
NEW YORK UNIVERSITY
JOURNAL OF LAW & LIBERTY

THE RIGHT TO DEFY CRIMINAL DEMANDS

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Craig is trying to force Danielle to do something, by explicitly or implicitly threatening to criminally retaliate if she doesn't comply with his demands—and if Craig makes good on the threats, third-party bystanders might suffer. Should the legal system require Danielle to comply, on pain of civil liability or even of criminal punishment? Or should Danielle be allowed to defy Craig's demands, even if this means a higher risk to bystanders?

These questions can arise in many different situations: negligence law, nuisance law, the heckler's veto, disturbing the peace law

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Thanks to Penelope Andrews, Alan Appel, Ahilan Arulanantham, Vera Bergelson, Dan Bussel, Sherry Colb, Beth Colgan, Sharon Dolovich, Ken Graham, Mark Greenberg, Lisa Grumet, Jill Horwitz, Jerry Kang, Russell Korobkin, Lynn LoPucki, Justin Murray, Doug NeJaime, Richard Re, Rebecca Roiphe, Richard Sherwood, Alex Stremitzer, Jonathan Varat, and Steve Yeazell.

more generally, the duty to retreat, the duty to comply with negative demands, and more. And they can arise with regard to many different criminal demands, whether political (e.g., terrorist threats aimed at abortion clinics, bookstores, and the like) or personal. This Article surveys all these areas, and suggests that the law should generally protect defiance of criminal demands against legal liability, even when such defiance can increase the risk that the criminal will harm third parties.

INTRODUCTION

Craig is trying to force Danielle to do something, by explicitly or implicitly threatening to criminally retaliate if she doesn't comply with his demands. And, as often happens, Craig's threatened retaliation would endanger not just Danielle but also innocent bystanders.

Should the legal system require Danielle to comply, on pain of civil liability or even of criminal punishment? Or should Danielle have, in effect, a right to defy Craig's demands, even if this means a higher risk to bystanders (and usually to herself)?

These questions arise in many contexts: threats to abortion clinics; attempts to impose a "heckler's veto" on unpopular speakers;[1] threats by robbers or kidnappers; attacks by jealous exes; and more. And they arise with respect to many legal rules that might punish such defiance, such as nuisance law, negligence law, and the criminal law of disturbing the peace and recklessness endangerment. A version of the problem also arises with respect to the criminal law duty to retreat and its lesser-known sibling, the duty to comply with negative demands.

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[1] Most narrowly, "the heckler's veto . . . occurs when police silence a speaker to appease the crowd and stave off a potentially violent altercation," Bible Believers v. Wayne Cnty., 805 F.3d 228, 234 (6th Cir. 2015) (en banc); "heckler" here thus refers to someone who threatens to attack the speaker and not just someone who interrupts the speaker. More broadly, a heckler's veto can refer to any situation where the law shuts down a speaker, or otherwise retaliates against a speaker, because some people who disagree with the speaker threaten to act violently.

In this Article, I'll try to bridge these topics, discussing the various facets of the problem together; I hope that showing these connections (which to my knowledge, had not been drawn before) can more clearly illuminate the core principles underlying the proposed right. My conclusion is that, on balance, courts and legislatures should generally recognize a "right to defy criminal demands": a right to refuse to comply with such demands, without being held civilly or criminally liable for the consequences of this defiance, and without losing other important rights (such as the right to lethal self-defense) because of such defiance. And I think the legal system does indeed usually recognize such a right, though not consistently, and without a recognition that the right transcends various legal doctrines. This Article is thus within the longstanding genre of works that infer a legal principle from a set of legal decisions that support the principle, even when the decisions haven't consciously articulated the principle.[2]

The Article will chart the potential scope of this right, and the authority for and against it. I begin by explaining the many fact patterns, mostly based on real cases, that raise the question whether a party has a right to defy (Part I). I then discuss how the right may arise as to negligence (Part II), nuisance (Part III), criminal law generally (Part IV), and the duties to retreat and comply (Part V). In Part VI, I discuss possible limits on the right to defy: for instance, perhaps the defiant person's behavior may still be punishable if it is independently wrongful (e.g., fighting words); if it has the specific purpose of provoking violence; if forbidding that behavior only modestly intrudes on liberty (one possible rationale for a limited duty to retreat); if the behavior is legal but constitutionally unprotected; if the defiance is unreasonable; and whether even if Danielle's behavior

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[2] Samuel Warren & Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890), is perhaps the most famous example.

may not be legally punishable, it should still lead to a lesser penalty for the criminal who is provoked by such behavior.

Finally, Part VII will ask whether it is legitimate for the law to require expensive precautions against potential violence by the Craigs of the world, short of requiring compliance with their criminal demands—for instance, by requiring threatened people or institutions to hire armed guards, put up physical barriers, or warn visitors or neighbors of the threat.[3] I think these precautions aren't as violative of the threat victims' dignity, because they don't enlist the state on the side of the criminal threatener. At the same time, courts and legislatures should be cautious about imposing such obligations, because they do let the threateners use the legal system to impose potentially massive costs on their victims. And, I'll argue, that is especially so when the duty is a duty to warn, which may intrude on the victims' privacy and lead people to shun them.

I. HOW DEFYING CRIMINAL DEMANDS MAY LEAD TO LEGAL RESTRAINTS

The law can impose liability for defying criminal demands in many different situations:

1. Danielle's abortion clinic has been firebombed in the past, by people who want it to close or at least leave town. Neighbors sue the clinic, claiming its operation is a nuisance, because it makes them fearful that future attacks will harm them as well.[4] If the neighbors win, that in effect means that Danielle had a legal duty to comply with the arsonists' demands (at

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[3] *See, e.g.*, Rocky Mountain Planned Parenthood, Inc. v. Wagner, 467 P.3d 287 (Colo. 2020).

[4] These are roughly the facts of McBrayer v. Governors Ridge Office Park Ass'n, Inc., 860 S.E.2d 58 (Ga. Ct. App. 2021), which led to a $1.5 million verdict in favor of the neighbors; the Court of Appeals reversed the verdict. I filed an amicus brief in this case on behalf of various advocacy groups and law professors (including myself), urging reversal.

least to the extent of moving to a place that may be more expensive for her, and less convenient for patients).

2. The clinic is indeed attacked again, and neighbors or visitors who are injured sue the clinic for having negligently increased the risk of such an attack. The same can of course apply to any controversial business or enterprise, such as a church, synagogue, or mosque; an animal experimentation facility; a political organization; or a bookstore that sells books that contain the Mohammed cartoons or other material that highly offends some people.[5]
3. A store is being robbed. Danielle, a store employee, refuses to go along with the robbers' demands that she turn over money, so the robbers injure a customer to accentuate those demands. The customer sues the store, claiming the employee's actions foreseeably increased the risk of the injury.[6] If the customer wins, that in effect means that Danielle had a legal duty to comply with the robber's demands.
4. Craig kidnaps Danielle's employee and demands ransom. Danielle refuses to pay, so Craig kills the employee; the employee's family sues Danielle for negligence, claiming that she had a duty to pay the ransom, as a facet of some possible duty to take reasonable steps to protect employees from foreseeable dangers.
5. Danielle and her fellow protesters carry signs insulting a religion. Craig and a group of his friends start throwing things at the protesters. The police order the protesters to leave,

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[5] *Cf. Charlie Hebdo Shooting: Belgian Bookstores Selling Magazine Sent Warning Letters; Muslim Leaders Condemn New Magazine Issue*, ABC NEWS (Australia) (Jan. 14, 2015, 1:08 PM) [https://perma.cc/M579-XQQ2] ("'I recommend that you do not spread these cartoons of our beloved Mohammed in this despicable Charlie Hebdo magazine, at the risk of reprisals against you and your horrible business,' the letters said . . . .").

[6] *See infra* Part II.B (discussing cases on which this hypothetical is based).

hoping to keep the confrontation from escalating,[7] and threaten to punish them with prosecution for breach of the peace or for resisting a lawful order if they don't comply.

A version of this problem also arises when Craig hasn't expressly demanded that Danielle do something, but rather when Craig obviously doesn't want Danielle to do it:

6. Danielle dances suggestively with a new lover in front of her estranged husband Craig (whom Danielle knows to be jealous). Craig shoots the lover, whose relatives sue Danielle for wrongful death, claiming her actions created a risk of injury by enraging Craig.[8] Again, their prevailing would mean that Danielle in effect had a duty to comply with Craig's implicit demands not to show romantic affection for others in front of him.
7. Danielle lets her niece stay at her home, because the niece is fleeing Craig, the niece's violent estranged husband. Craig comes to Danielle's house to attack the niece and Danielle, and the gardener gets caught in the crossfire. The gardener's relatives sue Danielle for wrongful death, claiming her actions created a risk of injury by foreseeably enraging Craig.[9]

And a version of this problem also arises with the "duty to retreat" that thirteen states still recognize in self-defense cases, and the

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[7] *See* Bible Believers v. Wayne Cnty., 805 F.3d 228, 239-40 (6th Cir. 2015) (en banc).

[8] This is based on Hurn v. Greenway, 293 P.3d 480 (Alaska 2013); *see also* Touchette v. Ganal, 922 P.2d 347, 357 (Haw. 1996); Starr v. Gregory, No. 53-2004CA-000161, 2004 WL 5213002 (Fla. Cir. Ct. Oct. 19, 2004); John C.P. Goldberg & Benjamin C. Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligent Enabling*, 44 WAKE FOREST L. REV. 1211, 1217 (2009) ("A woman is aware of her ex-boyfriend's violent jealousy, as well as his occasional appearances at a bar located in their small town. She nonetheless agrees to meet a date for a drink at the bar. If her ex-boyfriend shows up and proceeds to pummel her date, she is subject to liability [under the Restatement (Third) of Torts].").

[9] *Cf.* Rojas v. Diaz, No. B144346, 2002 WL 1292996, at *3 (Cal. Ct. App. June 12, 2002).

more general "duty to comply with a negative demand" that seven states still recognize. These "duties" don't threaten criminal punishment or civil liability just for defying a criminal's demands (whether the demands are just "leave," as in the duty to retreat, or "stop doing *X*" in the duty to comply). But the "duties" do provide that a victim who refuses to go along with certain demands is stripped of her legal right to use lethal force in self-defense should such force be necessary:

8. Danielle dances suggestively at a bar with a new lover in front of her estranged husband Craig. Craig demands that they stop, but they do not. Craig tries to knife Danielle, but she shoots him in self-defense. Danielle is then prosecuted, because state law provides that deadly force cannot be used in self-defense if "[t]he actor knows that he can avoid the necessity of using such force with complete safety . . . by complying with a demand that he abstain from any action which he has no duty to take."[10]
9. A racist mob demands that Danielle leave a place where she is lawfully present. She refuses, and she is attacked with deadly force; she defends herself with deadly force and is then prosecuted because she failed to retreat.[11]

All these scenarios involve a tension between two approaches to the risk of retaliatory violence. We might call one approach the *immediate pragmatism* approach:

- The unfortunate reality is that a criminal is threatening to

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[10] *See infra* note 106.

[11] This is based on the facts of Laney v. United States, 294 F. 412 (D.C. Cir. 1923). The issue can arise even with solo racist attackers, *see, e.g.*, Commonwealth v. Benoit, 892 N.E.2d 314, 327 (Mass. 2008) (concluding that self-defense was indeed unavailable in such a case).

retaliate against some lawful action *X*.

- That reality creates serious risks to bystanders.[12]
- This pragmatic concern has a moral component: the bystanders have the right not to be unreasonably endangered.
- Even innocent victims of the threat thus have a duty to try to minimize such risks, even if that constrains their liberty.

And we might call the opposite approach the *right to defy criminals' demands* approach:

- Everyone has the right to act without having to obey criminals' demands (or criminals' expected wishes, which would in effect be implied demands).
- The law shouldn't step in on the side of the criminal by adding the threat of criminal liability, civil liability, or liability for self-defense to the criminals' threats.
- This moral concern has a pragmatic component: by giving legal force to the criminal's unlawful demands, the law would encourage more such unlawful demands.
- Even innocent bystanders should thus have no claim on the innocent victims that would require the victims to obey the criminals.

In some of these situations, as will be discussed below, this right to defy has been recognized (though not under that name). In others, the right has been rejected. In still others, the matter is unsettled.

To foreshadow what I'll discuss in more detail below, I think that such a right is on balance sound: generally speaking, the legal system should let people insist on their liberty, in the face of violent threats, and in the face of the danger that is therefore created by such defiance. Contrary to a claim often made in favor of the duty to retreat,

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[12] Even self-defense against the threatener, as in the last two examples, can create a risk to bystanders who might get caught in the shootout when the threatener responds, or in any future cycle of retaliation.

the question isn't so much about letting people preserve honor or reputation or "manliness,"[13] but about letting them preserve liberty—freedom from domination by criminals—and the dignity that comes with such liberty.[14] Some may argue that this liberty and dignity comes at too high a cost, and ought to be restrained to protect bystanders, or even to protect the criminals. But whatever the right bottom line, we should acknowledge the cost of such a safety-first approach.[15]

To be sure, when our activities cause hazards to others, we often must cease those activities, at least if the magnitude of the hazard is seen as "unreasonable." We are expected to avoid off-loading those hazards onto our neighbors or our visitors. Thus, for instance, if our commercial establishment attracts vermin that then go onto neighbors' land, and there's nothing we can do stop it, we might have to close shop or move to an area where there are no neighbors nearby.[16]

But if our establishment attracts criminal enemies who try to force us to stop operating, and in the process the criminals create a

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[13] *See* State v. Abbott, 174 A.2d 881, 884 (N.J. 1961).

[14] In principle this would also apply to tortious demands: Say the abortion opponents in Example 1 above don't firebomb the clinic but instead just libel the clinic's neighbors, and the neighbors sue the clinic claiming that the clinic's continuing presence is a foreseeable cause of the libel; I'm inclined to say that there too the clinic shouldn't be held liable. But I'm not sure whether there would be libel liability in such a case. (Some libel cases allow lawsuits against an original libeler based on republication by third parties when such republication is "reasonably to be expected," RESTATEMENT (SECOND) OF TORTS § 576(c) (AM. L. INST. 1977), but I've seen none that allow lawsuits against a nonlibeler whose actions foreseeably lead to libels.) And more broadly, it would be a rare scenario where a demand would be merely tortious and not criminal and at the same time would threaten an innocent bystander in a manner for which the target of the demand would normally be legally liable.

[15] Though I don't claim that this dignitary interest is a general constitutional right as such (except in specific situations, such as speakers' or abortion clinics' refusal to obey shutdown demands), I do think it is a facet of liberty that the legal system ought to protect.

[16] *See, e.g.*, City of Atlanta v. Murphy, 391 S.E.2d 474 (Ga. Ct. App. 1990).

threat to our neighbors (whether as a deliberate tactic or just as a side effect of their attacks), we shouldn't have to give in to the criminals by closing or moving. To the extent that our behavior is a but-for cause of the criminal hazard to our neighbors, that is a hazard that our neighbors should have to bear, as part of the common danger all of us face from criminals. It is the job of law enforcement and the courts to prevent crime, chiefly by deterring and incapacitating criminals. If the law instead arms our neighbors or the police with the right to stop our behavior when criminals so demand (through threat of civil liability or criminal punishment), the law is arming criminals with an extra weapon against us.

The legal system needn't worry about incentive effects on animals (if garbage dumps have to move because they attract rats, this won't give an incentive to rats), but it should worry about incentive effects on humans (if abortion clinics have to close or move because arsonists threaten to burn them down, this will provide an incentive for more such threats). And having to do things to prevent harmful animal incursions doesn't undermine our dignitary interests the same way that having to comply with human criminals' demands does.

II. NEGLIGENCE

Let us return to our Danielle, whom Craig is trying to force to do something through threat of criminal attack. Danielle, like all of us, "ordinarily has a duty to exercise reasonable care when [her] conduct creates a risk of physical harm."[17] That includes a duty not to unreasonably increase the risk of criminal attack: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party."[18] Thus, for instance, Danielle could be sued for negligence if

[17] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7(a) (AM. L. INST. 2010).

[18] *Id.* § 19.

she hires someone who foreseeably criminally attacks her customers, or if she lends a dangerous weapon to someone who foreseeably uses it to attack someone.[19]

Say then that Danielle is aware that Craig is likely to violently attack her if she does *X* (is publicly seen with a new lover, continues to perform abortions, or sells a blasphemous magazine) or refuses to do *Y* (hand over the property that Craig is demanding). And say that bystander Paul is then injured in such an attack. The *Paul v. Danielle* lawsuit could easily be seen as raising a jury question as to whether Danielle is liable:

1. Danielle's conduct created a risk of physical harm to Paul. Though the conduct was not dangerous by itself, it became dangerous because of the threat of Craig's attack. And even if Danielle is being faulted for *not* acting, for instance by not turning over property to a robber, she may still have had a duty to prevent the risk of physical harm, for instance to customers of her business, such as Paul.[20]
2. This risk is foreseeable, so long as Craig has made such threats, has engaged in such attacks in the past, or is just known to Danielle to be a person who would be enraged by her conduct (e.g., an estranged husband whom she knows to be violently jealous).
3. Danielle's conduct would be the but-for cause of Paul's injury, since, had she complied with Craig's demands, it is more likely than not that Paul wouldn't have been injured.
4. It should therefore be up to the jury to decide whether Danielle acted reasonably in doing *X* or not doing *Y*, balancing the costs to her of complying with the demands against the

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[19] *Id.* § 19 illus. 2–3.
[20] *See, e.g.*, *id.* § 40 cmt. j.

benefits to Paul of avoiding Craig's violent attack.[21]

Consider some concrete cases, which I lay out below.

A. THE ESTRANGED SPOUSE'S IMPLICIT DEMANDS

1. Touchette v. Ganal

Mabel Ganal had an affair with David Touchette, and soon left her husband, Orlando Ganal, to move in with her parents.[22] Orlando then broke into the parents' home, murdered the parents, and injured Mabel and their son.[23] He drove to the Touchette family's home, blocked the doors, and set the house on fire, murdering four Touchette family members and severely injuring a fifth.[24] (David Touchette himself wasn't there.[25]) Orlando then set fire to his ex-employer's premises, though no-one was injured there.[26]

Touchette's sister, Wendy Touchette, then sued on behalf of her murdered relatives. She sued Mabel (among others), claiming that Mabel had acted negligently in provoking Orlando, and the Hawaii Supreme Court agreed that the case could go forward, because "Mabel had a duty to refrain from [her own] conduct that would create an unreasonable risk of harm to another through [Orlando] Ganal's conduct."[27] The allegation that Mabel "initiated and maintained a course of conduct which involved taunting and humiliating . . . Orlando . . . by flaunting her extra marital love affair with David

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[21] *Id.* § 8(b).

[22] Touchette v. Ganal, 922 P.2d 347, 348 (Haw. 1996). I generally refer to the parties by their last names, except when two parties share a last name, in which case I use the first name to avoid ambiguity.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* at 348-49.

[27] *Id.* at 355.

Touchette" sufficed to make out a case that Mabel acted unreasonably.[28]

The alleged "taunting and humiliating" included, in addition to Mabel "flaunting" the affair, her telling Orlando that Touchette was a better lover than he had been. (The court noted that Mabel wasn't being held liable for the omission of failing to prevent her husband's crime, but for her affirmative acts in provoking the crime.[29]) The case later settled for a six-figure amount, paid by Mabel's homeowner's insurance.[30] Some years later, a Florida trial court case followed *Touchette* in similar factual circumstances.[31] And the result fits the logic of modern tort law, as laid about above.[32]

To be sure, *Touchette* doesn't fit perfectly into the pattern I discuss in the Introduction (which is why my *Touchette*-based hypothetical alters a few elements): There is no allegation that Orlando had expressly demanded that Mabel not taunt him. Still, the case strikes me as quite analogous. Presumably Mabel knew that her jealous husband wouldn't want to hear about her new relationship and his own inadequacies, even if he had never expressly demanded that she not "taunt" him about such things. And the *Touchette* decision holds that people in Mabel's shoes have a duty (as part of their duty to avoid

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[28] *Id.* at 358.

[29] *Id.*

[30] Of course, such pretrial settlements are famously commonplace in civil cases, and are a reminder of how legal rules that open the door to liability can affect litigation even when no trial takes place.

[31] Starr v. Gregory, No. 53-2004CA-000161, 2004 WL 5213002 (Fla. Cir. Ct. Oct. 19, 2004) (denying a motion to dismiss based on allegations "that the Defendant flaunted her extra-marital affair and, in essence, incited and inflamed her husband, Timothy G. Gregory, to a 'murderous state'").

[32] The court expressly rejected the view that Mabel had a duty to control Orlando as her husband. *Touchette,* 922 P.2d at 355. Its rationale rested entirely on Mabel's having engaged in "conduct that would create an unreasonable risk of harm to another through Ganal's conduct," *id.*, by allegedly "flaunting her extra marital love affair with David Touchette" and "taunting and humiliating [Orlando] with respect to that affair," *id.* at 358.

creating unreasonable risks of harm to others) to avoid such behavior that fails to comply with such unstated demands backed by the threat of violence.

More broadly, under the logic of *Touchette*, a demand such as the one I hypothesize in the Introduction would even more clearly create a duty to comply: It would make even more foreseeable the possible harm to third parties if the demand is defied. (Note that *Touchette* doesn't turn on the special relationship between husband and wife; indeed, the court expressly rejected an argument that the law should recognize liability based on such a relationship.[33] The logic would apply equally to ex-spouses, or to unmarried estranged lovers.)

Of course, this decision simply left the matter to the jury; it didn't hold that the jury had to hold Mabel liable. Nonetheless, such denials of motions to dismiss will often lead to the case settling because of the risk of liability (and the expense of litigation)—that is what ultimately happened in *Touchette*. And such denials send a normative message about duty: The duty to take reasonable care may sometimes include a duty to obey criminals' demands, even if it's up to each jury to decide what was reasonable under the facts of the particular case. But I think this is the wrong normative message, for reasons stated in the case to which we will now turn.

2. Hurn v. Greenway

Carrie Randall-Evans was married to Jeffrey Evans, but the marriage wasn't going well.[34] Carrie was frightened of Jeffrey, who often

[33] The same would apply in situations involving property damage to third parties (e.g., arson, vandalism, and the like) that is factually caused by a defendant's provoking plaintiff; negligently causing property damage is of course also actionable under the negligence tort.

[34] Hurn v. Greenway, 293 P.3d 480, 482 (Alaska 2013) ("Carrie confided in Greenway that Jeffrey scared her"); *id.* ("Jeffrey threatened to 'beat the living [expletive deleted]' out of Carrie if she did not send him more money").

insulted and threatened her,[35] and she was staying at a friend's house to avoid him.[36] At the friend's house, she met Simone Greenway, and the two became close.[37]

Some time later, Carrie and Greenway were at Greenway's house, and Jeffrey (with whom Carrie had continued to have a relationship) was there as well, as was Bill Anthony, a friend of Greenway's.

> Carrie and Greenway sat at one end of the couch and held hands; Carrie appeared afraid but did not discuss why. Greenway said that Carrie sat next to her "like she wanted [Greenway] to protect her." Jeffrey asked Carrie and Greenway, "[W]hat would you girls do if somebody came in that door right now, after you?" Carrie and Greenway gave each other a high five and said, "[W]e'd kick his ass."
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> Carrie and Greenway began . . . dancing. While dancing, Greenway and Carrie kissed and touched each other. Greenway acknowledged that they were "laughing and joking and making fun out of [Jeffrey]" and that she was teasing Jeffrey "on purpose," with the intent of punishing him "because he was a jealous man." Greenway said that while she was laughing at Jeffrey she was attempting to express to Carrie the nonverbal message that "you don't have to be afraid. . . . [T]his is my domain, you don't have to

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[35] *Id.* at 488 n.40 ("Jeffrey [had] verbally abused Carrie and threatened to beat her, and Carrie was afraid for her life. On at least one occasion Carrie spent the night sleeping on a friend's floor because she was afraid of her husband. The record is silent as to physical abuse, but it is undisputed that their relationship was marked by threats and fear.").

[36] *Id.* at 481-82.

[37] *Id.*

> be afraid here." While being teased, Jeffrey "had no emotion, showed none whatsoever. He was stone cold, no emotion."[38]

Shortly after that, Jeffrey shot Greenway (who survived), and Anthony and Carrie, who died; Jeffrey then killed himself.[39]

David Hurn, the father of Carrie's two children, sued on their behalf; he sued both Jeffrey's estate (which settled for $800,000, but was unable to pay it) and Greenway. His claim against Greenway was that "Greenway was negligent when she made sexual advances towards Carrie Randall-Evans while her husband Jeffrey Evans was in the home."[40]

Now obviously Greenway and Carrie were doing something risky, especially given that they knew that Jeffrey had threatened Carrie before, and Carrie was afraid of him. Greenway had a legal duty to act reasonably when creating a risk to others; and but-for her actions, Jeffrey likely wouldn't have attacked Carrie (or at least wouldn't have attacked her as violently). Under the reasoning of *Touchette*, there likely would be a jury question as to whether Greenway acted unreasonably.

But the Alaska Supreme Court rejected the Hawaii Supreme Court's views. First, it concluded that "Jeffrey's violence was not foreseeable," even though "Greenway knew that Jeffrey had threatened Carrie with physical harm in the past; Carrie was afraid that Jeffrey would kill her; Jeffrey was a jealous man; on the night of the murder Jeffrey sometimes wore a 'stone cold expression' that betrayed no emotion; and prior to Greenway's dance, he had issued a veiled threat: 'What would you girls do if someone came in that door right now, after you?'"[41] "It is not clear," the court held, "that

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[38] *Id.* at 482.
[39] *Id.* at 481.
[40] *Id.* at 483.
[41] *Id.* at 488.

homicide could ever be the foreseeable result of mere teasing, and Greenway could not foresee such violence here."[42]

But the court didn't stop there, perhaps in part because foreseeability is usually a question for the jury; rather, it held that Simone's duty should be limited, as a matter of law. Plaintiff argued that the court should "reduce domestic violence in this state by imposing a duty to 'refrain from teasing or bullying someone known to be potentially violent,'" but the court refused "to give victims the duty to prevent their own abuse and then hold them liable when they fail."[43]

> [I]f Greenway is liable for taunting an abusive husband, it follows that victims themselves may be liable for provoking their partners if the result is harm to a third party. . . . . [Such liability is] particularly troubling where, as here, the "provocation" is an act of resistance. [Footnote: The sparring, dancing, and teasing at issue were a direct response to Jeffrey's not-so-veiled threat to Carrie and Greenway's physical safety . . . . While they were sparring and dancing and laughing at Jeffrey, Greenway was expressing to Carrie: "[T]his is my domain, you don't have to be afraid here."][44]

"We reject the idea that victims are responsible for the violence they endure in the home, and we will not blame them for their otherwise reasonable actions simply because those actions foreseeably result in

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[42] *Id.*

[43] *Id.* The court mentioned *Touchette* briefly and distinguished it on the grounds that "the allegations in that case"—"that the wife taunted and humiliated the husband and caused him 'to suffer severe and extreme emotional and mental distress and depression'—"were more severe than the uncontested facts in this one." *Id.* at 486 n.23. But it seems to me that the logic of *Hurn* would justify the opposite result from *Touchette* even on *Touchette*'s facts.

[44] *Id.*

violence."[45] It seems to me this logic is correct and can fit negligence law in two possible ways.

First, one could say that, as a matter of law, Greenway's conduct was not unreasonable. Perhaps nonviolent "resistance" to "abuse" is never unreasonable—maybe because the dignitary burden of having to avoid such resistance would be too great. [46]

Second, one could conclude that there ought to be a limitation to the normal duty "to exercise reasonable care when [your] conduct creates a risk of physical harm"[47]:

> In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.[48]

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[45] *Id.*

[46] For another example of resistance, though one that has fortunately not led to a murder, *see* Letitia Stein & Colleen Jenkins, *Mohammad Cartoonist Says U.S. Police Killing of Two Gunmen 'Justice'*, REUTERS, May 4, 2015 [https://perma.cc/4Z6B-WVZX] ("For the cartoonist whose portrait of Mohammad won a Texas contest, the police killing of two gunmen outside the meeting place was justice. . . . [Bosch] Fawstin's winning entry depicts a sword-wielding Prophet in a turban shouting, 'You can't draw me.' In reply, a cartoon bubble portrays the artist, his hand grasping a pencil, as saying, 'That's why I draw you.'"); *cf.* John F. Trent, *Cartoonist and Graphic Novelist Bosch Fawstin Faces Numerous Death Threats After Drawing Muhammed*, BOUNDING INTO COMICS, Sept. 10, 2018, [https://perma.cc/H9B8-ANDM]; *2005 Will Eisner Comic Industry Awards*, HAHN LIBRARY [https://perma.cc/ENY2-J748] (noting that Fawstin's work received an award). Fawstin's defiance may stem in part from his being "an ex-Muslim atheist." Robert L. Jones, *Bosch Fawstin: Infidel Artist*, THE ATLAS SOC'Y (Mar. 1, 2018) [https://perma.cc/HD8F-EL48]. *Cf. Stop the Cartoonist Bosch Fawstin Who Draws Prophet Muhammad (Peace Be Upon Him)*, CHANGE.ORG [https://perma.cc/2734-BKJY] (petition with almost 50,000 signatures demanding that Instagram remove Fawstin's account).

[47] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7(a).

[48] *Id.* § 7(b).

This should, I think, be one of those exceptional cases, with a right to defy criminals—a right not to have to adjust one's behavior to obey a criminal's implicit demands—making up this "countervailing principle or policy."

3. Rojas v. Diaz

Patricia Diaz was fleeing her abusive husband, David Alvarez, "who had physically and emotionally abused Patricia and threatened to kill her."[49] Patricia's aunt, Celia Diaz, let Patricia and Patricia's sister Veronica Diaz stay with her, though she "made it clear they could only stay at her house for three days because she was concerned Alvarez might go after Patricia, and she 'didn't want any problems.'"[50] Indeed, on the third day, David Alvarez came to the house and killed four people who were there (but not Patricia and Veronica, who had left that morning).[51] One of the murder victims was Manuel Rojas, who had done some gardening for Celia earlier that day and had come back for a drink of water.[52]

Rojas's family sued Celia for negligently failing to warn Rojas of the danger posed by Alvarez (so that, perhaps, Rojas might have skipped coming to mow the lawn while Veronica was there and the threat from Alvarez was most serious). The Court of Appeal held that this didn't state a claim, because the attack by Alvarez wasn't sufficiently foreseeable: though Patricia "was aware of Alvarez's propensity for violence and that he had threatened to kill Patricia," and was therefore afraid of Alvarez generally, there wasn't enough basis to foresee that Alvarez would come to Diaz's home and "rob, stab and shoot [its] occupants."[53] And this might have reflected the California

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[49] Rojas v. Diaz, No. B144346, 2002 WL 1292996, at *1 (Cal. Ct. App. June 12, 2002).
[50] *Id.*
[51] *Id.* at *1-2.
[52] *Id.*
[53] *Id.* at *3.

rule that "third party criminal acts [should be analyzed] differently from ordinary negligence, and require us to apply a heightened sense of foreseeability before we can hold a defendant liable for the criminal acts of third parties."[54]

But a similar scenario can easily arise when an attack is indeed foreseeable, even under a heightened standard, and when the alleged negligence wasn't just a failure to warn but the decision to harbor a stalking victim. Say, for instance, that:

- Alvarez had actually tried to shoot Patricia in the past (so a subsequent attempt to kill was much more foreseeable);
- Celia had decided to let Patricia stay indefinitely;
- Alvarez came to Celia's house, shot at Patricia, and injured a tenant or neighbor of Celia's; and
- the injured party sued Celia, claiming that letting Patricia stay at her house unreasonably increased the risk to tenants and neighbors.

This would squarely raise the question with which this Article deals: should Celia indeed be liable for defying Alvarez's threats?[55] And, for the reasons given above, I think the answer to that question should be "no"; all of us should have the right to shelter our relatives—or, for that matter, even strangers—when they are in danger,

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[54] Wiener v. Southcoast Childcare Ctrs., Inc., 88 P.3d 517, 524 (Cal. 2004) (citing Robinson v. Six Flags Theme Parks, Inc., 75 Cal. Rptr. 2d 838 (Ct. App. 1998)); *cf.* Fiala v. Rains, 519 N.W.2d 386, 387-89 (Iowa 1994) (holding that it was not foreseeable that an abusive "disgruntled boyfriend" would be waiting to attack another man that his girlfriend brought home one night, because "No evidence was presented of threats to [plaintiff] Fiala by [boyfriend] Moeller or of any known actions by Moeller immediately preceding the assault that would alert [defendant] Rains to a pending danger"); England v. Brianas, 97 A.3d 255 (N.H. 2014) (similar); Patzwald v. Krey, 390 N.W.2d 920 (Minn. Ct. App. 1986) (similar).

[55] *Cf.* Strahin v. Cleavenger, 603 S.E.2d 197, 206, 208-09 (W. Va. 2004).

without having legal liability added on top of the risk of criminal violence.

B. THE ROBBER'S EXPLICIT DEMANDS

Let's return to situation 3 from the Introduction: Craig comes to rob Danielle's store; he is demanding money, and Danielle has reason to think that, if she doesn't comply, Craig will injure some of the patrons. Does this make Danielle legally liable if she refuses to comply, on the theory that she has an affirmative duty to protect her business visitors,[56] and failing to give in to the demands violates that duty? No, several courts have ruled, expressly recognizing a "no duty" rule. The most prominent case is *Kentucky Fried Chicken of California, Inc. v. Superior Court* ("*KFC*"), from the California Supreme Court[57]: "[A] shopkeeper does not have a duty to comply with the unlawful demand of an armed robber that property be surrendered. . . . Recognition of a duty to comply with an unlawful demand would be contrary to public policy as it would encourage similar unlawful conduct."[58] Though property owners must generally exercise reasonable care to protect their visitors, "in particular situations a more specific standard may be established by judicial decision."[59]

The court pointed to several appellate precedents from other states that so held.[60] Part of the court's rationale was pragmatic:

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[56] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 40.

[57] Ky. Fried Chicken of Cal., Inc. v. Super. Ct., 927 P.2d 1260 (Cal. 1997).

[58] *Id.* at 1262.

[59] *Id.* at 1266.

[60] Yingst v. Pratt, 220 N.E.2d 276, 279 (Ind. App. 1966) (en banc); Schubowsky v. Hearn Food Store, Inc., 247 So. 2d 484, 484 (Fla. Dist. Ct. App. 1971); Bennett v. Estate of Baker, 557 P.2d 195, 198 (Ariz. Ct. App. 1976); Helms v. Harris, 281 S.W.2d 770, 771–72 (Tex. App. 1955); Adkins v. Ashland Supermarkets, Inc., 569 S.W.2d 698, 699-700 (Ky. Ct. App. 1978); Bence v. Crawford Sav. & Loan Ass'n, 400 N.E.2d 39, 41-42 (Ill. App. Ct. 1980); Boyd v. Racine Currency Exch., Inc., 306 N.E.2d 39, 42 (Ill. 1973).

> [T]he public interest would not be served by recognition of a duty to comply with a robber's demands. . . . [W]e are not satisfied that persons who commit armed robbery would not become aware of and be encouraged by the existence of such a duty. Moreover, we have no basis upon which to conclude that compliance actually prevents injury to robbery victims. The public as a whole is much better served if would-be robbers are deterred by knowledge that their victims have no legal duty to comply with the robber's demands and are under no duty to surrender their property in order to protect third persons from possible injury.[61]

And part was rights-based:

> We agree with KFC that no duty to comply with a robber's unlawful demands should be imposed . . . . Both article I, section 1 of the California Constitution and Civil Code section 50 recognize the right of any person to defend property with reasonable force. . . . Recognizing a duty to comply with an unlawful demand to surrender property would be inconsistent with the public policy reflected in article I, section 1 of the California Constitution and Civil Code section 50. . . . Simple refusal to obey does not breach any duty to third persons present on the premises.[62]

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[61] *Ky. Fried Chicken*, 927 P.2d. at 1270.

[62] *Id*. at 1269-70. One might make a different argument against liability: that the KFC employee's actions were undertaken in the heat of an extraordinarily stressful situation and therefore ought not be second-guessed by a judge or jury. Some states expressly take such an approach as to emergencies generally, usually under the rubric of the "sudden emergency" doctrine (also known as the "imminent peril" doctrine): "[A] person who . . . is suddenly and unexpectedly confronted with . . . imminent danger . . . is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." Abdulkadhim v. Wu, 266 Cal. Rptr. 3d 636, 639 (Ct. App. 2020) (cleaned up).

Three of the seven Justices, however, dissented, refusing to hold that "a business proprietor is *never* required to subordinate any of his own property interests—no matter how insignificant the object and no matter how slightly it is jeopardized—to his customers' safety—no matter how many they are and no matter how gravely they are threatened."[63] "'Inalienable rights'" to defend property, the dissenters reasoned, "are not ipso facto absolute rights."[64]

And one appellate case I know of seems to support the dissenters' view, though on peculiar grounds. In *Massie v. Godfather's Pizza*,[65] two men robbed a pizza store, and threatened to rape an employee if the manager didn't turn over the money. When the manager refused to comply, they did indeed rape the employee. She sued the store, and the court allowed the case to go forward. But the court relied in part on the restaurant's stated policy of complying with robbers, which "created [Godfather's] own duty to the public," and didn't more closely confront the arguments that *KFC* would later make, or that the cases *KFC* cited had earlier made.[66]

To be sure, *KFC* has been controversial, for two reasons. First, the majority's reliance on defense of property is perplexing given that the case didn't involve "active resistance to a robbery," and indeed

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But see Bedor v. Johnson, 292 P.3d 924, 928-29 & n.2 (Colo. 2013) (en banc) (abolishing the doctrine and citing other states that have done so). To borrow a phrase from a different context (self-defense law), perhaps "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921). But that was not the court's rationale in *KFC*; and I think cases like McBrayer v. Governors Ridge Office Park Ass'n, Inc., 860 S.E.2d 58 (Ga. Ct. App. 2021) (the abortion clinic nuisance case) suggest that the right to defy criminals' demands should extend beyond reactions to sudden threats, and should extend to situations where defiance does indeed stem from reflection.

[63] *Ky. Fried Chicken*, 927 P.2d at 1270 (Mosk, J., dissenting).

[64] *Id.* at 1271.

[65] 844 F.2d 1414 (10th Cir. 1988).

[66] Query whether focusing on the defendant's own policies is a sensible approach to duty questions (regardless of whether it might be apt as to breach-of-duty or foreseeability questions).

the court expressly declined to consider what would happen had it involved such active resistance. The case involved simply a claimed right to passively refuse to comply.[67] And, second, to quote one criticism, "*KFC* held, not only that the store's property rights outweighed the lives of those in the store, but also that the property interest in the small amount of money in the cash register—perhaps $150—outweighed the lives of even a large number of customers."[68]

But I don't think that the court was simply saying that people can value their property above others' lives. Rather, it was arguing that, first, in the aggregate, putting the force of law behind robbers' demands will increase robberies and thus jeopardize even more lives. And second, to the extent it cited the right to defend property, I think it was doing so to support not a right to protect property as such, but rather the dignitary right to refuse to "comply with an unlawful demand" (even a demand that seeks only property).

In this respect, *KFC* fits well, I think, with the no-duty rationale of *Hurn v. Greenway*.[69] It would be wrong for the law to restrict Greenway's liberty "by imposing a duty to 'refrain from teasing or bullying someone known to be potentially violent.'"[70] Likewise, it would be wrong for the law to restrict KFC employees' liberty by imposing a duty to refrain from provoking someone known to be potentially violent. "[Such liability is] particularly troubling where, as here, the 'provocation' is an act of resistance."[71]

To be sure, Greenway was in her own home, and was refusing to comply with Evans' implicit demand to stop showing affection to a

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[67] *Ky. Fried Chicken*, 927 P.2d at 1262. The court held that it "need not decide if that right [to reasonably defend property] is qualified by the duty to avoid injury to third persons or if a duty exists to avoid physical resistance that might provoke a robber into carrying out a threat to harm third persons," because the facts involved pure refusal to comply and not active resistance. *Id.* at 1270.

[68] Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. CAL. L. REV. 265, 321 (2006).

[69] *See supra* Part II.A.

[70] Hurn v. Greenway, 293 P.3d 480, 488 (Alaska 2013).

[71] *Id.*

friend, a demand motivated by jealousy; the KFC employee was in his workplace and was refusing to comply with the robber's explicit demand to hand over money, a demand motivated by greed. Perhaps the value of being able to kiss a friend while dancing is greater than $150. But at bottom, I think, the KFC employee's refusal wasn't about the money—it was about a refusal to obey criminal demands.

On balance, then, I think that the *KFC* majority, and the earlier cases that it followed,[72] was correct. One can doubt the extent to which robbers would have practically been encouraged had the *KFC* dissent prevailed. I expect that, even to the extent that they know what the law is in their jurisdiction, they might think the clerk's actions will be more affected by the threat of being killed than the threat of being fired for violating a store's comply-with-demands policy. But the rights-based argument strikes me as sound: the law shouldn't force either the clerk or Greenway to comply with a criminal's demands.

C. RANSOM DEMANDS

A robber's demand, "Give me the money or I'll kill/rape/injure your coworker/customer," is closely linked to a ransom demand. Surprisingly, there appears to be no caselaw on whether an employer has the duty to pay ransom if an employee is kidnapped (or else risk negligence liability).[73] Nor is there any caselaw on whether a company has the duty to pay ransom if hackers break into its computers

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[72] *Ky. Fried Chicken*, 927 P.2d at 1266-69 (citing cases).

[73] Lawsuits against insurers that had sold specialized kidnapping-for-ransom policies, arguing that the insurers failed to properly handle the ransom, *cf.* IAP Worldwide Servs., Inc. v. UTi United States, Inc., No. Civ. A. 04-4218, 2006 WL 305443 (E.D. Pa. Feb. 8, 2006) (dealing with one such lawsuit related to property damage), raise different questions related to contractual obligations, *see, e.g.*, Gotthard Gauci, *Piracy and Its Legal Problems: With Specific Reference to the English Law of Marine Insurance*, 41 J. MAR. L. & COM. 541, 553 (2010). I speak here of noncontractual duties.

and threaten to release customer data. (Assume the defendants took reasonable care in protecting their employees and securing their computers at the outset, so the company isn't liable for its failure to prevent the crime at the outset, but the crime took place despite that reasonable care.)

The logic of the *KFC* decision suggests that there too the target of the ransom demand wouldn't have a duty to comply. Indeed, the concern that "[r]ecognition of a duty to comply with an unlawful demand would be contrary to public policy as it would encourage similar unlawful conduct"[74] may be especially apt in ransom cases.

A typical robber of a fast-food restaurant may often not engage in careful risk-benefit balancing and may likely be unaware of the legal pressures under which such businesses are laboring. But kidnappers and ransomware hackers are more likely to be sophisticated planners, so encouraging ransom payments may well increase the incentive to commit such crimes.

For this reason, some countries have tried to outlaw ransom payments.[75] Some U.S. states are considering doing the same,[76] and the FBI Director has likewise urged companies to stop paying ransom to hackers.[77] But even if ransom payments aren't legally forbidden, the law should not in essence demand them.[78]

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[74] *Ky. Fried Chicken of Cal., Inc.*, 927 P.2d 1260, 1262 (Cal. 1997).

[75] *See, e.g.*, Hargrove v. Underwriters at Lloyd's, London, 937 F. Supp. 595, 600-03 (S.D. Tex. 1996) (discussing Columbian law, which was partly but not entirely invalidated by the Columbian Constitutional Court).

[76] Cynthia Brumfield, *Four States Propose Laws to Ban Ransomware Payments*, CSO ONLINE (June 28, 2021, 2:00 AM) [https://perma.cc/XTM8-EUU4].

[77] Sarah N. Lynch, *FBI Director Wray Urges Companies Stop Paying Ransoms to Hackers*, REUTERS (June 23, 2021, 4:36 PM) [https://perma.cc/55N4-7SSG].

[78] And to the extent that such crimes are committed by criminal organizations, paying ransom can help fund future crimes, including in some instances terrorism. Indeed, some such ransom payments are already outlawed by American law if they are known to go to entities that are subject to various governmental sanctions. *See* Meadow Clendenin, *"No Concessions" with No Teeth: How Kidnap and Ransom Insurers*

III. NUISANCE

A landowner creates an actionable private "nuisance" for neighbors if it foreseeably "significant[ly] harm[s]" the neighbors' "use and enjoyment of land,"[79] and its actions are "unreasonable"[80]—i.e., if:

> (a) the gravity of the harm [inflicted on neighbors] outweighs the utility of the actor's conduct, or
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible. . . .[81]
>
> The question is . . . whether reasonable persons generally, looking at the whole situation impartially and objectively,

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and Insureds Are Undermining U.S. Counterterrorism Policy, 56 EMORY L.J. 741 (2006); Nimrod Kozlovski, *Ransomware Victims Are in the Eye of the Storm*, CTECH (Nov. 18, 2020, 8:57 AM) [https://perma.cc/7G3Y-SX43]; Andreas Schotter & Mary Teagarden, *Blood Bananas: Chiquita in Columbia* (Ariz. State Univ. Thunderbird School of Global Mgmt. case study A09-10-0012). Thanks to Dalit Ken-Dror Feldman and Barak Orbach for pointing me to this issue.

There are two other possible distinctions between the ransom situation and *KFC* that might point in different directions. On one hand, robberies, as even the *KFC* dissent noted, "are stressful and unpredictable encounters, frequently fast paced, in which those being robbed are forced to decide and act, often instantaneously, upon necessarily incomplete information about the situation that confronts them." *Ky. Fried Chicken*, 927 P.2d 1260, 1273 (Cal. 1997) (Mosk, J., dissenting). This may call for more latitude in judging which reactions are "reasonable" under the circumstances; perhaps ransom demand targets have enough time for reflection that they don't require such extra latitude. On the other hand, ransom demands can be for millions of dollars, not just the likely small amount of cash in the till. On balance, I don't think these distinctions should make a legal difference.

[79] RESTATEMENT (SECOND) OF TORTS § 821F (AM. L. INST. 1979); *id.* § 821D. Nuisance is an intentional tort, but the defendant doesn't have to intend to interfere with another's use and enjoyment of land; it merely has to be acting intentionally, rather than by accident.

[80] *Id.* §§ 821F, 822(a).

[81] *Id.* § 826.

> would consider it unreasonable. Consideration must be given not only to the interests of the person harmed but also for the interests of the actor and to the interests of the community as a whole. Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards.[82]

And a business can be a nuisance when its conduct foreseeably leads to criminal behavior by third parties, such as its patrons.[83]

This definition is broad enough to encompass situations where Danielle's business (or she herself) is known to be targeted for violence—perhaps she has already been attacked, either once or more often—and her neighbors are afraid they will get caught in the crossfire. Indeed, this is what happened in *Governors Ridge Office Park Association v. McBrayer*, where neighbors sued an abortion clinic owner for nuisance, partly on the grounds that:

> [McBrayer] knowingly brought with [him] a substantial risk of physical harm and property damage to [neighbors], [and] instilled a fear that a clinic of Dr. McBrayer might be bombed again, and their physical safety, lives and buildings might be threatened by activities such as the arson fire-bombing in May 2012 of the clinic in the Park operated by [McBrayer].[84]

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[82] *Id.* § 826 cmt. c.

[83] Commonwealth v. Graver, 334 A.2d 667 (Pa. 1975) (bar); Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs., 712 P.2d 914 (Ariz. 1985) (soup kitchen); Atkinson-Barr v. Agoura Pony Baseball, No. B159759, 2003 WL 21640915 (Cal. Ct. App. July 14, 2003) (youth baseball). Indeed, some cities have passed ordinances that hold landlords liable for excessive 911 calls to their properties, on the theory that crime against their tenants—and not just crime by their tenants—is a form of nuisance. *See, e.g.*, Watson v. City of Maplewood, Mo., No. 4:17CV1268 JCH, 2017 WL 4758960 (E.D. Mo. Oct. 20, 2017) (refusing to dismiss a First Amendment challenge to such an ordinance).

[84] Brief of Appellees at 5, McBrayer v. Governors Ridge Office Park Ass'n, Inc., 860 S.E.2d 58 (Ga. Ct. App. 2021) (No. A21A0262).

A jury awarded the neighbors $1.5 million. (For an overseas zoning law analog, consider the Australian decision upholding a refusal to allow a building permit for a synagogue because it could be a terrorist target, given "[t]he threat situation with respect to Jewish communities around the world and Australia."[85]) And an anti-abortion activist group, Operation Rescue, hailed this as a means for fighting abortion clinics more generally: the case, Operation Rescue wrote, "gives other office park associations a template to follow when abortion businesses move in and cause disruptions. . . . We urge office parks where abortion businesses are located to sue for nuisance they cause."[86]

They (the abortion clinics) cause the nuisance, Operation Rescue was arguing—not the protesters (such as Operation Rescue members) who come to protest, or the arsonists who try to or threaten to burn down the clinic and thus endanger its neighbors. And while the Operation Rescue statement of course didn't urge violent attacks or threats, the logic of the decision created an incentive for such attacks or threats—after all, the office parks' suit for the "nuisance [the clinics] cause" relies in large part on the presence of such criminal conduct on the part of the anti-abortion movement's violent fringe.[87]

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[85] *Friends of Refugees of Eastern Europe v Waverley Council*, [2017] NSWLEC 1404, ¶¶ 51, 56, 64 (Austl.).

[86] Cheryl Sullenger, *Abortionist Slapped with $1.5 Million Judgment for Causing Nuisance in Business Park*, OPERATION RESCUE (Sept. 26, 2019) [https://perma.cc/Y3H3-KHFE] (quoting Operation Rescue's president).

[87] To be sure, the legal system does try to diminish such incentives in other ways, for instance by criminally punishing the attacks or threats (though note that anonymous threats can be very hard to track down and therefore punish), or by enhancing the sentence for such behavior when it is aimed at preventing certain important activities. But I think the legal system should still try to avoid implementing rules that tend to increase such incentives.

But the Georgia Court of Appeals reversed the verdict, relying in part on something like a right to defy[88]:

> If we were to hold that a legally-operated abortion clinic cannot even operate in a commercial office park zoned for medical practices without constituting a nuisance we would be, in effect, holding that such clinics cannot properly operate anywhere. As amici curiae correctly point out, such a holding could be used to expose a broad array of legal businesses and institutions to nuisance liability due to the fact that some find them controversial and some will protest their very existence. Both legal protestors and criminals have caused disruption around a multitude of business and institutions, such as gun shops, fur retailers, Chick-Fil-A restaurants, police departments, synagogues, statehouses, Black churches, adult entertainment establishments, and mosques, to name a few. Under the common law, property ownership in Georgia does not guarantee only ideologically-aligned neighbors whose business practices will cause no upset or attract no controversy, and we will not hold otherwise.[89]

One way of fitting this into negligence law is as an implicit holding that refusing to go along with criminals' demands is per se not "unreasonable"; to quote the Restatement:

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[88] The court also concluded that, under Georgia law, nuisance liability for the misbehavior of third parties may require a showing of "control" over those parties, and thus be limited to misbehavior by people who are or have been the business's patrons—not by the business's enemies.

[89] McBrayer v. Governors Ridge Office Park Ass'n, Inc., 860 S.E.2d 58, 63 (Ga. Ct. App. 2021). The cited amicus brief was filed by me, together with local counsel Darren Summerville, on behalf of various law professors, a Second Amendment advocacy group, and a First Amendment advocacy group. Brief Amici Curiae of Law Professors, the Firearms Policy Coalition, and the Georgia First Amendment Foundation, *McBrayer*, 860 S.E.2d 58 (Ga. Ct. App. 2021) (No. A21A0262).

> In respect to certain types of intentional invasion, there has been a crystallization of legal opinion as to gravity and utility, with the result that the invasions are held to be reasonable or unreasonable as a matter of law. . . . [Thus,] a series of judicial decisions may establish a rule of law to the effect that certain types of interference with residential uses of land in strictly residential districts constitute unreasonable invasions when the interferences are caused by public garages, mortuaries or some other particular type of business enterprise.[90]

IV. DISTURBING THE PEACE/DISORDERLY CONDUCT/RESISTING LAWFUL ORDERS AND THE HECKLER'S VETO

It is generally a crime—disturbing the peace or disorderly conduct—to engage in offensive behavior "tending reasonably to arouse alarm, anger, or resentment in others" in public.[91] Police officers thus generally have the power to order people to stop such behavior, [92] in order to prevent a fight.

This is the font of the "fighting words" doctrine, which allows people to be punished for personal insults that tend to lead to a fight.[93] The Court has famously held that such "epithets [and] personal abuse" are constitutionally unprotected, because they both "tend to incite an immediate breach of the peace" and "are no essential part of any exposition of ideas, and are of such slight social value

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[90] RESTATEMENT (SECOND) OF TORTS § 826 cmt. e (AM. L. INST. 1979). Note, however, that the Georgia Court of Appeals stressed that the abortion clinic in the Park had only been criminally attacked once. *McBrayer*, 860 S.E.2d at 64. Query whether the court's analysis would apply if the attacks had happened more often.

[91] *See, e.g.*, MINN. STAT. § 609.72 subdiv. 1(3) (2022).

[92] *See, e.g.*, CAL. PENAL CODE ANN. § 148.

[93] Gooding v. Wilson, 405 U.S. 518, 525–28 (1972), makes clear that this is in fact limited to face-to-face personal insults.

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."[94]

But the logic of the disturbing-the-peace theory could also apply to any speech that people find offensive enough to threaten a fight over, including political or religious speech that doesn't include personal insults—for instance, sharp criticisms of Islam at an Arab International Festival, which led to audience members "throwing plastic bottles and other debris."[95] This in turn sometimes leads police officers to order the speakers to stop, on the theory that "you are a danger to public safety right now"; "your conduct especially is causing this disturbance and it is a direct threat to the safety of everyone here"; "part of the reason they throw this stuff . . . is that you tell them stuff that enrages them."[96] "If you don't leave we're gonna cite you for disorderly."[97]

But courts have generally rejected this latter theory on the grounds that the theory would wrongly implement a "heckler's veto"[98]: "police cannot punish a peaceful speaker as an easy alternative to dealing with a lawless crowd that is offended by what the speaker has to say."[99] The speaker is free to defy the hecklers' threats, even when such defiance may lead to attacks, fights, and the need for more police protection.

And the rationale for such protection stems not just from the particular speaker's free speech rights, but also from a desire to protect other speakers in the future: if speakers could be arrested because their speech led to threatening heckling, "hecklers would be incentivized to get *really* rowdy, because at that point the target of their ire

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[94] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (cleaned up).

[95] Bible Believers v. Wayne Cnty., 805 F.3d 228, 239 (6th Cir. 2015) (en banc).

[96] *Id.* at 239–40.

[97] *Id.* at 247.

[98] *See generally* Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901, 923 (2015).

[99] *Bible Believers*, 805 F.3d at 250.

could be silenced."[100] Here we see what is perhaps the most forceful form of the right of defiance—a right secured as a constitutional matter, as a facet of the First Amendment, rather than just as a common-law right, as in the negligence and nuisance cases.

The courts' position here seems correct to me, both as a practical matter and as a matter of speakers' rights. Behavior that gets rewarded gets repeated, as the Sixth Circuit recognized. If threatening speakers accomplishes the threateners' goals, the results will often be more threats. (That's especially so because sometimes such threats can be delivered remotely and anonymously, with little risk of arrest and prosecution, and not just by in-person heckling.) Indeed, when people who oppose one set of views succeed in using threats to shut down those views, others who oppose other views might feel like they are chumps if they don't do the same to shut down the views they dislike.[101]

But beyond that, speakers shouldn't have to give in to criminals' demands to shut up. "If the speaker, at his or her own risk, chooses to continue exercising the constitutional right to freedom of speech, he or she may do so without fear of retribution from the state, for the speaker is not the one threatening to breach the peace or break the law."[102]

V. DUTY TO RETREAT/DUTY TO COMPLY WITH NEGATIVE DEMANDS

Thirteen states and D.C. continue to recognize a so-called "duty to retreat" as a limitation on the right to use lethal force in self-

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[100] Bible Believers v. Wayne Cnty., 765 F.3d 578, 595 (6th Cir. 2014) (Clay, J., dissenting); the en banc majority ultimately adopted the result urged by this dissent.

[101] *Cf.* Seattle Mideast Awareness Campaign v. King Cnty., 781 F.3d 489, 494 (9th Cir. 2015) (discussing threats aimed at suppressing anti-Israel messages).

[102] *Bible Believers*, 805 F.3d at 253.

defense.[103] The Model Penal Code captures the standard definition well: even in defending against threat of death or serious bodily harm, deadly force may not be used if "the actor knows that he can avoid the necessity of using such force with complete safety by retreating."[104] And this likely means that the defenders cannot return to the place from which they retreated, at least for some time.[105]

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[103] These states are the Mid-Atlantic and New England states (minus New Hampshire and Vermont), plus three Midwestern states (Minnesota, Nebraska, and Wisconsin) and Hawaii. CONN. GEN. STAT. § 53a-19(b) (2001); DEL. CODE. ANN. tit. 11, § 464(e)(2) (2001); HAW. REV. STAT. § 703-304(5)(b) (2001); Commonwealth v. DeCaro, 269 N.E.2d 673,674 (Mass. 1971); Burch v. State, 696 A.2d 443, 458 (Md. 1997); State v. Laverty, 495 A.2d 831, 832 (Me. 1985); State v. Johnson, 152 N.W.2d 529, 532 (Minn. 1967); NEB. REV. STAT. § 28-1409(4)(b) (2002); N.J. STAT. ANN. § 2C:3-4(b)(2)(b) (West 2022); N.Y. PENAL L. § 35.15(2)(a) (McKinney 2022); 18 PA. CONS. STAT. § 505(b)(2)(ii) (2002); State v. Martinez, 652 A.2d 958, 961 (R.I. 1995); State v. Wenger, 593 N.W.2d 467, 471 (Wisc. Ct. App. 1999); Gillis v. United States, 400 A.2d 311, 313 (D.C. 1979); *see also* 9 GUAM CODE ANN. § 7.86(b)(2) (2019).

[104] MODEL PENAL CODE § 3.04(2)(b)(ii) (AM. L. INST. 1962). There is generally no duty to retreat before using *non-deadly* force. There is also generally no duty to retreat from one's own home, *id.* § 3.04(2)(b)(ii)(A), or, in some states, one's own workplace, *e.g.*, HAW. REV. STAT. § 703-304(5)(b) (2001); NEB. REV. STAT. § 28-1409(4)(b)(i) (2002); 18 PA. CONS. STAT. § 505(b)(2)(ii) (2002), or vehicle, WIS. STAT. § 939.48(1m)(ar)(2) (2023). And there is no duty to retreat when doing so would result in increased danger. MODEL PENAL CODE § 3.04(2)(b)(ii).

[105] Girtman v. State, 684 S.W.2d 806 (Ark. 1985); Laney v. United States, 294 F. 412, 415 (D.C. Cir. 1923); State v. Marshall, 573 N.W.2d 406, 411 (Neb. 1998). This is especially so if the jurisdiction bars defendants from claiming self-defense when they knew that they were going to a place where an attack was likely. *See, e.g.*, Moore v. State, 160 S.W. 206, 207 (Ark. 1913) (self-defense is unavailable to a person who goes to a place "expecting trouble, and probably looking for it"); People v. Dupree, 771 N.W.2d 470, 481 (Mich. Ct. App. 2009) ("one who starts a fight or goes someplace expecting a fight cannot claim self-defense"). The more common view, reflected in the Model Penal Code, is that one cannot claim self-defense when one has *purposefully* gone looking for a fight. *Cf.* JUD. COUNCIL OF CAL. ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, JUD. COUNCIL OF CAL. CRIM. JURY INSTRUCTIONS [CALCRIM] 3472 ("A person does not have the right to self defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."); *see also* People v. Gonzales, 12 P. 783, 787 (Cal. 1887) (rejecting the expecting-trouble test, and reasoning that "one may know that if he travels along a certain highway be will be attacked by another with a deadly weapon, and be compelled in self-defense to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack").

Seven states also recognize the duty to comply with negative demands, by denying the right to use deadly force in self-defense if "the actor knows that he can avoid the necessity of using such force with complete safety . . . by complying with a demand that he abstain from any action which he has no duty to take."[106] And one state appears to recognize a narrow duty to comply with both positive and negative demands, but only if they are minor: North Dakota denies the right to use deadly force in self-defense if "it can be avoided, with safety to the actor and others, by . . . conduct involving minimal interference with the freedom of the individual menaced."[107]

Here too the law in essence requires people to comply with criminal demands. Say Craig tells Danielle, "leave this bar or I'll kill you." (It's not Craig's bar, so he's not just demanding that she cease an illegal trespass.) If Danielle refuses to comply with Craig's demands, she will lose her right to use deadly force to protect herself against Craig's deadly attack.[108] And "[t]he same result follows, of course, if there is no demand but the actor knows that he will be attacked if he appears in a certain place."[109] (Not all duty to retreat scenarios

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[106] MODEL PENAL CODE § 3.04 (AM. L. INST. 1962); CONN. GEN. STAT. § 53a-19(b)(3) (2001); DEL. CODE ANN. tit. 11, § 464(e)(2) (2001); HAW. REV. STAT. § 703-304(5)(b); ME. STAT. tit. 17-a, § 108.2.C(3)(c) (2022); NEB. REV. STAT. § 28-1409(4)(b) (2002); N.H. REV. STAT. ANN. § 627:4.III(c) (2022); N.J. STAT. ANN. § 2C:3-4.b(2)(b) (West 2022); *see also* 9 GUAM CODE ANN. § 7.86(b)(2) (2019). Oddly, New Hampshire does not impose a duty to retreat from any place in which one has a right to be, N.H. REV. STAT. ANN. § 627:4.III(3)(a), but *does* impose a duty to comply with demands to abstain. Alabama and Pennsylvania formerly imposed such a duty to comply, but have since repealed it. 2011 Pa. Laws 10 (amending 18 PA. CONS. STAT. § 505(b)(2)(ii)); 2006 Ala. Laws 303 (amending ALA. CODE § 13A-3-23).

[107] N.D. CENT. CODE § 12.1-05-07.2.b (2021).

[108] The right to use deadly force in self-defense against threats of death or serious bodily harm is understood by American law as a right—often even a constitutional right—and not just as a benefit that the law is free to withdraw. *See* Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 399, 409-10 (2007).

[109] MODEL PENAL CODE § 3.04 cmt. 3 (AM. L. INST., Tentative Draft No. 8, 1958).

involve such demands—sometimes the attacker actually wants the defender to stay, for instance when the attacker wants to beat up the defender. But they often do involve such a "retreat or else" demand, and then the duty to retreat, if state law recognizes it, applies.)

Likewise, if Craig tells Danielle, "don't dance with your new lover in front of me at this bar." That is "a demand that [s]he abstain from any action which [s]he has no duty to take."[110] By refusing to "comply[] with [that] demand," Danielle again loses her right to use deadly force should Craig attack her. And the statutory formulation of the duty to comply could in principle extend to serious demands indeed: "Don't have sex with my ex-lover or I'll kill you"; "don't set up your business competing with me, or I'll kill you"; "don't set up an abortion clinic, or I'll kill you."[111]

Of course, the theory behind such duties is that Danielle should try to have Craig arrested and prosecuted.[112] But say he denies having made the threat, and it's just his word against Danielle's at that point. The police may then decline to arrest him, the prosecutor may

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[110] *See id*. § 3.04(2)(b)(ii) (AM. L. INST. 1962).

[111]

> The legal requirement that an intimate partner must comply with all the aggressor's demands so long as they are negatively stated (i.e., that she must avoid certain actions) might legalize a full repertoire of demands [including to abstain from eating at the table in company, to abstain from watching television, to abstain from talking to people, to abstain from meeting friends and family, to abstain from reading books, and similar outrageous and abusive demands] that together might create a horrible and permanent pattern of severe domestic violence, including offensive, strange, arbitrary, humiliating and depressing demands, provided however that they direct the victim to abstain from performing certain actions.

Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and A Legislative Proposal to Amend Section 3.04(2)(b) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS. 17, 30 & n.77 (2015).

[112] *Cf.* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(d)(4) (2022) ("The apparent harshness of the rule may be mitigated, however, by the fact that *D*'s freedom of movement may be restricted only until he notifies the authorities of *A*'s threat, assuming, perhaps incorrectly, that the authorities will take the matter seriously and will be able to resolve it.").

decline to prosecute (perhaps foreseeing that it would be hard to prove the threat beyond a reasonable doubt based just on Danielle's word), or the jury may acquit for lack of proof beyond a reasonable doubt.

In any of these scenarios, Danielle would still lose her lethal self-defense rights by (say) dating the ex-lover. Indeed, her report of Craig's threat to the police could be used against her, since it would show that Craig had indeed made a demand with which Danielle has refused to comply. Self-defense is a form of self-help, which is especially useful if past attempts to enlist the legal system's help have failed. The duties to retreat and to comply foreclose such self-help.

The duties to retreat and comply are sometimes characterized as a special case of the "necessity" requirement in self-defense law:

1. To lawfully use deadly force in self-defense, the defender must reasonably believe that the use is necessary to prevent death, serious bodily injury, rape, kidnapping, or (in some states) some other serious crimes.[113]
2. Deadly self-defense is necessary, the argument goes, only if there is no alternative that would still avert the danger without using deadly force.
3. And if there is an alternative—averting the danger by safely retreating—that means deadly force isn't necessary.[114]

But this formulation of "necessity" is incomplete, because the law always recognizes that some alternatives need not be taken, because they unduly impose on your liberty.

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[113] MODEL PENAL CODE § 3.04 (AM. L. INST. 1962); *id.* § 3.04(2)(b).

[114] *See, e.g.*, United States v. Travers, 28 F. Cas. 204, 206 (C.C.D. Mass. 1814); Laney v. United States, 294 F. 412, 414 (D.C. Cir. 1923) ("no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict"); Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 201-02 (1998).

For instance, say you are in a jurisdiction that doesn't allow deadly force simply to prevent robbery. (Half of all American jurisdictions take this view.[115]) The "can't use lethal self-defense if it's not necessary" approach would suggest that you therefore can't use lethal self-defense if a robber demands your money, you refuse to obey, and he attacks you in a way that threatens death or serious bodily injury. After all, you could have averted the danger by handing over the money, so deadly force wasn't necessary.

Yet even the Model Penal Code's duty to comply wouldn't require this.[116] Instead, it makes clear that the duty to comply never includes the duty to turn over property (except property demanded under a claim of right, for instance as with repossession of borrowed or mortgaged property).[117] Having to turn over even a modest sum is seen as such an intrusion on liberty—or perhaps on dignity[118]—that you don't lose your right to self-defense by refusing to take that alternative.

Likewise, say someone credibly says, "beg me for mercy, or I'll break your arm." No jurisdiction would bar you from using deadly force against this threat of serious bodily injury on the theory that deadly force was not "necessary" because you could have avoided the injury by begging.[119] Even the Model Penal Code makes clear that, while you have a duty to comply with demands to *abstain* from

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[115] Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 53 (2015).

[116] MODEL PENAL CODE § 3.04(2)(b)–(c) (AM. L. INST. 1962).

[117] *Id.* Likewise, many states conclude that people have a duty to submit even to an unlawful arrest by a police officer—which might likewise be viewed as being backed by a claim of right, even if an erroneous claim—rather than resisting it with violence. *See, e.g.*, CAL. PENAL CODE § 834a (West 2022).

[118] Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 323–24 (2010).

[119] Presumably, even under North Dakota's provision that "[t]he use of deadly force is not justified if it can be avoided, with safety to the actor and others, by . . . conduct involving minimal interference with the freedom of the individual menaced," N.D. CENT. CODE § 12.1-05-07.2.b (2021), such begging-on-demand would be treated as more than a mere minimal interference with freedom.

action—or else lose your right to self-defense—you don't have a duty to comply with demands to *take* action.[120] Though there is an alternative (begging) that would still avert the danger without using deadly force, the Code (and, to my knowledge, the law of all states) would still let you use deadly force to protect yourself, without condemning such use as unnecessary.

The Code's drafters justified this exclusion of a duty to comply with positive demands by saying that such demands of "positive action" could be "infinite in variety," and some of them may be "outrageous, a demand to which the answer is that one would risk death rather than comply."[121] Perhaps a demand for begging might so qualify for some people, and other positive demands for still more people.

So the duty to retreat is more specific than a necessity requirement: it is a statement that, if threatened with serious violence, you must surrender your right to be in a particular place—but not your right not to turn over your money, or your right not to beg—or lose your right to deadly self-defense. Likewise for the duty to comply with negative demands.

This may be part of the reason why, despite the Model Penal Code's endorsement, the duty to retreat is now recognized in only about a quarter of the states—and why the duty to comply has been adopted by even fewer states.[122] Dean Margaret Raymond put it well in a 2009 article: the Code "inappropriately undervalue[s the] actor's dignitary interest"—the "interest in being permitted to move about

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[120] MODEL PENAL CODE § 3.04 (AM. L. INST. 1962).

[121] MODEL PENAL CODE AND COMMENTARIES § 3.04, at 60 (AM. L. INST. 1985). This echoes the act/omission distinction in tort and criminal law: People are generally not required to affirmatively act to save others' lives, perhaps because such a duty would create too wide a potential range of obligations. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 37 (2012).

[122] *See supra* nn.103-106 & accompanying text.

freely and to pursue those activities fundamental to a free society, without being subjugated to the unlawful demands of another actor."[123] "[R]equiring her [the actor] to submit to the unlawful demands of others in order to retain the privilege of self-defense improperly invades that interest," because it "requires her to submit to the subjugation of an aggressive and unlawful actor" and "allows bullies effectively to require compliance with their [express or implicit] demands."[124] Whatever the (uncertain) pragmatic costs and benefits of such duties to retreat or comply, such legally mandated "submi[ssion] to the subjugation of an aggressive and unlawful actor" is understandably unpopular.

The duty to comply with negative demands appears to have been inherited from the Restatement (First) of Torts, where it was a limitation on the self-defense defense to a tort claim for battery.[125] The Restatement, as best I can tell, invented the rule; it offers no case citations supporting its position. The Restatement (Second) continued to endorse the rule, but it was deliberately removed from the Restatement (Third).[126]

The practical limitation on the duty to comply may be prosecutorial discretion. I have found only two appellate cases that refer to the duty having been invoked, and the facts in both seem unusual:

1. James Savage and C. Sumner Morrill were fellow bluegrass band members; Savage had an affair with Morrill's wife, and after that ended, "Savage and his wife went to [Morrill's farm]. Savage

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[123] Margaret Raymond, *Looking for Trouble: Framing and the Dignitary Interest in the Law of Self-Defense*, 71 OHIO ST. L.J. 287, 323 (2010).

[124] *Id.* at 323-24.

[125] RESTATEMENT (FIRST) OF TORTS § 65(3)(b) (AM. L. INST. 1934); MODEL PENAL CODE § 3.04(2)(b)(ii) (AM. L. INST. 1962).

[126] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 23 cmt. i (AM. L. INST. Tentative Draft No. 6, 2021) ("no cases have been found that apply this . . . provision, and the provision is unduly broad"). This removal may have been prompted by an e-mail exchange that I had with the Reporter to the Restatement.

brought a loaded revolver, a tape recorder and copies of letters and tapes from Morrill's wife."[127] Because of their past history, "Savage was aware that Morrill did not wish to discuss Savage's relationship with Morrill's wife," but nonetheless "Savage placed the tape recorder on the table and said he wanted Morrill to hear something."[128] "Morrill said he did not want to hear it, he knew all about it, this was his home and that he would have to get his 'persuader.'"[129]

Savage then shot Morrill, and later "testified that Morrill had previously threatened to kill Savage and that he thought Morrill referred to a gun when he mentioned 'persuader.'"[130] The court upheld the conviction, and in particular endorsed a jury instruction "that Savage was not justified in using deadly force if he knew that he could with complete safety comply with a demand by the victim that he abstain from doing something that he was not obliged to do"—namely, the demand that Savage stop talking about the affair.[131]

Two facts here, though, make this an unusually strong case for a duty to comply, and may explain why it was argued in this case but so few others. First, Savage was in Morrill's house, doing something that Morrill had told him not to do. It doesn't appear that Morrill had demanded that Savage leave, so Savage wasn't exactly a trespasser.

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[127] State v. Savage, 573 A.2d 25, 26 (Me. 1990); *see also Killer of Heir to Baked Bean Fortune Gets 30 Years*, ASSOCIATED PRESS (Oct. 7, 1988) [https://perma.cc/5LVL-TGQK]. The same incident also led to a civil lawsuit, in which Merrill's sons sued Merrill's wife (their stepmother), claiming that she "'by intentional and subtle seduction, using the tools of love, hate, anger, jealousy and fear'" "contributed to the shooting death of her husband." *Sons Sue Stepmother in Dad's Death*, UNITED PRESS INTERNATIONAL (Nov. 13, 1989) [https://perma.cc/RT24-JS7H].

[128] *Savage*, 573 A.2d at 26.

[129] *Id.*

[130] *Id.* at 26-27.

[131] *Id.* at 27.

Still, any claim for a right to defy others' demands appears weaker when one is defying a homeowner's demands in his own home.

Morrill could have lawfully demanded that Savage leave, and could have lawfully threatened deadly violence as a means of backing that up.[132] Morrill's demand that Savage abide by Morrill's conditions if he were to stay seems comparable.

Second, Savage was talking *to* Morrill, over Morrill's objections. The law often gives people considerable veto powers over others' talking to them, whether through unwanted letters,[133] unwanted phone calls, or other unwanted contact.[134] (Indeed, the ban on fighting words may be seen as a special case of that principle.[135]) That would not justify Morrill's seeming implicit threat to shoot Savage if Savage continued discussing the matter. But it does weaken any interest on Savage's part in continuing to exercise his liberty notwithstanding Morrill's threat.

2. Lauren Daly and Margaret Dover were lovers who were raising children together; after they broke up, they had conflicts about the custody arrangements.[136] At one exchange of children, Daly shot Dover; her defense was that she believed Dover was trying to run her over with her car, and therefore shot in self-defense.[137] The parties had apparently agreed that all exchanges would take place with Daly remaining in the home (presumably to avoid tense in-person interactions between Daly and Dover); and the judge instructed the jury that

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[132] ME. STAT. tit. 17-a, § 104 (2022).

[133] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 730 (1970).

[134] *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731, 740 (2013).

[135] *Id.* at 756.

[136] Commonwealth v. Daly, No. 1510 EDA 2019, 2020 WL 4347045, at *1 (Pa. Super. Ct. July 29, 2020).

[137] *Id.* at *1-2.

> [If the Commonwealth proves that Daly] knew that she could avoid the necessity of using deadly force with complete safety by complying with a demand that she abstain from any action she had no duty to make and failing to do so by coming out of the house and coming to the proximity of this automobile during the transfer of the child[,] . . . the actions of [Daly] are not justified.[138]

This seems to me to be an error on the judge's part, because the "duty to retreat" generally does "not arise until [defendant] believed deadly force was immediately necessary to protect herself against . . . use or attempted use of unlawful deadly force";[139] by the same logic, the duty to comply wouldn't, either. Thus, if Daly and Dover were (say) having a non-visibly-life-threatening argument, and Dover said "just go away," Daly didn't go away, and Dover tried to run Daly over with her car, Daly would be able to use deadly force *if she were unable to safely retreat at that point*. It wouldn't matter that she could have avoided the problem by leaving before the situation became deadly (or else we would have a standing duty to avoid anyone who we think *might* threaten us if a conversation goes bad). Likewise here: If at the time Dover was (supposedly) trying to run Daly over, Daly couldn't safely avoid the situation by retreating or complying with a demand to abstain, she should have the right to use lethal force in self-defense—even if she could have avoided the problem by complying *before* the threat to her life became apparent.

VI. POSSIBLE LIMITS ON THE RIGHT TO DEFY

I've shown so far, I think, that the law at least sometimes expressly or implicitly recognizes a right to defy. But not always, and

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[138] *Id.* at *5.

[139] Johnson v. State, 271 S.W.3d 359, 367 (Tex. App. 2008); *see also In re* Y.K., 663 N.E.2d 313, 314 (N.Y. 1996).

not everywhere. Let me speculate on a few particular circumstances that might lead courts and legislatures to reject such a right (whether or not soundly).

A. INDEPENDENT WRONGFULNESS

To begin with, some behavior is seen as sufficiently wrongful that we do not much mind its being suppressed by the threat (however illegal) of private violence. The "fighting words" doctrine is a classic example: face-to-face personal insults that pose a serious risk of retaliatory violence can be punished as breach of the peace, precisely to avoid such violence.[140] In a sense, then, the law requires the would-be insulter to comply with the implicit threat "don't call me that, or I'll punch you."

But this isn't treated as a forbidden "heckler's veto," because such face-to-face insults are viewed as comparatively valueless and not just potentially harmful: "[S]uch utterances are 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."[141]

The fighting words doctrine, to be sure, has been criticized, though courts continue to uphold some fighting words convictions.[142] Perhaps it should be jettisoned. But to the extent it exists, it shows how courts limit a right of defiance to exclude situations where the defiant act is seen as at least borderline improper even without regard to the risk of retaliatory violence.

B. PURPOSE TO PROVOKE VIOLENCE

The law sometimes also condemns actions done with the *specific purpose* of triggering violent retaliation. The Model Penal Code, for

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[140] *See e.g.*, CONN. GEN. STAT. § 53a-181 (2022).
[141] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
[142] State v. Liebenguth, 250 A.3d 1, 6 (Conn. 2020).

instance, provides that deadly force can't be used for self-defense if "the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter."[143] (On this point, the Code does seem to represent a broadly recognized view among the states.[144])

Returning to Craig and Danielle, if Craig has demanded that his ex-girlfriend Danielle stop seeing her new lover, and she deliberately appears in front of Craig in the new lover's company, specifically hoping that Craig will attack her so that she can shoot him, that wouldn't be lawful self-defense.

If Danielle were just going about her business, resolved to ignore Craig's demands, and a threat from Craig foreseeably materialized, she wouldn't be barred from defending herself (at least in the 43 states that reject a duty to comply with negative demands). But the specific purpose to provoke turns this otherwise lawful defiance into a forbidden plan to bring about Craig's death.

There is some suggestion of this as well in the cases that generally reject the "heckler's veto." Those cases suggest that "intentionally provoking a given group to hostile reaction"—seemingly in the sense of speaking with the specific purpose of provoking violence—might be punishable, even though knowingly producing such a reaction is not.[145]

I'm skeptical of purpose-based tests, especially when it comes to speech restrictions, for reasons I've laid out elsewhere.[146] But it does appear that courts at least sometimes distinguish knowingly

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[143] MODEL PENAL CODE § 3.04(2)(b)(i) (AM. L. INST. 1962).

[144] *See, e.g.*, JUD. COUNCIL OF CAL. ADVISORY COMM. ON CRIM. JURY INSTRUCTIONS, JUD. COUNCIL OF CAL. CRIM. JURY INSTRUCTIONS [CALCRIM] 3472 (2022).

[145] Cohen v. California, 403 U.S. 15, 20 (1971); Bible Believers v. Wayne Cnty., 805 F.3d 228, 245 (6th Cir. 2015) (en banc).

[146] Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1366 (2016).

accepting a risk—even a near-certainty—of attack (which does not strip one of the right to resist or to defy) from purposefully bringing about the attack (which does strip one of such a right).

C. MAGNITUDE OF INTRUSION ON LIBERTY

The law sometimes creates a duty to comply with criminal demands when the demands are modest enough. This likely explains why some states recognize a duty to retreat, fewer recognize a duty to comply with negative demands, and only one recognizes a general duty to comply with positive demands—and that is limited to minor demands.[147]

Having to briefly leave a place (which is not your home or, in some states, your work or your vehicle) is seen, rightly or wrongly, as a modest imposition. But having to affirmatively do other things that a criminal demands may be a much more serious burden.[148] And we see that explicitly set forth in the North Dakota duty to avoid rule, which bars the use of lethal self-defense only if "it can be avoided . . . by . . . conduct involving minimal interference with the freedom of the individual menaced."[149]

Likewise, this may explain why, as we've just discussed, the *purpose* of provoking an attack might deprive people of their rights to self-defense even if the mere *knowledge* of a likely attack wouldn't. Restricting things that are done with the specific purpose of provoking violence is a minor restraint on liberty: despite the restriction, Danielle would remain free to do all she would have normally done

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[147] *See supra* nn.103-106 & accompanying text.

[148] Some affirmative commands might be comparatively small impositions (in the words of the Model Penal Code commentaries, "trivial and preferable to most people than resort to deadly force.") But if the decision is to be made more generally because "[t]o attempt to mediate between [the trivial impositions and the outrageous ones is] deemed impractical," then one can conclude that a duty to comply with positive demands should be categorically rejected. MODEL PENAL CODE AND COMMENTARIES § 3.04(d), at 60 (AM. L. INST. 1985).

[149] N.D. CENT. CODE § 12.1-05-07.2.b (2021).

in the absence of Craig's threats. Craig's threats wouldn't deprive her of any of her legal rights: she would simply be required not to do something that she couldn't legitimately do in any event—orchestrate a plan aimed at killing Craig.

This also explains some of the criticisms of the *Kentucky Fried Chicken* holding. For instance, consider Justice Mosk's argument in the dissent that, under the majority's rule, "a business proprietor is *never* required to subordinate any of his own property interests—no matter how insignificant the object and no matter how slightly it is jeopardized—to his customers' safety—no matter how many they are and no matter how gravely they are threatened."[150] Perhaps an establishment shouldn't have to surrender more valuable rights, for example the right to carry on a controversial business (e.g., to perform abortions, to distribute blasphemous images, to sell furs, and the like) or the right not to pay a million-dollar ransom. But having to hand over a few hundred dollars to a robber, the theory goes, is no big deal.

As I've noted above, I'm inclined to doubt this approach: Having to obey even facially minor criminal demands is in my view a grave loss of liberty and dignity. The law ought not side with the criminal in enforcing such demands, even when defiance causes some risks to bystanders (or, in the duty to retreat, to the criminal). Nonetheless, to the extent some judges and legislators reject a right of defiance in some situations, they may be moved by the relative "insignifican[ce]" of what the crime victim is being forced to do.

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[150] Ky. Fried Chicken of Cal., Inc. v. Super. Ct., 927 P.2d 1260, 1270 (Cal. 1997) (Mosk, J., dissenting).

D. WHETHER THE DEFIANT CONDUCT IS CONSTITUTIONALLY PROTECTED

Some of the examples given above involve people insisting on engaging in behavior that's constitutionally protected against government restriction: the abortion clinic refusing to give in to demands to close in 2009–10, when the conduct in *McBrayer* took place;[151] the bookstore refusing to give in to demands to stop selling blasphemous books; the speaker refusing the demands of hecklers; Simone Greenway showing romantic affection to Carrie Randall-Evans (indeed, in Greenway's own home);[152] perhaps the Kentucky Fried Chicken employee refusing to turn over property to the robber;[153] or perhaps Celia Diaz letting her niece stay with her.[154] Some might argue that these cases offer the most compelling rationale for a right of defiance, but the right shouldn't extend to cases involving legal but constitutionally unprotected behavior.

Yet I don't think that's right. There might not be a constitutional right, for instance, to sell fur or do animal experimentation for medical research. If the democratic process led to such behavior being outlawed, all of us would have to comply with such legal constraints. But it doesn't follow that the fur store or the medical research facility should have to close—or face legal liability for staying open—when the demands come not from the law but from the lawless. Likewise, even now that the Court has concluded that there is no constitutional right to abortion, and that abortions can be restricted by state legislatures,[155] it doesn't follow that lawful abortions should be suppressible by threats of violence.

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[151] *See supra* Part III.

[152] This might be covered by the right of intimate association. *See, e.g.*, Fair Hous. Council v. Roommate.com, LLC, 666 F.3d 1216, 1220 (9th Cir. 2012); Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984).

[153] *See supra* Part II.B (discussing the California Supreme Court's citation of the right to defend property, which is expressly protected by the California Constitution).

[154] *Cf.* Moore v. City of E. Cleveland, 431 U.S. 494, 505-06 (1977) (plurality opinion).

[155] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022).

So long as we are doing what we are legally entitled to do, we have an important interest in not having to follow criminals' orders. And, relatedly, all of us have an important interest in not creating an additional legal incentive for the criminals to make more such demands.

E. UNREASONABLE DEFIANCE/FORESEEABLE HARM

Of course, many possible restrictions on the right to defy involve situations where defiance is seen as "unreasonable" and the harm stemming from the defiance is "foreseeable": Mabel Ganal and Simone Greenway were accused of unreasonably provoking angry estranged husbands;[156] Kentucky Fried Chicken was accused of unreasonably failing to comply with the robber's demands;[157] Daniel McBrayer was accused of unreasonably creating a risk of harm to his abortion clinic's neighbors.[158] Negligence law generally requires unreasonableness and foreseeability for liability, and so does nuisance law.[159]

The criminal cases—prosecutions of people whose speech provokes violent hecklers, or the loss of the right of deadly self-defense on the part of people who fail to retreat or comply with demands—might likewise have an implicit "unreasonableness" dimension: for instance, the duty to retreat does not include a duty to retreat when doing so is unsafe.[160] And in all those cases, the possible consequences of refusing to retreat, comply, or shut up are foreseeable.

One could argue that the right of defiance should extend only to reasonable defiance (including cases where the harm is unforeseeable), as determined by a jury. Or one could argue this at least as to

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[156] *See supra* Part **Error! Reference source not found.**.
[157] *See supra* Part **Error! Reference source not found.**.
[158] *See supra* note 4 & accompanying text.
[159] *See supra* Part II.
[160] *See, e.g.* MODEL PENAL CODE § 3.04(2)(b)(ii) (AM. L. INST. 1962).

defiance of demands that are backed by a concrete threat of highly likely and imminent violence (as in *KFC*), rather than just a foreseeable threat of possible future retaliation (as in *Touchette* or in the abortion clinic case).[161] Indeed, one school of thought in torts cases is that many disputes—normative and not just factual—ought to be resolved through case-by-case balancing by juries.[162] And that was an explicit part of the dissent's argument in *KFC*: "the question of whether the restaurant breached [its duty of care] and failed to use due care when its cashier initially refused to comply with the robber's demands is a question for the jury."[163]

But, for the reasons given above, I think that refusal to comply with criminals' demands should not be seen as unreasonable, even when it creates or increases a risk of harm (imminent or otherwise). In negligence cost-benefit balancing terms,[164] the costs of taking such a precaution must be seen as including the dignitary costs of being forced to subordinate oneself to a criminal's will. And the law should conclude that, as a matter of law, such costs cannot be imposed by the legal system, rather than just leaving the question to unpredictable case-by-case jury decisionmaking.[165]

Indeed, tort law often recognizes that certain kinds of decisions about duty should be made as a matter of law by judges, rather than left to jury discretion; to quote the Restatement (Third) of Torts, "In exceptional cases, when an articulated countervailing principle or

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[161] Compare California cases dealing with a duty to try to take burdensome steps to protect against criminal attack (rather than a duty to yield to criminal threats): These require that the risk of crime not just be foreseeable but "highly foreseeable." Castaneda v. Olsher, 162 P.3d 610, 620–21 (Cal. 2007).

[162] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 cmt. c (2010) (AM. L. INST. 2010); Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 424–25 (1999).

[163] Ky. Fried Chicken of Cal., Inc. v. Super. Ct., 927 P.2d 1260, 1271 (Cal. 1997) (Kennard, J., dissenting).

[164] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e (AM. L. INST. 2010).

[165] *See id.* § 7(b) (authorizing such no-duty rules).

policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."[166] This rule supports deciding whether certain kinds of behavior should be immunized from tort liability "as a categorical matter under the rubric of duty, and a court's articulating general social norms of responsibility as the basis for this determination."[167] I have argued throughout this Article that people generally should not be seen as having "responsibility" to obey criminals.

F. SPECIAL RELATIONSHIPS CREATING A DUTY TO PROTECT

Of course, in practice, people sometimes do feel a moral or personal obligation to comply with criminals' demands, even heinous demands. That is particularly likely, I expect, when people are trying to protect their children; one hears stories, for instance, of mothers even accepting being raped in order to shield their children.[168] And, at least when something less awful is at stake, we might expect people to sometimes go along with criminal demands to protect someone with whom they have some special relationship, especially a family relationship.

But whatever one might think is right as a matter of moral obligation, or just personal emotional response, I don't think this extends to a legal obligation. Even parents, I think, should not be viewed as legally required to comply with criminal demands to protect their children (though I expect that legal pressures would have very little relevance to a parent's decision in such a situation, and emotional

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[166] *Id.*

[167] *Id.* cmt. c.

[168] *See, e.g.*, Harriet Agerholm, *North Korean Defector Speech Reaches 70 Million Views: 'My Mother Let Herself Be Raped To Protect Me'*, INDEPENDENT (Mar. 16, 2017, 9:10 PM) [https://perma.cc/MYM2-T23T].

reactions would overwhelmingly predominate). And the same is true for other relationships, whatever other legal significance they might have. Store owners may have duties to reasonably protect their business visitors, for instance by hiring guards or putting up security features. But I think the *KFC* court (and the others it followed) was right to say that this duty to prevent crime doesn't extend to a duty to obey criminals.[169]

Likewise for another kind of special-relationship-based duty, the psychiatrists' duty (recognized in many states) to reasonably protect third parties from foreseeable violent attack by the psychiatrists' patients.[170] The psychiatrist may have a duty to warn the prospective target about the threat from a patient. The psychiatrist may even have a duty to try to get the patient committed. But the psychiatrist should not have a duty to obey the patient's demands; if, for instance, Lawrence Moore (the psychiatrist in *Tarasoff*)[171] had been told by Prosenjit Poddar (the patient), "I'll kill Tatiana Tarasoff unless you tell me I'm Jesus"—or "I'll kill Tatiana Tarasoff unless you renounce Jesus"—that should not create a legal obligation on Moore to give in to that threat.

The one possible exception might be for people specifically hired to be ransom funders, or perhaps guards, who have expressly contracted to go along with such demands. If a ransom insurance company has agreed to pay ransom in the event of a kidnapping, it has given up its right not to pay (unless, of course, there is a law precluding such ransom insurance, on the theory that allowing ransom insurance encourages kidnappings). Likewise, one can imagine a similar deal for security guards or bodyguards, though again that might be limited by public policy (agreements to hand over property, if that is what it takes to protect the principal, might be enforceable, but agreements to do anything—down to submission to rape or other

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[169] *See supra* Part II.B.
[170] *See, e.g.*, Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 353 (Cal. 1976).
[171] *See id.* at 339.

serious abuse—might not be). But allowing such a contractual obligation, justified by an express promise, shouldn't lead to imposing such obligations as a matter of tort law or criminal law.

G. DEFIANCE AS PROVOCATION MITIGATING ATTACKER'S GUILT

Say Craig makes certain kinds of criminal demands of Danielle, such as that she not leave him or else he'll kill her; she defies those demands; and then he kills her. Some cases would treat Danielle's defiance as a basis for downgrading Craig's crime from murder to voluntary manslaughter.[172]

The same has at times been done or proposed with regard to offensive political or religious speech, providing a sort of limited immunity to violent hecklers as an analog to a "heckler's veto." Following the Supreme Court's flagburning decisions, there were calls to sharply decrease punishments for beating someone who burns the American flag.[173]

I'm inclined to think that such downgrading of the punishment should be rejected as a matter of law, and that the victim's defiance of the attacker's criminal demands shouldn't diminish the price that the attacker must pay for making good on the threat (or for attempting to do so). The right to defy criminals' demands should include the right to equal protection of the law from criminals' retaliation for such defiance, whether such a right is framed as a constitutional equal protection right or just as a subconstitutional legal principle.

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[172] *See generally* Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1351–58 (1997).

[173] *See Louisiana Senate Committee Votes to Lower Penalty for Beating Flag Burners*, ASSOCIATED PRESS (June 12, 1990) [https://perma.cc/6ZLA-FU2X].

Victoria Nourse has articulated this particularly well with regard to the voluntary manslaughter scenario.[174]

VII. EXPENSIVE DUTIES TO PROTECT

A. DUTIES TO PROTECT GENERALLY

So far we've discussed whether refusing to comply with a criminal demand should itself be tortious, be criminal, or nullify one's right to self-defense. But sometimes the claim is that a criminal demand creates an obligation to take care to diminish the risk of the crime. To adapt scenario 2 from the Introduction:

> 10. Danielle's abortion clinic has been firebombed in the past by people who want it to go out of business or at least to leave town. The clinic is indeed attacked again, and visitors who are injured sue the clinic for negligently failing to take reasonable steps to prevent the attack, such as hiring armed security guards or installing armored doors.

The claimed negligent conduct, unlike in the initial scenario 2, is not keeping the clinic open—it is keeping the clinic open without extra security. By imposing liability, the law would not be ordering law-abiding people to obey the bombers' demands, and the bombers would not be directly getting just what they want. But practically speaking, legally requiring such security can indeed hand the bombers a victory: their actions would have increased the clinic's cost of operating, perhaps enough to lead the clinic to shut down.

This is close to the scenario in *Rocky Mountain Planned Parenthood v. Wagner*, decided in 2020 by the Colorado Supreme Court. The case arose from a 2015 mass shooting at a Planned Parenthood clinic. Injured visitors and the relatives of a murdered visitor sued the clinic, claiming that the attack "was foreseeable, given the 'long history of violent direct attacks, killings and threats' against Planned

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[174] *See* Nourse, *supra* note 172, at 1332–34, 1392–93.

Parenthood facilities," and that the clinic should therefore have taken extra precautions. It should have had continuous armed security (rather than just "three days per week and only for about four hours each day"); it should have "erect[ed] a perimeter fence"; and it should have "replace[d its] tempered glass entry door with a steel or otherwise bullet-resistant door."[175]

The four Justices in the majority held that the case could go forward: it was possible "that a reasonable jury could find PPRM's allegedly insufficient security measures to have been a substantial factor in causing the plaintiffs' injuries."[176] Perhaps, if pressed on it, the Justices might have said that a clinic could indeed say, "millions for defense but not one cent for tribute,"[177] defying the demands of those who would make the clinic close—but then the clinic would then have to pay some money, if not millions, for defense. And they rejected the argument of the three-Justice dissent, which warned:

> [T]he majority's approach creates a perverse incentive: Knowing that women's health clinics are more threat-prone than other public-facing businesses, and that such clinics may be found liable for their failure to mitigate or prevent mass shootings, abortion opponents can increase the frequency and severity of their threats of violence in order to force women's health clinics to fortify their facilities to extreme levels. This, in turn, makes women's health clinics both prohibitively expensive to operate and virtually impossible to insure. . . .

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[175] 467 P.3d 287, 289-93 (Colo. 2020).

[176] *Id.* at 294.

[177] As best I can tell, the slogan dates back to 1790s American reactions to the threats from France to American shipping. IV JOHN PAYNE, NEW AND COMPLETE SYSTEM OF UNIVERSAL GEOGRAPHY 205 (1799).

> Moreover, this risk is not one that will be faced only by women's health clinics that provide abortion services. After today's decision, antisemitic fanatics can impose additional costs on synagogues, and White supremacists can inflict the same on Black churches or businesses.[178]

I'm uncertain about how these concerns ought to play out in such situations. Perhaps the right to defiance should nonetheless carry with it a duty to take reasonable care to protect visitors or bystanders against the harms that may flow from such defiance, so long as that care simply involves reasonable expenditures rather than giving up one's activities. Nonetheless, the practical concerns raised by the dissenters strike me as important, and as worth mentioning.

B. DUTIES TO WARN OF DANGER

Courts could likewise demand that people who have been threatened by criminals issue a warning to neighbors, visitors, and others, as a special kind of precaution:

> 11. Danielle has been threatened with a crime by Craig if she does something (continues seeing a new lover, sells blasphemous books, or performs an abortion). She refuses to comply. Craig attacks her and third parties—lovers, guests, neighbors, employees, coworkers, customers—get injured in his attack. They sue Danielle for failing to warn the injured parties of the danger, and giving them an opportunity to avoid the danger, including by shunning her.

I tried to deal with that in some measure in my *Tort Law vs. Privacy* article,[179] and just wanted to flag the issue here. But I do think

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[178] 467 P.3d at 287 (Hart, J., dissenting).

[179] Eugene Volokh, *Tort Law vs. Privacy*, 114 COLUM. L. REV. 879 (2014). *Compare* Apolinar v. Thompson, 844 S.W.2d 262, 263–64 (Tex. App. 1992) (holding homeowner

that, though warnings are often seen as inexpensive precautions, mandatory warnings that one is being targeted by criminals pose unusually great costs. Ellen Bublick puts it well in praising a court decision that held a "woman had no duty to warn [her] date about her extremely jealous ex-boyfriend"—"[a] contrary view could let his violence control her life."[180] And the same would apply, I think, to bookstores, abortion clinics, and other politically controversial organizations as well.

CONCLUSION

Criminals create risks for society—risks for their intended targets, and risks for bystanders. By defying criminals' demands, the criminals' victims may anger the criminals, and the criminals may respond by retaliating in ways that harm third parties.

Yet the law ought not in effect help criminals implement their demands by imposing liability on the defiant victims. People must be free to refuse to obey such demands, even when the refusal creates some extra risk. That often makes pragmatic sense, because it avoids creating extra incentives for criminals. But in any event, it is an important facet of human freedom.

Free citizens have a legal obligation to obey the law. But they shouldn't have a legal obligation to obey criminals. Kipling was dealing with limits on kings when he wrote of

> Ancient Right unnoticed as the breath we draw

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could be liable to housesitter for failing to warn housesitter that homeowner "had received harassing phone calls and threats"), *with* Faulkner v. Lopez, No. HHBCV01511200, 2006 WL 2949070, at *4–*5 (Conn. Super. Ct. Sept. 29, 2006) (holding tenant could not be liable to visitors to her apartment for failing to warn them of her restraining order against her violent ex-boyfriend).

[180] Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1446 n.185 (1999).

Leave to live by no man's leave, underneath the Law.[181]

Yet the same is equally true of living by no criminal's leave. Giving criminals' demands legal effect undermines their victims' dignity, precisely because it subjects people not only to the democratically endorsed coercion of the Law but to the arbitrary tyranny of the criminal. And it undermines the Law's rightful claim to be the one authority that may use the threat of violence to set the rules of behavior.

[181] RUDYARD KIPLING, THE OLD ISSUE (1899); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring in the judgment) (quoting this passage).