic priest’s speech more valuable than that of a group of witches? Even if the witches’ speech is deemed low value, attaching liability for

188. *O’ Bryan*, 349 F.3d at 401.

189. It is well-accepted that First Amendment rights, and most other constitutional rights of prisoners, are more limited. See *Houchins v. KQED*, 438 U.S. 1, 5 n.2 (1978) (holding that news media has no constitutional right of access to jails) (“It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights. Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will . . . by media reporters”); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (allowing restrictions of prisoners’ religious expression out of security concerns); *Beard v. Banks*, 548 U.S. 521 (2006) (restricting prisoners’ access to information).

190. *Delcarpio v. St. Tammany Par. Sch. Bd.*, 865 F. Supp. 350, 362 (E.D. La. 1994).

191. See *New York Times v. Sullivan*, 376 U.S. 254, 270–71 (1964).

192. *Armstrong*, *supra* note 6 (“This is a conjuring of evil—not about free speech.”).

some type of unproven or unprovable harm is a significant deviation from core First Amendment values.

The bulk of *Masterpiece Cakeshop* falls under the Free Exercise Clause because the bakers in the case claimed the state policy violated their right to refuse clientele based on their religious objections to homosexuality.¹⁹³ Justice Kennedy also spoke to the “confluence of speech and free exercise.”¹⁹⁴ Explaining the free speech principles at issue, Justice Kennedy wrote:

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.¹⁹⁵

Thus, if the Court is going to find First Amendment speech and religious values in making or not making a cake, then the same rationale should apply to hexes, curses, and spells.

CONCLUSION

Elements of the supernatural permeate our legal system. Even if the legal system totally disclaims or disregards the supernatural, the occult or witchcraft, it implicitly incorporates references to a higher authority through oaths and sworn testimony.¹⁹⁶ Though the entire legal system, and in some ways the integrity of the government, hinges on such oaths to uphold the law in fear of a higher authority, the Federal Rules of Evidence also prohibit using religious beliefs to impeach a witness or refute credibility based on religious beliefs.¹⁹⁷

In the modern world, hexes, spells, and curses may seem like an anachronism to many. But in a multicultural country, and world, where people harbor an infinite range of beliefs, there will be conflict of beliefs

193. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1723–24 (2018).

194. *Id.* at 1723.

195. *Id.*

196. *Oath*, BLACK’S LAW DICTIONARY, 1071 (6th ed. 1990) (“An outward pledge by the person taking it that his attestation or promise is made under an immediate sense of responsibility to God.”); KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE 63 (John William Strong, ed., 4th ed. 1992) (“[T]he common law required as a qualification for taking the oath as a witness, the belief in a God who would punish untruth.”).

197. FED. R. EVID. 610.

and religious practices. Though magic, sorcery, and witchcraft are not part of the mainstream, they are still part of our society. Mobs of pitchfork-toting vigilantes or guardians of faith and community are generally part of a bygone era in most parts of the world, and most reasonably replaced by criminal law and civil tort actions.

The legal system is bound by due process, procedure, open court proceedings, and rigorous jury selection. Moreover, the Constitution and the First Amendment provide the protection and breathing room to accommodate even the most offensive and outrageous beliefs and speech.¹⁹⁸

Even so, fitting this type of speech into a specific category of speech, which would help determine where it fits into the spectrum of protected or unprotected speech, poses difficult questions. As a criminal matter under either incitement or true-threats doctrine, liability would rest in both intent and actual reasonable belief that some harm would result from the curse or spell. The same rationale would be required for civil liability, most appropriately under the intentional infliction of emotional distress tort.

As a matter of pure speech, hexes, curses, and spells should be afforded protection under the First Amendment. It is reasonable to consider this type of speech as a branch of religious speech, which the Supreme Court has recently elevated and even merged for “double” protection under the First Amendment, as the Court noted in *Kennedy*.¹⁹⁹

Perhaps *Mahanoy v. B.L.*, the case involving the Pennsylvania high school cheerleader, illustrates how the modern free speech rights of an offensive speaker should be protected. Though a high school cheerleader’s off-campus social media rant is a far cry from casting a spell, the underlying issues are not too far off. She exercised, or flexed, her First Amendment muscles, just like the Brooklyn witches. Perhaps in a different era, powerful opponents would have found a young cheerleader’s passionate, profanity-laced speech the sign of some greater evil and declared the speaker a witch rather than kicking her off the cheerleading squad. But today, free speech takes on a new meaning.

Justice Brandeis wrote in his concurrence in *Whitney v. California* that “[m]en feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.”²⁰⁰ These words are just as true today in discussing hexes, curses, and spells.

198. See generally Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 618 (1982) (arguing that free speech facilitates “self-realization”).

199. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022); see also *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24.

200. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).