

# STRICTISSIMI JURIS

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\* Assistant Professor of Law, University of North Dakota School of Law. Great thanks go to the many participants of Crim Fest 2014 at Rutgers School of Law–Newark; the American Bar Association Criminal Justice Section Academics Committee’s 2014 Roundtable Workshop; and the 2014 University of Loyola Chicago School of Law’s Constitutional Law Colloquium. Specific thanks go to Miriam Baer, Amy Coney Barrett, Joanmarie I. Davoli, Richard Garnett, Aziz Huq, John Inazu, Ion Meyn, Helen Norton, Anthony O’Rourke, Zachary Price, John Rappaport, Lawrence Rosenthal, Meghan Ryan, Nirej S. Sekhon, Amy Sepinwall, Alexander Tsesis, and Robert Weisberg for their valuable comments. This article could not have been possible without the support of the University of North Dakota School of Law and Dean Kathryn R. L. Rand. All errors are my own.

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## ABSTRACT

*Courts and scholars uniformly reject guilt by association, but couch it only as the substantive due process right to individual, not group, liability. They have never set forth the procedural right that is necessary to support the substantive right. This Article establishes that procedural right by bringing to light the little-known rule of strictissimi juris.*

*Strictissimi juris (strictissimi) operates to separate the individual from her group to ensure that criminal liability attaches for individual, not imputed, conduct and mens rea. Strictissimi's promise, however, has gone unfulfilled. While courts and defendants often invoke strictissimi, the courts have never determined when exactly it should apply or what its application entails. As a result, strictissimi has never had the impact it is supposed to have.*

*This Article calls on courts and lawyers for the first time to apply strictissimi in a concrete, predictable way. It supports that call by providing strictissimi's exegesis in descriptive, prescriptive, and contextual ways. Descriptively, it provides the jurisprudential foundation and definition of strictissimi. Prescriptively, it sets forth the purposes for which lawyers and courts have invoked strictissimi, thus providing a guide for how future lawyers might invoke strictissimi, and courts apply it. Contextually, it analogizes strictissimi to substantive canons that play important roles in the separation of powers.*

## INTRODUCTION

Scholars have uniformly condemned guilt by association, but they tend to treat it as having only substantive, not procedural, due process aspects.<sup>1</sup> Occasionally, they will imply a procedural counterpart: sometimes in limited circumstances,<sup>2</sup> sometimes pessimistically,<sup>3</sup> and sometimes more

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1. David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267, 286 (2000–2001); David Cole, *Hanging with the Wrong Crowd: of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 217 (stating that the due process right of individual guilt, not guilt by association, “is substantive, not procedural.”) [hereinafter Cole, *Hanging*].

2. Mark Noferi, *Towards Attenuation: A “New” Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91, 107 (2006) (suggesting that guilt by association implicates procedural due process where multiple trials for co-conspirators are an option and substantive due process is inherent in the notion of personal guilt).

3. Kevin Jon Heller, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and United States v. Shabani*, 49 STAN. L. REV. 111, 134 (1996) (discussing guilt by association with a procedural aspect, but only in multidefendant trials, and claiming “no amount of procedural reform can completely remove the possibility of guilt by association from multidefendant trials”).

holistically.<sup>4</sup> They never, however, detail that procedure. And although the United States Supreme Court has held guilt by association to be a “thoroughly discredited doctrine,”<sup>5</sup> the Court too has never articulated a procedural due process counterpart to the substantive right of liability only for personal guilt. Guilt by association is dead in theory, but quite alive in practice. This Article fills the procedural gap by bringing to life the little-known rule of *strictissimi juris*.

*Strictissimi juris* (*strictissimi*), meaning “[o]f the strictest right or law,”<sup>6</sup> has long been invoked in American courts<sup>7</sup> but never truly understood. Defense counsel have, for example, used it in a number of ways with no apparent, principled pattern.<sup>8</sup> And it is difficult to determine the rate at which courts invoke *strictissimi sua sponte*—or its function when it is applied<sup>9</sup>—though there is nothing preventing them from doing so.

After its early, confused start<sup>10</sup> in surety law<sup>11</sup> and other areas unrelated to the focus of this Article,<sup>12</sup> *strictissimi* assumed its contemporary form in

4. Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 247 (1994) (“[C]ourts should scrutinize the evidence about each and every defendant in order to avoid any guilt-by-association problems, being careful to apply a standard that requires that the defendants have the specific intent and the level of participation in the gang’s nuisance creating activities required by the Constitution.”).

5. *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959).

6. *Strictissimi Juris*, BLACK’S LAW DICTIONARY (9th ed. 2009).

7. The first appearance of the term in an American case appears to be *Lester v. State*, 11 Conn. 415, 419 (Conn. 1836).

8. *Strictissimi* has been used in pre-trial motions in limine, Motion in Limine Requesting Application of the *Strictissimi Juris* Standard to Protect the Accused’s Rights to Freedom of Association, Assembly, and Due Process, *United States v. Stone*, 852 F. Supp. 2d 820 (E.D. Mich. 2012) (No. 10-20123), 2012 WL 161082; to dismiss charges based on the First Amendment, Government’s Response to the Defendants’ Motion to Dismiss the Superseding Indictment, *United States v. Larson*, 807 F. Supp. 2d 142 (W.D.N.Y. 2011) (No. 07-CR-304-S), 2010 WL 3691803; to dismiss charges based on insufficiency of the evidence, *United States v. Sanders*, 211 F.3d 711, 714 (2d Cir. 2000); to determine the membership of a conspiracy, Motion for *Vinson–Enright* Hearing, *Stone*, 852 F. Supp. 2d 820 (No. 10-20123), 2010 WL 3923445; and to propose jury instructions, Governor Siegelman’s Supplementary Proposed Jury Instructions, *United States v. Siegelman*, No. 2:05-cr-119-MEF, 2012 WL 2590670 (M.D. Ala. July 5, 2012), 2006 WL 1733040.

9. See *Bobo v. Commonwealth*, 48 S.E.2d 213, 215 (Va. 1948) (“When the court is dealing with mandatory requirements of the law the principle *strictissimi juris* obtains.”).

10. *United States v. Martindale*, 146 F. 280, 285 (D. Kan. 1903); *People v. Fid. & Deposit Co. of Md.*, 289 P. 231, 233 (Cal. Dist. Ct. App. 1930); *State v. Gritzner*, 36 S.W. 39, 42 (Mo. 1896).

11. *Nichols v. United States*, 22 F.2d 8, 8 (1st Cir. 1927); *Graham v. United States*, 188 F. 651, 657 (4th Cir. 1911); *U.S. Fid. & Guar. Co. v. United States ex rel. Griscom–Spencer Co.*, 178 F. 692, 695 (3d Cir. 1910); *United States ex rel. Del. Hardware Co. v. Lynch*, 192 F. 364, 368 (D. Del. 1912); *State v. Mass. Bonding & Ins. Co.*, 136 P. 905, 909 (Kan. 1913); *Am. Fid. Co. of Montpelier, Vt., v. State ex rel. Short & Walls Lumber Co.*, 97 A. 12, 14 (Md. 1916); *State ex rel. S. Md. Nat’l Bank of La Plata v. Nat’l Sur. Co.*, 94 A. 916, 916–17 (Md. 1915); *State v. Llewellyn*, 167 P. 414, 424 (N.M. 1917).

12. *Crygier v. United States*, 25 Ct. Cl. 268, 273 (1890) (stating that moluments of promotion in the Department of the Navy “are *strictissimi juris*.”); *United States v. Cutler*, 37 F. Supp. 724, 725 (D. Idaho 1941) (“[Native Americans] should be regarded ‘*strictissimi juris*’ and all uncertainties resolved in their favor.”); *United States v. Inlots*, 26 F. Cas. 482, 483 (S.D. Ohio 1873) (No. 15,441)

the 1961 Supreme Court cases *Scales v. United States*<sup>13</sup> and *Noto v. United States*.<sup>14</sup> Arising from criminal convictions based on the membership clause of the anti-Communist Smith Act,<sup>15</sup> these cases became important parts of the twentieth century's perennial conflict between First Amendment rights and membership crime.<sup>16</sup> *Noto* announced the core rule of modern *strictissimi*, which is that in membership clause prosecutions, the element of an individual defendant's criminal intent, like all of the other elements,

must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.<sup>17</sup>

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("[Government effort] to take property of citizens without their co[n]sent" is a "proceeding [] *strictissimi juris*."); *United States v. The Henry C. Homeyer*, 26 F. Cas. 278, 280 (S.D. Ohio 1868) (No. 15,353) (*strictissimi* applied to "highly penal statute[s]"); *Commonwealth ex rel. Byars v. Alford's Ex'r*, 218 S.W. 721, 723 (Ky. 1920) (*strictissimi* applied to exemptions from taxation); *In re Smith*, 157 N.E. 343, 344 (Mass. 1927) ("Proceedings for the establishment of exceptions always have been regarded as *strictissimi juris*."); *Jones v. State*, 107 So. 8, 11 (Miss. 1926) (statutory rule governing testimony at trial subject to *strictissimi*); *State ex rel. Newell v. Cave*, 199 S.W. 1014, 1020 (Mo. 1917) (*strictissimi* applied to rules regarding notice of elections); *State v. Peck*, 271 P. 707, 708 (Mont. 1928) (*strictissimi* applied to "statutes granting the right of appeal to the state"); *Berrian v. State*, 22 N.J.L. 9, 21 (N.J. 1849) ("Criminal tribunals have a jurisdiction strictly local. It is *strictissimi juris* . . ."); *State ex rel. Bell v. Harshaw*, 45 N.W. 308, 312 (Wis. 1890) (*strictissimi* applied to exemptions from taxation).

13. *Scales v. United States*, 367 U.S. 203 (1961).

14. *Noto v. United States*, 367 U.S. 290 (1961).

15. Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

18 U.S.C. § 2385 (2012) (emphasis added); *Scales*, 367 U.S. at 205 n.1 (italicizing membership clause).

16. See *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring); *Epton v. New York*, 390 U.S. 29, 31 (1968) (Douglas, J. dissenting) (considering whether a constitutionally protected right may be used as evidence of an overt act in furtherance of a conspiracy); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 481 (2004) ("[T]he crime of conspiracy has routinely been used by prosecutors to 'get' union organizers, political dissenters, radicals, and other 'dangerous' individuals who could not otherwise be convicted of an offense."); Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 *YALE L.J.* 1, 1 (1964); David B. Filvaroff, *Conspiracy and the First Amendment*, 121 *U. PA. L. REV.* 189, 190 (1972); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 *N.Y.U. L. REV.* 112 (2007). Indeed, a number of the major twentieth century criminal speech cases were conspiracy cases. See *Yates v. United States*, 354 U.S. 298, 300 (1957); *Dennis v. United States*, 341 U.S. 494, 496 (1951); *Hartzel v. United States*, 322 U.S. 680, 682 (1944); *Schenck v. United States*, 249 U.S. 47, 49 (1919); *Abrams v. United States*, 250 U.S. 616, 617 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

17. *Noto*, 367 U.S. at 299–300.

This was meant to avoid improper imputation of the group's criminal *mens rea* or conduct to the individual.<sup>18</sup> In turn, *Scales* established elements that defined the boundary of First Amendment-protected group membership activity.<sup>19</sup>

To ensure that individuals were judged for their own actions and intent, *strictissimi* was meant to address the unreliability of circumstantial evidence, the misuse of attenuated inference, and the improper imputation of guilt from the group to the individual. It was also meant to impose a preference for direct evidence, circumstantial evidence supported by direct evidence, and ambiguous First Amendment-protected evidence supported by direct or circumstantial evidence (so-called "independent evidence" rules).<sup>20</sup>

Because courts have invoked *strictissimi* to play multiple roles but have never adequately defined it, there is confusion as to what type of legal phenomenon *strictissimi* is. Courts refer to it as a "doctrine,"<sup>21</sup> a "standard of review,"<sup>22</sup> a "principle,"<sup>23</sup> a "rule,"<sup>24</sup> a "term of art,"<sup>25</sup> a "theory,"<sup>26</sup> a "concept,"<sup>27</sup> and as an adjective.<sup>28</sup> If "doctrine" is defined as "[a] principle, esp[ecially] a legal principle, that is widely adhered to,"<sup>29</sup> and "rule" is "[a]n established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation,"<sup>30</sup> then this Article will settle on referring to *strictissimi* as a rule—with doctrinal and standard of review characteristics—whose ill-definition the Article seeks to remedy.

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18. *Id.* at 299.

19. *Scales*, 367 U.S. at 207–08, 220; *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919 (1982) (*Scales* elements applied to property damage case); *United States v. Hammoud*, 381 F.3d 316, 328 (4th Cir. 2004) (money laundering and providing material support to terrorists); *Melzer v. Bd. of Educ.*, 336 F.3d 185, 198 (2d Cir. 2003) (§ 1983 action based on NAMBLA membership); *Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, (7th Cir. 2002) (civil liability for acts of terrorism); *Rice v. Paladin Enters.*, 128 F.3d 233, 249 (4th Cir. 1997) (wrongful death action); *United States v. Billings*, 58 M.J. 861, 865 (A. Ct. Crim. App. 2003) (weapons and assault charges); *State v. Manzanares*, 272 P.3d 382 (Idaho 2012) (recruiting into street gangs).

20. *Bourjaily v. United States*, 483 U.S. 171, 177 (1987).

21. *United States v. Stone*, 848 F. Supp. 2d 719, 722 (E.D. Mich. 2012).

22. *United States v. Montour*, 944 F.2d 1019, 1027 (2d Cir. 1991).

23. *Garden State Tanning, Inc. v. Mitchell Mfg. Grp., Inc.*, 273 F.3d 332, 335 (3d Cir. 2001).

24. *Pure Oil Co. v. Shlifer*, 175 A. 895, 898 (Pa. Super. Ct. 1934).

25. *Nat'l Union Fire Ins. Co. of Pittsburgh v. David A. Bramble, Inc.*, 879 A.2d 101, 108 n.5 (Md. 2005).

26. *Cole v. Loman & Gray, Inc.*, 713 N.E.2d 901, 905 (Ind. Ct. App. 1999).

27. *J.P. Morgan Chase Bank, N.A. v. Winget*, No. 08-13845, 2013 WL 6768606, at \*5 (E.D. Mich. Dec. 20, 2013).

28. *Carter v. Bernard*, 269 N.E.2d 139, 141 (Ohio Ct. Com. Pl. 1971).

29. *Doctrine*, BLACK'S LAW DICTIONARY (9th ed. 2009).

30. *Rule*, BLACK'S LAW DICTIONARY (9th ed. 2009).

Strictissimi is, furthermore, a procedural rule that supports the substantive right against guilt by association, so well set forth by David Cole.<sup>31</sup> Professor Cole rightly relies on *Scales* to establish this substantive right<sup>32</sup> and highlights important problems with the current state of affairs: now that speech is largely protected, the government has shifted to punishing association;<sup>33</sup> it can be especially difficult, and the government does not attempt, to discern an individual's criminal intentions from mere connection to a criminal group;<sup>34</sup> inferences of individual guilt from group conduct are unreliable;<sup>35</sup> and during times of crisis, like the contemporary war on terrorism, guilt by association is a lynchpin in the government's response.<sup>36</sup> Strictissimi promises a procedural response to these problems, solutions to which have, as Cole documents, proven elusive.

Whereas the substantive right against guilt by association is settled in theory,<sup>37</sup> the promise of strictissimi as the procedural counterpart that gives it expression has gone unfulfilled<sup>38</sup> because courts and lawyers have failed to understand what strictissimi concretely mandates.<sup>39</sup> Now, for example,

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31. Cole, *Hanging*, *supra* note 1, at 217.

32. David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L & POL'Y REV. 147, 147 (2012); Cole, *Hanging*, *supra* note 1, at 217.

33. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 6 (2003) ("[A]s censorship of ideas fell into disrepute, the government simply shifted tactics, substituting guilt by association for punishment of speech.") [hereinafter Cole, *McCarthyism*].

34. *Id.* at 10 ("The material support [for terrorism] law is a classic instance of guilt by association. It imposes liability regardless of an individual's own intentions or purposes, based solely on the individual's connection to others who have committed illegal acts.").

35. David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & RELIGION 267, 288 (2000–2001) ("Guilt by association similarly allows the government to rely on inferences and assumptions that are unsupported by fact.").

36. *McCarthyism*, *supra* note 33, at 2; David Cole, *Where Liberty Lies: Civil Society and Individual Rights After 9/11*, 57 WAYNE L. REV. 1203, 1263 (2011) ("The 'material support' laws have effectively rendered the right of association a meaningless formality.").

37. Cole, *Hanging*, *supra* note 1, at 216.

38. These concerns are manifested in a number of rules, including, for example, the probativeness of First Amendment speech to prove intent, *United States v. Kazuu*, 559 F. App'x 32, 35 (2d Cir. 2014); the relevance of circumstantial evidence, *United States v. Fullmer*, 584 F.3d 132, 160 (3d Cir. 2009); imputation of guilt from one person to a defendant through the admissibility of co-conspirator hearsay, *see United States v. Inadi*, 475 U.S. 387, 408 (1986) (Marshall, J., dissenting); and other such "metastatic" rules. *See United States v. Spock*, 416 F.2d 165, 173 (1st Cir. 1969).

39. There is confusion, for example, whether strictissimi is merely admonitory or whether it mandates substantive moves. Courts have cited it as a restatement of due process rights, *Marinello v. Bushby*, No. 1:95CV167-D-D, 1996 WL 671410, at \*17 (N.D. Miss. Nov. 1, 1996); a signal to apply extant rules carefully, *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972); *United States v. Hamilton Fed. Sav. & Loan Ass'n*, 566 F. Supp. 755, 757 (E.D.N.Y. 1983); *Commonwealth v. Newman*, 470 A.2d 976, 980 (Pa. Super. Ct. 1984); and an umbrella term encompassing a panoply of background principles, *State v. Gritzner*, 36 S.W. 39, 42 (Mo. 1896) (*lex certa* and *lex stricta*); *United States v. Cutler*, 37 F. Supp. 724, 725 (D. Idaho 1941) (narrow construction of statutes and possibly the rule of lenity); JEFFREY JACKSON & MARY MILLER, 8 MISSISSIPPI PRACTICE SERIES ENCYCLOPEDIA OF MISSISSIPPI LAW § 68:79, at 146–48 (Gregory V. Bell et al. eds., 2001 & Supp. 2014) (*nulla poena sine*

individuals who want to associate with terrorist organizations to promote peaceful resolution of conflicts may not do so;<sup>40</sup> conspiracy law continues to be used to convict people who may not have shared the criminal mens rea of their associates;<sup>41</sup> and scholars lately have documented the underdevelopment of association and assembly rights.<sup>42</sup> The result has been persistent instances of improper assignation of guilt by association and a negative impact on First Amendment rights.<sup>43</sup>

Compared to the difficult question of what strictissimi's application requires,<sup>44</sup> it is relatively easy to determine when it should apply, even

*lege*); Jona Goldschmidt, *Ensuring Fairness or Just Cluttering Up the Colloquy? Toward Recognition of Pro Se Defendants' Right to Be Informed of Available Defenses*, 61 DRAKE L. REV. 667, 734 n.335 (2013) (same). It has also been invoked with no reference to any substantive requirements. *United States v. Rodriguez*, 491 F.2d 663, 667 (3d Cir. 1974) (Adams, J., concurring); *Commonwealth ex rel. Byars v. Alford's Ex'r*, 218 S.W. 721 (Ky. 1920); *In re Smith*, 157 N.E. 343, 344 (Mass. 1927); *State ex rel. Newell v. Cave*, 199 S.W. 1014, 1020 (Mo. 1917); *State v. Peck*, 271 P. 707, 708 (Mont. 1928).

40. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

41. In 2014, the Fourth Circuit affirmed the conviction of Omar Hassan for conspiracy to provide material support to terrorists. *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014). Even though there was scant evidence (and probably not enough to satisfy the *Scales* elements) that Hassan agreed to join any conspiracy, Appellants' Opening Brief, *Hassan*, 742 F.3d 104 (Nos. 12-4067, 12-4063, 12-4061), 2013 WL 1402981, the Court superfluously exercised its "point of [] privilege" to praise conspiracy law, *Hassan*, 742 F.3d at 145–46, celebrating its evidentiary advantages that make it the "darling of the modern prosecutor's nursery" while "sometimes paint[ing] with a broad brush," *id.* at 146.

42. See PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013); JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012); Susan Frelich Appleton, *Liberty's Forgotten Refugees? Engendering Assembly*, 89 WASH. U. L. REV. 1423 (2012); Ashutosh Bhagwat, *Associations and Forums: Situating CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 543, 550 (2011) [hereinafter Bhagwat, *Associations and Forums*]; Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009); Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 HARV. J.L. & PUB. POL'Y 821 (2012); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Robert K. Vischer, *The Good, the Bad and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949 (2004); Ashutosh Bhagwat, *Assembly Resurrected*, 91 TEX. L. REV. 351 (2012) (reviewing INAZU, *supra*); Richard A. Epstein, *Forgotten No More*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 138 (2012) (same).

43. This is, to be sure, a problem endemic to American law. AVIAM SOIFER, *LAW AND THE COMPANY WE KEEP I* (1995) ("[T]he American legal system lacks any theory to handle groups.").

44. *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991) (strictissimi applies where criminal charges have "political overtones"); *United States v. Hurtado*, 779 F.2d 1467, 1474 (11th Cir. 1985) (strictissimi requires speedy bail determination); *United States v. Stone*, No. 10-20123, 2011 WL 17613, at \*4 (E.D. Mich. Jan. 4, 2011); *United States v. Marzook*, No. 03-CR-0978, 2005 WL 3095543, at \*6 (N.D. Ill. Nov. 17, 2005); *United States ex rel. Means v. Solem*, 480 F. Supp. 128, 131, 134, 136 (D.S.D. 1979); *United States v. Martindale*, 146 F. 280, 285 (D. Kan. 1903) (strictissimi applies in all criminal proceedings); *United States v. The Henry C. Homeyer*, 26 F. Cas. 278, 280 (S.D. Ohio 1868) (No. 15,353) (strictissimi applies to "highly penal statute[s]"); *United States v. Strong*, 36 C.M.R. 199, 205 (C.M.A. 1966) (Ferguson, J., concurring in part and dissenting in part) (strictissimi applies to death penalty cases); *Bobo v. Bd. of Levee Comm'rs for Yazoo-Miss. Delta*, 46 So. 819, 823 (Miss. 1908) (strictissimi applies to "highly penal statute[s]"); *Gumbs v. Martinis*, 338 N.Y.S.2d 817, 828 (N.Y. App. Div. 1972) (Stevens, P.J., dissenting) (strictissimi applies to criminal contempt cases); \$165,524.78 in *United States Currency v. State*, 47 S.W.3d 632, 647 (Tex. Ct. App. 2001) (Wittig, J., dissenting) (When the government wishes to "hold our children, take our homes, our safes, use pretext stops and confiscate valuable items as proceeds of felony drug dealing, . . . the law should not apply the lowest level of circumstantial conjecture but rather adhere to *strictissimi juris*."); Brief for Appellee at 8–9, *Commonwealth v. Sanchez*, 935 A.2d 21 (Pa. Super. Ct. 2007) (No. 2207 MDA 2006), 2006 WL

though courts have disagreed as to that question, and none have provided a reliable test. They have generally taken one of three approaches.<sup>45</sup> These

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4718250, at \*8–9 (citing *United States v. Cerilli*, 603 F.2d 415, 422 (3d Cir. 1979)); Letter Brief at 26–27, *Commonwealth v. Romero*, 852 A.2d 1253 (Pa. Super. Ct. 2004) (No. 470 EDA 2003), 2003 WL 25661573, at \*26–27; Peter E. Quint, *Toward First Amendment Limitations on the Introduction of Evidence: The Problem of United States v. Rosenberg*, 86 YALE L.J. 1622, 1641 (1977); Stephen Senn, *The Prosecution of Religious Fraud*, 17 FLA. ST. U. L. REV. 325, 340–41 (1990).

45. In addition to these three approaches, prosecutors would limit strictissimi’s jurisdictional application in two ways.

First, they argue, probably incorrectly, that strictissimi applies only on appeal. *United States v. Dellinger*, 472 F.2d 340, 393 (7th Cir. 1972) (applying strictissimi to “the jury in its fact-finding process and . . . the court in determining” sufficiency); Government’s Response to the Defendants’ Motion to Dismiss the Superseding Indictment, *supra* note 8, (arguing that strictissimi “is a matter for the jury and for appellate courts reviewing the findings of a jury”); see also Defendant Pope’s Reply to the Government’s Opposition to His Motion to Compel an Amended Bill of Particulars, *United States v. Buddenburg*, No. CR-09-00263 RMW, 2010 WL 2735547 (N.D. Cal. July 12, 2010), 2010 WL 3998605; Government’s Memorandum of Law in Opposition to Defendants’ Pretrial Motions, *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003) (No. 02 CR. 395 (JGK)), 2003 WL 23724530; Consolidated Reply Brief for Appellant, *Commonwealth v. Ripley*, 833 A.2d 155 (Pa. Super. Ct. 2003) (Nos. 84 EDA 2002, 85 EDA 2002, 86 EDA 2002, 88 EDA 2002, 89 EDA 2002, 92 EDA 2002), 2002 WL 34456702. They also argue that strictissimi applies only in federal, not state, courts. Letter Brief at 26, *Commonwealth v. Eidinger*, 850 A.2d 6 (Pa. Super. Ct. 2004) (No. 471 EDA 2003), 2003 WL 25674747, at \*26 (“This federal doctrine . . . is used only in ‘very special circumstances’ . . . .”); Letter Brief at 26, *Romero*, 852 A.2d 1253 (No. 470 EDA 2003), 2003 WL 25661573, at \*26 (same); Reply Brief for Appellant Sorenson, *Commonwealth v. Sorenson*, 815 A.2d 1132 (Pa. Super. Ct. 2002) (No. 01739EDA01), 2002 WL 32798722, at \*1 n.1 (strictissimi is not just followed by “some federal appellate courts”). In fact, state trial and appellate courts have repeatedly considered strictissimi. *Castro v. Superior Court*, 88 Cal. Rptr. 500, 508 (Cal. Ct. App. 1970); *Evans v. State*, 24 S.E.2d 861, 863 (Ga. Ct. App. 1943); *Commonwealth v. Leavitt*, 460 N.E.2d 1060, 1064 (Mass. App. Ct. 1984); *Jones v. State*, 107 So. 8, 11 (Miss. 1926); *State v. Peck*, 271 P. 707, 708 (Mont. 1928); *State v. Bell*, 560 P.2d 925, 933 (N.M. 1977); *People v. Gonzalez*, 431 N.E.2d 630, 633 (N.Y. 1981); *In re Young*, 211 N.Y.S.2d 621, 622 (N.Y. Sup. Ct. 1961); *Commonwealth v. Newman*, 470 A.2d 976, 980 (Pa. Super. Ct. 1984); \$165,524.78, 47 S.W.3d at 647 (Wittig, J., dissenting); *Bobo v. Commonwealth*, 48 S.E.2d 213, 215 (Va. 1948). Federal trial courts have also considered strictissimi. *United States v. Stone*, 848 F. Supp. 2d 719 (E.D. Mich. 2012); *United States v. Larson*, 807 F. Supp. 2d 142 (W.D.N.Y. 2011); *United States v. Siegelman*, No. 2:05-cr-119 MEF, 2008 WL 45531, at \*13 (M.D. Ala. 2008); *United States v. Marzook*, No. 03-CR-0978, 2005 WL 3095543, at \*6–7 (N.D. Ill. Nov. 17, 2005); *United States v. JACPG, Inc.*, No. 00 CR 1065, 2002 WL 1211303, at \*3 (N.D. Ill. 2002); *United States v. Shonubi*, 962 F. Supp. 370, 374 (E.D.N.Y. 1997); *United States v. El-Gabrowni*, No. S3 93 CR. 181 (MEM), 1994 WL 74072, at \*3 (S.D.N.Y. 1994); *United States v. Anaconda Am. Brass Co.*, 210 F. Supp. 873, 875 (D. Conn. 1962).

Second, prosecutors argue that strictissimi applies only to charges that directly challenge First Amendment conduct, Government’s Memorandum of Law in Opposition to Defendants’ Pretrial Motions, *supra*, such as when indictments charge explicit membership crimes (like charges under the Smith Act’s membership clause), advocacy, solicitation, or counseling of illegal conduct, Government’s Response to Defendant’s Motion in Limine Requesting Application of the Strictissimi Juris Standard, *United States v. Stone*, 852 F. Supp. 2d 820 (E.D. Mich. 2012) (No. 10-20123), 2012 WL 161099. But this cannot be the triggering mechanism because strictissimi is necessary precisely when the charges appear to be legitimate but may in fact be based on First Amendment activity. In *Castro*, prosecutors charged protestors with conspiracy. 88 Cal. Rptr. at 508. Reversing the convictions, the court rejected the state’s “slavish adherence to” the use of circumstantial evidence, which chilled the exercise of free speech, *id.* at 508, and its attempt to circumvent the First Amendment by charging conspiracy. *Id.* at 507 (conspiracy could “claim no talismanic immunity from constitutional limitations” and had to be tested against standards that satisfied the First Amendment). The state, said the court, could not use conspiracy as a First Amendment work-around. *Id.* at 514 (“[I]t must be that the First Amendment prohibits conspiracy prosecutions in this area where the People’s case that the demonstrations, as

tests are inadequate; I offer what I call the “objective/subjective” test in their place.

This Article calls on courts and lawyers for the first time to apply strictissimi in a concrete, predictable way. It supports that call by providing strictissimi’s exegesis. It does so descriptively, prescriptively, and contextually. Descriptively, in Parts I–III it provides the jurisprudential foundation and definition of strictissimi. Prescriptively, Part IV sets forth the purposes for which lawyers and courts have invoked strictissimi, thus providing a guide for how future lawyers might invoke strictissimi, and courts apply it. Parts V and VI contextualize strictissimi by analogizing it to substantive canons that play important separation-of-powers roles.

### I. THE KNOWN *STRICTISSIMI JURIS*

Early legal opinions held that strictissimi applied to all criminal proceedings,<sup>46</sup> criminal and penal statutes,<sup>47</sup> “highly penal statute[s],”<sup>48</sup> and questions of criminal jurisdiction.<sup>49</sup> These cases did not, however, clearly define strictissimi either for their time or for contemporary strictissimi, which is aimed at protecting First Amendment rights in the membership crime context.<sup>50</sup>

#### A. *Constitutional Purposes*

Modern strictissimi has two constitutional purposes: to define the boundaries of certain First Amendment rights and, within those boundaries, to protect those rights. These purposes emerge prominently in *Scales* and *Noto*.<sup>51</sup>

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planned, involved illegal means, rests entirely on circumstantial evidence. . . . [T]he People’s attempt to reach the evil by the ‘conspiracy-circumstantial evidence’ route is ‘too blunt an instrument’ . . .”).

46. *Martindale*, 146 F. at 285.

47. *State v. Gritzner*, 36 S.W. 39, 42 (Mo. 1896).

48. *The Henry C. Homeyer*, 26 F. Cas. at 280.

49. *Berrian v. State*, 22 N.J.L. 9, 21 (N.J. 1849).

50. While the interests that strictissimi promotes are present in cases beyond the First Amendment–membership crime category, this Article focuses only on that category both for manageability and because the most important cases dealing with strictissimi limit themselves to this category.

51. These cases dealt with the First Amendment right to associate and responded to the conflict between First Amendment rights and membership crime, which had become apparent quickly, *see* *Gitlow v. New York*, 268 U.S. 652 (1925) (conviction for criminal anarchy for publishing Communist Manifesto); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (criminal libel, First Amendment cited as defense); *Gilbert v. Minnesota*, 254 U.S. 325 (1920) (conviction of state crime for giving an anti-war speech); *Francis v. Virgin Islands*, 11 F.2d 860 (3d Cir. 1926) (criminal libel and contempt conviction; First Amendment cited as defense); *Hammerschmidt v. United States*, 287 F. 817 (6th Cir. 1923) (conspiracy to defraud the government by publishing anti-war pamphlets); *Dierkes v. United States*, 274 F. 75 (6th Cir. 1921) (Espionage Act conviction affirmed; evidence primarily consisted of protected

*Scales* expresses the boundaries purpose. While the decision did not tie this purpose directly to strictissimi, it did stake out the boundary between protected and unprotected association or assembly. Affirming a conviction under the anti-Communist Smith Act's membership clause,<sup>52</sup> the Supreme Court set forth a test to determine whether such prosecutions could stand. The First Amendment did not protect membership under the Smith Act if (1) membership was in an organization engaging in present advocacy of violent overthrow as soon as circumstances were propitious, (2) the member knew the purposes of the group, (3) the member intended to further those purposes and bring about violent overthrow as speedily as circumstances would permit, and (4) the member was an active member.<sup>53</sup>

*Scales* did not address how courts were to deal with cases whose facts did not clearly indicate either protected or criminal conduct. This protection purpose of strictissimi was left to the *Noto* Court, which directly addressed strictissimi's mandate, requiring that courts protect individuals' First Amendment rights to associate by taking special care to ensure that intent and proof of a crime's other elements are proven as to the individual defendant and are not wrongfully imputed from the conduct of the group of which the individual may have been a part.<sup>54</sup>

To illustrate the boundaries and protection purposes, consider *United States v. McKee*, in which Inge Donato, Joseph Donato, and Kevin McKee were convicted of conspiracy to defraud the United States, attempted evasion of employment taxes, and failure to file individual income tax returns.<sup>55</sup> They were all part of a pacifist religious group that opposed paying taxes because such a large portion of tax revenue supported warmaking activities.<sup>56</sup> Inge Donato was recorded giving a radio interview in which she openly admitted to not paying taxes and IRS records showed that Joseph Donato had failed to file income tax returns for four years, but

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speech); *Schoborg v. United States*, 264 F. 1 (6th Cir. 1920) (conspiracy convictions under the Espionage Act affirmed; evidence consisted solely of otherwise protected speech); Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919), after the substantive emergence of the First Amendment in 1919. *Abrams v. United States*, 250 U.S. 616 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Schenck v. United States*, 249 U.S. 47 (1919), were viewed as the substantive advent of the First Amendment. LEE C. BOLLINGER & GEOFFREY R. STONE, *Dialogue*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 1* (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 975 (1968); Mathieu J. Shapiro, Note, *When Is a Conflict Really a Conflict? Outing and the Law*, 36 B.C. L. REV. 587, 589 (1995).

52. *Scales v. United States*, 367 U.S. 203, 259 (1961).

53. *Id.* at 207–08, 220.

54. See SOIFER, *supra* note 43, at 68 (“[T]he machinery of legal sanctions must not be employed glibly or complacently to punish associations and relationships.”).

55. See 506 F.3d 225, 228 (3d Cir. 2008).

56. Brief for Donato Appellants at 4, *McKee*, 506 F.3d 225 (Nos. 05-3297, 05-3469, 05-3357), 2005 WL 6267590.

there was no direct evidence that Kevin McKee conspired to evade taxes. He merely made statements in opposition to paying them.

The boundaries purpose would bar the Donatos from strictissimi application because their conduct appears to be clearly illegal. It would suggest, however, that McKee's conduct should be judged under strictissimi because his conduct is not obviously either protected or criminal. The protection purpose would lead to strictissimi's application in McKee's case because an especially careful analysis of the facts is necessary to accurately assess guilt and protect McKee's First Amendment rights.

### B. *Scope of Application*

*McKee* implies the proper scope of strictissimi application, which is twofold. First, strictissimi applies where the facts at issue do not clearly indicate either First Amendment-protected or criminal conduct. Second, this factual vagary involves and strictissimi applies to all "membership crimes," which I define as crime "whose proof depends primarily or solely on membership in or association with certain, more-or-less formally defined groups."<sup>57</sup>

### C. *Function*

Strictissimi's function is twofold. First, it operates to mediate the conflict between First Amendment interests and membership crime. Second, it operates to separate the individual from her group for purposes of assigning criminal liability.

As to the mediation function, the First Amendment–membership crime conflict arises when evidence of the exercise of free speech, assembly, or association is used to prove a membership crime. On one hand, this evidence may be probative of a membership crime. On the other hand, it

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57. Steven R. Morrison, *Bradenburg for Groups*, 19 LEWIS & CLARK L. REV. 1, 5 (2015). At its inception in *Scales* and *Noto*, strictissimi was applied only to charges arising under the Smith Act's membership clause. But strictissimi's constitutional purposes suggest a broader scope. Indeed, the *Scales* elements have been widely accepted and applied in many types of membership crime cases—not just those involving the Smith Act. Courts have applied it to conspiracy charges, *Scales*, 367 U.S. at 232, and other membership crime cases. See *Elfbrandt v. Russell*, 384 U.S. 11, 17–19 (1966); Muhammad Salah's Response to the Government's Motions in *Limine*, *United States v. Marzook*, 462 F. Supp. 2d 915 (N.D. Ill. 2006) (No. 03 CR 978), 2006 WL 4686546 ("The personal guilt/specific intent requirement reflected in *Scales* and its progeny is a bedrock of our criminal justice system. It is not limited to membership crimes, but is generally required where criminal responsibility is based on connection to the illegal actions of others.").

may only *appear* to be probative, with its admission in evidence leading to an erroneous verdict of guilt for what was in fact protected conduct.<sup>58</sup>

The separation function gives substance to the mediation function. Because protected conduct may in some cases be probative and relevant, the appropriate demarcation for admissibility questions cannot be protected versus unprotected conduct. Rather, it should be whether the evidence—protected or otherwise—is probative of *individual* guilt. This demarcation serves to separate the individual from her group, ensure that criminal liability remains individual, and therefore protect the rights of speech, association, and assembly while not hobbling law enforcement and prosecutorial actions necessary for public safety.<sup>59</sup>

#### D. Effect on Evidence Law

The evidentiary reliability concerns involving strictissimi-worthy cases was expressed presciently in 1909 from Judge Philips of the Eighth Circuit. Dissenting from the affirmation of conspiracy convictions in *Richards v. United States*,<sup>60</sup> Philips was concerned about unreliable government witnesses who had also been co-conspirators,<sup>61</sup> the a priori assumption of a conspiracy to admit alleged co-conspirator statements, the lack of direct evidence,<sup>62</sup> and the jury's extensive reliance on inference.<sup>63</sup> To Philips, these problems shifted the burden of proof to the defendant and eliminated all of the defendant's usual protections; strictissimi should have been the remedy.<sup>64</sup>

Philips's concerns highlight four evidentiary issues that strictissimi addresses: the use of "metastatic" conspiracy rules, the reliability of circumstantial evidence, the use of inference, and burden shifting. Subsequent cases have raised two additional issues: the need to prove individual intent and the question of the need for independent evidence to render relatively less reliable evidence admissible.

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58. For more on this conflict, see Steven R. Morrison, *Conspiracy Law's Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013).

59. This is not an easy task, as "guilt by association can never be separated entirely from freedom of association." SOIFER, *supra* note 43, at 35.

60. 175 F. 911 (8th Cir. 1909).

61. *Id.* at 938–39 (Philips, J., dissenting).

62. *Id.* at 939.

63. *Id.* at 940.

64. *Id.* at 941 ("Throughout this case there was a special reason why the court should apply the rule of *strictissimi juris* in respect to the admissibility of the facts detailed by such witnesses [as the Hulls] to raise a bare presumption. To indulge every presumption as in this case in favor of the government, under the cloak of circumstantial evidence, is, in my judgment, to break down one of the great safeguards the law throws around the individual citizen.").

As to “metastatic rules” and the need to prove individual intent, consider the First Circuit’s opinion in *United States v. Spock*.<sup>65</sup> In that 1969 case, a group of anti-war activists were convicted of conspiracy to counsel and aid others to avoid the Vietnam War draft.<sup>66</sup> The First Circuit applied *strictissimi*, finding it was triggered because the defendants’ alleged agreement was legal, but the means to accomplish that end included legal and illegal activity.<sup>67</sup> It was “a bifarious undertaking, involving both legal and illegal conduct”<sup>68</sup> in “the shadow of the First Amendment.”<sup>69</sup> Thus triggered, the Court required an individual defendant’s specific intent to adhere to the illegal portions of the undertaking to be proven with one of three types of direct evidence:

by the individual defendant’s prior or subsequent unambiguous statements; by the individual defendant’s subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant’s subsequent legal act if that act is “clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated.”<sup>70</sup>

The Court went further, offering that conspiracy’s “metastatic rules” (which, except for the admission of co-conspirators’ statements to prove a defendant’s specific intent, it did not define) violated the principle of *strictissimi*.<sup>71</sup>

*Spock* left two issues unresolved. First, the “bifarious undertaking” trigger for *strictissimi* is unworkable because every conspiracy can be said to have a legal end with legal and illegal means.<sup>72</sup> For example, even a bank robbery conspiracy has the “legal” end of obtaining money, albeit through illegal means. As we shall see, the defendant’s role, not just the nature of the group, should be determinative.<sup>73</sup>

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65. 416 F.2d 165 (1st Cir. 1969).

66. *Id.* at 168.

67. *Id.* at 169.

68. *Id.* at 172.

69. *Id.* at 173.

70. *Id.* (quoting *Scales v. United States*, 367 U.S. 203, 234 (1961)).

71. *Id.*

72. *Cole, McCarthyism, supra* note 33, at 12 (“Most ‘terrorist organizations’ do not exist for the purpose of engaging in terrorism. . . . Some of [their] means may be terrorist and some may be perfectly lawful.”).

73. Consider the cases of three separate alleged tax avoiders. One speaks out against taxes and openly and admittedly fails to file his taxes. *See* Brief for Appellant Rose, *United States v. Rose*, 538 F.3d 175 (3d Cir. 2008) (No. 03-5199), 2006 WL 6209187; Brief for Donato Appellants, *supra* note 56; Petition for Writ of Certiorari at 4, *Pullman v. United States*, 528 U.S. 1081 (2000) (No. 99-945), 1999 WL 33639361, at \*4. Another violates tax law based on religious conviction and unaware that she violated any crime. *See* Opening Brief for Appellant at 4, 8, 11–25, 46–47, *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999) (No. 97-10445), 1998 WL 34089874, at \*4, \*8, \*11–25, \*46–47. A third

Second, *Spock*, like *Noto*, requires a stricter evidentiary standard.<sup>74</sup> Unlike *Noto*, *Spock* suggests that strictissimi would operate to exclude certain types of evidence: certainly co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E),<sup>75</sup> maybe circumstantial evidence,<sup>76</sup> and also any of conspiracy's other "metastatic" evidentiary rules. It is unclear, then, whether strictissimi should operate categorically to exclude types of evidence, impose stricter admissibility standards on all rules of evidence, or introduce an independent evidence rule requiring the supportive admission of more reliable evidence.<sup>77</sup>

As to the reliability of circumstantial evidence, the *Spock* court's concern was reflected in the *Scales* and *Noto* decisions. The *Scales* Court pointed to the use of circumstantial evidence, as well as inference, as particularly problematic methods of proof in membership crime cases. Its solution was a rule that would render such evidence admissible and inference justifiable only when supported by independent direct evidence.<sup>78</sup>

The *Noto* Court offered a different independent evidence rule, suggesting that it was direct or circumstantial evidence that was needed to pull ambiguous First Amendment material into admissibility<sup>79</sup> and permit the imputation of criminal intent to the entire group.<sup>80</sup> Even though

is charged with conspiracy to violate tax laws, but his religious beliefs and statements, which entail opposition to taxes, are used to prove the conspiracy, whose commission may be unclear. *See* United States v. McKee, 506 F.3d 225, 228, 239 (3d Cir. 2007); Defendant's First Corrected Proposed Jury Instruction, United States v. Farnsworth, No. 2:04-CR-707 (E.D. Pa. Nov. 28, 2005), 2005 WL 5903601; Defendant's Proposed Jury Instructions, United States v. Rose, No. CRIM.A. 05-101-02, 2006 WL 618851 (E.D. Pa. Mar. 8, 2006), 2005 WL 5904468. Arguably, the second two defendants should receive the benefit of strictissimi so that their religious beliefs and First Amendment activities are not chilled by an erroneous conviction. There seems little point, however, to apply strictissimi to the first defendant's case.

74. Senn, *supra* note 44, at 341 n.92.

75. United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969); Motion in Limine Requesting Application of the *Strictissimi Juris* Standard To Protect the Accused's Rights to Freedom of Association, Assembly, and Due Process, *supra* note 8 ("Application of the strictissimi juris standard prevents the government from using anything other than the defendant's personal statements and/or actions to prove his criminal intent . . .").

76. Castro v. Superior Court, 88 Cal. Rptr. 500, 508 (Cal. Ct. App. 1970) (The *Spock* prosecutors, said the court, "had introduced numerous statements by third parties, claimed to be coconspirators. Such practice is, of course, standard procedure in conspiracy trials. This was held to be improper. . . . The metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*. . . . Here it is slavish adherence to a rule of circumstantial evidence, developed in an altogether different criminal setting, which would violate the precept that any law which unnecessarily 'chills' the exercise of free speech, must fall." (internal citations and quotations omitted)).

77. *See* Hellman v. United States, 298 F.2d 810, 813 (9th Cir. 1961).

78. *Scales v. United States*, 367 U.S. 203, 232-33 (1961).

79. For example, "theoretical advocacy" that "violent revolution [is] inevitable," as opposed to "advocacy of violence," which includes "techniques for achieving that end." *Id.* at 233, 235.

80. *Noto v. United States*, 367 U.S. 290, 298 (1961) ("There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding

evidence of a group's criminal intent could be probative of an individual member's criminal intent, group intent was not sufficient on its own.<sup>81</sup> *Strictissimi* required that it be supported with direct evidence of the individual's intent.<sup>82</sup>

The Seventh Circuit, in *United States v. Dellinger*, expanded upon the independent evidence approach.<sup>83</sup> In that case, the court considered the convictions of the Chicago Eight for conspiracy to riot during the 1968 Democratic National Convention.<sup>84</sup> All of the defendants had participated in legal protests, during which some crime and violence occurred.<sup>85</sup> The government claimed the defendants shared the common aim of producing violence,<sup>86</sup> and the defendants claimed that they merely wanted to protest and organize peacefully.<sup>87</sup> The Court held that evidence of an individual defendant's participation in a group engaged in crime could not, standing alone, be probative of the defendant's unlawful intent.<sup>88</sup> That said, it is unclear what role *strictissimi* played in the Court's analysis;<sup>89</sup> indeed, the Court took steps to declare what *strictissimi* did *not* require.<sup>90</sup>

Finally, because all of these cases were decided prior to the adoption of the Federal Rules of Evidence in 1975,<sup>91</sup> there is a question whether their holdings on *strictissimi* were superseded. If *strictissimi* is a common law rule of evidence, the answer would appear to be yes. If *strictissimi* is a First Amendment rule, then it is a constitutional rule that trumps the Federal Rules of Evidence.

It seems most likely that *strictissimi* is a First Amendment rule for three reasons. First, the major cases detailing *strictissimi*, beginning with *Noto*, raise it as a rule necessary to protect First Amendment rights. Second, state courts have discussed *strictissimi* as a First Amendment-related rule and have not rejected it as an inapplicable federal evidentiary rule. Third, *strictissimi*'s relationship with evidence is not as a rule of evidence itself that would be superseded by the Federal Rules of Evidence,

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Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.”).

81. *Id.* at 299.

82. *Id.* at 299–300.

83. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972).

84. *Id.* at 348.

85. *Id.* at 349–53.

86. *Id.* at 353.

87. *Id.* at 354.

88. *Id.* at 393.

89. *Id.* at 394–407.

90. *Id.* at 394 (“We do not view the *strictissimi juris* doctrine as requiring clear, direct, and sufficient proof of unlawful intent at each stage, wholly independently of the proof at the other.”).

91. *Garrett v. Commonwealth*, 48 S.W.3d 6, 11 (Ky. 2001).

but as a way to evaluate evidence to ensure outcome reliability and protect First Amendment rights.

### E. Evaluating Evidence

Strictissimi cases suggest six ways to understand how courts applying strictissimi should evaluate evidence: as focused on the element of intent; as a sufficiency of the evidence rule; as a rule that requires exclusion of certain forms of evidence; as a rule requiring prosecutors to negate all innocent alternatives; as a rule requiring “clear proof”; and as a rule requiring direct, not circumstantial, proof.

First, although strictissimi should apply to all elements of a crime, the element of intent remains particularly important. *Spock* gave specific attention to it, and the *Noto* Court referred to it explicitly. Indeed, it is often the intent element that is the most difficult to discern accurately.

Second, strictissimi is, at its base, a sufficiency-of-the-evidence rule. The *Noto* Court, applying its independent evidence rule,<sup>92</sup> reversed the petitioner’s conviction because the evidence was too circumstantial and inferential, consisting as it did of testimony from others as to Communist literature, abstract advocacy of governmental overthrow, and Noto’s general activities with the Communist Party.<sup>93</sup> The *Dellinger* court as well conceived of strictissimi as a sufficiency-of-the-evidence rule.<sup>94</sup>

Third, as noted above, the *Spock* court might have departed from *Noto* by requiring the exclusion of certain types of evidence normally admissible under “metastatic” rules.

Finally, in the wake of *Scales* and *Noto*, the Ninth Circuit, in *Hellman v. United States*,<sup>95</sup> offered the negate-all-alternatives, “clear proof,” and direct evidence approaches to strictissimi. In *Hellman*, an “exceedingly active” Communist Party member<sup>96</sup> had been convicted under the Smith Act’s membership clause.<sup>97</sup> The Ninth Circuit reversed *Hellman*’s conviction for insufficient evidence of his specific intent,<sup>98</sup> requiring “strict standards of proof,” or “clear proof,” of intent<sup>99</sup> but not stating what this

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92. *Noto v. United States*, 367 U.S. 290, 298 (1961).

93. *Id.* at 292–96.

94. *Dellinger*, 472 F.2d at 392 (“Specially meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some participants to all others.”).

95. 298 F.2d 810 (9th Cir. 1961).

96. *Id.* at 813.

97. *Id.* at 811.

98. *Id.* at 811, 814.

99. *Id.* at 812.

meant.<sup>100</sup> The Court did offer two approaches to sufficiency review. One would require the government to negate any innocent alternatives to a defendant's conduct, and the other would give certain types of evidence authority as clear signals of guilt.<sup>101</sup> Because there was no evidence that Hellman engaged in illegal advocacy,<sup>102</sup> the government had been unable to negate the possibility of his innocent intent<sup>103</sup> to achieve the Party's aims through peaceable means.<sup>104</sup>

These approaches each entail problems. The first and second risk being too vague, subject to discretion, and thus evading appellate review. The third would result in the exclusion of categories of evidence, some parts of which are probative and relevant. And the *Hellman* approaches are already practiced by well-prepared prosecutors and would impose impossible prosecutorial burdens (negation-of-alternatives); entail assumptions that certain types of evidence have intrinsic inculpatory meanings, whereas other do not ("clear proof"); or reject the use of circumstantial evidence and inference ("direct evidence").

## II. WHEN SHOULD *STRICTISSIMI JURIS* APPLY?

Courts have generally taken three approaches to strictissimi's applicability. Each approach is infirm. I propose a fourth, better approach, which I call the "objective/subjective" approach.

First, some courts take a categorical approach to defining these circumstances, applying strictissimi when specific crimes are alleged.<sup>105</sup> This approach is easy to apply but also irrelevant to the interests that strictissimi is supposed to protect. Consider criminal contempt charges. In one instance, the charge may result when defendants have disobeyed a court order enjoining a union from picketing and boycotting businesses.<sup>106</sup> A separate contempt charge may arise when someone violates a court order

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100. *Id.* at 812–13.

101. *Id.* at 813 ("If Hellman's activity as a knowledgeable member of the Party was of a kind which is explainable on no other basis than that he personally intended to bring about the overthrow of the Government as speedily as circumstances would permit, personal illegal intent could properly be inferred. Examples of activity falling in the latter category would be the collection of weapons and ammunition in substantial quantities, or the conducting of field surveys to ascertain ways and means of sabotaging public utility or defense plants.").

102. *Id.* at 813.

103. *Id.* at 814.

104. *Id.* at 813.

105. *Noto v. United States*, 367 U.S. 290, 299 (1961). New York Judiciary Law § 750 (McKinney 2003), which provides for the power of courts to punish for criminal contempts, is subject to strictissimi. *See In re Young*, 211 N.Y.S.2d 621 (N.Y. Sup. Ct. 1961); *see also Borden v. Tobias*, 249 N.Y.S.2d 891 (N.Y. Sup. Ct. 1964); *Cook v. Moulton*, 64 Ill. App. 429 (Ill. App. Ct. 1896).

106. *Young*, 211 N.Y.S.2d 621.

enjoining him from stalking, harassing, and contacting his wife.<sup>107</sup> The former charge probably deserves application of strictissimi, but not the latter. If courts applied strictissimi to contempt, the result would be over-application; if they did not, the result would be under-application.

Second, courts take what I call a “nexus” approach,<sup>108</sup> under which strictissimi is applied when alleged criminal conduct is sufficiently linked to First Amendment activity. In *United States v. Cerilli*, the defendants were convicted of conspiracy to violate the Hobbs Act and substantive violations.<sup>109</sup> They were employees of the Pennsylvania Department of Transportation who extorted equipment lessors by requesting political contributions in exchange for business.<sup>110</sup> They argued that strictissimi applied because their solicitation for political contributions was lawful and protected by the First Amendment.<sup>111</sup> The Court rejected their argument.<sup>112</sup>

The government in *United States v. Larson* revived the *Cerilli* defendants’ nexus argument.<sup>113</sup> In *Larson*, defendant Gerald Bove was an officer in a labor union that was engaged in picketing and other agitation.<sup>114</sup> The government alleged that the union was simultaneously a “protected group” because it was a union and a “Criminal Enterprise” because it engaged in illegal activities to further illegal goals.<sup>115</sup> Bove was guilty of conspiracy, said the government, because of his proximity to the illegal conduct of others.<sup>116</sup>

If the *Cerilli* and *Larson* defendants deserved strictissimi, the nexus approach was an improper basis because it would lead to strictissimi’s application when a defendant is engaged in clearly illegal conduct, but for a possibly First Amendment-related purpose. Three examples of this include the *McKee* tax evaders,<sup>117</sup> environmentalists who obviously endanger the lives and property of loggers,<sup>118</sup> and journalists and their associates who steal a piece of evidence from an investigation site.<sup>119</sup> Strictissimi’s application where a defendant’s conduct is clearly criminal serves no purpose. Furthermore, when the nature of the defendant’s conduct is clear,

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107. *Commonwealth v. Jackson*, 10 A.3d 341 (Pa. Super. Ct. 2010).

108. *United States v. Cerilli*, 603 F.2d 415 (3d Cir. 1979).

109. *Id.* at 417.

110. *Id.* at 418.

111. *Id.* at 418, 421.

112. *Id.* at 422.

113. Government’s Response to the Defendants’ Motion to Dismiss the Superseding Indictment, *supra* note 8 (quoting *Cerilli*, 603 F.2d at 421).

114. *Id.*

115. *Id.*

116. *Id.*

117. Brief for Donato Appellants, *supra* note 56.

118. *United States v. Wyatt*, 408 F.3d 1257, 1259 (9th Cir. 2005).

119. *United States v. Sanders*, 211 F.3d 711 (2d Cir. 2000).

strictissimi serves no purpose because it is meant to resolve not the constitutional question whether someone's conduct should be protected, but the evidentiary question whether someone's conduct is criminal or protected.

Third, courts apply a "means/ends" approach. This approach is akin to the *Spock* bifarious undertaking approach.<sup>120</sup> Three major inadequacies inhere in this approach. First, the *Dellinger* court understood the means/ends approach to apply to defendants who are group members.<sup>121</sup> But strictissimi surely might apply to mere associates or even people who may not be associated with any group but appear to be. Under this approach, full group members might enjoy strictissimi, but alleged accomplices would not. Second, all groups can be said to have ultimately legal ends, and all groups certainly engage in some legal conduct as means. Hamas, for example, wants to create an Islamic Palestinian state<sup>122</sup> and support the religious, cultural, and social aspirations of Palestinians,<sup>123</sup> and the Armed Forces of National Liberation (FALN), an "armed clandestine terrorist organization," fights for the "legal" end of Puerto Rican independence.<sup>124</sup> Determining what a group's ends are is a normative-political act: Hamas can be said to have as its goal the destruction of Israel or the establishment of a Palestinian state, and FALN's end can be terrorist acts or Puerto Rican independence. The question cannot be whether a group has legal means and ends but what the characteristics of those means and ends are.<sup>125</sup> Finally, the means/ends approach discounts the individual's role in the group context; by focusing only on the group, the means/ends approach would

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120. *United States v. Spock*, 416 F.2d 165, 169, 172 (1st Cir. 1969).

121. *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972); *see also* *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991).

122. Government's Memorandum of Law in Opposition to Defendant Sami Amin Al-Arian's Amended Motion to Dismiss Counts One Through Four of the Indictment, *United States v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004) (No. 8.03-CR-77-T-30TBM), 2003 WL 24208680.

123. Muhammad Salah's Response to the Government's Motions in Limine, *supra* note 57; Muhammad Salah's Memorandum of Law in Support of His Motion to Dismiss Count II of the Indictment, *United States v. Marzook*, 383 F. Supp. 2d 1056 (N.D. Ill. 2005) (No. 03 CR 0978), 2005 WL 5653333.

124. *United States v. Rodriguez*, 803 F.2d 318, 319 (7th Cir. 1986).

125. The question is illustrated by confusion as to *what* must be bifarious: the undertaking, *United States v. Spock*, 416 F.2d 165, 172 (1st Cir. 1969); the offense, *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972); the organization, Motion in Limine Requesting Application of The Strictissimi Juris Standard To Protect the Accused's Rights to Freedom of Association, Assembly, and Due Process, *supra* note 8; Defendant Ashqar's Response and Objections to Government's Motion in Limine to Bar Evidence and Argument Related to Ethnic and Religious Issues and Consolidated Motions in Limine, *United States v. Marzook*, 383 F. Supp. 2d 1056 (N.D. Ill. 2005) (No. 03 CR 978), 2003 WL 25608266; the criminal conduct, Brief for Appellant Sorenson at 13, *Commonwealth v. Sorenson*, 815 A.2d 1132 (Pa. Super. Ct. 2002) (No. 01739EDA01), 2001 WL 34748561, at \*13; or the evidence, Reply Brief for Appellant Sorenson at 1, *Commonwealth v. Sorenson*, 815 A.2d 1132 (Pa. Super. Ct. 2002) (No. 01739EDA01), 2002 WL 32798722, at \*1.

lead to strictissimi's application where an individual's conduct is clearly criminal.

#### A. *Objective/Subjective Approach*

These inadequacies were not highlighted in *Spock* and *Dellinger* because the defendants in those cases were patently engaged in potentially core protected conduct. Other cases, however, involve bifarious groups but individual defendants who obviously have committed crimes.<sup>126</sup> The means/ends approach is appropriate for the former but not the latter. The objective/subjective approach, however, is appropriate for both.

Under the objective/subjective approach, to determine whether strictissimi applies, courts would ask two questions. First, they would ask the objective question: whether the group is sufficiently bifarious, meaning that however much criminal conduct the group engages in, it also engages in a substantial amount of protected conduct. Second, courts would ask the subjective question: whether, given the known facts of a case, there is a substantial question whether the individual defendant's conduct *might* be protected. In order for strictissimi to apply, both the objective and subjective methods would have to be satisfied.

Consider the prosecutions of protesters during the 2000 Republican National Convention in Philadelphia, which entailed both constitutionally protected conduct as well as crime.<sup>127</sup> The Commonwealth alleged that the protestors formed a conspiracy to obstruct streets, attended a secret meeting to plan the blockade, and rehearsed the plan. They then boarded a van headed for the blockade site and were arrested before they arrived. No substantive crime was ever committed.<sup>128</sup>

While all of the defendants were part of the same protest, each of them engaged in different conduct. Evidence against one defendant, Arnold, came entirely from the testimony of one officer, who was undercover with the protestors for eight days. He observed Arnold only on the last day and did not observe her do anything that clearly implicated her in a conspiracy.<sup>129</sup> He only observed her attend a meeting and in the van that was traveling to the protest.<sup>130</sup> He did not observe her say or do anything.<sup>131</sup> Another defendant, Sorenson, led protest marches, during which some vandalism and property damage took place. No evidence pointed to

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126. Petition for Writ of Certiorari, *supra* note 73, at 3–4.

127. Reply Brief for Appellant Sorenson, *supra* note 125, at 1.

128. Consolidated Reply Brief for Appellant, *supra* note 45.

129. Brief for Appellee Arnold, *Commonwealth v. Ripley*, 833 A.2d 155 (Pa. Super. Ct. 2003) (No. 00085EDA02), 2002 WL 32352973, at \*6.

130. *Id.* at 11–12.

131. *Id.* at 13.

Sorenson's involvement.<sup>132</sup> Defendant Romero was observed donning an adult diaper (so that she would not have to leave the blockade site to relieve herself), riding in a van in which equipment for the blockade was in plain view, and practicing "jail solidarity" when she was arrested.<sup>133</sup> Defendant Eidinger, by his own admission, clearly indicated that he intended to blockade streets, "fuck things up,"<sup>134</sup> and commit a crime.<sup>135</sup> While the objective question is answered in favor of all four defendants, the subjective question would favor Arnold and Sorenson, possibly Romero, and probably not Eidinger.

Consider also *United States v. Ham*, involving racketeering conspiracy, mail fraud, and murder conspiracy charges against members of the Hare Krishna New Vrindaban religious community.<sup>136</sup> The leader of New Vrindaban, Swami, had absolute control over the community<sup>137</sup> but claimed to have no knowledge of his members' illegal fundraising activities.<sup>138</sup> Because of the subjective question, Swami seems less eligible for strictissimi than Steven Fitzpatrick, a member of New Vrindaban who was convicted of conspiracy to commit mail fraud simply for creating written materials and stickers.<sup>139</sup>

Some might suggest employing only the subjective question and abandoning the objective question; this would comport more with the individualistic nature of criminal charges as well as the First Amendment right that individuals have to associate even with known criminals. But strictissimi is designed to address such individual conduct *in the group context*. Such group activity creates an additional layer of complexity to which strictissimi is supposed to respond. In the absence of such complexity, strictissimi may be unnecessary or at least entail excessive inefficiencies and false acquittals.

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132. Brief for Appellant Sorenson, *supra* note 125, at 4, 7–9.

133. Letter Brief, *Commonwealth v. Romero*, 852 A.2d 1253 (Pa. Super. Ct. 2004) (No. 470 EDA 2003), 2003 WL 25661573, at \*22, \*25.

134. Brief for Appellant, *Commonwealth v. Eidinger*, 850 A.2d 6 (Pa. Super. Ct. 2004) (No. 00471EDA03), 2003 WL 23974874, at \*11–12.

135. *Id.* at 29–30.

136. Brief for the United States at 2–3, *United States v. Ham*, 998 F.2d 1247 (4th Cir. 1993) (Nos. 91-5350(L), 91-5430, 91-5870), 1992 WL 12125685, at \*2–3.

137. Reply Brief for Defendant-Appellant Keith Gordan Ham at 1, 12, *Ham*, 998 F.2d 1247 (Nos. 91-5350(L), 91-5430, 91-5870), 1992 WL 12125683, at \*1, \*12.

138. *Id.*

139. Brief of Appellant Fitzpatrick at 3–5, *Ham*, 998 F.2d 1247 (Nos. 91-5430, 91-5350(L), 91-5870), 1992 WL 12125687, at \*3–5.

III. EVALUATING *STRICTISSIMI JURIS*: TOWARD A PURPOSIVE APPROACH

Strictissimi can be understood in one of three problematic ways. Strictissimi can be understood to guide courts' treatment of types of evidence,<sup>140</sup> assign varied weight to types of evidence, and impose a heightened sufficiency of the evidence standard.<sup>141</sup>

A. *Type of Evidence*

As to type of evidence, strictissimi is concerned with limiting or even eliminating the use of circumstantial evidence and inference.<sup>142</sup> Some

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140. *United States v. McKee*, 506 F.3d 225, 239 (3d Cir. 2007) (“First Amendment protections require that the government produce more than evidence of association to impose liability for conspiracy.”); *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991) (“Under *strictissimi juris*, a court must satisfy itself that there is sufficient direct or circumstantial evidence of the defendant’s own advocacy of and participation in the illegal goals of the conspiracy . . . .”); *Richards v. United States*, 175 F. 911, 940 (8th Cir. 1909) (“The only presumptions of fact which the law recognizes are immediate inference[s] from facts proved. . . . [C]autiousness . . . should be exercised by courts in ruling upon the admissibility of remote circumstances in criminal prosecutions . . . .” (quotation omitted)); *Castro v. Superior Court*, 88 Cal. Rptr. 500, 508 (Cal. Ct. App. 1970) (evidence of the demonstrators’ [illegal] conduct should not be admissible against the petitioners to show their intent to organize an [illegal] demonstration.); Motion for *Vinson–Enright* Hearing, *supra* note 8, (“[T]his Court has an obligation to apply the doctrine not only to ultimate sufficiency questions, but to admissibility questions as well.”); Brief of Appellant Fitzpatrick, *supra* note 139, at 2 (“The sufficiency and propriety of the evidence in such instances must be evaluated under the *strictissimi juris* standard.”); Quint, *supra* note 44, at 1641.

141. *Montour*, 944 F.2d at 1024; *United States v. Cerilli*, 603 F.2d 415, 421 (3d Cir. 1979); *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972); *United States v. Stone*, 848 F. Supp. 2d 719, 722, 724 (E.D. Mich. 2012); *United States v. Stone*, No. 10-20123, 2011 WL 17613, at \*4 (E.D. Mich. Jan. 4, 2011); *United States v. Larson*, 807 F. Supp. 2d 142, 166 n.9 (W.D.N.Y. 2011); *United States v. Marzook*, No. 03-CR-0978, 2005 WL 3095543, at \*6 (N.D. Ill. Nov. 17, 2005); Government’s Response to the Defendants’ Motion to Dismiss the Superseding Indictment, *supra* note 8; Government’s Memorandum of Law in Opposition to Defendants’ Pretrial Motions, *supra* note 45; Petition for a Writ of Certiorari, *Bove v. United States*, 133 S. Ct. 1838 (2013) (No. 12-1098), 2013 WL 873254, at \*13; 6 WEST’S A.L.R. DIGEST OF DECISIONS AND ANNOTATIONS WITH RESEARCH REFERENCES § 561(1), at 711–13 (Kenneth Stills et al. eds., 2010 & Supp. 2014) [hereinafter A.L.R. DIGEST CRIMINAL LAW].

142. *United States v. Markiewicz*, 978 F.2d 786, 813 (2d Cir. 1992); *Montour*, 944 F.2d at 1024; *United States v. Casper*, 541 F.2d 1275, 1280 (8th Cir. 1976) (Heaney, J., concurring in part and dissenting in part); *Hellman v. United States*, 298 F.2d 810, 812–13 (9th Cir. 1961); *Richards v. United States*, 175 F. 911, 941 (8th Cir. 1909); *United States v. Stone*, No. 10-20123, 2012 WL 1034937 (E.D. Mich. Mar. 27, 2012); *Marzook*, 2005 WL 3095543, at \*6; *United States v. Martindale*, 146 F. 280, 285 (D. Kan. 1903); *United States v. The Henry C. Homeyer*, 26 F. Cas. 278, 280 (S.D. Ohio 1868) (No. 15,353); *Castro*, 88 Cal. Rptr. at 508; \$165,524.78 in *United States Currency v. State*, 47 S.W.3d 632, 647 (Tex. Ct. App. 2001); Brief for Appellants James Sanders and Elizabeth Sanders at 61–62, 64, *United States v. Sanders*, 211 F.3d 711 (2d Cir. 2000) (Nos. 99-1430, 99-1431), 2000 WL 33980799 at \*61–62, \*64; Supplemental Brief in Support of Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29 on Counts Three, Five, Six, Seven, Eight, and Nine – The § 371, § 666(a)(1)(B), and Honest Services Charges, *United States v. Siegelman*, 467 F. Supp. 2d 1253 (M.D. Ala. 2006) (No. 05-cr-119-MEF), 2006 WL 6610448. Some courts, however, and the government, would not limit the use of circumstantial evidence or inference. *United States v. Fullmer*, 584 F.3d 132, 160–61 (3d Cir. 2009); *United States v. Stone*, 848 F. Supp. 2d 719 (E.D. Mich. 2012).

courts expand this concern to the “metastatic” rules of criminal conspiracy,<sup>143</sup> which include not only the liberal use of circumstantial evidence and inference<sup>144</sup> but also prosecution-friendly procedures for expanding the scope of a conspiracy after indictment;<sup>145</sup> the co-conspirator hearsay exception at Federal Rule of Evidence 801(d)(2)(E),<sup>146</sup> use of legal or First Amendment protected activity to prove a conspiracy;<sup>147</sup> easy avoidance of fair notice requirements;<sup>148</sup> the use of vague, factually incomplete indictments;<sup>149</sup> and *Pinkerton* liability.<sup>150</sup> To address these concerns, the *Scales*, *Noto*, and *Dellinger* courts offered independent evidence rules, and the *Spock* court required specific types of evidence to prove individual intent.

Each of these approaches is problematic. Independent evidence rules entail four problems: the difference between circumstantial and direct evidence is not always clear;<sup>151</sup> circumstantial evidence may in some cases be *better* than direct evidence;<sup>152</sup> any imputation of individual intent from group intent is fraught and presents its own set of questions; and multiple independent evidence rules for different types of evidence could be unwieldy for lawyers and judges, and confusing to jurors, leading to the same problems of evidentiary spillover<sup>153</sup> in membership crime cases that *strictissimi* is supposed to eliminate. And rules that limit or prohibit admission of certain forms of evidence would almost certainly hobble criminal prosecutions and render clearly probative and uncontroversial evidence inadmissible. Perhaps for these reasons, courts have not settled on

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143. *United States v. Spock*, 416 F.2d 165, 173 (1st Cir. 1969); *Castro*, 88 Cal. Rptr. at 508; Motion in Limine Requesting Application of the Strictissimi Juris Standard To Protect the Accused’s Rights to Freedom of Association, Assembly, and Due Process, *supra* note 8.

144. *Castro*, 88 Cal. Rptr. at 508; Letter Brief at 19–20, *Commonwealth v. Eiding*, 850 A.2d 6 (Pa. Super. Ct. 2004) (No. 471 EDA 2003), 2003 WL 25674747, at \*19–20.

145. *Spock*, 416 F.2d at 172 (“The First Amendment cases merely present a more difficult problem of insuring that the government does not use its procedural advantages to expand the strict elements of the offense [of conspiracy].”).

146. *Id.* at 173.

147. *Stone*, 2012 WL 1034937, at \*3, \*12.

148. *Id.* at \*7 (“The prosecution is not free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial . . . [D]efendants are entitled to have fair notice of the criminal charges against them so that they can prepare a defense.” (quotation omitted)).

149. *Id.* at \*8, \*11–12.

150. *Pinkerton v. United States*, 328 U.S. 640 (1946).

151. *Jules v. Vill. of Obetz Police Dep’t*, No. 2:11-CV-582, 2013 WL 4832893, at \*5 (S.D. Ohio Sept. 11, 2013).

152. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

153. *United States v. Novod*, 927 F.2d 726, 728 (2d Cir. 1991); *United States v. Cancel-Lorenzana*, 28 F. Supp. 3d 138, 140 (D.P.R. 2014).

consistent rules regarding strictissimi's effect on independent evidence rules or admissibility of evidence.<sup>154</sup>

### B. Weight of Evidence

Strictissimi clearly requires factfinders to view otherwise uncontroversial evidence with increased skepticism<sup>155</sup> and take special care in analyzing evidence against particular defendants.<sup>156</sup> For example, in *United States v. Stone*, the case of the Hutaree militia members who were accused of seditious conspiracy, the district court observed that strictissimi relates to the weight and sufficiency of the evidence.<sup>157</sup> In *United States v. Marzook*, a material support for terrorism case, the defendant argued that "special caution" must be taken in evaluating the defendant's *mens rea*.<sup>158</sup> The *Noto* court noted that evidence of the Communist Party's program might be "of weight" but that strictissimi should alter its significance.<sup>159</sup> Definitions of heightened scrutiny, however, remain unclear and practically inapplicable.<sup>160</sup>

### C. Sufficiency of Evidence

Expressed in varying ways,<sup>161</sup> strictissimi is most often referred to as requiring an elevated standard of sufficiency of the evidence.<sup>162</sup> What that

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154. See Quint, *supra* note 44, at 1654.

155. *United States v. Stone*, 848 F. Supp. 2d 719 (E.D. Mich. 2012); *Castro v. Superior Court*, 88 Cal. Rptr. 500, 508 (Cal. Ct. App. 1970); Quint, *supra* note 44.

156. *United States v. Casper*, 541 F.2d 1275, 1280 (8th Cir. 1976) (Heaney, J., concurring in part and dissenting in part); *United States v. Dellinger*, 472 F.2d 340, 394-407 (7th Cir. 1972); A.L.R. DIGEST CRIMINAL LAW, *supra* note 141, § 561(1).

157. *United States v. Stone*, No. 10-20123, 2011 WL 17613, at \*5 (E.D. Mich. Jan. 4, 2011).

158. Defendant Ashqar's Response and Objections to Government's Motion in Limine to Bar Evidence and Argument Related to Ethnic and Religious Issues and Consolidated Motions in Limine, *supra* note 125.

159. *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

160. Quint, *supra* note 44, at 1641 ("[T]he admissibility of evidence of a defendant's protected speech or association should be determined by a test substantially more stringent than the balancing test ordinarily applicable in the case of evidence posing significant risks of prejudice.").

161. *Casper*, 541 F.2d at 1280 (strictissimi entails the need for care in analyzing evidence against a defendant); *United States v. Stone*, 848 F. Supp. 2d 719, 724 (E.D. Mich. 2012) (strictissimi requires special care in protecting a defendant's right to associate); Motion in Limine Requesting Application of the *Strictissimi Juris* Standard To Protect the Accused's Rights to Freedom of Association, Assembly, and Due Process, *supra* note 8 (strictissimi requires "clear proof" of a defendant's specific intent to accomplish a group's illegal goals); Rebecca Allen, *People ex rel. Gallo v. Acuna: (Ab)using California's Nuisance Law to Control Gangs*, 25 W. ST. U. L. REV. 257, 295 (1998); Senn, *supra* note 44, at 341 n.2.

162. *Noto*, 367 U.S. 290; *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991); *United States v. Cerilli*, 603 F.2d 415, 421 (3d Cir. 1979); *United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1972); *Stone*, 848 F. Supp. 2d at 722; *United States v. Larson*, 807 F. Supp. 2d 142 (W.D.N.Y. 2011); *United States v. Marzook*, No. 03-CR-0978, 2005 WL 3095543, at \*6 (N.D. Ill. Nov. 17, 2005);

means is unclear. Some courts, like the *Scales* and *Spock* courts, take an elemental approach, imposing on the government the duty to prove elements beyond those set forth in criminal statutes. Others, like the *Noto* Court, imply that strictissimi requires something additional to proof of the *Scales* elements. These courts may strictly construe extant rules and resolve any doubts in favor of defendants.<sup>163</sup> A third approach is to favor certain forms of evidence over others, requiring, for example, enough direct or circumstantial evidence without recourse to imputation of guilt from other group members to the defendant.<sup>164</sup> A fourth approach requires the government to negate all possible innocent interpretations of conduct to obtain a conviction.<sup>165</sup>

#### D. A Purposive Approach to Strictissimi Juris

The types of evidence, weight of evidence, and sufficiency of evidence approaches are all related; certain types of evidence are meant to be weighted more heavily, or admitted or excluded, thus contributing to sufficiency of the evidence. Applying *all* of courts' interpretations of strictissimi, however, would be unworkable. Prosecutors would simultaneously be required to prove additional elements and meet a higher burden while having less probative evidence and fewer types of evidence available for use. Juries, in turn, would be permitted to make only the most direct inferences. The requirement of proving guilt beyond a reasonable doubt would be fundamentally altered.

It would therefore be impractical and lead to inefficient outcomes to apply these static, binary strictissimi rules categorically. The alternative is to view strictissimi's concrete mandates as applicable dynamically and flexibly<sup>166</sup> in light of the rule's fundamental purpose, which is to determine

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State v. Gritzner, 36 S.W. 39, 42 (Mo. 1896); Petition for a Writ of Certiorari, *supra* note 141, at 13; Brief for Appellants James Sanders and Elizabeth Sanders, *supra* note 142, at 55; Opening Brief for Appellant, *supra* note 73, at 46; Brief of Appellant Fitzpatrick, *supra* note 139, at 2; Government's Response to Defendant's Motion in Limine Requesting Application of the Strictissimi Juris Standard, *supra* note 45; Government's Response to the Defendants' Motion to Dismiss the Superseding Indictment, *supra* note 8.

163. For example, some have suggested that strictissimi's sufficiency standard entails that the government must prove that the defendant's speech was so offensive as to make it unprotected by the First Amendment, Petition for a Writ of Certiorari, *supra* note 141, at 14, and others require that courts critically analyze specific intent, *Stone*, 848 F. Supp. 2d at 724.

164. *Marzook*, 2005 WL 3095543, at \*6; *United States v. Martindale*, 146 F. 280, 285 (D. Kan. 1903).

165. *Dellinger*, 472 F.2d at 393; Supplemental Brief in Support of Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29 on Counts Three, Five, Six, Seven, Eight, and Nine – The § 371, § 666(a)(1)(B), and Honest Services Charges, *supra* note 142; Quint, *supra* note 44, at 1655.

166. This dynamic systems approach is illustrated in *Bryant v. United States*, 105 F. 941, 943 (5th Cir. 1901):

an individual's guilt separate from the nature of a group in which she acts.<sup>167</sup> This would give courts the space to act to protect defendants' important First Amendment interests and substantive right against guilt by association while ensuring that prosecutions are not hobbled by impossible restrictions. Courts would, indeed, have a number of options to address both sets of imperatives.

#### IV. THE USES AND POTENTIAL USES OF *STRICTISSIMI JURIS*

Based on its fundamental purpose, strictissimi has impacted and has the potential to be applied more during the criminal justice process from the preliminary hearing through appellate review. Lawyers should request, and judges apply, the following procedures under strictissimi where doing so would serve the rule's purpose.

##### A. Preliminary Hearing

Strictissimi figured heavily in the set of prosecutions arising from protests during the 2000 Republican National Convention in Pennsylvania. In one defendant's case, the Commonwealth argued that the defendants were not entitled to strictissimi because the evidence supported a prima facie case, and the Commonwealth did not need to prove its case beyond a reasonable doubt at the preliminary hearing.<sup>168</sup> The factfinder, not the court, was to determine whether the facts supported guilt or innocence.<sup>169</sup>

The Commonwealth was correct that proof beyond a reasonable doubt at the preliminary hearing is an improper standard. The purpose of a preliminary hearing is to give the defendant the opportunity to show that there is no probable cause for his continued detention.<sup>170</sup> Strictissimi operates where there almost certainly *is* probable cause. Strictissimi's applicability at a preliminary hearing would, finally, force the court to determine that a body of the government's evidence comprises proof beyond a reasonable doubt in the absence of the defendant's rebuttal

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While it is true that penal statutes should be strictly construed, it is undoubtedly the duty of the courts to look to the mischief intended to be prevented, and to take into consideration the character of the remedy proposed to be applied, in doing which the mere letter must yield to the manifest spirit, and give to the provisions that measure of restriction or expansion which a sound, reasonable reading of the whole requires of each particular.

167. *Noto*, 367 U.S. at 300; *see also* *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 919 (1982); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (strictissimi used to counter guilt by association); *Hellman v. United States*, 298 F.2d 810, 812 (9th Cir. 1961) (strictissimi used to avoid the impairment of "legitimate political expression or association."); *Marzook*, 2005 WL 3095543, at \*6 (strictissimi used to determine whether a defendant is "involved with the illegal aspects" of group conduct).

168. Consolidated Reply Brief for Appellant, *supra* note 45, at 3.

169. *Id.* at 9–10.

170. *Ross v. Sirica*, 380 F.2d 557, 559 (D.C. Cir. 1967).

evidence. This is in most cases an impossible decision to make and one that defendants would not welcome. *Strictissimi* should not, therefore, operate at the preliminary hearing.

### B. *Pre-Trial*

As discovery is generated and the details of the government's case become apparent, the deference given to the government at the preliminary hearing gives way to greater judicial oversight. As the pre-trial process unfolds, *strictissimi* should assume a gradually more influential role.

Courts and lawyers have identified four ways that *strictissimi* can apply after the preliminary hearing but before trial: during proceedings to determine the members of a conspiracy;<sup>171</sup> in a motion to dismiss based on lack of evidence;<sup>172</sup> in a motion to dismiss based on the right not to be tried;<sup>173</sup> and in motions to dismiss charges that are based on excessively inchoate or "pyramided" offenses.<sup>174</sup> *Strictissimi* may also affect motions in limine and bills of particulars.

Proceedings to determine the members of a conspiracy are necessary so that courts can make accurate co-conspirator hearsay admissibility rulings under Fed. R. Evid. 801(d)(2)(E). Although courts virtually always make these determinations mid-trial and conditionally,<sup>175</sup> it is better to hold these proceedings pre-trial, which would serve trial efficiency and prevent the jury from hearing damning hearsay that ultimately may be inadmissible.

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171. Motion for *Vinson–Enright* Hearing, *supra* note 8.

172. Memorandum in Support of Motion to Dismiss Counts 1, 2, 3 and 4 of the Indictment, *United States v. Al-Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004) (No. 8.03-CR-77-T-30 TBM), 2003 WL 24208654; Government's Memorandum of Law in Opposition to Defendants' Pretrial Motions, *supra* note 45.

173. Petition for a Writ of Certiorari, *supra* note 141, at 7–9.

174. Memorandum of Law in Support of Defe[n]dant's Motion to Dismiss Counts One and Two of the Indictment for Impermissibly Charging Multi-Level Inchoate Offenses at 3–4, 13, *United States v. Awan*, 459 F. Supp. 2d 167 (E.D.N.Y. 2006) (No. 1:06-CR-0154 (CPS)), 2006 WL 4692884, at \*3–4, \*13 (defendant charged with conspiracy to provide material support and providing material support; claimed the conspiracy count "impermissibly charges a multi-level inchoate offense—in effect, a *conspiracy to prepare* to commit another *conspiracy*—that far exceeds any appropriate limit for such offenses . . . . Count One's pyramiding of inchoate offenses—establishing, in essence, an unprecedented *triple* inchoate offense—violates the Fifth Amendment's Due Process guarantee, and requires dismissal. . . . This remoteness from conduct makes the 'membership' cases under the Smith Act, particularly *Noto*, . . . instructive," and required the application of *strictissimi*); Memorandum of Law in Support of Defendant Tarik Shah's Pre-Trial Motions at 30, *United States v. Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007) (No. 5205 CR. 673 (LAP)), 2006 WL 6155173, at \*30 (defendant invoked *strictissimi* because he and another man allegedly "agreed with each other to *assist* another individual to *transfer money* from the United States to locations overseas to purchase weapons and communications equipment for jihadists in Afghanistan and Chechnya" (emphasis added)).

175. *United States v. Gessa*, 971 F.2d 1257, 1270 (6th Cir. 1992) (citing *United States v. Vinson*, 606 F.2d 149 (6th Cir. 1979); *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978)); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977).

When strictissimi applies, 801(d)(2)(E) hearings should always be held pre-trial since such strictissimi-applicable prosecutions are likely to rely heavily on others' speech that may not be probative. Jurors who hear 801(d)(2)(E) evidence, which associates the defendant with her unpopular or criminal friends, are likely to impute the group's beliefs and conduct to the defendant.<sup>176</sup> Strictissimi is supposed to prevent this.

Strictissimi should inform motions to dismiss based on lack of evidence because both strictissimi and these motions aim to resolve sufficiency of the evidence questions. These motions can be based on the traditional quantum of evidence approach, by which courts ask whether there is enough evidence to convict.<sup>177</sup> They can also address charges that are excessively inchoate or pyramided. While multi-level membership crime charges, such as those charging "a conspiracy to prepare to commit another conspiracy,"<sup>178</sup> are normally sustainable, their evidence is usually comprised of the type of evidence strictissimi treats with skepticism. Strictissimi should operate to permit courts to dismiss such charges.<sup>179</sup>

Similar are motions to dismiss based upon the right not to be tried. In *Bove v. United States*, the defendant argued that the district court should have applied strictissimi pre-trial to protect his First Amendment right not to be tried for his participation in First Amendment-protected activity.<sup>180</sup> The defendant implied that strictissimi at this pre-trial stage would require the following five things: (1) the government must introduce the defendant's own statements that "he sought to further any unlawful aims of others by any unlawful means"; (2) the indictment must set forth facts intimating that the defendant himself committed the illegal act contemplated by the conspiracy or any subsequent legal act clearly taken for the specific purpose of rendering effective the later illegal activity; (3) the indictment cannot fulfill the showing of intent by alleging only others' activities; (4) the government must prove individual intent; and (5) the government must "make a concrete showing that the defendant's speech

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176. *Yates v. United States*, 354 U.S. 298, 339 (1957) (Black, J., concurring in part and dissenting in part) (complaining that the Smith Act trials are prolonged affairs in which massive collections of books, pamphlets and manifestoes are introduced: No juror can effectively evaluate this evidence, and guilt or innocence hinges on "what Marx or Engels or someone else wrote or advocated as much as a hundred or more years ago. . . . [P]rejudice makes conviction inevitable except in the rarest circumstances.").

177. *See United States v. Romo*, No. 06-CR-335, 2007 WL 3026717, at \*2 (E.D. Wis. Oct. 16, 2007); *United States v. Doyle*, No. 04-CR-572, 2006 WL 951881, at \*3 (N.D. Ill. April 11, 2006).

178. Memorandum of Law in Support of Defendant's Motion to Dismiss at 3, *United States v. Awan*, 384 F. App'x 9 (2d Cir. 2010) (No. 1:06-CR0154 (CPS)), 2006 WL 4692884, at \*3.

179. In one of the 2000 RNC protest cases, the court dismissed one defendant's charges before trial, applying strictissimi and finding insufficient evidence to establish a prima facie case. Brief for Appellee Arnold, *supra* note 129, at 16.

180. Petition for a Writ of Certiorari, *supra* note 141, at 9–10.

was so offensive as to bring it without the protections of the First Amendment.”<sup>181</sup>

The first and third requirements are implied from *Scales* and are questions of constitutional law that can and should be resolved by the court pre-trial. The second requirement is borrowed from *Spock* and so should be a required showing in the First Circuit and others that adopt it. The fourth requirement states nothing new, since indictments must always allege criminal intent. The fifth requirement—similarly—states black-letter First Amendment law. *Strictissimi* should therefore require the government, pre-trial, to meet the first, second, and third requirements.

*Strictissimi* should also be applied in rulings on motions in limine, which allow the court to rule on the admissibility and relevance of anticipated evidence before that evidence is offered at trial.<sup>182</sup> These questions are *strictissimi*'s primary concerns.

Finally, *strictissimi* should inform motions for bills of particulars. The purposes of a bill of particulars are to identify with sufficient particularity the nature of the charge pending against a defendant<sup>183</sup> and to limit the government's evidence and allegations.<sup>184</sup> These purposes are particularly emergent in *strictissimi*-applicable cases. Membership crime charges can be particularly vague<sup>185</sup> and can evolve over the course of a trial to suit the development of evidence.<sup>186</sup> Such vague charges often implicate First Amendment concerns and outcome unreliability and should be clarified prior to trial. In such cases, *strictissimi* should require courts to order reasonable bills of particulars upon the defendant's request.

### C. *Interlocutory Appeal*

One defendant has argued that trial court rulings regarding *strictissimi* are subject to interlocutory appeal.<sup>187</sup> The purpose of an interlocutory appeal is to resolve controlling legal issues as soon as possible to promote

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181. *Id.* at 13–14.

182. *See* *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984).

183. *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987).

184. *See* *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985); *United States v. Haskins*, 345 F.2d 111, 114 (6th Cir. 1965).

185. *See* *Krulewitch v. United States*, 336 U.S. 440, 446–47 (1949) (Jackson, J., concurring); *United States v. Spock*, 416 F.2d 165, 188 (1st Cir. 1969) (Coffin, J., dissenting); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393, 393 (1922).

186. Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 412 (1959).

187. Petition for a Writ of Certiorari, *supra* note 141, at 37; Defendant Gerald E. Bove's Memorandum of Law: Motion to Dismiss at 19, *United States v. Larson*, No. 07-CR-3045, 2010 WL 376404 (W.D.N.Y. 2010), 2010 WL 2486562, at \*19.

efficiency.<sup>188</sup> Such controlling issues are those whose resolution could terminate the action or materially affect its outcome.<sup>189</sup> Interlocutory appeal may also be available when necessary to determine evidentiary questions, or whether the prosecution violates a defendant's First Amendment or other constitutional rights.<sup>190</sup>

Many strictissimi issues should be subject to interlocutory appeal. In those cases that clearly call for strictissimi, a denial of strictissimi could materially affect the outcome of the case. In these cases, strictissimi's application could even end prosecution. Strictissimi is, furthermore, supposed to protect defendants' First Amendment rights, and it informs many points throughout the criminal justice process. Its application is therefore one of constitutional proportions.

#### *D. Trial*

During trial, strictissimi's application cannot alter the rules of evidence, but courts should make admissibility decisions based on these rules differently. Along with Federal Rule of Evidence 801(d)(2)(E), there are at least five other rules of evidence that should be treated differently, both as to their applicability and any necessary mid-trial jury instructions. Questions of directed verdicts after the close of the prosecution's case should also be treated differently.

Federal Rule of Evidence 401 provides that "[e]vidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence."<sup>191</sup> Relevancy questions are particularly important when lawyers seek to introduce circumstantial evidence,<sup>192</sup> so courts should evaluate Rule 401 questions under strictissimi. These questions should treat circumstantial evidence with skepticism, allow for independent evidence rules, attend carefully to issues around specific intent, and work to avoid group-to-individual imputation of guilt.

Rule 402 provides that courts should consider whether admission of even relevant evidence would entail a constitutional violation.<sup>193</sup> While Rules 401 and 402 favor liberal admission of evidence,<sup>194</sup> strictissimi

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188. *John v. United States*, 247 F.3d 1032, 1051 (9th Cir. 2001) (en banc) (Rymer, J., special statement).

189. *See Blackie v. Barrack*, 524 F.2d 891, 900 (9th Cir. 1975); *United States ex rel. Elliott v. Brickman Grp. Ltd.*, 845 F. Supp. 2d 858, 865 (S.D. Ohio 2012).

190. *See United States v. McDade*, 827 F. Supp. 1153, 1170 n.7 (E.D. Pa. 1993).

191. FED. R. EVID. 401(a).

192. FED. R. EVID. 401, advisory committee's note to 1972 proposed rules (explaining that relevancy questions are "coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof").

193. FED. R. EVID. 402.

194. *Gentile v. Cnty. of Suffolk*, 129 F.R.D. 435, 444 (E.D.N.Y. 1990).

should impose a stricter regime: the protection of defendants' First Amendment rights sometimes calls for the exclusion even of relevant evidence.<sup>195</sup> Courts entertaining Rule 402 questions should consider the amount of First Amendment activity in evidence relative to non-First Amendment activity, the centrality to First Amendment interests of this protected activity, and the public safety danger associated with the non-protected activity.

Under Rule 403, a court may exclude relevant evidence when its probative value is "substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury."<sup>196</sup> Rule 403 is supposed to prevent inducing decisions on a "purely emotional basis."<sup>197</sup> Instead of excluding the evidence, courts may opt for an effective limiting jury instruction.<sup>198</sup> Strictissimi should affect Rule 403 evaluations because both strictissimi and Rule 403 work to avoid unfair guilt by association.<sup>199</sup>

Rule 610 provides that evidence of a witness' religious beliefs or opinions is not admissible to attack or support her credibility.<sup>200</sup> For example, in the post-9/11 war on terror, cases have often depended upon an interpretation of terms like "jihad," "salafi," and "aman" to determine whether defendants intended to commit a crime.<sup>201</sup> Prosecutors have interpreted defendants' use of the word jihad to mean violent or armed jihad, where the term could also imply legal conduct.<sup>202</sup> Salafism is a puritanical sect within Sunni Islam, many of whose scholars have condemned terrorist attacks.<sup>203</sup> Courts, however, have connected it to

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195. See *United States ex rel. Del. Hardware Co. v. Lynch*, 192 F. 364, 368 (D. Del. 1912).

196. FED. R. EVID. 403.

197. FED. R. EVID. 403, advisory committee's note on 1972 proposed rules.

198. *Id.*

199. Quint, *supra* note 44, at 1641, 1662.

200. FED. R. EVID. 610.

201. See, e.g., *United States v. Mehanna*, 735 F.3d 32, 41 (1st Cir. 2013); *United States v. Jayyousi*, 657 F.3d 1085, 1099 (11th Cir. 2011); *United States v. Rahman*, 189 F.3d 88, 136–37 (2d Cir. 1999); Government's Reply to Defendant's Opposition to Government Motion in Limine to Limit Defense Comment Regarding Proposed Defense Expert's Testimony During Opening Statements at 9, *United States v. Mehanna*, 669 F. Supp. 2d 160 (D. Mass. 2009) (No. 09-10017-GAO), 2011 WL 5007415, at \*9.

202. "Jihad" may mean peaceful jihad, *Jayyousi*, 657 F.3d at 1099, a personal struggle against one's evil inclinations, efforts to morally uplift society, and other things, *Rahman*, 189 F.3d at 136–37.

203. *Imam Al-Albani on the Ruling on Suicide Bombings and Those Who Perform Them*, ISLAMAGAINSTEXTREMISM.COM (last visited Sept. 27, 2015), <http://www.islamagainstextremism.com/articles/dxwaj-imam-al-albani-on-the-ruling-on-suicide-bombings-and-those-who-perform-them.cfm>; *Shaykh Salih Al-Suhaymee on the September 9/11 Attacks in New York*, ISLAMAGAINSTEXTREMISM.COM (last visited Sept. 27, 2015), <http://www.islamagainstextremism.com/articles/imeemfe-shaykh-salih-al-suhaymee-on-the-september-911-attacks-in-new-york.cfm>; *Shaykh Ubayd Al-Jabiree Refuting and Exposing the Kharijite Anwar Al-Awlaki*, ISLAMAGAINSTEXTREMISM.COM (last visited Sept. 27, 2015), <http://www.islamagainstextremism.com/articles/nurpk-shaykh-ubayd-al-jabiree-refuting-and-exposing-the-kharijite-dog-anwar-al-awlaki.cfm>; *The Muftee, Shaykh Abd Al-Azeez Aal Al-Shaykh on the September 11, 2001 Attacks in New York*,

violent jihad and Al Qaeda.<sup>204</sup> Aman is an Islamic legal doctrine that would prohibit a Muslim living in the United States from attacking the country.<sup>205</sup> But in one case, the government opposed the admission of evidence of aman by a devout Muslim living in the United States who was accused of conspiring to kill U.S. nationals.<sup>206</sup> Trial courts that apply strictissimi should consider Rule 610 questions carefully to ensure that religious terms and concepts are not admitted or excluded in ways that impermissibly associate a defendant with a criminal group.

Rule 702 provides for expert witness testimony.<sup>207</sup> Expert witnesses have often served to blur the distinction between groups and individual defendants. Post-9/11 experts have testified in support of the existence of the “violent global jihad movement” and defendants’ inextricable link to that movement—even if no formal link is established.<sup>208</sup> Other experts have linked individuals to criminal street gangs,<sup>209</sup> organized crime families,<sup>210</sup> and narcotics rings.<sup>211</sup> Strictissimi should ensure that experts do not unfairly link defendants to larger groups, impute individual guilt from the group’s conduct, or allow juries to misuse expert testimony.

Finally, Federal Rule of Criminal Procedure 29 gives courts great discretion to direct a verdict of not guilty any time after the close of the prosecution’s case.<sup>212</sup> In directing a verdict, courts consider questions of law as well as sufficiency of the evidence.<sup>213</sup> Normally, a judgment of acquittal should be granted only when the evidence and all reasonable inferences, taken in the light most favorable to the government, are

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ISLAMAGAINSTEXTREMISM.COM (last visited Sept. 27, 2015), <http://www.islamagainstextremism.com/articles/oyngagpp-the-muftee-shaykh-abd-al-azeez-aal-al-shaykh-on-the-september-11-2001-attacks-in-new-york.cfm>.

204. *Mehanna*, 735 F.3d at 41.

205. Government’s Reply to Defendant’s Opposition to Government Motion in Limine to Limit Defense Comment Regarding Proposed Defense Expert’s Testimony During Opening Statements, *supra* note 201, at 17.

206. *Id.*

207. FED. R. EVID. 702.

208. Government’s Sentencing Memorandum at 60, *United States v. Amawi*, 579 F. Supp. 2d 923 (N.D. Ohio 2008) (No. 06CR00719), 2009 WL 8557096, at \*60 (“It would be both a dangerous and erroneous method of analyzing the appropriate sentence in this case by focusing on whether the defendants are, or were, directly linked to Al Qaeda or some other designated foreign terrorist organization. While there was no evidence introduced at trial that any of these defendants were ‘card-carrying members’ of [A]l Qaeda, the dangerousness of their conduct is by no means lessened given the emerging decentralization of the violent global jihad movement . . . .”); *see* Government’s Opposition to Defendants’ Joint Motion to Exclude Government Experts at 3–4, *United States v. Hassoun*, 477 F. Supp. 2d 1210 (S.D. Fla. 2007) (No. 04-60001-CR), 2007 WL 2349159, at \*3–4.

209. *United States v. Walker*, 391 F. App’x 638, 641 (9th Cir. 2010); *United States v. Hankey*, 203 F.3d 1160, 1167–71 (9th Cir. 2000).

210. *United States v. Locascio*, 6 F.3d 924, 936–37 (2d Cir. 1993).

211. *United States v. Bryant*, 256 F.R.D. 615, 617 (C.D. Ill. 2009).

212. *See United States v. Black Lance*, 454 F.3d 922, 924 (8th Cir. 2006).

213. FED. R. CRIM. P. 29(a).

insufficient to reasonably find guilt beyond a reasonable doubt.<sup>214</sup> Courts should apply strictissimi in considering Rule 29 motions by treating inferences with greater skepticism, considering alternative theories that the defendant was engaged in protected conduct, and requiring that evidence of guilt overwhelm the innocent alternatives.<sup>215</sup>

### *E. Jury Instructions*

The purpose of jury instructions is to advise the jury on the factual issues,<sup>216</sup> the proper legal standards to be applied in determining issues of fact before them,<sup>217</sup> and the role that the jury must play and the actions it must take.<sup>218</sup> These instructions should be “clear, concise, definite, positive, direct and accurate.”<sup>219</sup>

Jury instructions are especially important where strictissimi applies, since they affect how facts are to be used, alter the legal standards regarding factual issues, and require the jury to take special care in performing its duties.<sup>220</sup> Strictissimi-informed jury instructions should be clear and concise, but also nuanced. In practice, however, such instructions are often redundant, inconsistent, and confusing.<sup>221</sup> In general, these instructions should restate the strictissimi-informed evidentiary rulings made before and during trial, inform the jury that it must consider the evidence under a heightened level of scrutiny, remind them that they cannot impute guilt from the group to the individual, and remind them that they play a role not only in determining guilt, but also in protecting defendants’ First Amendment rights.

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214. United States v. Upton, 352 F. Supp. 2d 92, 95 (D. Mass. 2005) (quoting United States v. Pimental, 380 F.3d 575, 583 (1st Cir. 2004)).

215. Supplemental Brief in Support of Motion for Judgment of Acquittal Pursuant to Fed. R. Crim. P. 29 on Counts Three, Five, Six, Seven, Eight, and Nine – The § 371, § 666(a)(1)(B), and Honest Services Charges, *supra* note 142, at 8–10.

216. United States v. Gilbreath, 452 F.2d 992, 994 (5th Cir. 1971).

217. Daly v. Moore, 491 F.2d 104, 108 (5th Cir. 1974).

218. United States v. Assi, 748 F.2d 62, 65 (2d Cir. 1984).

219. United States v. Hill, 417 F.2d 279, 281 (5th Cir. 1969).

220. *Contra* United States v. Stone, 848 F. Supp. 2d 719, 722 (E.D. Mich. 2012).

221. United States *ex rel.* Means v. Solem, 480 F. Supp. 128, 131–33 (D.S.D. 1979); Commonwealth v. Newman, 470 A.2d 976, 980 (Pa. Super. Ct. 1984); Governor Siegelman’s Supplementary Proposed Jury Instructions, *supra* note 8, at 5–7; Defendant’s First Corrected Proposed Jury Instructions at 6, United States v. Farnsworth, No. 2:04-CR-707 (E.D. Pa. Nov. 28, 2005), 2005 WL 5903601, at \*6; Defendant’s Proposed Jury Instructions, *supra* note 73, at 19; Defendant Abdelhaleem Ashqar’s Objections to Government’s Second Amended Draft Jury Instructions at 1–2, United States v. Salah, 462 F. Supp. 2d 915 (N.D. Ill. 2003) (No. 1:03CR00978), 2003 WL 25714763 at \*1–2; Brief for Appellate Sorenson, *supra* note 125, at 10, 13.

*F. Sentencing*

Strictissimi's applicability at sentencing has been given little attention, but it has a role to play in ensuring that convicted defendants' First Amendment activities and beliefs are not unfairly used to calculate their sentences.

As amici in the case of Mumia Abu-Jamal, the ACLU argued that strictissimi should be applied at sentencing to ensure that First Amendment rights are not infringed, and that appellate courts should review de novo whether the prosecution impermissibly used protected activities at sentencing.<sup>222</sup> The question here is whether strictissimi should be used to govern the admission of abstract beliefs<sup>223</sup> or association with a criminal group<sup>224</sup> to determine sentences. This is not an easy question, since protected conduct can be both probative *and* protected, so that its admission is both reliable and chills First Amendment conduct.

The Supreme Court suggested an approach in *Dawson v. Delaware*.<sup>225</sup> In that case, the defendant was sentenced in part based on his membership in the Aryan Nation.<sup>226</sup> He objected to this, invoking strictissimi as a guide to considering such First Amendment activity at sentencing.<sup>227</sup> The Court did not discuss strictissimi but held that First Amendment activity may be admissible at sentencing if there is a sufficient connection between a defendant's beliefs and both his group and his criminal conduct.<sup>228</sup> On the other hand, use of association merely to generate prejudice against the defendant violated the First Amendment.<sup>229</sup> The safeguards alluded to in *Dawson*—requiring a connection between the First Amendment conduct and the group and crime at issue—should define strictissimi's application at sentencing.

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222. Brief of Amicus Curiae ACLU at 3, *Commonwealth v. Abu-Jamal*, 720 A.2d 79 (Pa. 1998) (No. 119 CAP), 1996 WL 33418254, at \*3.

223. Petition for Writ of Certiorari at 28, *Simkanin v. United States*, 547 U.S. 1111 (2006) (No. 05-948), 2006 WL 226500, at \*28.

224. Mohamad Hammoud's Submission on Sentencing at 23–24, *United States v. Hammoud*, No. 3:03 CR 147 MU, 2006 WL 516821 (W.D.N.C. Mar. 1, 2006), 2006 WL 5381153, at \*23–24.

225. 503 U.S. 159 (1992).

226. Brief for Petitioner at 5, 8, *Dawson*, 503 U.S. 159 (No. 90-6704), 1991 WL 527601, at \*5, \*8.

227. *Id.* at 21, 1991 WL 527601, at \*21.

228. *Dawson*, 503 U.S. at 168.

229. *Id.* at 166.

*G. Appellate Review*

Strictissimi is mentioned most as a defendant-favorable rule of appellate review.<sup>230</sup> There are three versions of strictissimi appellate review.

The predominant version requires appellate courts to review the sufficiency of the evidence<sup>231</sup> in one of three ways: in the light most favorable to the defendant;<sup>232</sup> under some “stricter standard of review” than the “rational trier of fact” standard;<sup>233</sup> or by replacing the light most favorable to the government standard with a strictissimi-specific standard. This standard would require the appellate court to ensure that the defendant is not held liable for the actions of the group, that there is sufficient evidence to show the defendant’s individual culpability, and that the court not “strain” to draw inferences in the government’s favor.<sup>234</sup> All of these versions suggest—but do not explicitly mandate—de novo review for questions of fact.

A second version of strictissimi at the appellate level would require a finding of per se prejudice and would suspend the harmless error doctrine when “mandatory requirements of the law” are violated.<sup>235</sup> This version, however, is a proposal by one legal scholar and has not been adopted by any court. A third version of strictissimi at the appellate level would require de novo review of a trial court’s admission or exclusion of evidence.<sup>236</sup> This version does not have the jurisprudential footprint that version one does and entails the abrogation of the abuse of discretion standard of review of evidentiary rulings.

The three forms of the first version remain potentially viable. All three forms abandon the light most favorable to the government standard of review in favor of the defendant. The third form is qualitatively different, whereas the first and second forms are quantitatively different. Strictissimi appellate review should be unique in both ways.

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230. See Government’s Response to the Defendants’ Motion to Dismiss the Superseding Indictment, *supra* note 8, at 67; Defendant Pope’s Reply to the Government’s Opposition to His Motion to Compel an Amended Bill of Particulars, *supra* note 45, at 16; Reply Brief for Appellant Sorenson, *supra* note 125, at 1 n.1; Senn, *supra* note 44, at 340–41.

231. Consolidated Reply Brief for Appellant, *supra* note 45, at 9–10; Brief for Appellant Sorenson, *supra* note 125, at 23.

232. See *Hellman v. United States*, 298 F.2d 810, 813–14 (9th Cir. 1961); Brief for Appellants James Sanders and Elizabeth Sanders, *supra* note 142, at 55–56.

233. Opening Brief for Appellant, *supra* note 73, at 46.

234. Brief for Appellants James Sanders and Elizabeth Sanders, *supra* note 142, at 56, 61–62, 64.

235. *United States v. Strong*, 36 C.M.R. 199, 204–05 (C.M.A. 1966) (Ferguson, J., concurring in part and dissenting in part) (quoting *Bobo v. Commonwealth*, 48 S.E.2d 213, 215 (Va. 1948)).

236. Quint, *supra* note 44, at 1667.

Qualitatively, strictissimi appellate review must ask a number of questions: Did a jury impute a group's conduct or intent onto an individual defendant? Was circumstantial evidence or inference used excessively? Was there sufficient independent evidence to support circumstantial or ambiguous First Amendment-protected evidence? Were the charges excessively inchoate or pyramided? And finally, did First Amendment activity comprise an overwhelming portion of the evidence?

Quantitatively, appellate courts should abandon the light most favorable to the government standard by confirming the reliability of the evidence and limiting the logical reach of inference. They should not be occupied with affirming a conviction wherever possible but with ensuring that the use of circumstantial evidence, inference, First Amendment activity, and imputation was minimal—and the government's evidence relied on a sufficient amount of reliable independent evidence.

While some might criticize this approach as excessively deferential to the defendant, it is actually *narrower* than the approach set forth in *Bose Corp. v. Consumers Union of United States, Inc.*,<sup>237</sup> a libel case about a magazine review of a Bose speaker system.<sup>238</sup> The district court found in Bose's favor under the *New York Times Co. v. Sullivan* actual malice standard.<sup>239</sup> The First Circuit performed a de novo review to ensure that the district court properly applied the governing constitutional law and that Bose had satisfied its burden of proof.<sup>240</sup>

The issue for the Supreme Court was whether the First Circuit's de novo review or the clearly erroneous standard set forth in Federal Rule of Civil Procedure 52(a) was proper.<sup>241</sup> The Court upheld the First Circuit's de novo review, writing that “in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’”<sup>242</sup>

The Court made clear that independent, de novo review of factual findings<sup>243</sup> is a “rule of federal constitutional law” in First Amendment cases.<sup>244</sup> Cases prior<sup>245</sup> and subsequent to *Bose* reaffirm this broad authority,<sup>246</sup> and scholars generally favor it.<sup>247</sup>

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237. 466 U.S. 485 (1984).

238. *Id.* at 487–88.

239. *Id.* at 491.

240. *Id.* at 492.

241. *Id.* at 493.

242. *Id.* at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–86 (1964)).

243. *Id.* at 501.

244. *Id.* at 510.

V. *STRICTISSIMI JURIS* AS CANON

To understand strictissimi, it is helpful not only to know how courts have defined and applied it and how they might do so in the future, but also how it fits into larger legal structures. I turn now to this contextualization. To do so, strictissimi is most usefully analogized to substantive canons as opposed to linguistic or extrinsic canons<sup>248</sup>—although not to ones of statutory construction, as canons are generally viewed. Strictissimi’s function reflects canons’ definition and function and relates closely to a number of specific canons.

A. *Definition and Function*

As a descriptive matter, substantive canons “promote policies external to . . . statute[s]”<sup>249</sup> and are best thought of as a set of background norms and conventions that courts use to interpret statutes.<sup>250</sup> This background consists of a structure of judicial-action norms that overlays the tripartite structure of government and performs a number of functions<sup>251</sup>: it shapes the relationship among the branches and regulates them;<sup>252</sup> it mediates the introduction of new legislation into what Henry Hart and Albert Sacks called the “general fabric of the law;”<sup>253</sup> it provides a backdrop of judicial interpretative norms against which Congress can legislate;<sup>254</sup> it supports the

245. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982) (involving African-American protests of white-owned businesses and one protest leader, Charles Evers, proclaiming to protesters, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”). In *Claiborne Hardware*, both the Fifth Circuit and Supreme Court appeared to apply de novo review to evaluate the sufficiency of the evidence. *Id.* at 914–15.

246. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128, 1133 (7th Cir. 1987); see also *Nor-West Cable Commc’ns P’ship v. City of St. Paul*, 924 F.2d 741, 746 (8th Cir. 1991); David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647, 1697 n.206 (2014).

247. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-12, at 872 (2d ed. 1988); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 242 (1985); Eugene Volokh, *Tort Law vs. Privacy*, 114 COLUM. L. REV. 879, 925 (2014).

248. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010); William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 674 (1999) (discussing extrinsic and linguistic canons).

249. Barrett, *supra* note 248, at 117.

250. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005).

251. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886–87 (2004).

252. *Id.* at 910–11.

253. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1380 (William M. Eskridge, Jr. and Philip P. Frickey eds., 1994); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1390 (2005).

254. Barrett, *supra* note 248, at 159.

separation of powers by straining to avoid invalidating statutes<sup>255</sup> and by casting courts as Congress' "faithful agents;"<sup>256</sup> and it may counteract predictable cognitive biases.<sup>257</sup> Related to the last point, canons can reduce the application of what Paul Robinson called "inculpatory exceptions," or "instances of 'imputed' elements of an offense"<sup>258</sup> that work against defendants, such as the presumption of complicity.<sup>259</sup>

Strictissimi can be analogized to substantive canons that aim not to interpret statutes for constitutionality or to construct their meaning to preserve democratic norms, but to evaluate factual allegations emerging from the executive branch. Thus, strictissimi is not part of the accepted set of canons which apply to evaluate legislative action. Rather, it is what might be called an executive-oriented canon. Although the law does not normally treat executive-oriented rules definitionally as "canons," it could because they meet the same needs.<sup>260</sup>

These needs include providing background norms against which courts can evaluate prosecutions and using which prosecutors can make decisions about when and what to charge. These norms support aspects of the "fabric of the law,"<sup>261</sup> which include protecting First Amendment rights and respecting the executive branch. As to the latter, strictissimi encourages comity vis-à-vis the executive because it provides a judicial alternative to granting motions to dismiss based on the First Amendment or insufficient evidence to establish probable cause. Instead of dismissing charges in factually ambiguous cases, judges may apply strictissimi. This would make the executive's job more difficult but would allow the prosecution to go forward.

Strictissimi also contributes to the separation of powers structure by mediating the executive-legislative relationship in three ways. First, strictissimi would encourage better lawmaking by impelling legislatures to draft more nuanced criminal statutes that avoid generating factual vagaries. Second, strictissimi would limit the delegation of authority to the executive both because nuanced statutes would cabin executive discretion and

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255. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992); Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 402 (2005).

256. Barrett, *supra* note 248, at 112.

257. William N. Eskridge, Jr. & John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 CORNELL L. REV. 616, 617–18 (2002).

258. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 611 (1984).

259. *Id.* at 657.

260. These concepts include background principles like the doctrines of mistake of law and fact, *Moore v. Brown*, 52 U.S. 414, 424 (1850), and the general preference for *mens rea* rather than strict liability, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)); *see also* *Staples v. United States*, 511 U.S. 600, 606 (1994).

261. HART & SACKS, *supra* note 253, at 1380.

because the judicial branch under *strictissimi* would more carefully police executive prosecutorial moves. Third, courts would remain the legislature's faithful agents because *strictissimi* respects prosecutions under reasonable statutory interpretations and avoids invalidating statutes as unconstitutional.<sup>262</sup>

As a normative matter, substantive canons are often controversial. While the descriptive approach to canons views them as neutral mediators and moderators of power among the three branches, leading to a reduced error rate,<sup>263</sup> Kenneth Bamberger and others<sup>264</sup> contend that canons reflect “values that the court imputes to our Constitution”<sup>265</sup> and reinforce judicial interpretations of legislation.<sup>266</sup> William Eskridge observed that canons can be forceful or merely window dressing, depending upon judges' willingness to internalize the canons' presumptions or use them to justify their decisions reached on other grounds.<sup>267</sup>

*Strictissimi* ought not be Eskridgean window-dressing but a rule that is more consistently, predictably, and forcefully applied. However, as a rule, there is no reason to reject its normative role—the issue is not *whether* it should play this role, but *what* that appropriate role is. *Strictissimi* plays two roles: First, while it encourages courts to remain legislatures' faithful agents and allow prosecutions to go forward, *strictissimi* also reinforces the judiciary's role in protecting constitutional rights and—as Bamberger noted above and Justice Marshall claimed in *Marbury v. Madison*<sup>268</sup>—declaring what those rights are and what they require of the government. Second, *strictissimi* *should* place a heavier weight on the interpretation of facts in favor of defendants. Canons that impact the criminal justice system nearly always favor the defendant because the harm arising from false conviction is so high; *strictissimi* carries this burden as well as the additional imperative to protect First Amendment rights. The dangers of false conviction and violation of constitutional rights justify *strictissimi*'s normative thumb on the scale.

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262. See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1543 (2008).

263. Eskridge & Ferejohn, *supra* note 257, at 643.

264. Brudney & Ditslear, *supra* note 250, at 8–11, 13 (arguing that substantive canons tend to “reflect . . . judicially preferred policy position[s]”).

265. Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 73 (2008).

266. *Id.* at 89.

267. Barrett, *supra* note 248, at 169; Eskridge & Frickey, *supra* note 255, at 595.

268. 5 U.S. 137, 177 (1803).

## B. Specific Canons

Strictissimi's general analogy to canons is further illustrated by reference to specific ones, which include the canon of constitutional avoidance, the rule of lenity, the presumption of tribal immunity, and the nondelegation canons.<sup>269</sup>

### 1. Canon of Constitutional Avoidance

The canon of constitutional avoidance encourages courts to decide cases at a sub-constitutional level, preserving statutes' validity.<sup>270</sup> This helps to preserve comity with the legislative branch and, especially in times of crisis, avoid inter-branch confrontations that could undermine the judiciary's authority.<sup>271</sup> Philip Frickey observed that even though the canon avoids constitutional questions, it also operates to "incrementally adjust[] public law to better respect individual liberty."<sup>272</sup> Indeed, Frickey argues the avoidance canon emerged in the 1950s anti-Communist cases and may be useful to mediate statutory or executive harshness and promote constitutional values in the post-9/11 terrorism cases.<sup>273</sup> For his part, Justice Frankfurter wrote that the avoidance canon encouraged congressional responsibility and due deliberation.<sup>274</sup>

Critics argue the avoidance canon should be abandoned for three reasons.<sup>275</sup> First, it allows courts to rewrite laws by imputing atextual elements (especially that of *mens rea*<sup>276</sup>) of a crime into law.<sup>277</sup> Second, it rejects the executive branch's interpretation of laws, revealing a lack of comity and respect for legislative deference to administrative agencies.<sup>278</sup> Third, it is overused such that while it is supposed to avoid making constitutional law, it indirectly does so.<sup>279</sup>

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269. All of these canons are transsubstantive. The interests that strictissimi is supposed to protect indicate that strictissimi, too, is transsubstantive. To make the discussion manageable and limited to strictissimi's use in the major cases detailing strictissimi, this Article approaches strictissimi's use only in the First Amendment–membership crime context.

270. Eskridge & Frickey, *supra* note 255, at 599.

271. Frickey, *supra* note 255, at 401.

272. *Id.*

273. *Id.* at 403.

274. *United States v. Rumely*, 345 U.S. 41, 46 (1953); Frickey, *supra* note 255, at 416.

275. William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 835 (2001).

276. Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1173 (2013).

277. *See generally* Kelley, *supra* note 275.

278. *Id.* at 873.

279. Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 90 (1996).

Strictissimi reflects many of the same virtues but avoids the vices of the avoidance canon. As a rule of sub-constitutional decision-making, it operates neither to invalidate statutes nor dismiss charges on constitutional grounds. It is not a tool of constitutional pronouncement. Rather, it accepts statutes as constitutional and assumes indictments satisfy probable cause even in light of substantive First Amendment questions.<sup>280</sup> It still, however, adjusts law over time to respect individual liberty by enabling an inter-branch dialog concerning the scope of judicial review where the First Amendment is at issue.<sup>281</sup>

Strictissimi, like the avoidance canon, is most relevant in what I call “crisis cases” in which the conflict between First Amendment rights and the criminal law is most salient. These crisis cases target unpopular groups that may, at least in some instances, pose an actual threat; strictissimi is particularly suited to them and can blunt executive overreach. If applied consistently, strictissimi could temper not only the attempted reach of the executive branch, but also expansive and poorly-worded legislation. Finally, its modest moves against the legislature and executive promote comity by assuming the validity of statutes and indictments and requiring only more care in making a case.<sup>282</sup>

Strictissimi calls into question executive interpretation of statutes and appears to create constitutional law. As to the first point, the extent to which courts should defer to executive branch interpretations of statutes is debatable. Strictissimi does not explicitly question that interpretation. However, by evaluating the facts especially carefully, courts applying strictissimi will limit the scope of that interpretation. As to the second point, strictissimi does, modestly and over time, create constitutional law. However, it does so by engaging the judiciary’s role in clarifying the line between protected and unprotected association and developing an evidentiary regime that can accurately distinguish the individual from his group.

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280. *Id.* at 13–14 (noting that the partial purpose of avoidance is to limit judicial authority, respect the other branches, and reinforce the separation of powers).

281. *Id.* at 17–18 (observing the “fiction” that avoidance “promotes dialogue on constitutional issues between the courts and legislatures”).

282. For example, avoidance was applied in *Dennis v. United States*, 341 U.S. 494 (1951), and *Yates v. United States*, 354 U.S. 298 (1957), the two infamous 1950s anti-Communist trials. *Id.* at 54–57. Strictissimi might have enabled the Court to reverse the convictions based on insufficient evidence, thereby avoiding the harsher step of invalidating law.

## 2. Rule of Lenity

The rule of lenity requires that criminal statutes be construed strictly<sup>283</sup> in favor of defendants where statutory language is unclear.<sup>284</sup> The rule's purpose is to encourage fair notice of what the law requires; to defer to the legislature and thereby reinforce the separation of powers;<sup>285</sup> to discipline the legislature to craft clear laws<sup>286</sup> and avoid delegation<sup>287</sup> either to the executive branch through its interpretation of law or to the judiciary through its imposition of atextual elements of crime, most often that of *mens rea*;<sup>288</sup> and to prevent charging of “overbroad proxy” crimes in favor of charging “genuine offense[s],”<sup>289</sup> in part through enabling jury nullification.<sup>290</sup>

Dan Kahan discounts lenity because he believes that its normative benefits accrue only in marginal cases.<sup>291</sup> He favors the executive's enhanced authority to have its interpretation of statutes respected by the judiciary.<sup>292</sup> This idea is based on the *Chevron* doctrine, arising from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a 1984 case in which the Supreme Court held that absent a clear congressional statement to the contrary, courts are to defer to an administrative agency's interpretation of statute if the agency's construction of the statute is “permissible.”<sup>293</sup> Lawrence Solan noted that the Court, in a later case, *United States v. O'Hagan*, approved of the executive branch's novel “misappropriation theory” to find a violation of SEC rules.<sup>294</sup> While it suggested as much, the *O'Hagan* Court did not clearly state whether the judiciary should defer to reasonable Department of Justice (DOJ) interpretations of criminal statutes.<sup>295</sup>

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283. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 354.

284. *Id.* at 345–46; see also Price, *supra* note 251, at 885.

285. Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998).

286. Kahan, *supra* note 283, at 351; Price, *supra* note 251, at 911.

287. Kahan, *supra* note 283, at 354.

288. Sohoni, *supra* note 276, at 1173.

289. Price, *supra* note 251, at 912.

290. *Id.* at 921.

291. Kahan, *supra* note 283, at 405 (“Even when federal criminal statutes lack clear edges, their core applications ordinarily involve socially undesirable conduct.”).

292. See *id.* at 396; Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 650 (2000) (“[C]ourts should use [*Chevron*] to uphold statutory constructions formally defended by the Department of Justice in advance of prosecution . . .”).

293. 467 U.S. 837, 843 (1984).

294. Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2240 (2003) (citing *United States v. O'Hagan*, 521 U.S. 642, 647 (1997)).

295. *Id.* at 2275.

Solan apparently excludes the DOJ from his list of “agencies” that should enjoy *Chevron–O’Hagan* deference.<sup>296</sup> Kahan, however, convincingly argues in favor of such deference.<sup>297</sup> His deference would entail locating interpretive authority, in particular people within the DOJ or a related agency who are not line prosecutors,<sup>298</sup> and requiring that agency to abide by administrative law requirements for statutory interpretation. These requirements include a notice and comment period, justifications for its interpretations, and adoption of its interpretations prior to their use in a prosecution.<sup>299</sup> Kahan believes this would moderate the law by removing interpretive authority from line prosecutors, whose decision-making can be sullied by ambition and desire to enter elected politics,<sup>300</sup> and place it in a more democratic and accountable executive structure.<sup>301</sup>

The rule of lenity disciplines and respects the legislature, avoids delegation, limits the interpretive authority of the executive, and protects defendants through strict statutory construction. *Strictissimi*, in turn, facilitates the same structural dynamics,<sup>302</sup> not by strictly construing statutes, but by strictly construing facts. Where statutes are vague, lenity operates, and where facts are vague, *strictissimi* operates—both for the same reasons. Even more specifically, where lenity may limit overbroad proxy crimes, *strictissimi* has the explicit purpose and design of resolving the inherent vagaries associated with such charges,<sup>303</sup> including as they do “the presence of some nefarious intention [as] the only thing to distinguish criminals from ordinary citizens.”<sup>304</sup> Indeed, *strictissimi* directly addresses prosecutions that implicate lenity’s concern with “broad and open-ended”<sup>305</sup> statutes applied in “cases where social circumstances have moved

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296. *Id.* at 2277.

297. Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 *BUFF. CRIM. L. REV.* 5, 15–19 (1997); see also David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 *SUP. CT. REV.* 201, 235 (seconding Kahan’s approach).

298. Kahan, *supra* note 297, at 15–17.

299. *Id.* at 19.

300. *Id.* at 15–16.

301. *Id.* at 19.

302. Price, *supra* note 251, at 910–11 (explaining lenity is justified by a theory of “political processes of criminal law—of the structural relationships between the governmental branches and the role of statutory construction in regulating them”).

303. As an aspect of structure, *strictissimi*, like lenity, plays a “role in structuring the processes of criminal lawmaking and law enforcement” and minimizes the charging errors associated with proxy crimes. *Id.* at 886–87.

304. *Id.* at 937; see also Frickey, *supra* note 255, at 424–25 (noting Justice Harlan’s admission in *Yates* that “distinctions between advocacy or teaching of abstract doctrines . . . are often subtle and difficult to grasp” (quoting *Yates v. United States*, 354 U.S. 298, 326 (1957))).

305. Price, *supra* note 251, at 926.

beyond the terms of the statute,”<sup>306</sup> and that therefore require a judicial response attentive to democratic preferences.<sup>307</sup>

Kahan’s prescription highlights the need for and amenability of *strictissimi*. His argument may be the best solution and reduce the need for *strictissimi*. It is, however, a major structural change that is unlikely to be implemented. Line prosecutors will continue to apply ad hoc interpretations of law to suit the needs of each case and do so throughout the process.<sup>308</sup> *Strictissimi* may be the second-best solution, but it offers a response to what Kahan views as the current, suboptimal situation in two ways. First, it blunts line prosecutors’ interpretations of statutes. Second, it addresses itself to cases not where the conduct is socially undesirable, but where the conduct may be protected by the First Amendment—in other words, socially *desirable* conduct. In the end, Kahan is not searching for a defendant-friendly canon like lenity but one that allows courts to make the “best” interpretation of statutes—narrow or broad.<sup>309</sup> *Strictissimi*, while it is defendant-friendly, may be nuanced enough and respectful enough of the other branches to satisfy Kahan.

### 3. *Presumption of Tribal Immunity*

The presumption of tribal immunity provides default immunity from state regulation to Native American tribes<sup>310</sup> because they have been historically disadvantaged in legal disputes with the United States.<sup>311</sup> It can be conceived as part of a larger presumption in favor of statutory construction to protect discrete and insular minorities where statutes are ambiguous.<sup>312</sup>

*Strictissimi* works similarly to construe factual vagaries in favor of defendants as the weaker party in a prosecution.<sup>313</sup> They are weaker especially in cases to which *strictissimi* should apply because of

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306. *Id.* at 930.

307. *Id.* at 940.

308. *Krulewicz v. United States*, 336 U.S. 440, 447 (1949) (Jackson, J., concurring) (noting that “chameleon-like, [conspiracy] takes on a special coloration from each of the many independent offenses on which it may be overlaid”); Goldstein, *supra* note 186, at 412 (“The trial becomes a vehicle for constant shaping and forming of the crime, through colloquies among court and counsel, as each new item of evidence is offered by the prosecution to fill out an agreement whose scope will be unknown until the entire process is completed.”).

309. Kahan, *supra* note 283, at 415.

310. Eskridge & Frickey, *supra* note 255, at 609.

311. Barrett, *supra* note 248, at 151.

312. Eskridge & Frickey, *supra* note 255, at 602.

313. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 4 (1997) (“As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs. Severe limits on defense funding are the most obvious example, but not the only one.”).

prosecution-friendly discovery rules,<sup>314</sup> the *Spock* metastatic evidentiary rules, the often—and sometimes unfairly—prejudicial use of First Amendment activity as evidence, and the prejudice that juries can have in strictissimi-worthy cases,<sup>315</sup> which are often crisis cases dealing with unpopular, but perhaps law-abiding, defendants.

#### 4. *Nondelegation Canons*

Cass Sunstein argued that the nondelegation doctrine, whose demise or even lack of existence has been touted,<sup>316</sup> has in fact been renamed and relocated in a set of nondelegation canons that forbid executive agencies from making certain decisions on their own.<sup>317</sup> While there are obvious separation-of-powers canons,<sup>318</sup> the nondelegation canons work to promote individual rights through institutional design.<sup>319</sup> These canons include the rule of lenity<sup>320</sup> and the presumption of tribal immunity.<sup>321</sup> John Manning observed that the nondelegation canons often promote constitutional values that are under-enforced because they are threatened by government action that falls short of a cognizable violation.<sup>322</sup>

These canons do their work not by directly opposing the actions of other branches, but by using interpretive rules to promote branch responsibility, specifically by urging them to avoid the exercise of vague or

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314. “[I]n most criminal prosecutions, the *Brady* rule, Rule 16 and the Jencks Act, exhaust the universe of discovery to which the defendant is entitled.” *United States v. Presser*, 844 F.2d 1275, 1285 n.12 (6th Cir. 1988); *see also* *United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (finding that *Brady* does not “impose an affirmative duty upon the government to take action to discover information which it does not possess” (quoting *United States v. Beaver*, 524 F.2d 963, 966 (5th Cir. 1975))); *United States v. Hart*, 760 F. Supp. 653, 657 (E.D. Mich. 1991) (finding *Brady* and Jencks Act material is discoverable only after witness testifies); Andrew D. Goldsmith, *Trends—or Lack Thereof—in Criminal E-Discovery: A Pragmatic Survey of Recent Case Law*, U.S. ATT’YS’ BULL., May 2011, at 2, 4 (“[T]he prosecution’s disclosure obligations are limited in scope, extending only as far as the requirements of *Brady*, *Giglio*, *Jencks*, and Rule 16 . . .”).

315. *See* Price, *supra* note 251, at 921 (discussing that to the extent that strictissimi gives juries a basis for acquittals or nullification, strictissimi may serve to moderate cognitive biases against unpopular groups); Eskridge & Ferejohn, *supra* note 257, at 617–18 (finding that strictissimi may serve to moderate cognitive biases against unpopular groups); *id.* at 645 (explaining lenity provides judges who “will be prone . . . to attribute criminal liability to particular defendants” a canon that “requires them to think twice and find a targeted source for such liability”).

316. Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002).

317. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000).

318. *See* Eskridge & Frickey, *supra* note 255, at 604 (discussing the presumption against disruption of the separation of powers).

319. *See* Sunstein, *supra* note 317, at 317; Manning, *supra* note 262, at 1541–42.

320. Kahan, *supra* note 283, at 354.

321. Sunstein, *supra* note 317, at 333.

322. Manning, *supra* note 262, at 1542.

ambiguous authority.<sup>323</sup> These canons let the judiciary police the executive and legislative branches in a way that avoids a direct confrontation with them through invalidation of statutes or dismissal of charges.<sup>324</sup>

Like nondelegation canons, strictissimi is designed to protect individual rights where state action negatively affects those rights but falls short of a cognizable violation. Strictissimi encourages the executive to present better cases and the legislature to write clearer, Constitution-aware laws, but in a non-confrontational way that respects the executive's right to bring cases and the legislature's right to draft laws as it sees fit.<sup>325</sup> Strictissimi polices these two branches through the exercise of its power to say what evidence is admissible, how to evaluate that evidence, and what the Constitution requires. This may blunt executive and legislative criticism of the judiciary and avoid pushback by those branches that would cancel out strictissimi's benefits.<sup>326</sup>

Strictissimi is a modest rule<sup>327</sup> that structures the tripartite government to promote individual liberty, First Amendment values, and outcome reliability.<sup>328</sup> It includes both First Amendment interests and law enforcement imperatives in its analysis.<sup>329</sup> As such, it plays an important role in shaping the separation of powers.

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323. See *id.*; Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 251–52 (2010) (touting nondelegation doctrine as a necessary corollary to the distrusted unitary executive).

324. Manning, *supra* note 262, at 1543.

325. Eskridge & Frickey, *supra* note 255, at 631 (“While a Court that seeks to avoid antidemocratic constitutional activism might refuse to invalidate federal statutes because of their infringement of these constitutional norms, such a Court might also seek other ways to protect those norms.”).

326. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 560, 562 (2001).

327. Like the avoidance canon's operation in times of crisis, strictissimi can perform “a valuable theoretical function . . . by providing an intermediate alternative between statutory invalidation and validation.” Frickey, *supra* note 255, at 452. Unlike the avoidance and other canons, strictissimi may avoid canons' tendency to “overenforce the Constitution by handicapping Congress in the exercise of powers that it legitimately possesses.” Barrett, *supra* note 248, at 173.

328. *But see* Eskridge & Frickey, *supra* note 255, at 631 (regarding strictissimi as a quasi-constitutional canon because it is indirectly “democracy-enhancing by focusing the political process on the values enshrined in the Constitution.”).

329. See Jessica Lutkenhaus, Note, *Prosecuting Leakers the Easy Way: 18 U.S.C. § 641*, 114 COLUM. L. REV. 1167, 1203–04 (2014) (arguing that “the government interest in secrecy must be conceptualized not as *outweighing* the First Amendment interest; instead, it is *part* of the First Amendment analysis” in information-leak cases).

VI. *STRICTISSIMI JURIS* AND THE SEPARATION OF POWERS

The tripartite form of government can be viewed as structured to protect individual rights.<sup>330</sup> This is particularly important in criminal law because separation-of-powers questions in that area have been largely overlooked, leading to fewer checks on governmental action in criminal matters.<sup>331</sup> One commentator noted that a view toward “structural abuses” in criminal law is the preferred approach, since the Bill of Rights has not proven to be an effective check.<sup>332</sup> As a descriptive matter, *strictissimi* fits well into this structural approach. As a normative matter, *strictissimi* facilitates the minimization of inter-branch conflict.

A. *The Descriptive Claim*

Externally, the judicial branch is concerned with declaring what the Constitution means, making reasonable interpretations of statutory law,<sup>333</sup> and creating and improving common law. This entails a certain amount of review of the actions of the executive and legislative branches, as well as appellate review of lower court actions. As an internal matter, the judicial branch is concerned with promulgating rules of evidence and rules of criminal procedure.<sup>334</sup>

Inter-branch conflicts over the permissible scope of judicial authority<sup>335</sup> and the proper role of Congress in overseeing judicial rules<sup>336</sup> are common and persistent. Normative critiques arise when one branch attempts to arrogate excessive or non-existent power, such as when the executive

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330. Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514 (1991).

331. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 992–93 (2006).

332. These abuses include arbitrary enforcement of laws, secretive plea bargaining, discriminatory or selective plea bargaining, divergence from prosecutors’ office policies, and lack of true judicial oversight of guilty pleas. *Id.* at 1024, 1026–28, 1032.

333. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

334. Its concern is checked by congressional authorization through the Rules Enabling Act. 28 U.S.C. § 2072 (2012).

335. For example, the separation of powers may entail the judiciary’s deference to the legislature. Dru Stevenson, *Judicial Deference to Legislatures in Constitutional Analysis*, 90 N.C. L. REV. 2083, 2122 (2012). Or, it could provide a theory of judicial review. Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 367 (1982). It could also justify more judicially activist moves. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 724 (2000); Alexander Dill, Comment, *Scope of Review of Rulemaking After Chadha: A Case for the Delegation Doctrine?*, 33 EMORY L.J. 953, 955–56 (1984).

336. Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677, 701 (2002); Megan Barbero, Note, *Interpreting Rule 68 to Conform with the Rules Enabling Act*, 57 STAN. L. REV. 2017, 2020 (2005).

engages in lawmaking<sup>337</sup> or acts unilaterally,<sup>338</sup> or when Congress delegates too much authority to the executive or does so without adequate standards.<sup>339</sup> It is beyond the scope of this Article to define a normatively optimal state of separation of powers, so I adopt as the touchstone of evaluation the extent to which strictissimi minimizes inter-branch conflicts.

### B. *The Normative Claim*

Strictissimi can effectively minimize inter-branch conflict. It provides courts with a vehicle to ensure that prosecutions, laws on their face, and laws as applied do not violate defendants' First Amendment rights. It does so modestly: avoiding judicial invalidation of laws, imputation of atextual elements to legislation, and dismissal of charges.<sup>340</sup> It therefore respects the legislature's right to make law and the executive's right to prosecute. At the same time, strictissimi's counter-majoritarian function protects defendants, and its institutional function supervises application of evidentiary and procedural rules.

Strictissimi can also encourage the legislature to write laws that are clearer, more narrowly tailored to the problems they purport to address, and more respectful of individuals' First Amendment rights. Similarly, it can encourage prosecutors to initiate criminal charges that are more specifically pled and whose impact on the First Amendment and democratic norms are either reduced or at least more taken into account. These two secondary effects serve the separation of powers by avoiding excessive delegation of lawmaking to the executive through vague, broad laws.<sup>341</sup>

Finally, strictissimi can revive the jury's separation of powers role.<sup>342</sup> Now marginalized,<sup>343</sup> juries were once seen as "symbol[s] of populist revolt."<sup>344</sup> Through a jury instruction, strictissimi would allow jurors to

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337. Steven G. Calabresi et al., *The Rise and Fall of the Separation of Powers*, 106 NW. U. L. REV. 527, 528, 538 (2012).

338. Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2674 (2005).

339. Thomas Molnar Fisher, Note, *Republican Constitutional Skepticism and Congressional Reform*, 69 IND. L.J. 1215, 1218 (1994).

340. Strictissimi does not go "too far" because it invalidates no executive or legislative action, nor does it impose any permanent constitutional restraint. See Barrett, *supra* note 248, at 175.

341. Stuntz, *supra* note 326, at 506 ("The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system's real lawmakers.").

342. Barkow, *supra* note 331, at 1015 ("The jury . . . is a key component of the separation of powers in the criminal law.").

343. *United States v. Reid*, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002); Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 898 (2002); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 74 (2006).

344. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 327 (1995).

determine whether there is proof of a crime beyond a reasonable doubt in light of the vagaries inherent in strictissimi-related evidence and the constitutional claims against a guilty verdict.

### C. Addressing Potential Critiques

Strictissimi is subject to five critiques. First, prosecutors will protest that they already consider the democratic and First Amendment implications of their prosecutions. However, strictissimi's benefits need not address only prosecutorial bad or negligent actors. Although it does require more of prosecutors, strictissimi addresses prosecutions that are the result of good faith action shaped by cognitive biases<sup>345</sup> as much as it addresses intentionally antidemocratic prosecutions. Strictissimi is not meant primarily to deter bad governmental conduct, but to encourage accurate outcomes.<sup>346</sup>

Second, strictissimi can be viewed as undermining the prosecutor's right to try her case as she likes. One response is that the Supreme Court already limited this right *Old Chief v. United States*,<sup>347</sup> so courts should be free to impose strictissimi mandates on prosecutors. But *Old Chief* was limited, merely suggesting in dicta the broad proposition that a prosecutor's right to try her case as she likes is limited where doing so would risk "a verdict tainted by improper considerations."<sup>348</sup> Nevertheless, strictissimi's explicit purpose is to avoid such taint. In fact, even where certain evidence is relevant and would not result in a tainted verdict, and therefore satisfies *Old Chief*, strictissimi has the additional role of protecting constitutional rights. This role tracks the mandate of Federal Rule of Evidence 402, which renders inadmissible even *relevant* evidence if the Constitution requires it.

Third, strictissimi could be viewed as mandating proof of the *Scales* and *Spock* elements, thus violating the separation of powers by imposing elements that the legislature did not include in the statutory language. This argument, however, misunderstands the elements contained in these two

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345. Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 513, 515 (2007) ("Traditionally, prosecutorial decision making has been studied through a lens of fault, blame, and intentional wrongdoing. . . . [T]here has been increased attention to the possibility that unintentional cognitive biases can play at least as large a role in wrongful convictions as intentional prosecutorial misconduct."); see also Eskridge & Ferejohn, *supra* note 257, at 639–40 (arguing that the structure of the separation of powers addresses cognitive biases); Price, *supra* note 251, at 913 ("[B]lameless defendants may be punished because law enforcers incorrectly identify them as criminal suspects.").

346. Even though American law assesses guilt "only on an individual basis . . . , guilt by association seems to be a prevalent national tradition endorsed and encouraged by judges." SOIFER, *supra* note 43, at 54.

347. 519 U.S. 172, 174 (1997).

348. *Id.*

cases. The *Scales* elements are not elements of a crime. Rather, they are a set of conditions that must obtain for an individual's First Amendment rights to be jettisoned in the group setting. As such, the nature of the *Scales* test is no different than the test for First Amendment protection set forth in *Brandenburg v. Ohio*<sup>349</sup> and *New York Times Co. v. Sullivan*.<sup>350</sup> It is an expression of the Court's mandate to declare what the Constitution requires. The *Spock* test is more concerning because it purports to favor certain types of evidence to support the element of specific intent. While this entrenches upon the prosecutor's right to try her case, it also impacts the right of the jury to receive relevant evidence and evaluate it. Ultimately, however, the *Spock* test is a more nuanced evidentiary rule designed to protect individuals' constitutional rights. As such, it falls squarely in the judiciary's purview.

Fourth, strictissimi limits the ability of Congress to delegate authority to the executive branch. The critics of this limitation, however, like Kahan, base their opinion on an unrealistic structural shift in charging regimes. Strictissimi, in comparison, is a practicable overlay on the existing system that already has a jurisprudential pedigree.

Finally, strictissimi, to the extent it is given to juries to administer, could be viewed as enabling jury nullification. There are many democratic arguments for<sup>351</sup> and against<sup>352</sup> jury nullification, so recourse to a democracy-based argument in favor of strictissimi going to juries may be a wash and derivative of this much larger debate. The more convincing argument is that strictissimi *appears* to enable jury nullification but is actually a rule of a different sort. Jury nullification occurs when juries acquit a defendant despite the fact that they believe, beyond a reasonable doubt, that the defendant committed the crime in question. A jury applying

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349. 395 U.S. 444, 447 (1969).

350. 376 U.S. 254, 279–80 (1964).

351. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1191–99 (1991); David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 105 (1995); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 900–01 (1995); Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 224 (1972); Alan W. Schefflin & Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 166 (1991); Chaya Weinberg-Brod, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 827 (1990); Arie M. Rubenstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959, 960 (2006); Ran Zev Schijanovich, Note, *The Second Circuit's Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence*, 20 CARDOZO L. REV. 1275, 1287 (1999).

352. Pamela Baschab, *Jury Nullification: The Anti-Atticus*, 65 ALA. LAW. 110, 114 (2004); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996); Leo P. Dreyer, Comment, *Jury Nullification and the Pro Se Defense: The Impact of Dougherty v. United States*, 21 U. KAN. L. REV. 47, 60–63 (1972); Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563 (1997).

strictissimi, on the other hand, would make its decision because it has been told that evidence in strictissimi-worthy cases can be especially ambiguous and *apparently* damning, and so the jury must take greater care in evaluating the evidence. Applying strictissimi, the jury would not acquit if it believed in a defendant's guilt; rather, it would require clearer evidence to find that guilt.

#### CONCLUSION

Separating an individual from her group for purposes of assigning individual criminal liability is often difficult because evidence, especially First Amendment-protected conduct, can falsely *appear* to be probative. Solutions are evanescent because the same evidence can often *in fact* be probative. The outcome is unreliability and First Amendment infringements that may not rise to the level of cognizable violations.

The result is a system that consistently undermines the substantive right against guilt by association. While that right is well-established, its procedural counterweight, which provides the necessary systemic support for it, is underdeveloped. Strictissimi is meant to solve this problem. To do so, it must be systemic, dynamic, and predictable. Strictissimi is therefore best analogized to canons, which facilitate the important separation of powers norm of reducing inter-branch conflicts while promoting accurate outcomes and protection of constitutional rights.

But strictissimi does not yet solve the problem because courts and lawyers have failed to understand its concrete mandates. This Article calls on them to do so and provides a detailed description, prescription, and contextualization of the rule to support that call.